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Judicial Deference to Legislative Reality: The Interpretation of Title IX in the Contect of Collegiate Athletics

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NOTES

Judicial Deference to Legislative Reality: The Interpretation of Title IX in the Context of Collegiate Athletics

Perhaps no two themes have longer remained more central to the theory of American governance than the doctrine of separation of powers[1] and the principle of equality of opportunity.[2] Yet the promise of theory has only incompletely been fulfilled in fact. This Note will treat both themes in a context where they intersect in undiluted form: collegiate athletics. This Note concludes that the concept of representative democracy, central to American governance,[3] can be realized only by the accordance of great deference to the legislative branch by its coordinate branches[4] even when, as in the athletic context, such deference

1. "Although the doctrine is not specifically set forth in the federal constitution . . . the doctrine has apparently a general origin in Montesquieu's declaration that 'when the legislative and executive powers are united in the same person, or the same body of magistrates, there can be no liberty, because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.' " C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 3.04, at 31-32 (4th ed. 1972) (quoting MONTESQUIEU, SPIRIT OF THE LAWS 215). "Under the state and federal constitutions in the United States . . . institutional separation of power was accepted as a natural and basic organization of government and during the latter half of the nineteenth century it became an unalterable basis for the separation of functions." C. SANDS, *supra*, § 4.03, at 74 (citing Sharp, *The Classical American Doctrine of "Separation of Powers"*, 2 U. CHI. L. REV. 385 (1935)).

Viewed by the modern political theorist, "[s]eparation of the powers of government for exercise by separate functionaries is a mode of political organization and operation calculated to safeguard liberty not only by preventing concentration of too much power in the same hands but also by effecting a measure of equilibrium among correlative power centers according to the classic conception of checks and balances and by defining authority and identifying its residence in order to facilitate establishing and enforcing responsibility." C. SANDS, *supra*, § 3.02, at 28.

2. "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776).

3. "That to secure these rights [life, liberty, and the pursuit of happiness] Governments are instituted among Men, deriving their just powers from the consent of the governed. . . ." The Declaration of Independence para. 2 (U.S. 1776). "[T]he general concern [is] that large decisions of policy should be grounded in consent. Consent is the product of compromise and can only be arrived at through representation." Jaffe, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 359, 359 (1947), *reprinted in* C. SANDS, *supra* note 1, at 197.

"It is folly and a contradiction of the teachings of history to believe, whatever the defects of the legislative institution, that democracy can be preserved without legislative primacy in a people-elected and a people-responsive delegate legislature." Breital, *The Lawmakers*, 65 COLUM. L. REV. 749, 763 (1965), *reprinted in* C. SANDS, *supra* note 1, at 164. "[T]he legislative process is deliberatedly exposed to the buffeting and the pressures of outside interests. This lends a responsiveness to the needs of the community as expressed by those interested." Breital, *supra* at 761.

4. "It is the legislative branch, for good and for ill, which holds the key to democratic insti-

may temporarily retard the goal of equality of opportunity.[5] In the context of Title IX's construction, this principle requires use of the direct funding interpretation to give the words of Title IX's triggering language their "ordinary meaning."[6]

I. SEX DISCRIMINATION IN EDUCATION AND TITLE IX

Enactment of Title IX of the Education Amendments of 1972[7] evidenced congressional concern over a heritage of sex discrimination in the educational context.[8] In athletics this imbalance of opportunity has been particularly salient[9] and has had a harmful effect on the educa-

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tutions." Breital, *supra* note 3, at 772. "The effect [of the decline in prestige of the legislative branch, leading to a power vacuum filled by both executive and judicial branches] on the political structure has been drastic, especially if it is recognized that in a modern democratically organized society, periodically elected lawmaking delegates, separate from the executive, are the distinguishing mark." *Id.* at 760. "[I]t is not for the judicial branch to arrogate powers that can only in the long run degrade the legislative branch the more and disjoint the most effectively democratic organ in government. Institutionally, the modern democracy has in the popularly elected legislature its unique home and its last resort against subversion or tyranny." *Id.* at 775. "Since we now have legislatures specifically designed and equipped to discharge the primary function of making law, it can be argued that courts ought to leave to legislatures the principal responsibility for legal change and modernization." C. SANDS, *supra* note 1, § 3.26, at 59.

5. The interpretation of Title IX's triggering language which this Note advocates may indeed lead to the wholesale exemption of collegiate athletic departments from Title IX's strictures. *See infra* notes 32-33 and accompanying text. To this objection, the Note responds that Congress, and not the courts, is where the social concerns of the citizenry are best aired, weighted, and resolved into legislative compromise. *See* Breitel, *supra* note 3, at 762 ("people-responsive" laws can best be created in legislatures). In other words, it is not worth artificially invigorating a statute at the cost of sacrificing the primacy in lawmaking of the very legislative forum where the popular will is heard regularly, robustly, and efficaciously. Put another way, "[w]hat tomorrow will bring no one knows, but whatever it is, it will be a safer and more stable society if the seats of political power remain divided whatever the cost." *Id.* at 776.

6. Absence of adequate evidence of legislative intent requires according to statutory terms their "ordinary meaning." North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 544 & n.7 (1982) (Powell, J., dissenting). *See infra* note 97.

7. Pub. L. No. 92-318, 86 Stat. 373 (1972) (codified as amended at 20 U.S.C. §§ 1681-1683 (1982)).

8. *See, e.g.*, Commentary, *Sex Discrimination in Athletics: Conflicting Legislative and Judicial Approaches*, 29 ALA. L. REV. 390, 390 (1978) ("Sex discrimination has stifled the potential of over half the American population."); Note, *Title IX and Intercollegiate Athletics: HEW Gets Serious About Equality in Sports?*, 15 NEW ENG. L. REV. 573, 573 (1980) ("Women as a class have been discriminated against throughout history."). *See also infra* note 10 (educational and career detriment to women resulting from sex discrimination in athletics).

9. *See* Yellow Springs Exempted Village School Dist. v. Ohio High School Athletic Ass'n, 647 F.2d 651 *passim* (6th Cir. 1981) (historical sketch of discrimination against girls and women in American sports). *See also* H. NIXON II, SPORT AND SOCIAL ORGANIZATION 50 (1976) (women's sports facilities usually inferior to men's); G. SAGE, SPORT AND AMERICAN SOCIETY 285-86 (2d ed. 1974) (women historically excluded from sports); Edwards, *Desegregating Sexist Sport*, in OUT OF THE BLEACHERS: WRITINGS ON WOMEN AND SPORT 188, 191 (S. Twin ed. 1979) ("Sexually, the most segregated department on any major college campus in the athletics department. It takes only a glance at its budget and the degree of public and administrative concern over its functioning to understand that it is also the most important."); Comment, *Sex Discrimination in Athletics*, 21 VILL. L. REV. 876, 901 & n.191 (1976) (men's teams have had better funding, equipment, coaching, and concomitant prestige than have women's teams); Note, *supra* note 8, at 593 n.96

tional and career development of women.[10] Title IX's language nevertheless reveals that the enacting congressional majority did not wish to purge all sex-differentiation from the educational milieu. What begins as a blanket prohibition of sex discrimination is crippled by its con-

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("Traditionally, sports have provided men with a medium for communicating positive role models. This has not been true for women.")

10. Because athletic participation has beneficial effects on other aspects of the athlete's life, denial to women of opportunities equal to those enjoyed by men to participate in athletics restricts women's educational and career development. *Cf.* A. GUTTMANN, FROM RITUAL TO RECORD: THE NATURE OF MODERN SPORTS 157 (1978) ("In sport we can discover the euphoric sense of wholeness, autonomy, and potency which is often denied us in the dreary rounds of routinized work that are the fate of most men and women."); P. MCINTOSH, FAIR PLAY: ETHICS IN SPORT AND EDUCATION 156 (1979) ("Players . . . are moulded by their games; they do not just play them."); H. NIXON II, *supra* note 9, at 43 (recognition resulting from college sports participation can lead directly to success in non-sports career endeavors); J. SCOTT, THE ATHLETIC REVOLUTION 178 (1971) (college athletics are a means of social advancement for a talented few); Edwards, *supra* note 9, at 188, 191, 196-97 ("[S]port [is] perhaps the basic institution allowing for communal reaffirmation of secular values." *Id.* at 188); Comment, *supra* note 9, at 876 ("School-sponsored athletic programs, long considered an integral part of education, have also served to reinforce sexual stereotypes."); Note, *supra* note 8, at 593 nn.95 & 96, 594 n.98 (crucial to equalize opportunities in athletics in order to provide women with the positive social self-image which sports participation has provided men). *See generally* Yellow Springs Exempted School Dist. v. Ohio High School Athletic Ass'n, 647 F.2d 651 *passim* (6th Cir. 1981) (salubrious and educational benefits of athletic participation historically denied to girls and women).

It is undeniable that success in college sports may have a *direct* beneficial effect on one's career in professional sports. The *indirect* beneficial effects of intercollegiate athletic success are less quantifiable, but, as the above-cited sources indicate, are generally acknowledged.

Some see a more direct causal link between athletic prowess and success in non sports-related pursuits, whether career or social. Uncompromisingly put, this argument holds that "conditions of American sport constitute a fundamental obstacle to the achievement of women's equality in American society . . . . [U]ntil [women] have succeeded in overthrowing male domination of sport, they might as well be running on a treadmill." Edwards, *supra* note 9, at 188.

Many variables in addition to college athletic success may interact to further the former college athlete's career and social mobility. H. NIXON II, *supra* note 9, at 45. These additional variables obscure the causal relationship between athletic participation and success in later life. A list of such variables would include: university and degree marketability and prestige; academic performance personality traits and innate skills or inteligence which may increase career and social mobility; family socio-economic stratum; the sport in which the former college athlete achieved success, (*see* G. SAGE, *supra* note 9, at 259); characteristics of the universe of college students as compared to the pool of all college athletes. All these, as well as other factors, may have consequences advancing or retarding career and social mobility. One possible negative effect of college athletic participation is on grades and, as a result, on career mobility. *See id.* at 258.

At least one commentator argues that those successful in athletic pursuits are innately successful people:

> [P]eople who succeed in sport and achieve upward mobility in or through sport are unusually talented, intelligent, and persistent individuals, destined to succeed in whatever they do—with or without the influence of their sports participation. A sports role has only given them the chance to demonstrate their special capabilities.

