IRONIES, INCONSISTENCIES, AND INTERCOLLEGIATE ATHLETICS: TITLE IX, TITLE VII, AND STATISTICAL EVIDENCE OF DISCRIMINATION

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INTRODUCTION

Sex discrimination in athletics has been pervasive, controversial, and in some respects, inevitable. The traditional exclusion of women from sports has reinforced many of the most extreme gender stereotypes, from hulking male football players to alluring female cheerleaders. Yet athletic teams are almost invariably segregated by sex, so attempts to integrate sports programs inevitably fall short of integrating particular sports. In athletics, there is no “sex blind” counterpart to “colorblind” justice.

The argument that physical differences between women and men require sex-segregated teams raises fundamental questions about different gender roles. If these differences cannot be disregarded, how can we—or should we—attempt to achieve equal treatment between women and men in athletics? In college sports, these issues are even more complicated because they are superimposed on the odd fit between intercollegiate athletics, the booming market for sports of all kinds, and the academic goals of higher education. Nothing in a college or university, apart from the age of the students, makes it a suitable training ground for professional athletes.\(^1\) And no other country appears to have made the judgment that it is suitable, at least not to the extent that we have in our programs of intercollegiate athletics.

As a legal matter, these questions come to rest uneasily in the prohibition against discrimination in Title IX of the Education Amendments of 1972.\(^2\) This prohibition applies broadly to all

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1. As University of Chicago President Robert Hutchins put it pungently in explaining the decision to eliminate the university’s intercollegiate athletics program: “A college racing stable makes as much sense as college football. The jockey could carry the college colors; the students could cheer; the alumni could bet; and the horse wouldn’t have to pass a history test.” Richard G. Sheehan, Keeping Score: The Economics of Big-Time Sports 261 (1996).
programs, including athletic programs, at all schools that receive federal financial assistance in any form, including scholarships and loans to individual students. In a series of recent cases, the courts have considered what constitutes sex discrimination in intercollegiate athletics. They have generally reached three conclusions: (1) cutting back on women's teams usually violates the statute; (2) cutting back on men's teams usually does not violate the statute; and (3) the basic test for equal athletic opportunities is whether the number of positions on women's and men's teams mirrors the proportion of women and men in the school's overall enrollment—a position we describe as "parity with enrollment."

In this article, we argue that only the first of these conclusions has much to be said for it, and then only if it is women's teams alone that are cut or that are cut more drastically than men's teams. The second and third contradict settled principles under other civil rights statutes about how to achieve equal treatment and how to use statistical evidence. "Leveling down," by cutting either women's or men's sports alone, decreases opportunities for one sex exclusively and should be disfavored for that reason. Moreover, the discrimination prohibited by the statute should not be defined by using simplistic statistical tests.

Regulators, courts, and litigants have been driven to the current position in large measure by the anomalies resulting from the fact that football, the largest single sport in most college athletic programs, is reserved exclusively for men, and that there is no equally large sport reserved for women. The consequences of this disparity have led to a search for compensating steps, which usually involve cutting men's teams while preserving or increasing women's teams, often in the same sports.

Instead of forcing colleges and universities further down this path, Title IX should be interpreted to give them the flexibility to comply with the statute by other means. They should not be forced to achieve parity with enrollment if they can develop more accurate statistics on a more limited pool of students: those actually enrolled (or who might be recruited) with the interest and the ability to participate in intercollegiate athletics. The dismaying consequences of sex segregation in general and the role of football are better countered by

3. Id. § 1687 (1994). The National Collegiate Athletic Association itself, however, is not covered, at least not on the ground that its member schools receive federal funds. See NCAA v. Smith, 119 S. Ct. 924, 928-30 (1999).
this specialized means than by imposing rigid numerical standards for equal participation.

This article proceeds in four parts. Part I sets forth the institutional background of intercollegiate athletics and the response that colleges and universities have made to the first wave of litigation under Title IX. Part II examines the statutory and regulatory framework of litigation under Title IX, and in particular, the varying degrees of deference to be given to statements by the Office of Civil Rights of the Department of Education. Part III compares the treatment of statistics and affirmative action under Title IX with the treatment of the same subjects in employment discrimination law under Title VII of the Civil Rights Act of 1964. In this part, we raise the question why enforcement of Title IX should diverge so sharply from the principles developed under Title VII. Part IV concludes by recommending changes in existing law, as it has been interpreted by the majority of courts, to bring enforcement of Title IX into conformity with the statute and regulations as written and with the treatment of statistics and affirmative action under Title VII. These changes would give colleges and universities discretion—and, indeed, strong incentives—to engage in affirmative action in favor of women, but would not actually require them to do so. This is exactly the balance between encouraging, but not requiring, affirmative action that is presently found in Title VII. With suitable modifications, this balance should prove to be equally effective under Title IX.

I. INSTITUTIONAL BACKGROUND AND THE IMPLICATIONS OF FOOTBALL

The effort to define “discrimination” under Title IX is complicated by the highly general language of the statute and by the enormous variety of intercollegiate athletics. The statute simply states that no person shall “on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination” in educational programs, including programs of intercollegiate athletics. This proscription must be applied in contexts ranging from the huge, multimillion-dollar enterprises of Division I-A universities in the National Collegiate Athletics Association (“NCAA”) to the smallest

liberal arts colleges, which grant no athletic scholarships. It also applies across a spectrum of sports ranging from what are, in effect, the minor leagues for the lucrative professional teams in football, men’s and women’s basketball, and an increasing number of other sports, all the way to small-college contests in wrestling and field hockey that may have difficulty attracting the participants’ roommates as spectators. Moreover, the prohibition on discrimination applies not only to the allocation of competitive opportunities and athletic scholarships, but also to a wide variety of additional practices, including the provision and pay of coaches, access to performance arenas and practice facilities, and the conditions of travel to away games.

The simplest and most obvious way to satisfy the command of the statutory language would be to have unisex teams in all sports, with men and women equally eligible to compete for roster spots, athletic scholarships, and playing time. This plausible interpretation founders

5. The NCAA classifies athletics programs into divisions reflecting a school’s commitment to a sport. The top teams in any sport comprise Division I and the weakest level of competition is Division III. Among the differences between divisions is the number of scholarships authorized by NCAA rules. Division I teams have the largest number of authorized scholarships, and Division III teams are not allowed to give athletic grants-in-aid. A school may choose to compete in different divisions in different sports. 1999-2000 NCAA Division I Manual 339 (1999).

6. Indeed, there have been a number of cases, most at the high school level or below, asserting that the exclusion of females from a sports team because of sex constitutes unlawful discrimination. These claims, which have been asserted under both Title IX and the Equal Protection Clause of the Fourteenth Amendment, have met with mixed results. Some courts have upheld the exclusion of females from male teams in “contact sports” or because the school or other sponsoring entity offered a girls’ team in the sport. See, e.g., O’Connor v. Bd. of Educ., 449 U.S. 1301 (Stevens, Circuit Justice, 1980) (approving a provision of separate junior high school basketball teams on the ground that basketball is a contact sport); Lantz v. Ambach, 620 F. Supp. 663 (S.D.N.Y. 1985) (holding Title IX is not violated by the exclusion of a 16-year-old girl from a high school football team because football is a contact sport). See also Ritaeco v. Norwin Sch. Dist., 361 F. Supp. 930 (W.D. Pa. 1973) (approving separate boys’ and girls’ tennis teams to prevent male dominance of the sport); Bucha v. Illinois High Sch. Ass’n, 351 F. Supp. 69 (N.D Ill. 1972) (approving separate high school swimming teams for males and females). In noncontact sports, courts generally have required integration of girls onto an existing boys’ team, unless a separate team for girls already exists. See, e.g., Brenden v. Indep. Sch. Dist. 742, 477 F.2d 1292 (8th Cir. 1973) (disapproving exclusion of girls from a high school cross-country skiing team); Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977) (disapproving exclusion of girls from a high school soccer team where no separate team was offered); Gilpin v. Kansas State High Sch. Ass’n, 377 F. Supp. 1233 (D. Kan. 1973) (disapproving exclusion of girls from the school’s only cross-country track team). Generalization is extremely difficult, however, as courts have differed on the definition of a
on the widely accepted obstacles—cultural as well as physical—that stand in the way of most forms of direct athletic competition between women and men. It follows that any effort to define “discrimination” requires not one, but two, playing fields to be leveled. Ironically, “separate but equal” is the standard to which we are driven. But how do we measure the equality of two separate worlds? Do we do it on a sport-by-sport basis, and if not, how do we construct a sensible measure across sports?

A. Football—The Big Stumbling Block

We emphasize at the outset a problem that has bedeviled the analysis of Title IX issues in a context dominated by the model of parity with enrollment, namely, the difficulty caused by the popularity and huge squad size of football. Men’s football is by far the most popular and most lucrative of intercollegiate sports. It also consumes “contact sport.” Compare Magill v. Avonworth Baseball Conference, 364 F. Supp. 1212 (W.D. Pa. 1973), vacated without opinion, 497 F.2d 921 (3d Cir. 1975) (finding baseball is a contact sport), with Nat’l Org. for Women v. Little League Baseball, Inc., 318 A.2d 33 (N.J. 1974) (finding girls are at no greater risk of physical injury than boys in baseball). Some courts have reached different conclusions under Title IX and the Fourteenth Amendment in cases dealing with the same sports. See Lantz, 620 F. Supp. 663 (reasoning that the exclusion of a 16-year-old girl from a high school football team did not violate Title IX, but the blanket rule of exclusion based on physical averages without regard to individuals lacked a reasonable relation to a governmental objective). Even the rule against inter-gender competition in contact sports is not universally observed. See, e.g., Mercer v. Duke Univ., 1999 WL 492650 (4th Cir. July 12, 1999) (holding that a woman who was allowed to try out to be a place kicker on the otherwise male football team cannot be excluded from the team because of sex); Saint v. Nebraska Sch. Activities Ass’n, 684 F. Supp. 626 (D. Neb. 1988) (granting preliminary injunction to a high school girl who was prohibited from trying out for the boys’ wrestling team).

7. Thus, the Department of Education regulations under Title IX expressly provide that a school may “operate or sponsor separate teams for members of each sex where selection for such teams is based on competitive skill or the activity involved is a contact sport.” The same regulation defines “contact sports” to “include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.” 34 C.F.R. § 106.41(b) (1998).

8. Football accounts for 47% of all athletic revenues among NCAA Division I-A schools, with the remaining 53% divided among men’s basketball (18%), all other sports (3%), and revenues unrelated to any specific sport (32%). See Daniel L. Fulks, Revenues and Expenses of Intercollegiate Athletic Programs: Financial Trends and Relationships – 1993, 15, Table 3.2 (NCAA 1994). Unfortunately, there are no hard data to substantiate or refute the claim made by football partisans that much of the “unrelated” revenue, for example, contributions to a school’s overall athletic scholarship fund, is also attributable to football. See infra text accompanying notes 17-22.
by far the largest number of roster spots of any intercollegiate sport, with 85 full scholarships permitted for Division I teams by NCAA rules.9 There are no women’s college teams in football, nor are there teams in any college sport played exclusively by women that are of comparable size. Moreover, football’s popularity among spectators and its tremendous revenue potential suggest that it will continue to be a dominant part of the intercollegiate athletics scene for many years to come. This creates a nightmare in a world driven by the superficial statistics of parity with enrollment.

This nightmare has played itself out in an intense debate over whether football should count in determining parity with enrollment. Should regulators bow to the strength of its proponents, treat football as sui generis, and eliminate its very large squads from comparative analyses of participation rates for gender equity purposes? This would, of course, substantially weaken the impact of Title IX. On the other hand, inclusion of football in the parity mix arguably discriminates against male athletes in the “nonrevenue” sports where both men and women often compete, but on different teams. At the congressional level, proposals to exempt “revenue” sports—football and men’s basketball—were put forward, debated, and rejected.10 Yet Congress hardly resolved the matter, leaving it to the administrative process to devise regulations addressed to sex discrimination in intercollegiate sports.11 These developments have left football within the scope of Title IX, but they have not ended the debate over the implementation or consequences of this decision.

10. In 1974 Senator Tower proposed an amendment to Title IX to exempt revenue-producing sports from regulation under the statute. He argued that those sports provide the money necessary to sustain teams in other sports. Hence, he concluded, undercutting profits through detrimental regulation would not only hurt football but all intercollegiate athletic programs; it would certainly not result in the expansion of competitive opportunities for women. See 120 Cong. Rec. 15,322-23 (1974) (statement of Sen. Tower). For more recent efforts to exempt football from Title IX, see Mike Zapler, Coaches of Major Football Teams Ask Congress To Help Revamp Enforcement of Title IX, Chron. Higher Educ. Jan. 6, 1995, at A44. See also Phillip Anderson, A Football School’s Guide to Title IX Compliance, 2 Sports L.J. 75, 96 (1995); Walter B. Connolly, Jr. & Jeffrey D. Adelman, A University’s Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios, 71 U. Det. Mercy L. Rev. 845, 909 (1994); James V. Koch, Title IX and the NCAA, 3 W. St. L. Rev. 250, 259 (1976).
This debate is often waged in very emotional terms. Football's proponents point to its huge popularity and the revenues it generates, which they claim benefit the entire intercollegiate program at many colleges and universities. On the other hand, football, more than any other sport, may contribute to the perpetuation of gender stereotypes. It is a macho, violent sport, increasingly played at the highest levels by only the very largest men. Moreover, removing football from the assessment of how resources are distributed between male and female athletes would perpetuate an historic and quite unattractive imbalance in this area. It would transform sex segregation in athletics into a justification for turning the sport with the biggest teams, the most scholarships, the greatest resources, and the most visibility into an exclusively male preserve, thus reinforcing the pattern of traditional discrimination against women in college athletic programs.

Ironically, however, leaving football within the coverage of Title IX does little to eliminate these effects. Short of abolishing football, or somehow creating a sport with corresponding squad size and popular appeal exclusively for women, nothing can be done to eliminate male dominance in this, the largest and most popular of college sports. Moreover, the power of the football program within most athletic departments has preserved its squad size and number of scholarships from cutbacks. Existing enforcement norms thus do little to eradicate the traditional exclusion of women from intercollegiate athletics, and what little they do comes at the expense of men's programs in nonrevenue sports—often the sports in which both men and women

12. See Fulks, supra note 8, at 15. See also Title IX of the Education Amendments of 1972, Hearing Before the House Subcomm. on Postsecondary Educ., Training, and Life-Long Learning of the Comm. on Econ. and Educ. Opportunities, 104th Cong. at 200 (1995) [hereinafter Hearing] (statement of Charles M. Neinas). Mr. Neinas, then the Executive Director of the now-defunct College Football Association, did not seek legislation exempting football from Title IX, but did press for a "reasonable" interpretation of Title IX that would keep universities from "becoming prisoners to a strict proportionality test." Id. He cited football's public relations value, its fundraising draw, and its revenue production. See id. at 202-06. Tom Osborne, the head football coach at Nebraska at the time, also argued that the revenue base created by football should not be undercut by adherence to strict proportionality. In addition to the revenue and fundraising arguments, he stressed the growing success of women's athletic teams at schools with major football programs. See id. at 385-87.

compete, though on different teams. Should we accept the conclusion that, because football is very popular and generates a large amount of money, the elimination of discrimination requires schools to support teams for women, but not men, in less violent sports such as gymnastics, swimming, and tennis?

In debating these difficult issues, participants have clashed over how to take account of the surrounding economic environment. Universities and colleges from Notre Dame in Division I-A to Amherst in Division III generally fill their stadiums, large and small, for football games on fall afternoons. The revenues from football ticket sales and the televising of games dwarf those from any other sport. The number of disadvantaged students who seek and find tickets out of poverty by playing football is much larger than in any other sport. Successful football coaches can command high salaries and generous perks because they are only one step away from the high-paying professional market or from more lucrative offers from colleges in larger metropolitan areas.

On the other hand, there is room for substantial doubt that most football programs actually throw off direct revenues that benefit other sports. Available data suggest that 67% of NCAA Division I-A football programs turn an annual profit. The question is complicated, however, by numerous accounting and fundraising issues. One such

17. See Sheehan, supra note 1, at 263-64. The long-time Executive Director of the NCAA put it this way:

The accounting variables in college athletics make it difficult if not impossible to know whether a big-time sport pays for itself much less whether it generates net receipts to finance the deficit sports. Actual cost accounting, in the sense of a hard-nosed business analysis, isn’t done. In past times as today, through university-approved accounting techniques, many big-ticket items are shunted off athletics department budgets to be
issue is how to account for the cost of stadiums and other football-related facilities.\textsuperscript{19} If they are financed and amortized out of general university revenues, football's contribution to the athletic department's income stream will be overstated by an amount roughly equal to the annual amortization payment. If they are paid for up front by contributors to the football program or amortized out of football revenues, then football’s contribution to the income stream may be understated by an amount equal to the annual value of these facilities for uses in other sports. Other issues are created by the disparate ways in which schools treat alumni contributions.\textsuperscript{20} While many schools do have separate contributions earmarked for the support of athletic programs, some do not. Even among those who do, some do not count these contributions in the athletic department's budget. These accounting differences further complicate another already difficult question, namely, how much credit football deserves for overall alumni contributions to a university’s general athletic program.\textsuperscript{21} Though hard data are virtually nonexistent, there is a widespread belief that there is a correlation between the success of a school's football team and donations to its athletic department.\textsuperscript{22}

paid by student fees, donated booster/alumni funds, other departments of the university, or state appropriations. Capital expenditures for buildings or permanent equipment as well as the maintenance and upkeep of facilities may be in the university's overall accounts and current operating budget, with fractional accounting charges to athletics.


\textsuperscript{19} See Sheehan, supra note 1, at 264; Byers, supra note 18 at 221.

\textsuperscript{20} According to economist Richard Sheehan, only 31 out of 103 NCAA Division I-A schools conduct a financially “healthy athletic program.” The formula devised by Sheehan establishes a healthy athletic program as one that requires a net profit of $3.5 million in order to break even. The $3.5 million figure incorporates a $1 million buffer zone for unexpected expenditures and includes his estimate of $2.5 million for administrative expenses. Finally, in order to determine how much money the programs earn as opposed to how much is contributed to them, Sheehan excludes “gifts and state contributions” to athletic department budgets from the equation. Thus, under Sheehan's formula, it appears that athletic program budgets that fall below the $3.5 million mark are considered financially unhealthy. See Sheehan, supra note 1, at 264, 306. See also Brain L. Porto, Completing the Revolution: Title IX as Catalyst for an Alternative Model of College Sports, 8 Seton Hall J. Sport L. 351, 379 (1998).


\textsuperscript{22} See Lee Sigelman & Samuel Bookheimer, Is It Whether You Win or Lose? Monetary Contributions to Big-Time College Athletic Programs, 64 Soc. Sci. Quarterly 347, 357 (1983).
The debate is complicated by issues of state law as well. Many state universities operate under statutes or other constraints forbidding the appropriation of general revenue funds from the state or tuition dollars for intercollegiate athletics, while others are not so constrained. At the former schools, the athletic department must raise without state assistance all the money for scholarships, equipment, arenas and playing fields, coaches' salaries, travel, and the myriad other expenses attendant upon competition from ticket sales, media revenues, sales of copyrighted items, and private donations. No such legal restrictions apply to private colleges and universities, but they are collectively even less likely to divert funds from the central mission of education to assure athletic success.

The fear—largely undocumented, but real nonetheless—is that the financial health of the entire athletic program in such an environment is largely dependent on the success of the football program. If that is true, anything that undermines the potential success of the football program—and that obviously includes internal competition for scholarships and other resources—may have a significant adverse effect upon the money available to support other sports, both for women and men.

Nor has the debate ignored regulation by private entities, in particular the NCAA, which, among other things, sets the number of athletic scholarships, or their financial equivalents, that can be awarded in each sport in each division. Thus even in a world governed by parity with enrollment, the NCAA could ameliorate Title IX compliance issues for most schools by drastically reducing the number of scholarships that member schools could award in football. It can certainly be argued that the allocation of eighty-five full athletic scholarships currently by the NCAA to football in Division I-A schools is excessive. One of us is old enough to remember when professional football teams carried only thirty-three players, and even today these

23. See Weistart, supra note 13, at 208 (“In some cases, college sports are made self-funding by statute. In other cases, the arrangement is a product of a choice that is made to keep peace with legislators, taxpayers, or, in the case of private universities, groups that make competing claims on the school's budget.”).

24. See supra note 5. In most instances, Division I schools award full athletic scholarships in the “revenue” sports of football and men's and women's basketball, while giving coaches in other sports the discretion to offer partial scholarships, not exceeding a maximum equivalent level set by the NCAA, to a larger number of student athletes.
teams are limited to fifty-three members.\textsuperscript{25} But while some within the
NCAA have been trying to cut back on roster sizes and coaching staffs,
their success has been hampered both by the powerful football
interests within the NCAA itself\textsuperscript{26} and by the increasingly realistic
spector of antitrust liability for measures that limit the competitive
opportunities of coaches and players.\textsuperscript{27}

In political terms, the football debate seems to be at a stalemate.
The sport's proponents have repeatedly tried and failed to exempt it
from the reach of Title IX. At the same time, their power within
athletic departments—and the fears of those charged with paying for
athletic programs—have allowed them successfully to exempt the sport
from the loss of scholarships and other resources at most schools. In
other words, football's proponents have generally succeeded in forcing
schools to find the resources to expand women's programs elsewhere.
This stalemate seems unlikely to be broken in the near future, and thus
the present-day market realities regarding the generation of revenues,
the ability of major-college football coaches to command very high
compensation, and the very large rosters of football teams are likely to


\textsuperscript{26} In 1987 the NCAA convened a special convention to consider cost-containment
strategies, including cutting football scholarships and reducing the number of football coaches.
After comments and pressure from the American Football Coaches' Association and from
several high-profile football coaches, the proposals were either defeated or tabled for further
study. See Rodney K. Smith, Reforming Intercollegiate Athletics: A Critique of the
President's Commission's Role in the NCAA's Sixth Special Convention, 64 N.C. L. Rev. 423,
430-39 (1988). Since then the upper limit on scholarships has been reduced from 95 to 85, but
there has been no reduction in the upper limit on football coaches at Division 1-A schools. See

\textsuperscript{27} Over the past 20 years there have been several antitrust challenges to NCAA rules, with
mixed results. See NCAA v. Board of Regents, 468 U.S. 85, 120 (1984) (determining the
NCAA plan to limit the number of televised football games for each school violated the
Sherman Act); Banks v. NCAA, 977 F.2d 1081, 1082 (7th Cir. 1992) (sustaining the NCAA
draft and agent rules); Hennessy v. NCAA, 564 F.2d 1136 (5th Cir. 1977) (upholding the
NCAA limit on the number of assistant coaches). The NCAA recently suffered a major
setback, however, when the Tenth Circuit affirmed a lower court ruling invalidating the so-
called "restricted earnings coaches" rules placing upper limits on the pay of certain revenue-
1998). Perhaps spurred by this result, the NCAA subsequently settled class-action litigation
aimed at its minimum academic standards. For general discussions of antitrust issues as they
relate to the NCAA, see Rand E. Saeks, The Restricted Earnings Coach Under Sherman Act
Review, 4 Sports L.J. 13 (1997); Peter C. Carstensen & Paul Oliszewka, Antitrust Law, Student-
Athletes, and the NCAA: Limiting the Scope and Conduct of Private Economic Regulation,
remain a fact of life. In such an environment, supporters of other men's sports argue with considerable force that a rule of parity with enrollment results in discrimination against male athletes in nonrevenue sports, rather than a mere leveling of the playing field for women. The nationwide trend is to cut nonrevenue men's sports to try to reach parity with enrollment.28 Male swimmers, wrestlers, gymnasts, tennis players, and crew members whose teams have been cut, while varsity women's teams in their sports have not, certainly look like they have been “excluded from participation” in their sports “on the basis of sex,” contrary to the literal terms of Title IX.29

B. The Composition of a School's Intercollegiate Athletics Program

The problems we have been discussing are in large measure the product of a conflict between the economic realities of the sports marketplace and the ill-conceived requirement of parity with enrollment for judging compliance with Title IX. As the preceding discussion indicates, budgetary issues impose important limits on the creation or maintenance of varsity competition in a given sport and the composition of the total varsity package at a given school. Any approach to Title IX compliance that ignores the economic constraints imposed by the sports marketplace and the fiscal problems of college and university athletic departments is doomed to failure.