H. NIXON II, *supra* note 9, at 44-45. Similarly exorbitant claims have occurred at the opposite end of the analytical spectrum. Perhaps none is more innocent of the realities of causation than the following statement by a former university president: "In 1885 our first Gymnasium . . . was erected by aid of the alumni . . . and a great impetus was given to athletics, which proved of signal benefit to the health of the students. Before this four cases of insanity from overstudy developed, but there were none afterwards." 2 K. BATTLE, HISTORY OF THE UNIVERSITY OF NORTH CAROLINA 513 (1912).

cluding phrase.[11]

Judicial construction of this language has led to widely divergent conclusions regarding Title IX's applicability to similar factual circumstances. These interpretations of Title IX's triggering language fall into three general categories. This Note identifies and analyzes these three theories of Title IX's applicability and discusses their ramifications for the cause of equal educational opportunity regardless of sex.

This Note concludes that Title IX's language deserves a common sense interpretation[12] as a matter of jurisprudential policy[13] and in accordance with the intent evidenced by Congress.[14] In other words, of the three extant judicial interpretations of Title IX's triggering language, only one, the direct federal funding interpretation, is properly deferential to the legislative process. By adopting this interpretation, the legislative branch would retain or regain relative superiority over the executive branch in matters of the lawmaking function.[15] Finally, this Note argues that the plain language interpretation of Title IX's triggering language using the direct funding theory may serve to remind the Congress that it, and not the courts, is responsible not only for creating,[16] but also for extending statutory law.[17]

If however, the Supreme Court were to identify the institution-as-program interpretation as the correct reading of Title IX's triggering language, effectuating its supposed anti-discriminatory policy,[18] as op-

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11. Title IX's jurisdiction-triggering—and limiting—language is the phrase "program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (1982).

12. *See infra* note 106.

13. *See supra* notes 3-5 and accompanying text; *see infra* notes 21-22, 24-25 and accompanying text.

14. Evidence of congressional intent in enacting Title IX is largely in the statutory language itself. *See infra* note 36. Accordingly, the statutory terms ought to be given their "ordinary meaning." *See infra* note 97.

15. "The Anglo-American scheme of government conceives of lawgivers apart from and at times paramount over courts." Landis, *A Note on Statutory Interpretation*, 43 HARV. L. REV. 886, 886 (1930). "The real problems arise where the meaning of the legislature is not discoverable. . . . To condone in these instances the practice of talking in terms of the intent of the legislature, as if the legislature had attributed a particular meaning to certain words, when it is apparent that the intent is that of the judge, is to condone atavistic practices too reminiscent of the medicine man. No compromise can be had on this issue." *Id.* at 891. *Accord id.* at 892 (legislative and not judicial intent must govern statutory interpretation). *See also supra* note 3-4 (the legislative function should be the province of the legislative branch of government).

16. U.S. CONST. art I, § 1 ("All legislative Powers . . . shall be vested in a Congress of the United States. . . ."); U.S. CONST. art. I, § 8 ("necessary and proper" clause).

17. *See supra* note 4.

18. From this jurisprudential viewpoint, statutory interpretation is the process of determining a statute's underlying policy and not the process of historical reconstruction of judicial intent. Radin, *A Short Way With Statutes*, 56 HARV. L. REV. 388, 423 (1942). Professor Radin, principal advocate of this theory of statutory policy effectuation, argued that legislative intent is itself a fiction: "A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and

posed to its legislative contours,[19] agency and executive branch powers would *ipso facto* be enhanced with respect to those of the legislative branch, to which the Constitution accords the lawmaking function.[20]

Between these extremes of interpretation, the Court would have an option tending to enhance the power of the judicial branch with respect to both executive and legislative branches, roughly a common law role.[21] Employing this self-perception, the Court would adopt the ingenious, if alchemic, judicial creation known as the indirect funding interpretation.[22]

In short, lurking beneath the already complex issue of Title IX's applicability is the much larger issue of the allocation of legislative powers in American governance. This Note's thesis is based on the premise that legislative power should continue to be given to the people's representatives and not to undemocratic bodies,[23] precisely as the Constitu-

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beliefs." Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930). *Cf. infra* note 36 (vagueness in statutory terms and legislative history is a concomitant of the legislative process). The process of ascertaining and effectuating a statute's policy is, in effect, a means of substituting compatible present purposes for the superseded intentions of a past legislature. In Professor Radin's words, "[i]f the doctrine [of effectuating the policy behind legislation] means anything, it means that, once the expression is before the court, the intent becomes irrelevant." *Id.* at 872. A later commentator spoke of effectuating the "equity" or "spirit" of statutes: "[T]he spirit of a statute which differs from . . . a literal meaning may be taken if it is actually a sensible contextual meaning that the words will bear by fair use of language." de Sloovere, *Textual Interpretation of Statutes*, 11 N.Y.U. L.Q. 538, 544 (1934).

19. A statute's legislative contours include not only the statute's language, but also its legislative history—what the enacting legislature meant at the time of passage if it can be determined. The combination, then, becomes the statute's interpretation. "[T]he emphasis must lie upon the honest effort of courts to give effect to the legislature's aims, even though their perception be perforce through a glass darkly." Landis, *supra* note 15, at 893. The difference between using legislative intent to ascertain the meaning of statutory language and effectuating a non incompatible policy is that "genuine interpretation concerns itself only with the clarification of language while spurious interpretation attempts to . . . substitute for the legislative policy the policy of the courts." Horack, *In the Name of Legislative Intention*, 38 W. VA. L.Q. 119, 123 (1932).

20. *See supra* notes 3 & 16.

21. In other words, the court would take precisely the opposite approach of that urged in note 15, *supra*, tending to judicial activism.

22. *See infra* text accompanying note 59.

23. The approach to statutory interpretation advocated in this Note—to ascribe primary importance to the meaning of the statutory language itself—is not mere literalism or formalism. Neither is it, however, ever to grant legislative intention a position of greater deference than that due the statutory language itself. Legislative history is thus used as a means of confirming or rendering more precise the meaning conveyed by a statute's plain language. Of an abundance of commentary, the following examples articulate this common-sensical approach to the interpretation of statutes. "For judicial construction to stick close to what the legislation says and not draw prodigally upon unformulated purposes or directions makes for careful draftsmanship and for legislative responsibility. . . . Judicial expansion of meaning beyond the limits indicated this reprehensible because it encourages slipshodness in draftsmanship and irresponsibility in legislation. It also enlists too heavily the private social and economic views of judges." Frankfurter, *A Symposium on Statutory Construction—Forward*, 3 VAND. L. REV. 365, 367-68 (1950); "The writer is unwilling to accept the extreme thesis that the indefiniteness of words is so great that judges are practically free agents in determining the effect to be given to statutory enactments." Jones, *Extrinsic Aids in the Federal Courts*, 25 IOWA L. REV. 737, 739 (1940); "[I]t should be remembered

tion intends.[24] For in the macrocosm of jurisprudence, as well as in the microcosm of Title IX's interpretation, only a plain language reading—the direct funding interpretation—preserves the essential earmarks of representative democracy: that laws proceed from the electorate speaking through their legislators.[25]

A. *Historical Context*

1. Statutory Background

Title IX's basic prohibition of sex discrimination in education is modeled on the language of Title VI of the Civil Rights Act of 1964.[26] Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."[27] As is true of Title VI, enforcement of Title IX is accomplished in two ways: federal administrative enforcement and private enforcement actions.[28]

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that statutes are written and published so that individuals may govern their conduct in accordance with the legislative command. In such circumstances it is not unreasonable to insist that the burden of communication is on the legislature, and that if words having a usually accepted 'meaning' are used, that 'meaning' should be applied no matter what the legislature may have intended." Nutting, *The Ambiguity of Unambiguous Statutes*, 24 MINN. L. REV. 509, 516-17 (1940); "[O]nce [legislative intention] has been discovered, it should be relevant to the solution of the case only if consistent with the 'meaning' which may reasonably be attached to the words used." *Id.* at 521; "[T]he whole document is found to have a certain play in the joints when its words are translated into things by parol evidence, as they have to be. . . . Thereupon we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used. . . ." Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-18 (1899). *See also infra* notes 97 & 106 and accompanying text (Supreme Court states that statutory terms of Title IX should be given their "ordinary meaning").

24. *See supra* note 16. Read in conjunction with the commentary contained in notes 3 and 4, *supra*, it is clear that the concept of representative democracy was intended to be secured by the constitutional situation of the legislative function in the legislative branch. U.S. CONST. art I, § 1.

25. *Id.*

26. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), states, "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."

The Supreme Court noted the parallel nature of Title IX and Title VI in Cannon v. University of Chicago, 441 U.S. 677, 696-99 (1979) ("The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been. . . .").

But in the Supreme Court's most recent consideration of the relationship between Titles VI and IX, Justice Blackmun, writing for the majority in North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982), stated: "The focus on the history of Title VI . . . is misplaced. It is Congress' intention in 1972, not in 1964, that is of significance in interpreting Title IX." *Id.* at 529. Justice Blackmun continues, "although two statutes may be similar in language and objective, we must not fail to give effect to the differences between them." *Id.* at 530.

27. 20 U.S.C. § 1681(a) (1982).

28. In the former, the Department of Education (formerly the Department of Health, Education & Welfare) is empowered to terminate federal funding to a sex-discriminatory educational entity. *Id.* at § 1682(1). Note that, while the Department of Education does, in fact, have this power over *most* federal government grants to educational institutions or programs, its funding

The Department of Health, Education & Welfare originally, and the Department of Education more recently, promulgated regulations to define the terms and effectuate the purposes of Title IX.[29] These regulations refer not only to "program[s] or activit[ies]," as does the statute, but also to "institution[s]" and "recipient[s]," thereby extending Title IX's limited scope.[30] They also deal with specific elements of the edu-

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termination power extends only to those education programs or activities funded under its auspices. If, for example, the Department of Defense administered a grant to education, it, and not the Department of Education, would have the right to devise regulations for effectuating Title IX with respect to that grant. *Id.* at § 1982. Such funding termination must be limited to the "particular program, or part thereof," in which sex discrimination has been found. 20 U.S.C. § 1682(1) provides, in pertinent part, that termination of federal financial assistance "shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding [of Title IX noncompliance] has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found." This provision has been referred to as the "pinpoint termination provision" of Title IX. *See, e.g.*, Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 GEO. L.J. 49, 65 (1976). *Cf. infra* note 51 (cases using the program-specific language of 20 U.S.C. § 1682 as evidence of the limited meaning of the phrase "program or activity" in 20 U.S.C. § 1681(a)).

The Supreme Court allowed the second means of enforcing Title IX, a private cause of action, in Cannon v. University of Chicago, 441 U.S. 677 (1979). The Court held that it was not necessary to show legislative intent to create a private cause of action to enforce Title IX. An explicit denial of such a cause of action would, however, have been controlling. *Id.* at 694. In *Cannon*, the Court recognized that a cease and desist order may often better protect a complainant's interests than would terminating federal funding of the discriminatory entity. *Id.* at 704-05.