All varsity sports require expenditures for equipment, playing and practice space, coaching, training, travel, and, depending on the level of competition, athletic scholarships. These expenditures vary tremendously with the sport, the level of competition involved, and the existence of practice and competition facilities at the school. For example, track and field requires relatively little equipment, there is at most schools little demand for spectator accommodation, and most campuses will afford open spaces for ovals, jumping pits, and the like.

28. Between 1972 and 1995 colleges and universities had eliminated 140 men's wrestling teams, 101 men's gymnastics teams, and 64 men's swimming teams. See Christa D. Leahy, Note, The Title Bout: A Critical Review of the Regulation and Enforcement of Title IX in Intercollegiate Athletics, 24 J.C. & U.L. 489, 520 (1998). Indeed, so many schools have dropped men's gymnastics that the NCAA had to grant a special exemption from its rule regarding the minimum number of competing teams to allow a Division I national championship in the sport. See Jerry R. Parkinson, Grappling With Gender Equity, 5 Wm. & Mary Bill of Rights J. 75, 138 & n.401 (1996).
Swimming, by contrast, requires the possession—or construction—of a substantial facility for practice and competition. Football, basketball, and baseball, at least at a certain level, demand large arenas for spectators. Crew is impossible without a suitable nearby body of water, and the purchase, maintenance, and transportation of rowing shells is surprisingly expensive.\textsuperscript{30} The cost of uniforms and equipment varies greatly from sport to sport.

Thus the number of sports in which a school can offer varsity competition and the choice of individual sports will be in the first instance a function of the facilities and revenues available. Moreover, these revenues must be generated for the most part from donations and surpluses from gate receipts and media payments in a handful of sports: football, men’s basketball, and to a lesser extent and only at some schools, baseball and women’s basketball. Most colleges do not even charge admission to contests in other sports, let alone derive any broadcast revenues from them.\textsuperscript{31}

Most athletic departments today find themselves squeezed for cash.\textsuperscript{32} As tuition rises, the cost of athletic scholarships, for which the athletic department typically must reimburse the central university, escalates without any substantial compensation in additional revenues.\textsuperscript{33} Thus, as noted above, the trend is to decrease rather than

\textsuperscript{30} According to the University of Virginia Athletic Department, the university’s women’s crew team, which was granted varsity status in 1995, has incurred more than $200,000 in capital expenditures during its first four years, most of which represents the cost of shells. The figure also includes more than $26,000 for a vehicle to transport the shells. The team budget calls for annual equipment replacement outlays of $25,000.

\textsuperscript{31} See Blair v. Washington State Univ., 740 P.2d 1379, 1381 (Wash. 1987) (finding that most of the funds for the men’s programs were derived largely from football revenues and that very little of the funds for the women’s programs came from gate admissions).

\textsuperscript{32} There seems to be widespread agreement that this is a time of fiscal retrenchment in college and university athletics generally. See Brian L. Porto, Completing the Revolution: Title IX as Catalyst for an Alternative Model of College Sports, 8 Seton Hall Sports L.J. 351, 379 (1998); T. Jesse Wilde, Gender Equity in Athletics: Coming of Age in the 90’s, 4 Marq. Sports L.J. 217 (1994); Jim Naughton, More Colleges Cut Men’s Teams to Shift Money to Women’s Athletics, Chron. Higher Educ., February 21, 1997, at A39. However, this oft-made assertion is, like much else in this area, not easy to document. One frequently cited article simply asserts, without support, that “[m]ore than 70% of college athletics programs operate at a deficit.” Bill Byrne, Funding New Women’s Sports Will Stretch Budgets to Breaking Point, USA Today, June 9, 1992, at 10c.

\textsuperscript{33} Schools with highly successful programs may, ironically, be in a worse position in this regard than others. Where stadiums and arenas are already sold out, the only potential sources of new revenues are higher ticket prices, more broadcast revenues, and more private
to expand the number of varsity sports offered. This trend has been exacerbated by the effort to achieve parity with enrollment under current Title IX enforcement assumptions. While many schools have added new women’s sports in recent years, many have also cut existing men’s programs to improve their participation ratios under prevailing Title IX enforcement assumptions. The result is that some sports—wrestling and men’s gymnastics have been the hardest hit—appear headed for the endangered sports list.

Other vital factors in determining the size and composition of a school’s varsity program are its athletic history, its traditions and its academic culture. Some schools have long winning traditions in a few selected sports. Others seek to compete at the highest level in all their varsity sports. Others are content to field teams principally to allow their students to experience competition, without much regard for their win-loss ratio. Moreover, different schools maintain different academic standards, and some are more willing than others to compromise those standards to promote athletic success. A fortunate few—Stanford and Duke come to mind—are able to attract many athletes with solid academic credentials and to avoid much, if any, real academic compromise. Upsetting the balance among these factors may risk alumni displeasure and loss of contributions.

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34. Many athletic departments say they are engaged in major cost-cutting efforts in order to avoid the necessity to cut back on the number of varsity offerings. There is, however, room for skepticism as to how evenhanded these efforts are. For example, many Division 1 football squads stay in hotels the nights before home games, presumably to make it easier to enforce curfews. See Deborah Brake & Elizabeth Catlin, Gender & Sports: Setting a Road Toward Gender Equity in Intercollegiate Athletics, 3 Duke J. Gender L. & Pol’y 51, 71 & n.133 (1995). This unique and substantial expenditure hardly seems warranted in the face of serious budgetary constraints. Moreover, scheduling decisions can greatly increase expenses by driving up the cost of travel, though it is possible that the returns on long-distance national games for revenue-sport teams more than offset these expenses.

35. General Accounting Office, Participation in Intercollegiate Athletics, GAO/HEHS-99-3R at 5 (June 18, 1999).

36. See supra note 28.
II. STATISTICS AND TITLE IX

The current impasse in applying Title IX to intercollegiate athletics results from interpretations of the statute that are at once obscure and simplistic. Judicial opinions have offered rigid interpretations of highly technical administrative guidelines that appeared to offer flexible solutions to vexing problems. In handing down these decisions, the courts have reduced the broad requirement of equal treatment, found in both the statute and its implementing regulations, to a single statistical formula. Seemingly for want of a better alternative, courts have seized upon a test of statistical imbalance that compares the athletic opportunities available to women and men to their overall enrollment at the school in question.\(^37\) Under this approach, a college with an enrollment evenly divided between women and men must also divide the positions on its intercollegiate teams evenly.

Nothing in the statute and little in the regulatory statements themselves supports, let alone requires, this conclusion. Moreover, by giving parity with enrollment the decisive weight that it now has, the courts have ignored more basic inquiries. Among these are questions about the extent of training and experience needed for different intercollegiate sports at different levels, the desirability of requiring colleges and universities to engage in affirmative action in athletics, and the consequences of “leveling down” by achieving equality through the elimination of men’s sports. No doubt questions on these topics admit of different answers. However, the current use of statistics under Title IX pushes all these important questions aside.

A. The Statutory Language

Like other civil rights statutes,\(^38\) Title IX begins with a broadly framed prohibition against discrimination:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or

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\(^37\) Since 1992, four federal courts of appeals have awarded victories to female student athletes under Title IX based on statistical disparities between the proportion of men and women participating in intercollegiate athletics and the proportion of men and women in their schools’ student bodies. See Horner v. Kentucky High Sch. Athletic Ass’n, 43 F.3d 265 (6th Cir. 1994); Favia v. Indiana Univ. of Pennsylvania, 7 F.3d 332 (3d Cir. 1993); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993); Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993).

be subject to discrimination under any education program or activity receiving Federal financial assistance . . . 39
The statute immediately adds an equally broad disclaimer of any form of required affirmative action. Section 1681(b) states that nothing in the main prohibition “shall be interpreted to require” preferential treatment on the basis of sex determined by “comparison with the total number or percentage of persons of that sex in any community, State, section, or other area.”40

The wording of this provision is taken directly from the corresponding provision in Title VII of the Civil Rights Act of 1964, which disclaims any intent to require affirmative action in employment.41 Similarly, the wording of the main prohibition is taken, almost verbatim, from Title VI of the same statute, which prohibits discrimination on the basis of race by recipients of federal funds.42

The statutory antecedents of these provisions place Title IX firmly in the tradition of other civil rights laws. The provisions themselves reflect the familiar tension between a narrow prohibition against discrimination and a broad requirement of affirmative action. A

40. Id. § 1681(b) (1994). This section states in its entirety:
Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: Provided, that this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program on activity by the members of one sex.
42. Title VI reads as follows:
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.
prohibition against taking sex into account does not support affirmative action; on the contrary, if taken literally, it rules it out. Title IX explicitly disavows any form of required affirmative action, but it leaves open the question whether it permits affirmative action. This question, much litigated under other civil rights statutes, has not been litigated under Title IX at all. Even cases arising from the elimination of men's sports, where no women's sport was eliminated, have been resolved solely on the ground that different treatment of men and women was necessary to comply with the statute.43

Two other features of the statute may discourage litigation over permissible forms of affirmative action. First, several provisions explicitly allow certain specific forms of single-sex education and activities, such as schools traditionally limited to members of one sex alone.44 These provisions do not refer to sex segregation in athletics, but they furnish strong support for it by analogy. The regulations promulgated under Title IX explicitly recognize the prevalence of single-sex sports.45 Some opinions have even gone so far as to rely on sex segregation in sports to support the simplified test of parity with enrollment.46 All of these sources of law demonstrate how tolerant Title IX is of sex-based classifications in education. If these classifications are allowed for other purposes, then it is hard to deny them for voluntary forms of affirmative action.

Second, the proviso to the section on affirmative action permits statistical evidence to be used to prove discrimination.47 Such evidence also figures prominently in any attempt to define an imbalance in opportunities that can be used to justify voluntary affirmative action. As we shall see, the agency charged with enforcing Title IX, the Office for Civil Rights ("OCR") in the Department of Education, has approved statistical comparisons that effectively require affirmative action to achieve parity with enrollment. Such statements by OCR rest on the assumption that the statute at least allows voluntary affirmative action.

43. See Kelley v. Board of Trustees, 35 F.3d 265, 271-72 (7th Cir. 1994).
45. 34 C.F.R. § 106.41(b) (1998). See also infra Part II.B.
47. Id.
B. The Regulatory Environment

In an important amendment to Title IX, Congress in 1974 specifically authorized OCR to issue regulations relating to the prohibition of sex discrimination in intercollegiate athletics.\(^{48}\) This amendment, known as the Javits Amendment, was enacted after a proposed exemption for revenue-producing sports, notably football and men’s basketball, failed in Congress.\(^{49}\) Regulations issued by OCR under the Javits Amendment (the “Regulations”), have been progressively refined in subsequent statements issued by OCR, particularly as they apply to the use of statistical evidence.\(^{50}\) It is important to distinguish between the Regulations themselves and these subsequent explanatory statements.

The Regulations themselves only enumerate factors for evaluating athletic programs, and most of these factors require equal support for women’s and men’s sports only after particular sports have been established within a school.\(^{51}\) They require equal equipment, supplies, and facilities for comparable sports.\(^{52}\) Only one of the factors listed in the Regulations addresses the more basic question of what sports must be established for each sex. It is: “Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.”\(^{53}\) The regulations do not offer a definition of what constitutes “effective accommodation.” This issue was addressed by OCR first in a “Policy Interpretation”\(^ {54}\) and later in a “Clarification.”\(^ {55}\)

These less formal means of administrative guidance have proved, somewhat paradoxically, to be more influential with both courts and college administrators than the statute or the Regulations explicitly authorized by Congress. Nevertheless, neither the Policy Interpretation nor the Clarification purports to lay down legal

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49. Parkinson, supra note 28, at 79.
50. See infra notes 54-59 and accompanying text.
51. 34 C.F.R. § 106.41(a), (b), (c) (1998).
52. Id. § 106.41(c) (1998).
53. Id. § 106.41(c)(1) (1998).
requirements. Instead, these documents have the more modest aim of providing a framework for resolving complaints and providing further guidance to colleges and universities.\textsuperscript{56} Like the Regulations, the Policy Interpretation addresses all aspects of equal treatment in intercollegiate athletics, but it devotes a separate section to “the governing principle in this area . . . that the athletic interests and abilities of male and female students must be equally effectively accommodated.”\textsuperscript{57} Accordingly, it sets forth a three-part test for equal and effective accommodation:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.\textsuperscript{58}

As this three-part test is framed, it appears to allow compliance to be achieved by satisfying any one of its three branches independently of the others. Read literally, it allows colleges and universities to choose the statistical comparison most favorable to them. Nevertheless, as previous commentators have noted, these appearances are deceiving and the first of these three parts has gradually acquired priority over the other two.\textsuperscript{59}

\textsuperscript{56} Policy Interpretation, supra note 54, at II, 44 Fed. Reg. at 71,413; Clarification, supra note 55, at 1.

\textsuperscript{57} Id. at VII, 44 Fed. Reg. at 71,414.

\textsuperscript{58} Id. at VII, 44 Fed. Reg. at 71,418.

\textsuperscript{59} See Parkinson, supra note 28, at 102; Charles P. Beveridge, Note, Title IX and Intercollegiate Athletics: When Schools Cut Men's Athletic Teams, 1996 U. Ill. L. Rev. 809.
On reflection, this development is not surprising, since only the first part of the test sets forth a baseline against which to measure discrimination—the proportionality of competitive opportunities to enrollment, what we have called parity with enrollment. To satisfy this part, a school must provide opportunities in intercollegiate athletics substantially equal to the relative proportion of men and women among enrolled students. If half the students in a school are women, then half the positions in intercollegiate athletics must be allocated to women.

Neither of the other parts of the three-part test sets forth an alternative baseline for measuring equal opportunity. The second part, despite appearing to be formally independent of the first part, in fact depends upon it. It requires continuing expansion of opportunities for the “underrepresented” sex (almost always women) and it seems to assume a definition of “underrepresentation” based on the enrollment of women in the student body as a whole. The ultimate goal, toward which the school must be making progress, is parity with enrollment under the first part. The second part, in other words, requires some degree of progress towards satisfying the first part. In the end, the second part does not supply an alternate means of complying with the statute, but only allows a school to delay compliance with the baseline set forth earlier.

The status of the third part is more complicated because it was elucidated in the subsequently issued Clarification. The third part requires the interests of women to be “fully and effectively accommodated.”60 This general standard, which does not differ much from the standard already found in the Regulations,61 could support an alternative baseline for determining equal opportunity. It could require an examination of the interests and abilities of female students as a whole to determine compliance. In a university in which women make up 50% of the students, but only 40% of the students interested and qualified to compete in intercollegiate athletics, the baseline for compliance would be 40%; only 40% of positions would have to be allocated to women’s teams. The Clarification, however, limits the scrutiny of “full and effective accommodation” under the third part to an analysis of interests and abilities in a particular sport, not across a

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60. Clarification, supra note 55, at 5.
school's varsity program as a whole. Thus failure to create a team in a single women's sport, for example, women's lacrosse, could defeat compliance under the third part. If the women in an informal club team in lacrosse were interested and qualified to compete at the varsity level, and if comparable schools already fielded varsity teams in women's lacrosse, then their school would have to establish its own varsity team. If it failed to do so, the interests of the women lacrosse players would remain unmet, regardless of the interests and participation of other female students in other sports. The latter would not count at all toward compliance with the third part.

This difference in interpreting the third part, although seemingly a matter of technical detail, turns out to be crucial. The narrow focus on a single sport does not involve any comparison of the overall athletic opportunities available to women and men, leaving that to be determined only under the first part by parity with enrollment. This renders the third part just another means, like the second, of temporarily justifying a delay in compliance with the first part. Until athletic opportunities are proportional with enrollment, colleges and universities must make continued progress towards that goal under the second part or they must satisfy the demands of all women who meet the requirements of the third part.

Compliance with the first part of the Policy Interpretation—parity with enrollment—thus appears initially to be a "safe harbor," but in the end, proves to be the only harbor. Its effect is magnified further by the concrete circumstances in which litigation or administrative enforcement is likely to take place. Individuals are likely to sue or to complain to OCR only if their school does not recognize a sport in which they are particularly interested. In these circumstances, the Clarification effectively restricts the third part to a narrow inquiry into the interests and abilities of the complaining individuals and the feasibility of offering the sport they want. There is no inquiry into the overall proportion of women and men with the interests and abilities necessary to participate in intercollegiate athletics. In the end, schools that fail to meet the first part must either add the women's sports that the plaintiffs are interested in (to satisfy either the second or the third part) or cut existing men's sports (to satisfy the first part).

Apart from their technical intricacy, nothing would be objectionable about the Policy Interpretation and the Clarification if

OCR had adopted the right baseline for determining compliance with Title IX. Colleges and universities could hardly complain if OCR had simply given them additional time to bring their athletic programs into compliance. But everything depends upon whether the baseline of parity with enrollment is correct. There is good reason to believe that it is not, based on the law developed under Title VII, discussed in the next Part of this article. The analogy to Title VII presupposes, however, that the issue of appropriate statistical comparisons under Title IX is left for the courts and not already resolved by OCR. Under Title VII, the courts have taken an active role in assessing the relevance and persuasiveness of statistical evidence. The question is whether they can take the same role under Title IX.

C. Judicial Deference to OCR

Unlike most regulations on substantive issues under Title VII, the regulations promulgated by OCR under Title IX have the force of statutory law. The issuance of regulations by OCR was specifically authorized by Congress in the Javits Amendment. On the other hand, the Regulations are framed in very broad terms, requiring only that “the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.”

The Policy Interpretation, with its three-part test, is more specific, but it does not purport to be a regulation specifically authorized by Congress. Although it was preceded by extensive notice and comment, the Policy Interpretation was not promulgated as a regulation, and its aims are more limited: to explain the regulations and to offer additional guidance on how colleges and universities can comply with Title IX. As we have seen, the Policy Interpretation still leaves open the issue of what constitutes full and effective accommodation sufficient for compliance under the third part of the three-part test. The Clarification addresses this question, but adds another layer of agency statement at another remove from the statute. Although it, too, was preceded by notice and comment, the Clarification is expressly limited to guidance and elaboration on the three-part test of the Policy Interpretation.

64. Id.
66. Clarification, supra note 55, at 1. The Clarification describes its role as follows:

This Clarification provides specific factors that guide an analysis of each part of the
Under *Chevron, U.S.A. v. Natural Resources Defense Council*,67 the Clarification might be entitled to controlling deference from the courts as a reasonable interpretation of a statute by the administrative agency charged with its enforcement. In order to qualify for judicial deference under *Chevron*, however, the Clarification must actually constitute an “interpretation” of the “statute.”68 It is doubtful that it does.

By its own terms, the Clarification only provides guidance about the Policy Interpretation,69 which itself falls short of an interpretation of the statute.70 Perhaps more important, instead of laying down a rule, the Clarification goes no further than a statement of probabilities: “An institution’s failure to provide nondiscriminatory participation opportunities *usually* amounts to a denial of equal athletic opportunity because these opportunities provide access to all other athletic benefits, treatment, and services.”71 And the Policy Interpretation, which lists numerous factors that might affect the determination of the accommodation of interests and abilities,72 purports only to be “a framework within which complaints can be resolved” and “additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs.”73

Agency pronouncements with such limited objectives hardly fit the model of regulations entitled to judicial deference under *Chevron*,74 especially since Congress in the Javits Amendment required OCR to promulgate “regulations,”75 not “policy interpretations” or “clarifications,” both of which are less visible and more equivocal than regulations. If OCR had wanted the Policy Interpretation and the Clarification to have the force of law, it could and should have

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68. Id.
69. Clarification, supra note 55, at 1.
71. Clarification, supra note 55, at 3 (emphasis added).
73. Id. at II, 44 Fed. Reg. at 71,413.
amended the Regulations themselves. Moreover, by their very terms, the Policy Interpretation and the Clarification are not absolutely binding on OCR itself. These agency regulatory pronouncements contain only a list of competing “factors,” a statement of what “usually” violates the statute, a “framework” for resolving complaints, and “guidance” about the requirements of the statute.76 None of these commit OCR to a binding interpretation of Title IX.

This is not to say that the courts should entirely disregard the Policy Interpretation and the Clarification. Wholly apart from Chevron, these regulatory statements “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”77 Close examination of judicial opinions in Title IX litigation reveals that the courts have, quite properly, limited the Policy Interpretation and the Clarification to the role of support for propositions that the courts have independently adopted.78 In fact, it was a court, not OCR, that first framed the approach to part three of the Policy Interpretation found in the Clarification.79 In Cohen v. Brown University,80 the First Circuit held that the Policy Interpretation should be given “appreciable deference” or a “particularly high” degree of deference, not that it precluded judicial interpretation of Title IX.81 The court went on to follow the Policy Interpretation and, based on its own reading of the statute, formulated the standard for full and effective accommodation in the third part of the three-part test.82 This standard was later adopted in the Clarification. It follows that in the absence of a change in the officially promulgated Regulations, it is not immune from judicial reconsideration.

Even supposing that OCR has offered an “interpretation” of Title IX in the Clarification, there is ample reason to reconsider the Clarifications under the terms of Chevron itself. An agency's

78. See infra Part II.D.
79. See Trudy Saunders Breidhauer, Twenty-Five Years Under Title IX: Have We Made Progress?, 31 Creighton L. Rev. 1107, 1113 (1997-98) (“Interestingly, the courts have been more stringent in enforcement of Title IX in the context of athletics than the Office of Civil Rights.”).
80. 991 F.2d 888 (1st Cir. 1993) (on appeal from preliminary injunction) [hereinafter Cohen I]; 101 F.3d 155 (1st Cir. 1996) (after final judgment) [hereinafter Cohen II].
81. Cohen I, 991 F.2d at 895.
82. Id. at 897-900.
interpretation of a statute is not entitled to deference at all if Congress has already clearly resolved the issue in a contrary manner in the statute itself, or if the agency's interpretation of the statute is unreasonable.\textsuperscript{83} The courts must resolve both of these issues before they can give any deference at all to an agency interpretation.\textsuperscript{84} These issues take us back to the question whether the rigid test of parity with enrollment fits the statutory disclaimer of any intent to require affirmative action. They also take us forward to the principal judicial decisions applying Title IX to intercollegiate athletics.

\textbf{D. Judicial Decisions}

The leading case endorsing student enrollment as the baseline for determining compliance with Title IX is \textit{Cohen}. The case arose from the decision of Brown University to discontinue women's teams in volleyball and gymnastics, a situation typical of litigation under Title IX over intercollegiate athletics.\textsuperscript{85} Two men's teams were also eliminated, but that fact did not relieve the university of liability.\textsuperscript{86} The First Circuit's two decisions in \textit{Cohen}, reviewing first the issuance of a preliminary injunction and later the final judgment, both applied the three-part test of the Policy Interpretation. As indicated above, the second of these decisions originally set forth the position taken by OCR itself in the Clarification—that interest and ability are relevant only in determining under the third part of the test whether there is some particular sport in which women have not been fully and effectively accommodated.\textsuperscript{87} This holding established the priority of the first part of the three-part test, requiring parity with enrollment.

As in most cases arising from cuts in women's sports, the university could not comply with either of the other two parts of the test. The elimination of two women's teams discontinued the university's progress in adding athletic opportunities for women, thus preventing compliance under the second part. It also created a group of qualified women with an unmet interest in sports in which sufficient competition from other schools existed, thereby defeating any prospect of satisfying

\textsuperscript{83} See \textit{Chevron}, 467 U.S. at 843.
\textsuperscript{85} \textit{Cohen I}, 991 F.2d at 891.
\textsuperscript{86} Id. at 892.
\textsuperscript{87} \textit{Cohen II}, 101 F.3d at 174.
the third part. That left the university with only one option — to comply with the first part — which it failed to do because women made up 48% of its students but only 37% of its varsity athletes. The first part of the test thus became decisive, in effect requiring the university to engage in affirmative action to increase the percentage of women among its varsity athletes.

The statute, as we have seen, seemingly disclaims any such requirement. Section 1681(b) provides that nothing in subsection (a), the main prohibition in the statute, “shall be interpreted to require” preferences on the basis of sex determined by “comparison with the total number or percentage of persons of that sex in any community, State, section, or other area.” In its final opinion in Cohen, the First Circuit avoided the force of this provision by giving it a narrow interpretation, one that reduces it almost to the vanishing point. The court relied on a formalistic distinction between comparisons based on geographic areas, which it said are covered by the statutory phrase, “any community, State, section, or other area,” and comparisons based on enrollment, which it said are not.