29. 34 C.F.R. § 106 (1983) (formerly 45 C.F.R. § 86; recodified when the Department of Health, Education & Welfare's functions were transfered to the newly created Department of Education in 1980).

30. *Compare, e.g.*, Title IX's applicability to "any education program or activity receiving Federal financial assistance . . . ," 20 U.S.C. § 1681(a) (1982), *with* the regulations' applicability "to every *recipient* and to each education program or activity operated by such recipient which receives *or benefits from* Federal financial assistance." 34 C.F.R. § 106.11 (1983) (emphasis added). Note first that in the regulations the subject of the "which receives" clause is ambiguous; it could be either "program or activity" or "recipient." If the subject of the clause is "program or activity," the program may trigger Title IX not only by receiving, but also by benefiting from "Federal financial assistance." If "recipient" is the subject of the "which receives" clause, then an institutional "recipient" need merely have benefited from federal financial assistance directed at some other entity, not necessarily educational. Both interpretations are problematic in that they seem to extrapolate from the plain language of Title IX, § 1681(a), which does not refer to benefits or beneficiaries. As one persistent critic of the Title IX regulations has stated, "There are several problems with that 'or benefiting from,' but foremost is the fact that Congress did not say it. HEW said it." 121 CONG. REC. 23845 (1975) (remarks of Sen. Helms).

In addition, a "recipient" is defined in 34 C.F.R. § 106.2(h) (1983) to include an entity or person "to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance. . . ." This definition of recipient would allow federal financial assistance directly to an institution to become transformed into "benefits" in order to bring the institution's constituent programs or activities within the reach of Title IX. No means of determining what constitutes a "benefit" is established in the regulations; a benefit could, therefore, be hypothetical or inferred. Moreover, such a benefit might no longer be either federal or financial in nature. In such a case, allowing the benefit to trigger Title IX's strictures would be an invalid extension of Title IX, § 1681(a). This view is expressed in the following commentary on 34 C.F.R. § 106.11 (1983), the applicability provision of the regulations: "[B]y the insertion of the phrase 'or benefiting from' in connection with Federal financial assistance, HEW brings within the coverage of its regulations activities which do not receive Federal financial assistance in any reasonable sense of the concept. Thus,

cational context, for example, athletics and admissions departments, which Title IX does not. These regulations take a very expansive view of the programatic language of Title IX.[31]

2. Equal Education Opportunity and Athletics

Athletic activities for students at any level of proficiency, particularly competitive sports, have long been recognized as important components of an educational institution's offerings.[32] Colleges have, however, not provided the athletic opportunities to women which they have for so long lavished upon male students.[33] Conspicuous though this discrimination has been, women have had no legal means of obtaining access to collegiate athletic programs: the fourteenth amendment's equal protection clause does not recognize sex, unlike race, as an inherently suspect classification.[34] Thus, provision of equal educational opportunities for women, traditionally denied, is best compelled, if at all, through Title IX. But whether Title IX is expansive enough to compel equal treatment in all college athletic departments if far from clear.[35]

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the Department has made vague that which was precise. . . ." 121 CONG. REC. 23845 (1975) (remarks of Sen. Helms). *See also* Koch, *Title IX and the NCAA*, 3 W. ST. U.L. REV. 250, 252 (1976) (Title IX's implementing regulations expand the statute's language by applying Title IX to programs not directly receiving, but benefiting from another program's receipt of federal financial assistance).

31. *Id.*

32. *See* Comment, *supra* note 9, at 876. *Cf. supra* note 10 (describing the educational impact of sports participation).

33. *See, e.g.*, Yellow Springs Exempted Village School Dist. v. Ohio State High School Athletic Ass'n, 647 F.2d 651 *passim* (6th Cir. 1981) (benefits of athletic participation at all levels have been limited for women); Edwards, *supra* note 9, at 188, 196 (women should demand access to sports facilities, programs from which they have been historically excluded); Note, *supra* note 8, at 593 n.95 (HEW urged to deal "aggressively" to expand women's athletic opportunities in educational institutions). *See generally supra* note 9.

34. Reed v. Reed, 404 U.S. 71, 75 (1971). In *Reed* the Supreme Court set up a "middle tier" of scrutiny for sex-based distinctions. This middle tier test is a heightened scrutiny form of "rational relation" test. The Court elaborated on middle-tier analysis under the fourteenth amendment equal protection clause in Craig v. Boren, 429 U.S. 190 (1976). "[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197. *Accord* G. GUNTHER, CONSTITUTIONAL LAW 964 (10th ed. 1980); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1063-66 (1978); Sassower, *Women, Power, and The Law*, 62 A.B.A. J. 613 (1976).

35. *See, e.g.*, University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982); Bennett v. West Texas State Univ., 525 F. Supp. 77, 79-80 (N.D. Tex. 1981), *rev'd and remanded*, 698 F.2d 1215 (5th Cir. 1983) (reversal of order granting summary judgment; remanded to allow plaintiff to argue direct federal funding does reach university's athletic department); remarks of Sen. Helms: "The regulations are inconsistent with the enactment [Title IX] in that they apply to programs and activities not receiving Federal funds such as athletics. . . ." 121 CONG. REC. 17300 (1975); remarks of Sen. Tower: "I do not believe that Congress intended Title IX to extend to intercollegiate athletics. . . ." 120 CONG. REC. 15323 (1974); remarks of Sen. Bayh: "While the impact of this amendment [Title IX] will be far reaching, it [Title IX] is not a panacea." 118 CONG. REC. 5808 (1972); "Even though there was an apparent absence of legislative intent, HEW has effectively included collegiate sports within the purview of Title IX via the implementing regulations." Koch, *supra* note 30, at 254; "The final implementing regulations are critically deficient from the

Indeed, the language of Title IX almost certainly reflects the sort of limiting compromise necessary to gain congressional enactment.[36]

II. THREE JUDICIAL INTERPRETATIONS OF TITLE IX'S TRIGGERING

Each of the three extant judicial interpretations of Title IX's triggering language[37] would have a markedly different impact on sex discrimination in college athletics. Moreover, the judicial prevalence of any one interpretation would have much to say about congressional primacy in the legislative function.[38]

A. *The Institution As "Program or Activity"*

If Congress's purpose in enacting Title IX[39] had been the complete elimination of all forms of sex discrimination in education, Title IX's triggering language[40] would have been unnecessary.[41] Congress would

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standpoint that there is an absence of any recognition whatsoever for sports which generate revenue." *Id.* at 258.

36. *Compare* Title IX, 20 U.S.C. § 1681(a) (1983) as enacted *with* the original Senate version of Title IX:

> No person in the United States shall, on the ground of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program of activity *conducted by a public institution* . . . which is a *recipient* of Federal financial assistance for *any* education program or activity. . . .

117 CONG. REC. 30156 (1971) (emphasis added). The triggering language of the original Senate bill was conspiciously institution-oriented; it covers public institutional "recipients." Title IX would be triggered as to an allegedly discriminatory education program by the mere fact that the public institution received federal financial assistance for "*any* education program or activity." The plain language of Title IX § 1681(a) is, by contrast, program-oriented; it is the allegedly discriminatory "program or activity" and not a "public institution" which must be "receiving," (present tense), "Federal financial assistance." *Accord* Bennett v. West Texas State Univ., 525 F. Supp. 77, 78 (N.D. Tex. 1981), *rev'd and remanded*, 698 F.2d 1215 (5th Cir. 1983).

That this change in phraseology between the original Senate version of Title IX and the enacted version was not inconsequential is demonstrated by the language of Title IX's blindness provision, 20 U.S.C. § 1684, which retains the institutional triggering language: "No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a *recipient* of Federal financial assistance for any education program or activity. . . ." (emphasis added). Section 1684, with its "recipient"/institutional language, is on its face, of much broader potential applicability than is program-specific § 1681(a).

37. Title IX's structures are triggered through the phrase, "program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a) (1983).

38. *See supra* notes 18-25 and accompanying text.

39. Senator Bayh, a principal proponent of the Act, described Title IX as:

> an important first step in the effort to provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they have a fair chance to secure the jobs of their choice. . . .

118 CONG. REC. 5808 (1972). *See also* Comment, *Title IX's Promise of Equality of Opportunity in Athletics: Does It Cover the Bases?*, 64 KY. L.J. 432, 432-34 (1975) (Title IX's purpose was to aid in upgrading women's historic position of inferiority in American society).

40. "[E]ducation program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a) (1982).

41. Title IX's otherwise absolute prohibition of sex discrimination in education is limited by the Act's triggering language. *See supra* text accompanying notes 27 & 36.

simply have coined an absolute prohibition. Assuming, arguendo, such an absolute purpose in Title IX as passed, however, and the judicial will to effectuate it, one would arrive at a construction of Title IX at the opposite extreme from the direct funding interpretation this Note advocates: validating the regulations in making the college or university itself an "education program or activity"[42] for purposes of triggering Title IX.[43] An institution of higher education which received some form of university-wide "Federal financial assistance"[44] would subject all its components to Title IX's strictures.[45] In other words, there would be no need to determine whether the university's athletic department was a recipient of federal financial assistance since the university itself is, under the institution-as-program model, both "program" and "recipient" within the meaning of Title IX and its regulations.[46]

Precedent is lacking in the area of athletics in the institution-as-program model, but the interpretation has been applied to an all-male college honorary society claiming exemption on the ground that it

42. 20 U.S.C. § 1681(a) (1982).

43. 34 C.F.R. § 106.11 states that the regulations implementing Title IX apply "to every *recipient and* to each education *program* or *activity*. . . ." (emphasis added). Title IX itself is applicable to "any education program or activity receiving. . . ." 20 U.S.C. § 1681(a) (1982). Because recipients, as well as programs, are mentioned in the regulations, and since only programs are covered by Title IX itself, it is necessarily true that the regulations are equating a recipient institution with an education program when interpreting Title IX's triggering language. *Accord* Iron Arrow Honor Soc'y v. Hufstedler, 499 F. Supp. 496, 503 n.1 (S.D. Fla. 1980), *aff'd*, 652 F.2d 445 (5th Cir. 1981).

44. 20 U.S.C. § 1681(a) (1982).

45. *See, e.g.*, Iron Arrow Honor Soc'y. v. Hufstedler, 499 F. Supp. at 504-06 (A university which receives federal financial assistance subjects organizations to which it provides "significant assistance" to Title IX's strictures.) Iron Arrow Honor Society, the sex-discriminatory organization in *Iron Arrow*, was an "outside" organization. *Id.* at 503. As a result, the nexus of "significant assistance" between the university and the Society had to be established. *Id.* at 504-06. Presumably, therefore, under the *Iron Arrow* court's reasoning, a university's internal organs would automatically be subject to Title IX, assuming the university's receipt of some "Federal financial assistance." Succinctly stated, "[i]f HEW's broad definition of 'receiving federal financial assistance' is sustained [*i.e.* the definition contained in the implementing regulations, 34 C.F.R. § 106] . . . arguably every program of any educational institution enrolling students receiving federal aid or benefits will be subject to HEW regulation." Comment, *HEW's Regulations Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges*, 1976 B.Y.U. L. REV. 133, 168. *Cf.* Bob Jones Univ. v. Johnson, 396 F. Supp. 597, 601 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975) (Federal financial assistance provided directly to students at a university is "Federal financial assistance" to the university as a whole, thus subjecting the university's components to Title VI's strictures). *But see* Rice v. President & Fellows of Harvard College, 663 F.2d 336, 338-39 (1st Cir. 1981) (rejecting institution-as-program interpretation, and following direct funding interpretation); Othen v. Ann Arbor School Bd., 507 F. Supp. 1376, 1386 n.12, *aff'd*, 699 F.2d 309 (6th Cir. 1983) (questioning the continued validity of the institution-as-program reading of Title IX adopted in *Iron Arrow*); Note, *Title VI, Title IX, and the Private University*, 78 MICH. L. REV. 608, 609 (1980) (judicial interpretations and legislative history undermine HEW's institution-as-program interpretation of Title IX).

46. *See supra* note 43.

received no earmarked federal funding.[47] Applying this interpretation to a college honorary society is quite different, however, from applying it to a collegiate athletic department: no nexus of purpose between the educational mission of the university and that of its athletic department would, under the institution-as-program interpretation, be necessary. Because a university's athletic department is an internal organ of the institution,[48] once a university receiving some form of federal financial assistance is found to be a "program or activity"[49] within the meaning of Title IX, Title IX is automatically triggered against the university's athletic department.[50]

This method of determining Title IX's breadth is attractive for its administrative simplicity, but several courts have held that the regulations implementing Title IX are impermissible extensions of statutory authority, as they pertain to institutional recipients of federal financial aid regardless of whether the institutional sub-unit allegedly in violation of Title IX actually receives any federal funds.[51] These courts have used as evidence of the Act's limited reach Title IX's enforcement provision,[52] which requires that the federal funds termination be limited to the discriminatory sub-unit.[53]

Thus, courts are faced with a choice between the plain language of Title IX, which entails the direct funding interpretation, and that of its

47. In Iron Arrow Honor Soc'y v. Hufstedler, 499 F. Supp. 496 (S.D. Fla. 1980), *aff'd*, 652 F.2d 445 (5th Cir. 1981), the Fifth Circuit held that the University of Miami was an education program. 652 F.2d 445, *aff'g* 499 F. Supp. at 503 n.1. Because it had determined that the honorary society was an "outside" organization, however, the court had to find a commonality of purpose between the university and the society in order to hold that the society's membership could be regulated through Title IX's applicability to the university. 652 F.2d at 447.

48. For example, since the university itself is, under the institutional program model, an "education program" within the meaning of 20 U.S.C. § 1681(a), its departments and related divisions are elements of an "education program." *But cf. infra* note 73 (an athletic department which is an "auxillary enterprise" for accounting purposes is not a part of the university's educational provision).

49. 20 U.S.C. § 1681(a) (1982).

50. Title IX is triggered as to an "education program." All the sub-divisions of the "education program" are, therefore, subject to Title IX. *See supra* note 45.

51. *See, e.g.*, University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982); Bennett v. West Texas State Univ., 525 F. Supp. 77, 80 (N.D. Tex. 1981), *rev'd and remanded*, 698 F.2d 1215 (5th Cir. 1983); Othen v. Ann Arbor School Bd., 507 F. Supp. 1376, 1387 (E.D. Mich. 1981), *aff'd*, 699 F.2d 309 (6th Cir. 1983); Dougherty County School Sys. v. Harris, 622 F.2d 735, 736-38 (5th Cir. 1980), *vacated and remanded sub nom.* Bell v. Dougherty Co. School Sys., 102 S. Ct. 2264 (1982). *Cf.* Rice v. President & Fellows of Harvard College, 663 F.2d 336, 338-39 (1st Cir. 1981) (rejecting the institution-as-program interpretation and espousing the direct funding interpretation, without reference to Title IX's implementing regulations).

52. 20 U.S.C. § 1682 (1982).

53. Bennett v. West Texas State Univ., 525 F. Supp. 77, 79 (N.D. Tex. 1981), *rev'd and remanded*, 598 F.2d 1215 (5th Cir. 1983); Othen v. Ann Arbor School Bd., 507 F. Supp. 1376, 1382 (E.D. Mich. 1981), *aff'd*, 699 F.2d 309 (6th Cir. 1983); Dougherty Co. School Sys. v. Harris, 622 F.2d 735, 737 (5th Cir. 1980); Rice v. President & Fellows of Harvard College, 663 F.2d 336, 339 n.1 (1st Cir. 1981).

regulations, which interpret Title IX's triggering language according to the institution-as-program theory. Recognition that Title IX's regulations exceed the scope of the statute itself must lead to their invalidation to the extent of that excess. Administrative regulations are subordinate to the statute they purport to effectuate.[54] No more than a cursory reading of Title IX is necessary to convince one that the institution-as-program interpretation is not only disingenuous, but also an arrogation by the executive branch (through the HEW/Education Department's regulations) and by the judicial branch (to the extent that courts apply the regulations where they so clearly and so critically hyperextend the statute)[55] of exclusively legislative prerogatives.[56] In a representative democracy, upholding such deficient regulations is unacceptable.[57]

B. *The Indirect Funding Interpretation*

Those who discard the institution-as-program approach as too brazenly hyperextensive of legislative intent, but wish Title IX were a comprehensive prohibition, have espoused the indirect funding interpretation of Title IX's triggering language, mistakenly assuming that all athletic departments would thereby come within the scope of Title IX's prohibitions.[58] The indirect funding interpretation would classify a collegiate athletic department, as opposed to the institution as a whole, as a "program or activity."[59] The indirect approach, in addition, gives virtually unlimited breadth of the phrase "receiving Federal financial assistance."[60] Succinctly stated, the theory holds that federal grants to an educational institution as a whole trickle-down into the

54. The Administrative Procedure Act authorizes agencies [defined in 5 U.S.C. § 551(1) (1982) to include the Department of Education] to "publish in the Federal Register for the guidance of the public . . . substantive rules of general applicability adopted *as authorized by law*. . . ." 5 U.S.C. § 552(a)(1)(D) (1982) (emphasis added). The Supreme Court has on several occasions upheld the rule of subordination of regulations to the statute they purport to effectuate:

> The power of an administrative officer or board to administer a federal statute and prescribe rules and regulations to that end is . . . [only] the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute is a mere nullity.

Manhattan Gen. Equip. Co. v. Commissioner, 297 U.S. 129, 134 (1936). *Accord* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1976); Dixon v. United States, 381 U.S. 68, 74 (1965); United States v. Larinoff, 431 U.S. 864, 873 (1977).

55. *See supra* note 43.

56. *See supra* notes 3-5 and accompanying text.

57. *See supra* note 54 and accompanying text.

58. *See infra* notes 63 & 72.

59. In this, the indirect and direct federal funding interpretations are consistent. *See* Haffer v. Temple Univ., 524 F. Supp. 531, 533 (E.D. Pa. 1981), *aff'd per curiam*, 688 F.2d 14 (3d Cir. 1982). *See also* Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1077-78 (5th Cir. 1969) (establishing indirect federal funding to make Title VI applicable to local schools' education programs or activities).

60. *See* Haffer v. Temple Univ., 524 F. Supp. 531, 540 (E.D. Pa. 1981), *aff'd per curiam*, 688

university's constituent divisions, making those programs recipients of "Federal financial assistance," thus subject to the strictures of Title VI or Title IX.[61]

Two components of the indirect funding theory emerge. First, each institution is composed of any number of "program[s] or activit[ies];" the institution itself is not a program to trigger Title IX with respect to its constituent entities. Second, a program's receipt of assistance which is both federal and financial in nature must be logically possible as well as actually having occurred. Proponents of the indirect funding interpretation have nevertheless seemed to equate the theoretical possibility of a receipt with its actuality. They have thereby created an interpretive problem, only to ignore its existence.

Perhaps this underscores the fundamental problem with the indirect funding interpretation; it is a judicial creation which did not arise from the interplay of legislative ingredients.[62] The result is that the indirect funding interpretation is unequal to the task for which it was created; it simply does not clarify the extent of Title IX's applicability.[63] In addi-

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F.2d 14 (3d Cir. 1982). *Accord* Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1079 (5th Cir. 1969).

61. *See infra* notes 63 & 73.

62. On the desirability of adhering to the principles of representative democracy by enacting laws in legislatures, rather than allowing courts to make law, *see generally supra* notes 3-5, 21-22, 24-25 and accompanying text.

63. It is not, in short, logically sufficient to assert that because federal funds have been received by an educational institution, the institution's constituent departments have received any portion of the funding, even by way of in-kind benefits. For even if one allows, arguendo, that all federal funding generates benefits to the institution as a whole, one has not established receipt of "Federal financial assistance" by any of the institution's constituent "program[s] or activit[ies]." Put another way, it is undeniable that federal funds provide many forms of benefits to the university recipient. Even allowing that such benefits are, in fact, forms of "Federal financial assistance," one will not have triggered Title IX; the statute's plain language requires that discriminatory programs or activities actually receive such assistance. Therefore it is never certain whether, under the indirect funding interpretation, Title IX is applicable.

One is left, therefore, with a problem falling within the province of accountants. Funding has come to the institution from the federal government and has generated a variety of benefits. The question is whether a specific department has received some portion of those federally generated benefits. Resolution of the problem turns on the benefit's valuation, for Title IX explicitly states that federal assistance sufficient to trigger Title IX must be "financial." 20 U.S.C. § 1681(a) (1982); "Federal *financial* assistance," 34 C.F.R. §§ 106.1, .2(g) (1983) (emphasis added).