Putting aside the question whether a college or university constitutes a community, it is almost always confined to one or a few campuses, which, of course, are geographic areas. But more fundamentally, to read the statutory provision so narrowly would be to defeat its purpose, which plainly is to limit the obligation of colleges and universities to provide special opportunities to members of either sex. Restricting section 1681(b) only to geographic areas allows, as it did in Cohen, the substitution of enrollment ratios, which at most modern coeducational institutions approximate overall population ratios. As the proportion of women enrolled in most colleges approaches (or even exceeds) their proportion in the population as a whole, section 1681(b) has less and less significance. Congress could not have meant its careful limitation to be so easily evaded.

88. Cohen I, 991 F.2d at 892.
90. Cohen II, 101 F.3d at 174-75.
91. The student body at Brown University at the time was 52.4% men and 47.6% women. Id. at 163.
92. Among full-time students enrolled in four-year colleges in 1996, 51% were women. Bureau of the Census, Statistical Abstract of the United States 1998 at 198 (1998) (calculations from Table 320). Among all freshmen at all colleges and universities in 1997, 54% were women. Id. at 197 (Table 318).
The First Circuit initially took a more promising approach to interpreting section 1681(b). In its initial decision in *Cohen*, affirming the preliminary injunction issued by the district court, the court focused upon the proviso allowing the use of statistical evidence to prove discrimination.\(^93\) The court correctly concluded that statistical evidence of an imbalance alone did not require a finding of discrimination.\(^94\) Such an imbalance can constitute evidence of discrimination, but is not itself equivalent to discrimination. In the First Circuit’s view, at least in this opinion, additional evidence is necessary to establish a violation of Title IX.\(^95\)

The First Circuit, however, abandoned this promising approach by finding sufficient additional evidence of discrimination merely in the desire of qualified female students to retain existing varsity teams in particular sports.\(^96\) This interpretation is wrong on two counts. First, it neglects the quality of the statistical evidence needed to support an inference of discrimination. Statistics on enrollment, no matter how accurate, do not support an inference of discrimination unless they convey information about the pool of athletes who can compete in a school’s intercollegiate sports program. Second, even if they support this inference, statistics on enrollment must be supplemented by further evidence that relates these statistics to a finding of discrimination. Not just any additional evidence will do.

The evidence relied on by the First Circuit—the interest of female students in their own varsity teams—reveals again how the three-part test collapses into a one-part test. In any case in which a women’s team has been eliminated, the university will fail the second part of the test on continuing progress, unless it has replaced one women’s team with another, and it will in any event fail the third part by not fully and effectively accommodating the needs and interests of the women whose team has been discontinued. Under the interpretation of the proviso offered by the First Circuit, the university must therefore comply with the first part requiring parity with enrollment. Thus, like the Clarification, the *Cohen* decision transforms evidence of an imbalance based on enrollment statistics into an irrebuttable presumption of discrimination in violation of Title IX.

\(^{93}\) *Cohen I*, 991 F.2d at 894-95.
\(^{94}\) Id. at 895.
\(^{95}\) Id.
\(^{96}\) Id. at 904.
While Brown University encountered problems in cutting women's teams, a similar dilemma will confront any school that fails to establish women's teams when enough women with sufficient ability express an interest in participating in intercollegiate competition. Such a school might seem to be able to satisfy the second part if it can demonstrate a history of expansion of women's opportunities. But this, too, will prove to be illusory, since failure to achieve parity with enrollment still would mean that the school would have to add women's teams—or cut men's teams—as interested and qualified women come forward.

Decisions from other circuits generally conform to this approach. Most courts have found a violation whenever a college or university has been unable to establish parity between athletic participation and overall enrollment. Only one decision, by a district court and only in dictum, has criticized parity with enrollment as the baseline for compliance with Title IX. In Pederson v. Louisiana State University, the court refused to accept overall enrollment of men and women as a measure of interest and ability to participate in intercollegiate sports. "Rather," the court said, "it seems much more logical that interest in participation and ability to participate as percentages of the male and female populations will vary from campus to campus and region to region and will change with time." Even so, applying a more appropriate baseline, the court found that Louisiana State University did not provide sufficient opportunities for female athletes.

With this single exception, the courts have generally followed the same approach as the Policy Interpretation and Clarification. Although they have deferred to these detailed pronouncements of OCR, they have not felt bound by them. Otherwise, the courts' extended discussion of these issues would not have been necessary. Indeed, the narrow focus on particular sports in assessing the interests and abilities of female athletes under the third part of the three-part test originated with the First Circuit in Cohen. It remains to be seen whether the approach of OCR and the courts can be reconciled with the provision on affirmative action in section 1681(b) in light of judicial interpretations of virtually identical language in Title VII of the Civil Rights Act of 1964.

97. See supra note 37.
99. Id. at 913-14.
100. Id. at 915.
III. STATISTICAL EVIDENCE UNDER TITLE VII
AND TITLE IX

Title IX closely resembles Title VII in structure. Both contain general prohibitions against discrimination qualified by provisions disclaiming any form of required affirmative action. Indeed, as noted earlier, the provision against required affirmative action is framed in almost the same terms in both statutes. The two provisions differ only in that a proviso in Title IX explicitly allows the use of statistical evidence to prove discrimination, a result that was reached under Title VII solely through judicial interpretation. The two statutes do differ in the scope of their coverage and prohibitions. Title VII prohibits discrimination in employment on the basis of race, national origin, sex, or religion, while Title IX prohibits discrimination only in education and only on the basis of sex. These differences, however, should not affect the use of statistical evidence within the proper scope of either statute.

The analogies between employment and education, although not complete, are pervasive and powerful. Discrimination in either sphere reduces the opportunities available to covered individuals, and in fact, discrimination in education has its most lasting effect in limiting later opportunities in employment. Government regulation of both employment and education takes place against the background of decisions, contracts, and related activities in a variety of markets, some more perfect than others. Students, no less than employees, choose among competing offers from different institutions, or among alternatives to formal education.

Of course, there are disanalogies between employment and education. Students differ from employees, because for the most part they are purchasers of services, not suppliers. On closer examination, however, this distinction is not so stark as it first appears. Many

101. See supra Part II.A.
102. See International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), discussed below in Parts III.A and IV.
104. 20 U.S.C. § 1681(a) (1994). Recently, the Supreme Court has also emphasized that the remedies available to private plaintiffs under Title IX might be limited because the statute was designed to be enforced mainly by public authorities. Gebser v. Lago Vista Indep. Sch. Dist. 524 U.S. 274, 287-92 (1998) (limiting private action for damages for sexual harassment under Title IX).
employees, particularly early in their careers, choose jobs because of the training or prestige they offer. Moreover, some students, and particularly those on athletic scholarships, are most plainly providers of services. The extent of the services provided by athletes and the extent of compensation through scholarships varies, of course, from school to school. Division I-A schools with nationally ranked teams recruit athletes more vigorously and may bend academic standards for athletes more than Division III schools with smaller athletic programs, which might use athletic ability as only one element among many others in evaluating applicants for admission. Indeed, in Division III, athletic scholarships are prohibited, and a student athlete is free to stop providing athletic services with impunity. These and other differences among schools must be accommodated in an economic analysis of intercollegiate athletics, but they are typical of the behavior of actors in competitive markets. Employers also differ in the jobs and the terms of compensation they offer to prospective employees. Market forces in both spheres foster a variety of strategies to match individuals with institutions.

The definition of the appropriate labor market is the first step in any Title VII analysis. Statistical evidence about the composition of the labor market plays a crucial role both in determining liability for direct discrimination and in evaluating most forms of affirmative action. Indeed, the courts and OCR under Title IX recognize the validity of a market approach. But, as we shall demonstrate from a review of decisions under Title VII, they have failed to define the relevant market properly.

**A. Proving Discrimination Under Title VII**

The leading case on the use of statistical evidence to prove discrimination under Title VII is *Hazelwood School District v. United States*. Hazelwood concerned a claim against a suburban school district for failing to hire a sufficient number of black teachers from the surrounding metropolitan area. In analyzing this claim, the Supreme Court set forth general standards for proving a pattern of employment discrimination, and in particular, for using statistical evidence from the appropriate labor market to establish a baseline for measuring discrimination. Drawing a contrast with another Title VII case,
International Brotherhood of Teamsters v. United States, which involved the relatively unskilled position of truck driver, the Court emphasized that the appropriate labor market had to be defined in light of the undisputed qualifications for the job. For school teachers, one of these qualifications was the possession of a teaching certificate. That meant that the relevant evidence was not the proportion of blacks in the metropolitan area generally, but the proportion of blacks in the area qualified to teach. By contrast, in Teamsters, the only undisputed qualification for the job of truck driver was a driver’s license, which was assumed to be evenly distributed throughout the population. For that reason, general population figures were properly used in that case to prove discrimination.

In Wards Cove Packing v. Atonio, the Supreme Court refined the definition of the labor market still further on an issue surprisingly similar to the use of enrollment figures under Title IX. The plaintiff in Wards Cove alleged racial discrimination in hiring practices for the relatively skilled jobs in two canneries in Alaska. The unskilled jobs at these canneries were filled mainly by members of minority groups, while the skilled jobs were filled mainly by whites. The plaintiff tried to use this disparity between the proportion of minority employees in skilled and unskilled jobs to establish a violation of Title VII. The Supreme Court rejected this evidence because the market for employees in skilled jobs was narrower than the market for employees in unskilled jobs. The plaintiff’s claim was based on the theory of disparate impact, a form of liability under Title VII different from liability for intentional discrimination, but one that also involves the use of statistical evidence. Much of the Supreme Court’s opinion was devoted to the theory of disparate impact, and much of that discussion was superseded by subsequent amendments to Title VII subsequently

109. Id. at 308.
110. Id. at 308 & n.13.
111. See id. at 308 & n.13.
112. See id.
114. Id. at 647-48.
115. Id. at 650-55.
116. Id. at 645-46.
enacted by Congress. 117 None of the complications surrounding the theory of disparate impact, however, detracts from the Court's holding about the appropriate definition of the labor market: it does not allow a comparison of skilled and unskilled jobs. 118

A nearly identical issue arises from the use of enrollment figures under Title IX. 119 Figures on overall enrollment for a particular school correspond roughly to figures on the overall work force for a particular employer. Neither set of figures reveals anything about the composition of the more limited pool of those with specialized skills. Enrollment figures reflect merely the proportion of men and women who have been offered admission by the school and who have chosen to matriculate, most of them for reasons wholly unrelated to intercollegiate athletics. By contrast, intercollegiate athletic competition today—even at the lowest level—requires a degree of ability, experience, and training far beyond what most students possess. Thus, in the analysis of claims under Title IX, college athletes correspond to skilled workers under Title VII. It follows that the relevant pool for measuring exclusion from athletic participation must be limited to those students possessing the skills required for intercollegiate competition at the appropriate level.

Of course, available data will rarely, if ever, precisely identify the pool of prospective athletes with the required skills. Approximations inevitably are necessary, as the next part of this article discusses in some detail. Enrollment figures, however, are not even remotely an approximation of the properly defined pool. They are a measure of something entirely different: the combined pool of those who have the required skills and those who do not. Evidence about this broader pool does not bear at all on claims of exclusion from or discrimination in athletic participation. An employer need not hire, and a college or university need not accept into its athletic program, an individual who does not now possess the required skills for a particular job or a particular sport. That individual might develop the necessary skills and could at some point be included in a broader pool of potential applicants. Such a broader pool bears on an issue very different from

117. These amendments can be found in 42 U.S.C. § 2000e-2(k) (1994). They did not address the use of statistical evidence, except to approve the holding of Wards Cove on the issue of causation. Id. § 2000e-2(k)(1)(B).

118. Wards Cove, 490 U.S. at 650.

the existence of discrimination: the desirability of requiring or encouraging colleges and universities to engage in affirmative action in intercollegiate athletics. The cases under Title VII demonstrate just how this broader pool might be defined.