One may not conveniently ignore Congress' use of the adjective "financial" in Title IX's triggering phrase. It means that, whatever else can be said of the federal assistance, it *must* be financial. "Financial," an adjective, is defined as, "1. pertaining to monetary receipts and expenditures; pertaining or relating to money matters; pecuniary. . . ." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 532 (1966). An item described as "financial" is, accordingly, always describable as an objective amount of money. In the United States, financial assistance must be describable as some number of dollars worth of assistance; "financial assistance" under Title IX is no exception. That a person or entity has ascertainably derived a certain benefit, does not assure that the benefit was either federal in origin or financial in nature. Yet, both characteristics of the assistance must be clearly present before Title IX is triggered against the entity in question. Note, too, that the beneficiary and the recipient of federal financial assistance are two different "persons." *See* Note, *supra* note 45, at 615. Title IX is applicable to an "education *program or activity*

tion, the indirect interpretation exaggerates the power of courts with respect to legislatures, a jurisprudential reason for its abandonment.[64] Furthermore, the indirect interpretation would serve to exempt "big time" athletic departments from Title IX's strictures.[65]

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receiving Federal financial assistance," not to a *beneficiary* of federal financial assistance. 20 U.S.C. § 1681(a) (1982) (emphasis added). *Cf.* Bob Jones Univ. v. Johnson, 396 F. Supp. 597, 601 n.15 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975) (distinguishing recipients from beneficiaries of "Federal financial assistance" in order to determine the applicability of Title VI, 42 U.S.C. § 2000d to 2000d-6 (1976 & Supp. V 1981).

Accordingly, to show a federally conferred benefit to a program as defined in the indirect funding approach, one must be able to describe the benefits in terms of a dollar amount, objectively determined. This is referred to as the "money measurement principle" of accounting. The principle requires that all assets be measured in monetary terms. P. BERNEY, W. LYONS & S. GARSTKA, FINANCIAL ACCOUNTING AND REPORTING 99-100 (1979) [hereinafter cited as BERNEY, LYONS & GARSTKA].

A related principle—the "cost principle"—requires that assets be valued at original cost. Thus, prospective gains and future value cannot be computed into the monetary value of an asset—federal assistance. *Id.* at 100-01.

Valuation of financial assistance or benefits allegedly received indirectly from the federal government must be individualized, as the pro rated benefit will vary from person to person, depending on what characteristics an individual possesses. *See supra* note 10. *Cf.* G. CALABRESI, THE COST OF ACCIDENTS 216 (1970) (individualization of pain and suffering in accidents). Individualizing the valuation of pain and suffering is analogous to individualizing valuation of personal benefits for the purpose of triggering Title IX:

> Actually, we cannot be fully satisfied with any way of valuing physical injuries because such injuries involve elements not fully convertible into money; thus any device which converts them into money will not be fully adequate. And yet in practice we do say that at some point . . . we do make a decision *for* accidents which implies that the injuries are not priceless. This means that some valuation of their cost is inevitable. *Id.* at 213.

But such benefits as prestige and social acceptance are less susceptible to measurement than tangible and visible physical injuries. Thus, the valuation of a benefit, for purposes of showing that it is a form of "Federal financial assistance" under 20 U.S.C. § 1681(a) (1982), and therefore that it should trigger Title IX's strictures pursuant to the indirect funding theory, is further complicated.

The amount of financial loss which would be sustained by the program if the alleged federal benefit were withdrawn has, furthermore, been held an insufficient measure of the dollar value of the benefit. Iron Arrow Honor Soc'y v. Hufstedler, 499 F. Supp. 496, 505 (S.D. Fla. 1980), *aff'd* 652 F.2d 445 (5th Cir. 1981). Accounting principles would, therefore, be the only objective means of determining whether the program actually received any federal financial assistance.

64. "Because so many of us like so much of what we have received at the hands of the judges, as if they were so many philosopher-kings, the risk is that we will trade away the force of the ballot. . . ." Breitel, *supra* note 3, at 771. Judicial incursion into the legislative realm are dangerously against public policy in that courts "have no taproot in the political system from which to draw strength directly from the people. This lack may bode no good." *Id.* at 763. Breitel continues, "[t]he power of the courts is great indeed, but it is not a power to be confused with evangelic illusions of legislative or political primacy." *Id.* at 777. *See generally supra* notes 3-5, 21-22, 24-25 and accompanying text (representative democracy entails restraint by the judiciary when faced with interpretation of a legislative enactment).

65. In the context of collegiate athletics, conventional income statement accounting is the only objective way to determine whether federal financial assistance actually has reached the athletic "program or activity" in question. Title IX is applicable to educational programs "receiving Federal financial assistance." 20 U.S.C. § 1681(a) (1982). Evaluation of the type of transaction described by Title IX's triggering language lies uniquely within an accountant's field of expertise. No adequate alternative means of *financial* valuation and transactional analysis exists. Such accounting for receipts of financial value by the athletic department, from the federal government, but through the medium of the university, would have to include payments and financially quantifiable benefits to the university by the athletic department. This is required by the "matching

Judicial use of indirect federal funding to apply Title IX to athletic

principle" of accounting: expenses must be subtracted from total revenue to determine net income (profit) for the period in question. BERNEY, LYONS, & GARSTKA, *supra* note 63, at 104. An entity's net income for a given period is revealed on the entity's "statement of income" by use of the matching principle. *Id.* at 11. In other words, the athletic department's statement of income would reflect its balance of payments relationship with is parent university. The athletic department's record of operations, or statement of income, must reflect its financial relationship to all other persons and entities for the period in question. The athletic department's statement of income, (whether a positive or negative amount), must be kept separate from the university's overall record of operations. This is a requirement of the "entity principle," which mandates separation of an entity from its owners, suppliers, and other business relationships for accounting purposes. *Id.* at 98. *Cf.* AMERICAN COUNCIL ON EDUCATION COLLEGE AND UNIVERSITY BUSINESS ADMINISTRATION 128, 129 (G. Van Dyke ed. 1968) [hereinafter cited as AMERICAN COUNCIL ON EDUCATION]. (An auxiliary enterprise, as well as an organized activity related to an educational department, "should have its own budget and accounting to identify all operating costs and revenues.") This principle is of particular importance when the athletic department is an "auxiliary enterprise," as in the case of a big time athletic department. *Id.* at 202 (if athletic department is an auxiliary entity, its accounting should be separate from the institution's); J. RUSSELL, THE FINANCE OF HIGHER EDUCATION 321 (2d ed. 1954) ("The most important principle is to provide for strict separation of the accounts for [auxillary] enterprises from those having to do with the educational programs"); AMERICAN COUNCIL ON EDUCATION, *supra*, at 167 (if athletic department is separately incorporated, *its* financial report should be appended to the college or university's financial report). Gross revenues of auxiliary enterprises are reported under an "other sources" category on the university's financial statement. *Id.* at 193-94. If the athletic department is separately incorporated, its transactions are *not* reported in the institution's financial statements, but are appended. *Id. Compare id.* at 253 (example of university "Schedule of Current Funds Expenditures," "Auxiliary Enterprises" category) *with id.* at 262 (example of "Schedule of Revenues and Expenditures . . . Intercollegiate Athletics"). Note that the athletic department's report does not indicate any receipts from the federal government; the university's report, on the other hand, has a separate category for such receipts. This indicates either that the university does not know how much of its federal funding has filtered into the athletic department (via federal student loan recipients, etc.), or that the university does not consider any federal money at all to have reached the athletic department. Clearly, though, the sample athletic department does not believe it received any federal financial assistance during the period in question. *Id.* at 253, 262.

The seeming arbitrariness of accounting practices is particularly evident when applying them in the university context. A university is an organic, social-science phenomenon which, unlike a conventional business, markets a largely intangible product—education. Because the applicability of Title IX depends on a program's receipt of "Federal financial assistance," 20 U.S.C. § 1681(a), the internal logic of the indirect funding interpretation entails the use of accounting principles. This can have the effect of drawing boundaries within the university where, as a functional matter, none previously existed. While for accountants this presents no particular problem, the financial separation of entities may perpetuate their actual separation, potentially eroding the vital symbiosis of functions within a university.

Balance sheet accounting has significant implications on the efficacy of the indirect funding interpretation in triggering Title IX against an athletic department. Forms of financial assistance coming to the athletic department indirectly from the federal government would comprise some portion of the funding and financially quantifiable benefits coming to the department from the university's general budget; the federal financial assistance is "buried." *Federal* financial assistance is, if present at all, just one conceptual component of the funding "package" coming into the athletic department from the university's general budget. A related question arises: At what point does financial assistance cease to be federal, and begin to be university-originated? Arguably, money budgeted by the university for its constituent programs cannot be anything but university funding. The university has the power to allocate—budget—from its general funds; the program receives funding from the university. *Id.* Thus, from the standpoint of both the university and its athletic department, the financial transactions between them do not involve federal funds at all. If, therefore, the financial benefits received by the athletic department from the university are valued at less than the value of financial benefits generated by the athletic department for the

programs of colleges is novel,[66] but finds its precedent in several cases brought under Title VI of the Civil Rights Act of 1964.[67] In these Title VI cases, federal funding of university-wide impact was used as a means of obtaining jurisdiction over both the university and its constituent parts.[68] Title VI case law, in other words, recognizes the indirect funding approach—that an institutional recipient of federal funds can serve as the conduit by which federal funds are transmitted to any of the institution's constituent programs, thereby subjecting those programs to the statutory strictures.[69]

Utility of the Title VI analogy is hindered by the fact that none of the Title VI indirect funding cases dealt with race discrimination in a collegiate athletic program.[70] This analogical limitation creates a significant precedential vacuum, because a collegiate athletic department—and particularly a "big time" athletic department—is uniquely independent.[71] Still, analogous use of the indirect funding approach to trigger Title IX would bring most, but not all, athletic departments within Title IX's ambit.[72] Those beyond Title IX's reach even under the indirect funding interpretation are the "big time" athletic departments.[73]

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university as a whole, it is impossible, that any federal financial assistance actually reached the athletic department during the fiscal year, accounting's standard unit of measurement. *Id.*

"Big time" athletic departments would, by functional definition, have an automatic exemption from Title IX's strictures under the indirect funding paradigm. Big time athletic departments are those most likely, because of their financial characteristics (*see infra* note 73), to be generating more money for the university than they receive from the university's general fund.

66. Haffer v. Temple Univ., 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd per curiam*, 688 F.2d 14 (3d Cir. 1982) is the only case in which a court held Title IX applicable to a college athletic department based on findings of indirect federal funding to the department. The indirect construction of Title IX was rejected by the trial court in University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982) and in Bennett v. West Texas State Univ., 525 F. Supp. 77 (N.D. Tex. 1981), *rev'd and remanded*, 598 F.2d 1215 (5th Cir. 1983), which required direct federal funding of an athletic department in order to bring the department within Title IX's ambit. 525 F. Supp. at 80-81. (Note that the remand of *Bennett* was merely to allow the plaintiff to argue that the university's athletic department did, in fact, receive direct federal funding). *Haffer*, *Richmond*, and *Bennett* are the only decisions which construe Title IX's triggering mechanism in the context of intercollegiate athletics.

67. *See, e.g.*, Board of Pub. Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969); Flanagen v. President & Directors of Georgetown College, 417 F. Supp. 377, 384 (D.D.C. 1976).

68. *Id.*

69. *Id.*

70. Despite its linguistic similarity to Title VI, Title IX is not a mere copy of Title VI. With these two statutes in mind, Justice Blackmun stated, in North Haven Bd. of Educ. v. Bell, "Although two statutes may be similar in language and objective, we must not fail to give effect to the differences between them." 456 U.S. at 530. Soon after the Supreme Court's *North Haven* opinion, a court faced with the same question of the relationship between Titles VI and IX noted, "Title IX lacks the constitutional scope of Title VI." University of Richmond v. Bell, 543 F. Supp. at 328. *See also supra* note 34 and accompanying text.

71. *See infra* note 73 and accompanying text.

72. *See infra* text accompanying notes 73-75 & 77.

73. Because of the accounting implications of the indirect funding theory, it is necessary at

Because these "big time" departments have an impact on the col-

this point to construct a meaningful definition of this class of "big time" athletic departments. Such a definition was not germane to discussion of the institution-as-program interpretation, since *every* organ of the university-recipient was, under that interpretation, covered by Title IX. In employing the indirect interpretation, however, one shifts the programmatic locus at least to the departmental level. The accounting implications of the indirect funding approach render a careful definition of the departmental entities in question necessary. For purposes of this Note, nonetheless, one need only define a "big time" athletic department in order to discern clearly all organs of a university which do not have "big time" characteristics.

To that end, a "big time" collegiate athletic department may be defined as a semi-autonomous, income-producing organ of the university consisting chiefly, not but necessarily exclusively, of "varsity" level athletic teams engaging in intercollegiate competition. In order to maintain its fiscal profitability, part of its definition, every "big time" athletic department must contain at least one revenue-producing sport. *See generally infra* text accompanying notes 74-76. *But cf.* Jackson, *College Football Has Become a Losing Business*, in SPORT, CULTURE AND SOCIETY 237, 238 (J. Loy & G. Kenyon 1969) (Any institution which can afford to lose a lot of money on athletics "has to be considered just as Big Time as a school that makes a lot of money"). The latter definition ignores the obvious distinction between profitability of an athletic department and accumulated institutional wealth on the one hand, and actual capital expenditures to cover athletic department losses and *potential* to make such capital expenditures on the other. In addition, *no* institution, no matter how well endowed, could afford to cover massive athletic department losses indefinitely. Thus, a department could, under Jackson's definition, remain big time for only a foreseeable and finite period. Finally, definitions such as Jackson's do not correspond to the popular image of big time athletic departments. Many of the departments which Jackson's definition would encompass *would* have to comply with Title IX under the indirect federal funding interpretation of the statute. Big time athletic departments as defined in this Note, however, could not be forced to comply with Title IX under the indirect funding interpretation. *See infra* text accompanying notes 75-76.

Part of the big time athletic department's profit must, moreover, be applied to the university's general funds. Note that applying some portion of the athletic department-generated monies to the university's general fund is an essential characteristic of the big time exemption posited here under the indirect funding interpretation of Title IX's triggering mechanism, 20 U.S.C. § 1681(a). If the athletic department used all its revenues within the department, the exemption would not be available, since university monies entering the department would not be exceeded by departmental revenues donated to the university as a whole.

The choice may not rest entirely with athletic department officials. The American Council on Education manual states that "[i]nstitutional policy should determine the use of income resulting from intercollegiate athletics." AMERICAN COUNCIL ON EDUCATION, *supra* note 65, at 134. A collegiate athletic department may be classified as either an "auxillary enterprise" or an "organized activity relating to an educational department" for purposes of describing its organizational and financial relationship to the university as a whole.

"An *auxiliary enterprise* is an entity that exists to furnish a service to students, faculty, or staff, and that charges at a rate directly related, but not necessarily equal, to the cost of the service. The general public may be served incidentally by some auxiliary enterprises." *Id.* at 128. A big time athletic department is likely to be an "auxiliary enterprise." An intercollegiate athletic program which is a revenue-producing part of an academic department of physical education is an "organized activity related to an educational department":

> An *organized activity related to an educational department* is an entity that exists to provide an instructional or laboratory experience for students and that incidentally creates goods or services that may be sold. In the course of providing the incidental goods or services, expenditures are incurred in addition to those necessary solely for the educational benefit of the students.

Id. (emphasis added).

> The classification of some activities among the . . . categories may vary from institution to institution, reflecting differences in the purposes for which they exist. For instance, at institutions where gate receipts are sizeable, intercollegiate athletics should be classified as an auxiliary enterprise; where gate receipts are negligible and the athletic program is primarily intended for students participation rather than spectator entertainment, intercollegiate athlet-

legiate athletic milieu more substantial than their number would at first glance suggest,[74] eliminating sex discrimination in them is crucial to the equalization of opportunity in collegiate athletics as a whole.[75] Yet, the indirect funding interpretation is of no help in bringing "big time" athletic departments within Title IX's reach. By channeling more money back into the university's general budget than they received each fiscal year, these "big time" departments will have received no federal financial assistance discernible by means of generally accepted accounting

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ics may be classified as an organized activity; where there are no gate receipts, it should be a separately identified section of the budget for the department of physical education.

Id. at 129, 134.

As an "auxiliary enterprise," the big time athletic department is not, for financial purposes, a part of the university's curricular provision. "In some cases . . . the program of intercollegiate athletics is operated purely as a business activity and consequently should not be classified with the educational division of the institution." J. RUSSELL, *supra* note 65 at 178. A common characteristic of auxiliary activities is the expectation that the income they produce will meet all expenditures occasioned by their operation. In this respect the auxiliary activities contrast with the educational program, which is normally expected to have some subsidy from tax appropriations, endowment, or other sources. *Id.* at 319.

Consequently, a semantic program arises. The big time athletic department is, under two of the three interpretations of Title IX's triggering language, 20 U.S.C. § 1681(a), an "education program or activity." *See infra* note 115 (direct funding interpretation); Haffer v. Temple Univ., 524 F. Supp. 531, 533 (E.D. Pa. 1981), *aff'd per curiam*, 688 F.2d 14 (3d Cir. 1982) (indirect funding interpretation). *But see supra* text accompanying notes 42-43 & 45-46 (institution-as-program interpretation). But under the applicable accounting classifications, the big time athletic department is an "auxiliary enterprise," not a party of the university's "educational program." J. RUSSELL, *supra* note 65, at 319. The problem is mainly paradoxical. Russell used the term "educational program" to refer to an institution's entire curricular provision; he distinguishes a functionally independent athletic department as not a part of the teaching curriculum. Title IX, § 1681(a) employs the phrase "education program or activity," and under two of its three extant interpretations is understood to refer to an institutional subdivision, educational in the broadest sense.

The separation of the athletic department from its parent university is not a new phenomenon; college sports are now in their second big time cycle. Athletic associations, which appeared in the early twentieth century to finance and manage college sports—especially football—were, "in effect private corporations. University administrations exercised little more than nominal control over them." Jackson, *supra*, at 237. After the post-World War II influx of veterans, a decline in spectator revenues forced the athletic associations to turn to the university's general budget for financial support. A decline in athletic association/department autonomy occurred concomitantly. *Id.* at 238. Increased media attention to major college sports programs has again made many athletic departments—the big time departments—functionally independent of central university control. As a result, one sociologist has argued that, "businessmen—those individuals whose decisions influence the dispersion of opportunities for achievement—dominate and control most of our collegiate athletics." Edwards, *supra* note 9, at 189. The number of departments so influenced—*i.e.*, privately sustained—would not seem to justify Edwards' statement. Note, however, that those departments to which his statement is applicable have a disproportionately large impact on the intercollegiate athletic milieu. *See infra* note 74 and accompanying text.

74. The big time departments are without question the most "visible" college athletic departments and set the tone for collegiate athletics as a whole. The importance of the indirect funding implicit exemption for big time departments is not that it would lead to wholesale abandonment of Title IX's purposes. Rather, the danger lies in allowing exempted athletic departments to comply when it is convenient—to discriminate selectively.

75. *See supra* note 10.

principles.[76] A conservative estimate of the number of athletic programs which might annually find themselves with a net outlay to the university as a whole has been estimated to be twenty-eight percent of all revenue-producing athletic programs.[77] Thus, any extension of Title IX's coverage in the athletic context through use of the indirect funding interpretation is ultimately a pyrrhic victory. The most notable offenders will remain unfettered, and make it hard for small time athletic programs (which are fettered) to compete.

The conclusion is inescapable. "Big time" athletics do not come within Title IX's circumscription, even using the indirect funding interpretation. Consequently, installing indirect funding as the normative interpretation of Title IX's triggering language would not only divorce the statute's meaning from its language, but would also circumvent the reality of legislative compromise[78]—with no effect whatsoever on the most influential athletic departments, the "big time" departments.[79]

Title IX apologists may, initially, be reluctant to abandon the indirect funding interpretation. However, their reluctance should disappear when faced with the prospect of other organs of colleges and universities coming to share the financial characteristics of "big time" athletics[80] (and thus becoming exempt from Title IX). One who realizes the unexplored implications of the indirect funding interpretation cannot escape the conclusion that the indirect funding interpretation does not suffice to circumvent the limiting language in which Title IX is couched. "Big time" athletics are not merely an exception to prove a supposed rule (of the indirect funding interpretation's validity), but

76. *See supra* notes 63 & 65. On "generally accepted accounting principles" (GAAP), *see generally* BERNEY, LYONS & GARSTKA, *supra* note 63, at 97-106.

77. Note, *supra* note 8, at 579 n.31.

78. *See supra* note 36.

79. *See supra* notes 65 & 73.

80. The class of exemptions which would arise under the indirect funding model is based on university organization and program structure. The exemptions would tend, like big time athletic departments, to be profitable quasi-corporations within the university. Other than big time athletic departments, no such exemptions presently exist under this model.