B. Affirmative Action Under Title VII

The leading case on voluntary affirmative action in employment is United Steelworkers v. Weber.\textsuperscript{120} It reveals the intimate connection between training and affirmative action and demonstrates how statistics about the unskilled labor force can be used to justify voluntary affirmative action for skilled positions. Weber concerned a training program for skilled craft workers, in which half of the positions were reserved for blacks. Only a handful of unskilled black workers would have gained admission to the program on the basis of seniority, which was the standard that otherwise determined admission. Moreover, less than two per cent of the skilled craft workers in the plant were black. The affirmative action plan was nevertheless justified because 39\% of the workers in the general labor market were black.\textsuperscript{121} The difference between these two figures would not have justified a finding of discrimination, since it revealed nothing about the proportion of blacks already in the market for skilled jobs. Yet, it was sufficient to justify a voluntary affirmative action plan.\textsuperscript{122}

The flexible use of statistics to justify voluntary affirmative action was endorsed again in Johnson v. Transportation Agency.\textsuperscript{123} The Court in Johnson discussed the necessary statistical evidence in greater detail, although in a manner that reveals the ambivalent, and often confusing, attitude that the courts have taken toward affirmative action. Johnson concerned an affirmative action plan that resulted in the first promotion of a woman to a skilled craft position with the employer.\textsuperscript{124} Largely because the plan provided a flexible remedy for the complete absence of women in these positions, the Supreme Court upheld it as a permissible form of voluntary affirmative action under Title VII.\textsuperscript{125} As an initial matter, the Court relied on the proportion of women in the general labor market, without considering the qualifications or

\textsuperscript{120} 443 U.S. 193 (1979).
\textsuperscript{121} Id. at 198-99, 208.
\textsuperscript{122} Id. at 208.
\textsuperscript{123} 480 U.S. 616 (1987).
\textsuperscript{124} Id. at 619-22.
\textsuperscript{125} Id. at 641-42.
experience necessary for the skilled craft position in question. Statistics about the general labor market were sufficient to establish a "manifest imbalance" in the representation of women in skilled craft positions, a difference between 36.4% for the general labor market and zero for these positions.\footnote{Id. at 621, 631-32 & n.11.} Statistics for the skilled labor market also remained necessary, however, in order to assure that the affirmative action plan was flexibly applied.\footnote{Id. at 637-38.} Apparently, under Johnson, statistical evidence about both the general labor market and the skilled labor market is necessary to justify voluntary affirmative action under Title VII. Even so, it is only voluntary affirmative action that can be justified in this way.

Compelled affirmative action must meet a far higher standard under Title VII: proof of egregious discrimination by the employer against the group that benefits from the particular affirmative action plan.\footnote{Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 448-50 (1986) (plurality opinion of Brennan, J.); id. at 483-84 (Powell, J., concurring in part and concurring in the judgment).} Any such finding of discrimination by the employer, as the opinion in Johnson took pains to point out, requires an appropriate definition of the labor market according to the qualifications required for the job in question. In Johnson, the Supreme Court was willing to weaken this requirement only because the case involved voluntary affirmative action by the employer, not a court-ordered affirmative action plan.\footnote{480 U.S. at 632 & n.10.} Statistical evidence about unskilled workers is relevant to affirmative action in skilled jobs, but only to voluntary affirmative action.

C. Title VII Principles Applied to Title IX Statistics

Translated from Title VII to Title IX, these principles make statistical evidence about general enrollment relevant only to voluntary efforts to increase the proportion of women in intercollegiate sports. Such voluntary forms of affirmative action have not been challenged under Title IX, with one revealing exception: where a school cut men's sports in order to meet the test of proportionality with enrollment imposed by OCR.\footnote{Kelley v. Board of Trustees, 35 F.3d 265, 269-70 (7th Cir. 1994).} This form of affirmative action, however, can hardly be characterized as voluntary. It is done only to avoid a finding
of discrimination as defined by OCR.

But even if it were considered to be voluntary, cutting men's teams as a form of affirmative action would encounter further difficulties, also recognized in the decisions under Title VII. Affirmative action that results in layoffs of white employees to favor minority employees, or of men to favor women, has been uniformly prohibited under Title VII. Even Weber, the case that most liberally allows affirmative action under Title VII, \textsuperscript{131} identified the discharge of white employees and their replacement by blacks as a measure that would "unnecessarily trammel the interests of the white employees." \textsuperscript{132} Johnson applied the same general principles to affirmative action in favor of women and, on the facts of that case, only affirmative action in promotion to skilled positions was at issue. \textsuperscript{133} Layoffs of men in favor of women were out of the question. \textsuperscript{134}

So, too, under Title IX, elimination of men's sports in order to achieve proportionality for women's sports should be out of the question. Indeed, it is even worse in many respects than affirmative action in layoffs. Eliminating men's teams reduces the opportunities for men without necessarily increasing the opportunities for women. Cutting the men's team in golf or crew need not be accompanied by adding a women's team in these sports. Moreover, it eliminates positions wholesale, for everyone participating on the team that is cut. Unlike the situation in employment, where individual job openings can arise gradually through attrition, the decision to discontinue a team has all-or-nothing consequences. The segregated nature of athletic competition also means that the decision to start (or to continue) a women's team can have no beneficial effects for men who want to compete on a men's team in the same sport. All of these considerations strongly support extending the prohibition against layoffs already recognized under Title VII to analogous forms of affirmative action under Title IX. The fact that prohibition under Title VII applies to public employers as a matter of constitutional law\textsuperscript{135} makes the extension less a matter of policy and more a matter of

\textsuperscript{131} 443 U.S. at 200-08.
\textsuperscript{132} Id. at 208. See also Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 579-80 (1984) (rejecting interpretation of consent decree that resulted in layoffs of whites).
\textsuperscript{133} 480 U.S. at 641-42.
\textsuperscript{134} Id. at 638.
\textsuperscript{135} See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279-84 (1986) (opinion of Powell, J.); id. at 294-95 (White, J., concurring in the judgment).
constitutional requirements, at least for public colleges and universities.

Other forms of affirmative action, however, should remain permissible, even if section 1681(b) does not make them mandatory. Voluntary affirmative action has advantages over alternative remedies for past discrimination. Affirmative action does not require proof of a connection between the particular defendant who is penalized and instances of past discrimination regarded as particularly egregious. It offers, instead, the promise of a broad and effective remedy, supplementing the individualized relief typically available in ordinary litigation.

Voluntary affirmative action at the college level, because it dispenses with the connection between past discrimination and future remedies, provides a promising means of increasing women’s participation in schools at all levels. It immediately increases the opportunities for women already in college. Moreover, along the lines of “if you build it, they will come,” it also creates incentives for female students in high school to develop the skills necessary for competition at the college level. To some extent, the existing patterns of enforcement of Title IX have fostered precisely this development. Rates of participation and overall visibility of women in college sports have increased dramatically. So, too, the college scholarships available to women encouraged more female students to participate in high school sports.

Nothing can be said against these consequences of existing policy, except that they cannot go so far as to require affirmative action. The desirability of increasing the opportunities available to female athletes cannot be used to impose obligations upon colleges and universities. Title IX, by disavowing any form of required affirmative action, holds these institutions liable only for their own actions, not those of high schools and other athletic programs for students before they come to college. Yet compensating for discrimination in these programs seems to be the only plausible justification for requiring parity with enrollment: that it is necessary to eliminate the effects of prior

136. See National Fed’n of State High Sch. Ass’ns, 1998 Athletics Participation Survey (finding an increase of female participants in high school athletics from 7.4% of all participants in 1971 to 40.6% in 1997-98).
discrimination that denies female students the chance to participate in athletics at the college level. Justifications along these lines lead to "societal discrimination" as the basis for affirmative action, a basis that has been squarely rejected as a matter of constitutional law. 140

When we turn from what is required to what is permitted, however, the role of skills becomes much more flexible. Under Title VII, as we have seen, an employer can justify voluntary affirmative action by relying on general labor market statistics. Thus, in Johnson, the imbalance between the proportion of women in the general labor market and the proportion of women in skilled jobs established the justification for engaging in affirmative action in favor of women. 141 Examination of the skilled labor market was necessary only to assure that the affirmative action plan was implemented flexibly instead of in a rigid fashion. 142 The same analysis, substituting athletic skills for employment skills, can be used to justify voluntary—but not mandatory—affirmative action under Title IX.

IV. AN APPROACH TO THE CONSTRUCTION OF TITLE IX

To recapitulate: OCR and the courts have erred in their approach to Title IX in two fundamental respects. First, they have defined discrimination exclusively by reference to a statistical comparison with the proportion of men and women in a particular population, in violation of section 1681(b). Second, they have chosen the wrong statistical baseline. Comparison of the allocation of roster spots in intercollegiate athletics with the proportion of men and women in a school's student body misdefines the relevant market because it takes no account of the distribution of the relevant skills required for participation in varsity intercollegiate sports.

We offer below an approach to the construction of Title IX that avoids these pitfalls and pays due heed to the language, structure, and purpose of the statute.

141. 480 U.S. at 621.
142. Id. at 635-37.

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A. The Statutory Language

One thing that is missing from the analyses of Title IX proffered by OCR, the courts, and most commentators is close attention to the language of the statute. There is much interpretation of the rather open-ended goals of Congress, usually reflecting the ideological predilections of the interpreters. Both of these developments are only to be expected, given the level of disagreement over what constitutes sexual equality and how it is to be achieved. But today’s Supreme Court, which will ultimately resolve the question of the meaning of Title IX, has repeatedly emphasized that any exercise in statutory interpretation must begin with a close examination of the language employed by Congress. Thus we begin our effort at construction by reading the words of the statute.

Section 1681(a) contains three separate prohibitions, any one of which can apply to intercollegiate athletics. It states that “no person” shall “on the basis of sex” (a) “be excluded from participation in,” (b) “be denied the benefits of,” or (c) “be subjected to discrimination under” “any educational program or activity receiving federal financial assistance.” These prohibitions are distinct from one another, yet overlapping. Each covers a different aspect of unequal treatment on the basis of sex, and while the precise boundaries between them need not be delineated with precision, each must be given some independent force and effect. Each prohibition focuses on a different way in which equality can be denied and each must be given sufficient scope to achieve its objective. None of the prohibitions can be sacrificed to achieve the others.

The prohibition that most directly applies to allocation of opportunities in intercollegiate sports is the first, against exclusion from participation in “any educational program or activity receiving federal financial assistance.” Students who cannot compete at all are plainly denied the opportunity to participate. The added phrase, “any educational program or activity receiving federal financial assistance,” however, is crucial to understanding the scope of the prohibition. In an amendment subsequent to the initial enactment of Title IX, this phrase

145. Id.
was broadly defined to mean “all the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education.” 146 This broad definition was adopted to overrule the Supreme Court’s decision in Grove City College v. Bell, 147 which construed the original version of Title IX very narrowly to prohibit only exclusion from or discrimination under the particular program receiving federal funds. The amendment made clear that the receipt of any federal financial assistance by an educational institution barred exclusion from or discrimination under all of its programs or activities on the basis of sex, regardless of whether the particular activity received federal money. As amended, each prohibition in section 1681(a) applies to any of a school’s activities, whether narrowly or broadly defined, thus expanding the coverage of Title IX. 148 As applied to intercollegiate athletics, the statutory definition of “program or activity” leaves open precisely what counts as an athletic program subject to these prohibitions. It might be as narrow as a particular team or as broad as entire athletic program, including both intramural and intercollegiate sports. This variable focus, as we shall see, supports a flexible approach to interpreting the prohibition against exclusion in section 1681(a), allowing it to move from a single sport to an entire athletic program without losing sight of the overall goals of the statute. We now turn to a more extended examination of this issue.

146. Id. § 1687(2)(A) (1994).
148. Strictly speaking, alternative interpretations are possible, but none of them makes sense of the definition of “program or activity” in the amendment. Substituting the definition in § 1687(2)(A) for this phrase where it appears in § 1681(a) results in the ungrammatical conjunction of “any” and “all” to yield “any all of the operations of a college, university . . . .” Deleting “any” and keeping “all” would make this phrase grammatical, but it would narrow the prohibitions in § 1681(a) to admissions alone. Only persons denied admissions are excluded from, denied the benefits of, or suffer discrimination under “all of the operations of” a college or university. Deleting “all” comes closer to the purpose of the amendment, but by itself, this deletion leaves open the very question that the amendment was supposed to resolve: which of the operations of the college or university must receive federal funds to trigger coverage of Title IX. Any tenable reconstruction of the statute must resolve this question. The most plausible means of doing so is to interpret § 1681(a) as it reads as follows, with all of the italicized material based on the amendment:

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 operation of a college, university, or other post-secondary institution, or a public system of higher education any of whose operations receive Federal financial assistance.
B. Exclusion From Participation on the Basis of Sex

What does it mean to “be excluded from participation” in intercollegiate athletics “on the basis of sex”? First, it clearly does not mean that men and women must be allowed to compete on the same teams. Bowing to the inevitable, the OCR regulations, which under the Javits Amendment have the force of law, recognize the widely accepted fact of sex segregation in athletics and more particularly the potential danger to the vast majority of women entailed in competing against men in “body contact sports.” Schools are thus not required to have unisex teams in any sport (indeed, fielding such a team in most sports, whether or not they involve body contact, would have the ironic effect of excluding almost all women from participation), and schools are expressly not required to permit such teams in body contact sports.\(^\text{149}\)

Of what, then, does the prohibited “exclusion” consist? As a preliminary matter, there must be sufficient interest among students who are able to compete at the school’s relevant competitive level. So much is recognized by OCR in the third part of the three-part test (but not in the other two parts).\(^\text{150}\) Neither the person with no interest in participating nor the enthusiastic but inept player unable to compete at the relevant level can meaningfully be said to have been “excluded from participation” in intercollegiate athletics “on the basis of sex” merely because the school he or she attends does not field a varsity team for that person’s gender in any particular sport.