Most of the potential exemptions under the indirect funding approach are, unlike an athletic department (not affiliated with a department of physical education), connected to an academic department of the university. Members of these departments are frequently recipients of federal research grants. The products of their research are made possible by the direct federal funding of their research projects. Accordingly, if the university created, for example, a genetic engineering corporation, it would almost inevitably have to comply with Title IX, since much of the research which created the firm's product would have been federally funded. In such a case, the mere fact that the corporation channeled its massive profits into the university's general funds would not serve to exempt the corporation from Title IX under the indirect funding exemption here poisted. Similarly, a university's professional drama company would probably be subject to Title IX on the basis of direct federal subsidies. The applicability of Title IX would, as always under either the direct or indirect federal funding interpretations, have to be determined on a program-by-program basis within each institution's structure.

rather a signal which reveals the theoretical vapidity and disingenuousness of the indirect interpretation.

Only four courts have been squarely faced with determining the meaning of the phrase "receiving Federal financial assistance" in the athletic context.[81] Only three of these cases concerned institutions of higher education.

Haffer v. Temple University[82] involved women students who alleged sex discrimination in the university's athletic program.[83] The trial court adopted the indirect federal funding interpretation of section 1681(a), but in keeping with the methods used in the Title VI indirect funding cases[84] did not use accounting principles to determine whether Temple's Athletic Department received federal financial assistance. As *Haffer* was the first case to interpret Title IX's triggering language according to the indirect approach in the context of collegiate athletics, it is not surprising that the court did not explore the administrative and financial peculiarities which may, and generally do, make athletic departments unique among the organs of a university.[85] Had the court fully explored the ramifications of applying the indirect funding interpretation in the collegiate athletic context, it would have recognized that all athletic department financial operations had to be examined in order to determine whether the department actually received federal financial assistance.[86] Temple's has, however, conspicuously never

81. University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982); Bennett v. West Texas State Univ., 525 F. Supp. 77 (N.D. Tex. 1981), *rev'd and remanded*, 598 F.2d 1215 (5th Cir. 1983); Haffer v. Temple Univ., 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd per curiam*, 688 F.2d 14 (3d Cir. 1982); Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981), *aff'd*, 699 F.2d 309 (6th Cir. 1983).

82. 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd per curiam*, 688 F.2d 14 (3d Cir. 1982).

83. *Id.* at 532.

84. *E.g.*, Board of Pub. Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969); Flanagan v. Georgetown, 417 F. Supp. 377 (D.D.C. 1976).

85. *See supra* notes 63, 65, 73 & 80.

86. Realization of the unique position of many athletic departments within the university structure (*see supra* note 73) and the need to ascertain whether those departments received "Federal financial assistance" under 20 U.S.C. § 1681(a) (1982) entails the use of accounting methods. One such method is the matching principle. *See generally* BERNEY, LYONS & GARSTKA, *supra* note 63, at 104.

It is slightly more likely that an athletic department would receive direct federal funding if the department were a subdivision of a department of physical education comprising one of the administrative divisions of the teaching curriculum. As one proceeds farther along the spectrum from these departments towards the big time departments, it becomes less and less likely that the athletic department in question is receiving direct federal grants or subsidies. This is primarily because federal grants are designed to facilitate academic research, not to fund spectator sports. If, moreover, college athletic departments did, in fact, commonly receive direct federal financial assistance, interpretation of Title IX's triggering mechanism would be unnecessary. In *University of Richmond v. Bell*, the Department of Education, in fact, argued that "athletic programs are never earmarked for direct Federal funding and that [the Department of Education] may obtain jurisdiction over an athletic department only if indirect funding is considered to be a basis for jurisdiction." 543 F. Supp. 321, 332 n.17. Plaintiffs in both Bennett v. West Texas State Univ.,

been a "big time" athletic department. The case's outcome would, therefore, not have been different had the accounting principles here advocated been applied.

For most athletic departments, like Temple's, the indirect interpretation would trigger Title IX. However, that fact alone should not convince one that it is the best interpretation of Title IX's triggering language. The adoption of that interpretation by the Supreme Court would enshrine only a halfway measure. A minority of collegiate athletic departments having hegemonic influence on the conduct of collegiate athletics are beyond Title IX's reach under the indirect funding interpretation.[87] This specific deficiency illustrates the fundamental problem with departing from the concept of representative democracy sufficiently to allow courts and executive branch agencies to become *de facto* legislators. For whatever its shortcomings when measured against the magnitude of the problem it seeks to solve, a legislative enactment was once the political least common denominator of a legislative majority.[88] This, in itself, renders the indirect approach, a judi-

525 F. Supp. 77 (N.D. Tex. 1981), *rev'd and remanded*, 598 F.2d 1215 (5th Cir. 1983) and Haffer v. Temple Univ., 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd per curiam*, 688 F.2d 14 (3d Cir. 1982), had to resort to the indirect federal funding interpretation of Title IX's language precisely because they recognized that there was no direct federal funding of those universities' athletic programs. Only if the defendant institution were one of the United States military/"service" academies would direct federal funding of a non-academic athletic department exist. In such a case, it would be unnecessary to find additional means of rendering Title IX applicable.

87. The objection is not merely theoretical. Covering the majority of athletic departments would obscure much of any perceived need for further legislation to end sex discrimination in education, and particularly in athletics. Proponents of equality of educational opportunity regardless of sex are, in other words, wiser to recognize the limited nature of Title IX and to adopt an interpretation which maximizes the apparent need for further, complementary legislation, than to adopt the indirect interpretation, inherently minimizing the need for further legislation.

An additional drawback to using the indirect federal funding model is the difficulty and administrative cost which both government and institutions might incur by implementing the accounting principles necessary to determine whether a particular collegiate athletic department was "receiving Federal financial assistance," 20 U.S.C. § 1681(a), during the particular fiscal year. *Cf. supra* note 65 (describing financial relationships between universities and their athletic departments). Although accounting practices currently in use are entirely adequate for the university's own purposes, they are not cognizant of indirect financial receipts. *See, e.g.*, AMERICAN COUNCIL ON EDUCATION, *supra* note 65, at 253, 262.

Both university and athletic department account for their own receipts and expenditures. Included in the university's financial report is a "Governmental Appropriations" category, which reports receipts from the government for "educational and general purposes." *Id.* at 191. The athletic department's financial report typically would not show governmental subsidies. *See supra* note 73. Thus, the link between federal government subsidies to the university and the athletic department, crucial to invoking Title IX under the indirect funding interpretation, is absent.

It is out of the discernment and valuation of indirect federal financial subsidies in any form to the university's athletic department that the additional costs of implementing the indirect interpretation arise. Incurring these administrative costs to install a means of triggering Title IX which would serve to exempt twenty-eight percent of all revenue-producing programs (*see supra* note 77) is far from rational. Such an inefficient mode of enforcement cannot have been the intent of Congress in enacting Title IX. *See supra* note 36.

88. *See supra* notes 3 & 36.

cial incursion into legislative branch territory,[89] unacceptable when compared with the direct approach to interpreting Title IX's triggering language.[90]

C. *The Direct-Earmarked-Federal Funding*

In marked contrast to the first two interpretations, the direct funding interpretation of Title IX's triggering language is both honest and unambiguous. Direct and indirect interpretations coincide in defining a "program or activity" as a department or equivalent division of an educational institution. But there the similarity ends.

1. The Direct Funding Theory

The direct funding interpretation holds that Congress drafted Title IX's triggering language in order to state clearly its intent that Title IX apply only to those organs of the educational institution which actually and directly receive federal funding. Because such a common sensical interpretation may seem too simplistic to have proceeded from the majoritarian mind of Congress, one need only reflect that if Congress had intended to institute either the indirect funding interpretation or the institution-as-program approach, then Title IX is an exceptionally poorly drafted statute. Neither its plain language[91] nor its legislative history[92] suggest either interpretation.

While the Supreme Court has not announced a definitive interpretation of Title IX's triggering language, the Court strongly hinted in *North Haven Board of Education v. Bell*[93] that it disapproved of the institution-as-program approach. But because it chose not to define the word "program" as used in Title IX,[94] the Court has not yet dispatched the institution-as-program interpretation to its deserved fate.[95] Both the majority and the dissenters[96] in *North Haven* opined that the pri-

89. *See supra* note 16.

90. *See supra* notes 3-5 and accompanying text.

91. The phrase, "program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (1982).

92. *See supra* note 36.

93. 456 U.S. 512 (1982).

94. 456 U.S. at 539 ("[W]e do not undertake to define 'program' in this opinion").

95. *North Haven* involved the fundamental question of whether employees of an education program are "persons" within the meaning of Title IX, 20 U.S.C. § 1681(a) (1982). *See supra* note 73 and accompanying text. Not surprisingly, the Court's majority had little difficulty in determining that employees are, indeed, persons. 456 U.S. at 520 (Justice Blackmun wrote for the majority, consisting of Justices Brennan, Marshall, O'Connor, Stevens and White). But behind this simple conclusion lie reasoning and determinations which render the *North Haven* opinion of great evidentiary value in urging adoption of the direct funding interpretation of Title IX's triggering language.

96. Justice Powell authored the dissent in which Chief Justice Burger and Justice Rehnquist joined.

mary guide in interpreting Title IX should be the plain language of the statute itself.[97] The Court's opinion went on to hold that Title IX is applicable only to education programs, not to entire institutions.[98]

Having held that Title IX's scope is limited to "education programs," Justice Blackmun, writing for the majority, described Title IX as prohibiting sex discrimination in "federally *financed* education programs"[99] and in "federally *funded* education programs."[100] In support of his construction of the statute's triggering language, Blackmun quotes Title IX's principal sponsor, Senator Bayh, who used the words "funds" and "funded" in describing the statutory term "financial assistance" during floor debate on Title IX.[101] These interpretations of Title IX's triggering phrase, "education program or activity receiving Federal financial assistance,"[102] imply use of the direct funding interpretation.

Finally, the Court held that while Title IX's language bears striking similarity to that of Title VI,[103] "we must not fail to give effect to the differences between them."[104] The Court thus indicated that Title VI case law is not determinative in interpreting similar language in Title IX.

2. Caselaw: Direct Federal Funding And Collegiate Athletics

Though *North Haven* has no substantive kinship to those cases involving Title IX's applicability in the collegiate athletic context,[105] it

97. Justice Blackmun stated that Title IX's terms should be construed according to their "ordinary meaning." "Our starting point in determining the scope of Title IX is, of course, the statutory language." 456 U.S. at 520. Justice Powell, in his dissent, added, "[n]or must a court shun common sense in resolving ambiguities." *Id.* at 555 (citing Buckley v. Valeo, 424 U.S. 1, 77 (1976)).

98. "Title IX's legislative history corroborates in general program-specificity. Congress failed to adopt proposals that would have prohibited *all* discriminatory practices of an institution that receives federal funds. . . . We conclude . . . that an agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation. . . ." *Id.* at 537.