But does an unmet desire to participate on the part of a single able athlete rise to the level of “exclusion” “on the basis of sex”? Almost certainly not, but we need to be mindful here that a school’s recruiting practices dramatically affect the number of able and interested athletes in a given sport in the student body. A school that maintains a men’s soccer team should not be able to avoid fielding a women’s soccer team merely because its failure to do so has driven most of the able female soccer players elsewhere. Nonetheless, the decision to establish and maintain a varsity team in any sport entails a significant commitment of resources, and there are ways to develop and test levels of interest that should be employed before a school can meaningfully be said to have “excluded” athletes of one gender from participation in any sport “on the basis of sex.”

\(^{149}\) See 34 C.F.R. § 106.41(b) (1999).

\(^{150}\) Policy Interpretation, supra note 54, at VII; 44 Fed. Reg. at 71,418.
Most, if not all, colleges and universities offer intramural sports and “club” teams that compete against other schools at a non-varsity level, and the NCAA has developed and provided to its member schools survey instruments that can be used to measure the level of interest and ability in a range of sports.\textsuperscript{151} While no hard and fast line can be drawn, a finding of “exclusion” from participation in any sport should require a demonstration of a significant level of interest and ability among a substantial number of students.

1. \textit{Single and Dual Gender Sports}

Perhaps the most difficult question is whether the test for “exclusion” should be applied on a sport-by-sport basis or to the totality of a school’s intercollegiate athletics program. Without any explanation and seemingly without any rationale, OCR and the courts have moved back and forth between the two perspectives. The broad definition of “program or activity” permits this change of perspective, but it should be done in a systematic rather than an ad hoc fashion. The first part of the three-part test in the OCR Policy Interpretation focuses on overall participation rates, while the third part, as interpreted by the Clarification and following the \textit{Cohen} decision, looks at unmet needs and interests in individual sports.\textsuperscript{152} Significant consequences flow from the choice of perspective, and it is here that the dimensions of the football problem are most clearly revealed.

If the focus is on the individual sport, it is clear that in those sports where both men and women compete, albeit on different teams, a school could not maintain a team for only one sex in the face of a demonstration of interest and ability by members of the other sex, without “excluding” the latter from participation “on the basis of sex.” One attractive aspect of this sport-by-sport focus is that it would put an end to the facially perverse notion that the way to end discrimination on the basis of sex is to cut a men’s team in a particular sport while adding or retaining a women’s team in the very same sport. The male swimmers or tennis players or gymnasts who have lost their team to balance the distribution of roster spots in the pursuit of parity with enrollment certainly have a substantial claim that they have been “excluded from participation” “on the basis of sex.”

\textsuperscript{152} See supra part II.B.
On the other hand, a sport-by-sport focus is less attractive in those sports where men and women do not both compete, including football. There is no exclusively female counterpart to football in terms of roster size or widespread participation. Indeed, field hockey and synchronized swimming are among the few collegiate sports where all-female teams predominate and men generally do not compete. Thus the danger in focusing on individual sports is that it could permit a school to maintain a major football program, with perhaps a few teams for both sexes in dual gender sports, and little or nothing for women separately.

What is needed is a self-conscious blending of micro and macro perspectives, coupled with judicial distribution of the burden of proof and careful attention to the strictures of section 1681(b). The structure of the statute invites the following approach: examination of a narrowly defined activity under a single prohibition, followed by examination of more broadly defined activities and other prohibitions as necessary to prevent evasive practices. So, a school that maintains a team for only one sex in a dual gender sport, in the face of a demonstration of an appropriate level of interest and ability in the sport by members of the other sex, would bear the burden of justifying its facial “exclusion” of members of the unrepresented sex. Similarly, a school whose overall distribution of participation opportunities deviates significantly from an appropriate statistical measure of the distribution of men and women in the available pool of collegiate athletes would bear the burden of demonstrating that this deviation in participation rates is not the result of exclusion on the basis of sex.

What sort of evidence could suffice to justify either the maintenance of a team for only one gender in a dual gender sport, or a significant statistical disparity between a school’s distribution of participation opportunities and the relevant pool of potential athletes? Let us take the former situation first.

153. There are potential problems where men’s and women’s sports are similar but not identical, as in the case of gymnastics, where the men and women compete in some different events, and in the case of baseball and softball, where essentially the same game is played by men and women with different equipment and under different rules. For simplicity’s sake, these should be viewed for purposes of Title IX analysis as sports where both men and women compete, although on different teams.
2. Dual Gender Sports

Considerations of expense, which are often legitimately central to decisions concerning the composition of a school’s varsity program, should seldom justify the maintenance of only one team in a dual gender sport where both men and women have shown the requisite level of interest and ability. Fielding a team for one sex will mean that the school possesses or has access to the necessary facilities, often the item of greatest cost. In a number of sports, such as swimming, track and field, and golf, men and women can practice together, share at least some equipment, and use a single coaching staff. The added marginal costs of maintaining two teams should suffice only rarely to justify the facial exclusion of one sex in a dual gender sport.

The most difficult defense to a claim of exclusion in a dual gender sport will be that one sex has been left out to help balance the school’s overall distribution of participation opportunities. This defense is unappealing, especially when it is put forward as a justification for cutting an existing team. In the latter case, the “Title IX made me do it” defense seems to contradict settled principles governing affirmative action in other areas of civil rights law. Nonetheless, a complete refusal to entertain such a defense could perpetuate the exclusion of women that Title IX seeks to eradicate, at least in a world dominated by football and lacking a corresponding female sport. Courts should entertain this defense only as a last resort and should seldom, if ever, permit it to justify cutting an existing men’s team.

3. Single Gender Sports and Overall Imbalance

How should courts proceed where the claim is one of exclusion based on an imbalance in the school’s overall distribution of competitive opportunities? In many, if not most, cases, an assessment of exclusion in a school’s overall intercollegiate athletics program will involve resort to statistical evidence. The proviso to section 1681(b) contemplates as much. But there is no one rigid statistical criterion that can serve as a definition of “exclusion” without doing violence to that section’s basic prohibition. As the Supreme Court cautioned in the context of efforts to measure the appropriate employment market under Title VII, “statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In

short, their usefulness depends on all of the surrounding facts and circumstances.\textsuperscript{155} The only limitation on statistical evidence is relevance—the numbers must tell us something about the pool for prospective student athletes in which a particular school operates.

OCR and the courts, as we have seen, have gone in the opposite direction; they have become preoccupied with requiring parity with enrollment and have neglected the need to develop better evidence of imbalance. They have rejected evidence in the form of student surveys of interest and ability in favor of simpler, but largely irrelevant, figures on enrollment.\textsuperscript{156} In a statistical version of Gresham's Law, bad statistical evidence has succeeded in driving out good.

This tendency has had perverse and unforeseen consequences. The existing preoccupation with enrollment figures favors those schools with low enrollment of women, rewarding their athletic programs because of the imbalance in their admissions. These tend to be military academies and engineering schools. Conversely, schools with predominantly female enrollment must meet a higher standard of women's participation in intercollegiate sports. No doubt enrollment figures remain relevant to determining the pool of eligible athletes. The more one sex predominates in the student body of a school, the more it is likely to predominate among the athletes who can successfully be recruited by that school. Nevertheless, schools with a disproportionate enrollment of men (or women, for that matter) should not be subject to what is, in effect, a different standard for compliance with Title IX.

A more sophisticated analysis of the pool of eligible athletes would offer all schools the same opportunity to tailor their compliance programs to their own situations. The question in each case would be whether a school had excluded members of one sex from participation—in essence, whether it had responded differently to demonstrations of interest and ability in particular sports evinced by men and women. Various statistical measures, including periodic surveys of the interests and abilities of men and women among the student body and data concerning the number of active participants in competitive sports at other similarly situated colleges, or in high schools, might be helpful, but not controlling, in making this

\textsuperscript{155} Teamsters, 431 U.S. at 340.

\textsuperscript{156} In Cohen, for instance, the First Circuit relied on enrollment figures because of their simplicity. Cohen I, 991 F.2d at 900; Cohen II, 101 F.3d at 179-180.
determination. Under the terms of section 1681(b), statistical evidence of imbalance generates only an inference of exclusion; imbalance alone does not constitute a violation of the statute.

4. *Allocating the Burden of Proof*

The question of greatest practical significance is: who has the burden of proof on the issue of exclusion from participation? In traditional legal terms, the burden of proof breaks down into the burden of production and the burden of persuasion. The Policy Interpretation seems to assign both of these burdens to the school, at least with regard to the three-part test.\(^\text{157}\) On the other hand, the limited aims of the Policy Interpretation do not concern litigation, but the steps that colleges and universities can take to resolve complaints and achieve compliance in order to avoid being sued. Because the Policy Interpretation does not address situations in which any plaintiff has decided to sue, it does not take up the question of whether the plaintiff has the burden of proof. The statute and the regulations are silent on the burden of proof, presumably supporting the usual rule that the plaintiff has the burden of persuasion. That, in any event, is the rule under Title VII\(^\text{158}\) and the rule formally articulated by the opinions under Title IX.\(^\text{159}\) Nevertheless, these opinions also defer to the Policy Interpretation and critically analyze the deficiencies in the evidence offered by the defendant colleges and universities.\(^\text{160}\)

The most plausible synthesis of these contradictory statements and attitudes in existing law is to place the initial burden of proof, both of production and persuasion, on the plaintiff to establish that a group of students with sufficient interest and ability has been denied the opportunity to participate. Once this preliminary requirement has been met, only the burden of persuasion should remain with the plaintiff. The burden of production should shift to the defendant to establish overall balance in athletic opportunities or some other justification sufficient to rebut an inference of exclusion. Apart from conforming to the usual rule on the burden of persuasion, this synthesis has the advantage of placing the burden of production on the party


\(^{156}\) Hazelwood, 433 U.S. at 299; Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981).

\(^{159}\) *Cohen I*, 991 F.2d at 901-01; *Cohen II*, 101 F.3d at 175; *Roberts*, 998 F.2d at 829-31. But see *Kelley*, 35 F.3d at 271.

\(^{160}\) *Cohen I*, 991 F.2d at 899-900; *Cohen II*, 101 F.3d at 178-81; *Roberts*, 998 F.2d at 831-32.
best able to generate relevant evidence. Again, under Title VII, the burden of production has been placed on the defendant to offer reasons for apparently discriminatory decisions.\textsuperscript{161} This principle has not extended to statistical evidence of discrimination, on which the plaintiff under Title VII typically bears both burdens,\textsuperscript{162} but the undeveloped state of the available statistics under Title IX justifies placing the burden of production on the defendant. The continuing discriminatory effects of football, discussed in Part I, also support this allocation of the burden of proof. Plaintiffs should not lose because colleges and universities have not provided the relevant information. Unlike plaintiffs under Title VII, plaintiffs under Title IX do not have a realistic alternative of pursuing individual claims of exclusion from intercollegiate athletics. In most cases, they are forced to rely on statistical evidence. By contrast, colleges and universities have both the means and the incentive to collect this evidence as a defense to Title IX claims.