99. *Id.* at 531 (emphasis added).

100. *Id.* at 537 (emphasis added).

101. *Id.* at 524. Senator Bayh stated: "[T]he heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds." 118 CONG. REC. 5803 (1972). Bayh reiterated: "Central to my amendment [which became Title IX] are sections 1001-1005, which would prohibit discrimination on the basis of sex in federally funded education programs. . . . *Id.* at 5807.

102. 20 U.S.C. § 1681(a) (1982).

103. 42 U.S.C. § 2000(d) (1976).

104. 456 U.S. at 530 (citing Lorillard v. Pons, 434 U.S. 575, 584-85 (1978)).

105. *North Haven* dealt primarily with whether the word "person" as used in § 1681(a) includes employees of an "education program." The cases arising in the athletic context focus on the construction of Title IX's triggering language, especially the word "program." The Court explicitly declined to address this question in *North Haven*. 456 U.S. at 539.

has substantial weight in corroborating what logic[106] had already taught thoughtful judicial analysts.[107]

The first case to examine Title IX's triggering language in the athletic context was *Othen v. Ann Arbor School Board*.[108] In *Othen* plaintiff alleged her dismissal from her high school golf team occurred as a result of sex discrimination. The *Othen* court held Title IX inapplicable, as the school's athletic program received no "Federal financial assistance."[109] The *Othen* court, moreover, held that the Department of Education regulations purporting to implement Title IX in the athletic context[110] were invalid to the extent that they employed an institutional view of Title IX's programmatic language.[111]

Ground broken by the *Othen* court soon served as foundation for a similar holding in the collegiate context. In *Bennett v. West Texas State University*[112] plaintiff alleged pervasive sex discrimination in the university's athletic department, contrary to Title IX as effectuated by its regulations. Like the *Othen* court, the *Bennett* court held Title IX applicable only to those constituent programs of the educational institution actually receiving direct federal funding.[113] To the extent that Title IX's regulations imposed a more expansive interpretation of Title IX's triggering language, in contravention of the statute's plain meaning, the *Bennett* court held the regulations invalid.[114]

As rendered applicable in the context of collegiate athletics by the *Bennett* court, the direct funding interpretation has several significant implications in the college and university setting. First, a university athletic department is a "program or activity" within the meaning of Title IX.[115] Second, federal financial assistance must take the form of

106. In addition to the majority's admonition to give statutory terms their ordinary meaning, *id*. at 521, Justice Powell restated in his dissent that where a statute's meaning is uncertain, a court must "draw upon" 'those common-sense assumptions that must be made in determining direction without a compass.' " *Id*. at 555 n.17 (quoting Buckley v. Valeo, 424 U.S. 1, 77 (1976)). One can scarcely imagine stronger endorsements for the use of logic in giving Title IX its plain—direct—meaning.

107. Bennett v. West Texas State Univ., 525 F. Supp. 77 (N.D. Tex. 1981), *rev'd and remanded*, 598 F.2d 1215 (5th Cir. 1983); Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981), *aff'd*, 699 F.2d 309 (6th Cir. 1983). The appeals courts' decisions are consistent, so far as they go, with the Supreme Court's decision in *North Haven*.

108. 507 F. Supp. 1376 (E.D. Mich. 1981), *aff'd*, 699 F.2d 309 (6th Cir. 1983).

109. *Id*.

110. 34 C.F.R. § 106.41 (1983).

111. 507 F. Supp. at 1387. Note that the *Othen* court's holding is entirely consistent with *North Haven*'s reaffirmation of Title IX's program-specificity. 456 U.S. at 539.

112. 525 F. Supp. 77 (N.D. Tex. 1981), *rev'd and remanded*, 598 F.2d 1215 (5th Cir. 1983).

113. 525 F. Supp. at 80. *Accord* Rice v. President & Fellows of Harvard College, 663 F. 2d 663 F.2d 336, 338-39 (1st Cir. 1981); Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981), *aff'd*, 699 F.2d 309 (6th Cir. 1983).

114. 525 F. Supp. at 80.

115. *Id*. at 77. Plaintiff and defendant were in agreement that the university's athletic department constituted a "program" within the meaning of Title IX, 20 U.S.C. § 1681(a).

purpose-earmarked funding.[116] Third, and most importantly, a "program or activity receiving Federal financial assistance" is that program to which the federal check is, in effect, made payable.[117]

The most recent case interpreting Title IX's triggering language in the context of collegiate athletics benefited not only by the awareness of previous courts' conclusions in *Othen*,[118] *Bennett*,[119] and *Haffer*,[120] but also by the Supreme Court's reasoning and ruling in *North Haven*.[121] As a result, the trial court's opinion in *University of Richmond v. Bell*[122] is exceptionally well-founded in adopting the direct funding interpretation of Title IX's triggering language.

In *Richmond* the university sought to enjoin the Department of Education from investigating the athletic department pursuant to Title IX's implementing regulations. The university argued that since its athletic department received no direct federal funding, the Department of Education lacked statutory authority to compel the athletic department's compliance with Title IX.[123] To the extent that the regulations authorized the Department of Education's investigation, plaintiff argued they were invalid extensions of Title IX's plain language.[124]

In rejecting defendant's institution-as-program view of Title IX's coverage,[125] the *Richmond* court also refuted the indirect funding interpretation.[126] Granting that some portion of some students' payment of tuition and fees comes from federal sources, the court held that, "even if such funds could be construed as aid to educational institutions,[127] they do not constitute direct aid to the intercollegiate athletic program;"[128] thus Title IX did not apply.[129] Having followed the Supreme Court's direction in *North Haven* to refer primarily to the statute's

116. *Id.* at 80. Note that the appeal court's reversal affirmed Title IX's program specificity. 598 F.2d 1215 (5th Cir. 1983).

117. 525 F. Supp. at 80. *Accord* Rice v. President & Fellows of Harvard College, 663 F.2d 336, 339 n.2 (1st Cir. 1981) ("once admitted to an educational institution, allegations of discrimination in violation of 20 U.S.C. § 1681 must involve discrimination by the particular funded education program within that institution.") *Cf.* Koch, *supra* note 30, at 252 (Title IX applies only to programs directly receiving federal financial assistance).

118. 507 F. Supp. 1376 (E.D. Mich. 1981).

119. 525 F. Supp. 77 (N.D. Tex. 1981).

120. 524 F. Supp. 531 (E.D. Pa. 1981).

121. 456 U.S. 512 (1982).

122. 543 F. Supp. 321 (E.D. Va. 1982).

123. *Id.* at 323-25.

124. *Id.* at 325.

125. *Id.*

126. *Id.* at 332 n.17.

127. The court identified the funds in question as tuition and fees paid to the university by students. The court characterized these fees as compensation to the university for services rendered and not as aid, much less "Federal financial assistance" within the meaning of Title IX. *Id.* at 330.

128. *Id.*

129. *Id.* at 327 n.10.

plain language in interpreting Title IX,[130] the *Richmond* court succienctly stated the import of the direct funding interpretation in the collegiate context: the Department of Education "should not in the future endeavor to investigate, regulate, coerce, or intimidate colleges and universities with regard to programs or activities that do not receive direct federal financial assistance."[131] Accordingly, finding no evidence of any direct federal financial assistance to the university's athletic department, the court granted plaintiff the injunction.

Significantly, in *Richmond* the Department of Education argued that athletic programs never receive direct federal funding, and therefore that an athletic department is covered only by the indirect interpretation.[132] To this negative argument against adoption of the direct interpretation, the court responded by reasserting the legislative supremacy of Congress. Since, in other words, in Title IX Congress created a law which, in practical terms, exempts collegiate athletic departments, the Department of Education is bound to preserve that exemption.[133]

In so holding, the *Richmond* court focused on the real issue in interpreting Title IX's triggering language—the question of allocation of legislative function in a democracy. One may concede that rudimentary notions of justice require that women have the opportunity to participate in collegiate athletic activities with all appropriate equipment and support resources, yet maintain that only the direct funding interpretation of Title IX's triggering language is appropriate. It is equally basic that, in a democracy, upholding regulations which may vary with the change of federal administrations, which are enacted unilaterally in the executive branch, and which lack authorization in their enabling statute[134] would frustrate the underlying principle of governance.[135] Agencies, as well as courts, must respect the realities of legislative compromise[136] if the concept of representative democracy is to have any

130. *See supra* note 97.

131. 543 F. Supp. at 333.

132. *Id.* at 332 n.17.

133. *Id.* The *Richmond* court stated, in effect, that the Department of Education's own admission that collegiate athletic departments are not federally funded, if true, renders Title IX inapplicable to those departments.

134. On the principle that administrative regulations cannot exceed the scope of their enabling statute, see *supra* note 54. Several courts have held that Title IX's regulations are impermissibly in excess of the statute's scope. *See* Rice v. President & Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982); Bennett v. West Texas State Univ., 525 F. Supp. 77 (N.D. Tex. 1981), *rev'd and remanded*, 598 F.2d 1215 (5th Cir. 1983) (appeals court did not reverse trial court on this point); Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981), *aff'd*, 699 F.2d 309 (6th Cir. 1983) (appeals court did not consider the regulations). *But see* Haffer v. Temple Univ., 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd per curiam*, 688 F.2d 14 (3d Cir. 1982); Iron Arrow Honor Soc'y v. Hufstedler, 499 F. Supp. 496 (S.D. Fla. 1980), *aff'd*, 652 F.2d 445 (5th Cir. 1981).

135. *See supra* notes 3-5 & 15 and accompanying text.

136. *See supra* note 36.

practical meaning.

III. CONCLUSION

The "ordinary meaning" of Title IX's triggering language, as well as an absence of evidence of legislative intent to the contrary, demands that courts adopt the direct funding interpretation in applying Title IX.[137] This interpretation is the only one of the three set forth in this Note which accords proper deference to the congressional function in lawmaking—that of serving as a forum for public opinion on matters of public policy.[138] It is, furthermore, in the best tradition of Anglo-American jurisprudence.[139]

Only the direct funding interpretation supplies a reading of Title IX's triggering language which accords the legislative branch due deference.[140] The direct funding interpretation merely accepts what has been obvious but too seldom recognized: Title IX does and will exempt non-federally funded education programs—including collegiate athletic departments—until such programs become recipients of federal funds or until Title IX's triggering language is legislatively broadened.

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137. *See supra* notes 97 & 106.
138. *See supra* notes 3-5 & 15.
139. *See supra* notes 15, 19 & 23.
140. *See supra* notes 3-5 & 15 and accompanying text.

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