5. \textit{What Must Be Proved}

It is impossible to specify in advance exactly what constitutes sufficient evidence of exclusion from athletic opportunities. In cases involving proof of overall imbalance, statistical evidence plays the largest role, but considerations of available resources and facilities and evidence of discrimination in conditions of participation, discussed in the next section of this article, also can be crucial. Even with statistical evidence alone, no simple rule can capture all the nuances that make one set of statistics appropriate for one school and inappropriate for another. As the Supreme Court has cautioned, these issues must be resolved on the facts of each case.\textsuperscript{163}

Most of these issues arise from a seemingly obvious fact, but one that has been neglected by both OCR and the courts. The appropriate pool of potential athletes has two different components: enrolled


\textsuperscript{163} Teamsters, 431 U.S. at 340.
students who might participate as "walk-on" athletes; and potential applicants who are recruited for admission and athletic scholarships. Evidence of imbalance must address each of these components. The enrollment figures favored by existing law measure only the first component, and imperfectly at that, since enrollment figures alone fail to take account of interest and ability. A standard survey developed by the NCAA can be used to fill this gap in the evidence, although the conditions under which it is administered are crucial to its validity. Careful attention must be given to issues such as the level of interest and skills measured by the survey, the range of sports covered, the accuracy of the responses, and the selection of students to whom the survey is given.

No matter how accurate, however, surveys of enrolled students do nothing to address the need for evidence about the pool of potential students from which athletes are recruited from outside the school. At colleges and universities in the highest level of competition, Division I-A of the NCAA, recruited athletes predominate almost to the exclusion of walk-ons. To the extent that this is true of any particular school, it is necessary to look beyond enrolled students because the school's own recruitment practices look to a wider pool of athletes. Enrolled students form an appropriate pool only for schools in which most of the athletes are walk-ons. As the district court pointed out in *Cohen v. Brown University*, student surveys do not measure the proportion of women in the pool of athletes who might have been recruited, but were not because the school failed to establish a women's team for them to play on. Athletes who might be recruited, even more so than students who are already enrolled, form the pool from which most athletes in major sports programs are drawn. The latter figure provides some evidence of the pool of athletes who might be recruited, although it will be biased in favor of established sports at any particular school. It is therefore necessary to look at other evidence to determine the composition of the pool of athletes who might be recruited based on athletic ability. The only statistics readily available concern participation in sports by students in high schools that report to the National Federation of State High Schools.

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165. Id. at 206-07.
Associations. These statistics reveal that 40% of participants are female and 60% male in all sports listed, including several (such as “air riffery” or “bowling”) that are hard to find at the college level. These sports could be excluded and the data broken down by region to reflect geographical patterns of recruiting. More serious is the problem that the published figures count the number of participants, not the number of individuals, resulting in double counting of students who play more than one sport. These figures also do not count other forms of athletic activity outside of the reporting high schools: in other schools, in athletic clubs, or in city and county leagues.

Obviously, as the second and third parts of OCR’s three-part test recognize, Title IX compliance is a moving target. The currently emerging demographics of higher education display a growing majority of women attending colleges and universities nationwide. Similarly, the percentage of women among those with the interest and ability to participate in intercollegiate athletics has been growing rapidly in recent years, and this trend seems likely to continue. The NCAA and the state governing bodies of high school athletics are recognizing competition for women in a broadening range of sports. As more and more women arrive at college possessed of the skill and the desire to compete in intercollegiate sports, schools must respond to their expressed interest and demonstrated ability by allocating to them more of the limited resources of the schools’ athletics programs. As we showed in Part III above, schools may choose to expand opportunities ahead of the curve, but Title IX does not require them to do so. The question in any given case is whether a school is engaged in “excluding” women (or men) from participation “on the basis of sex.” The answer demands not a cookie-cutter response based on irrelevant enrollment statistics but a sophisticated and sensitive, though hardly mysterious or unprincipled, determination not unlike those the courts have been making for years under other civil rights laws. College sports no longer are—if they ever were—a simple addition to college academic programs. Assuring equal participation in college sports cannot be a simple matter of achieving parity with enrollment.

167. Id.
C. "Discrimination" in Conditions of Participation
   "on the Basis of Sex"

Wholly apart from exclusion of women from intercollegiate athletics, Title IX also prohibits "discrimination" against women in sports in which they have been allowed to participate. Subsuming the allocation of participation opportunities under the heading of "discrimination," instead of "exclusion," has led regulators and courts to focus most of their attention on this problem and on the cognate question of the allocation of scholarship resources. This makes some sense, for until barriers to participation have been breached, issues such as travel accommodations and access to training and practice facilities may seem secondary. But giving the language of the statute its natural construction permits us to see more easily that there are really two distinct and important sets of problems. There is significant evidence that, even at schools that have been relatively progressive about creating competition opportunities for women, female competitors have been subject to serious discrimination in such areas as scholarships, quality of coaching, conditions of travel and other accommodations, equipment, training, and access to facilities for practice and competition. These issues deserve separate and detailed consideration under the heading of "discrimination."

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170. Thus despite significant gains in the number and percentage of participants throughout the 1990s, women's teams in 1996 and 1997 still lagged significantly behind men's programs in expenditures for operating expenses, coaches' salaries, recruiting, and athletically related financial aid. See Welch Suggs. More Women Participate in Intercollegiate Athletics, Chron. Higher Educ., May 21, 1999, A-44 (discussing survey of Division I schools shows a disparity in financing between men's and women's teams); Jim Naughton. Women's Teams in NCAA Division I See Gains in Participation and Budgets, Chron. Higher Educ., April 8, 1998, at A42-43 (showing 38% of participants in top athletic programs were women, but men's programs received more than twice as much money); NCAA, NCAA Study Shows Small Gains for Women's Sports, April 29, 1997 (stating that while women gained significantly in percentage of participants in Division I-A, expenditures for men's programs increased at a much higher rate). See also Cook v. Colgate Univ., 802 F. Supp. 737 (N.D.N.Y. 1992), vacated as moot, 992 F.2d 17 (2d Cir. 1993) (finding inadequate funding of women's hockey team created disparities in quality of coaching, locker room facilities, equipment, and travel); Mary Jordan, Only One
1. Allocation of Scholarships

In one respect the approach of the courts has been largely, though only incidentally, correct. The allocation of scholarship resources should follow the allocation of competitive opportunities. The process of allocating scholarships is a difficult and sensitive topic within many athletics departments. The NCAA sets a maximum number of full athletic grants-in-aid, or their equivalents, for each sport in each Division.\textsuperscript{171} Few if any schools in the entire country are able to afford the maximum number of scholarships in all their sports. The allocation of scholarship resources thus largely determines the school's relative level of emphasis on—and hence likely long-range competitive success in—particular sports. At many schools, especially in Division I-A, the needs of the "revenue sports" are met first.\textsuperscript{172} The remaining scholarship dollars are then divided among the other sports. Programs with a history of competitive success often fare better in this process, which thus takes on aspects of a self-fulfilling prophecy, as the teams with relatively more scholarships to distribute are likely to be able to attract better athletes.

Scholarship dollars are probably the only entirely fungible entity in the array of resources whose distribution is affected by Title IX. There is no obviously good reason why, if 40% of the participants in intercollegiate athletics are women, they should not receive 40% of the scholarship dollars.\textsuperscript{173} Any other result seems facially discriminatory.\textsuperscript{174} This may well mean that at a school that maintains a significant commitment to football, there will be relatively greater

School Meets Gender Equity Goal, Wash. Post, June 21, 1992, at D1 (noting that Washington State was only major university meeting enrollment proportionality test, but while 44 percent of participants were women, only 20 percent of the budget was allocated for women's sports); Debra E. Blum, Slow Progress on Equity, Chron. Higher Educ., Oct. 26, 1994, at A51 (finding that by 1994, female participation at Washington State was up to 46%, but women still received only 41% of scholarship dollars).

\textsuperscript{171} In many sports the head coach is given scholarship "equivalents" to distribute among existing and prospective student athletes. That is, a student may receive only a partial grant-in-aid. The percentage of a full scholarship offered to a particular prospective student athlete is often an item of competition between schools.

\textsuperscript{172} See Weistart, supra note 13, at 215.

\textsuperscript{173} Cf. Jim Naughton, Tension Between Title IX and NCAA Rules Is at the Heart of Lawsuit, Chron. Higher Educ., June 20, 1997 (discussing difficulty of complying with both Title IX and NCAA rules on scholarships).

\textsuperscript{174} This is OCR's view, see 34 C.F.R. § 106.37(c)(1) (1998), though it may be a product of its adherence to the standard of parity with enrollment.
emphasis on (and more recruiting resources available to) women’s sports in the distribution of the remaining scholarship dollars, but that is a matter left ultimately to the schools themselves.175

2. Coaching Quality and Salaries

Both student athletes and coaches have strong interests in how coaches are recruited and paid and both would have standing under Title IX to complain of discrimination.176 Because of historic discrimination women have been largely excluded from the coaching ranks. The majority of women’s sports are now coached by men,177 and female coaches have been and continue to be paid less than their male counterparts.178 The athletes generally have an interest in having the best coaching available. Female athletes have an interest in positive female role models in their sports.179 Perhaps most importantly, female coaches have an interest in being fairly and adequately compensated.

175. A potentially troubling side effect of such a rule might be that men’s nonrevenue sports generally would receive less emphasis at the collegiate level, with the result that the number and quality of athletes in those sports would suffer overall. This could lead to a disintegration in the level of international competition that the United States could mount in those sports. That is not a problem, however, that those interpreting a statute banning discrimination in the allocation of resources in intercollegiate athletics can hope to solve.

176. See 34 C.F.R. § 106.51 (1996) (preventing sex discrimination in employment): Grace-Marie Mowery, Creating Equal Opportunity for Female Coaches: Affirmative Action Under Title IX, 66 U. Cin. L. Rev. 283, 283 (1997) (“Although most of the attention and activity surrounding Title IX focuses on the female athlete, Title IX was intended to have a similar beneficial impact on their coaches.”).

177. While the expansion of women’s teams in the wake of Title IX has created many new job opportunities, the vast majority of those coaching jobs have gone to men. Id. Thus, ironically, the percentage of female athletes coached by women has fallen from 90% before the enactment of Title IX to 46.7% in 1996. Id.


179. For the argument that female coaches are important positive role models for female athletes and that their widespread absence is a subtle form of discrimination affecting the athletes, see Claussen, supra note 178, at 157-58.
This aspect of Title IX enforcement most closely parallels Title VII.\(^\text{180}\) We are, after all, dealing directly with an employment market, though one that remains more highly differentiated than most typical Title VII markets. Coaches in the revenue sports and a few others with existing or emerging profitable professional leagues benefit from the popularity of their sports and can command higher salaries and more generous perks than coaches in other sports. But with due adjustment for this aspect of the market, Title VII is essentially a perfect fit. Seniority, as in Title VII cases, is a problem. The interest in hiring the best available coach will often conflict with the effort to eliminate historic discrimination. The better and more experienced coaches quite sensibly command higher pay. Moreover, the number of coaches employed by most colleges and universities is very small, so small that statistical comparisons may have relatively little validity. Nonetheless, the Title VII model points the way toward voluntary entry-level affirmative action in the hiring and promotion of coaches.\(^\text{181}\)

3. Conditions of Travel, Meals, and Accommodations

One area of major discrimination against female athletes has been conditions of travel, meals, and accommodations. Athletes in the “revenue sports,” which with the emerging exception of women’s basketball are all male, have received and continue to receive preferential treatment in this regard. They travel by air, sometimes on chartered planes. They have special team meals on game days. They stay in single rooms on the road. And a significant number of Division I-A football teams house and feed their athletes in hotels even before home games.\(^\text{182}\) Athletes on other teams travel by cars, vans, or buses.

\(^{180}\) See Mowery, supra note 176, at 283 (“Although the procedural requirements and remedies of Title VII are different from Title IX, both proscribe employment discrimination in almost identical language.”).


even to relatively distant competition sites, which means, among other things, that they effectively lose more class time because of travel. They receive a per diem allowance for meals. And they sleep two or more to a hotel room. Within this group of second-class citizens, women have traditionally been treated the worst. Their meal allowances have been smaller than those for the men, and they have often been required to share, not merely rooms, but beds on the road.

Many schools have made significant strides in eliminating this sort of inexcusable disparity. But there is a long way to go, despite the fact that the differences are easily measured and, for the most part, easily eliminated. Title IX, of course, does not speak directly to disparities between athletes in revenue and nonrevenue sports, though the fact that virtually all the athletes favored by this distinction are males is highly relevant to a claim of discrimination. But even among nonrevenue sports significant discrimination against female athletes persists. There are, of course, reasons that may justify some discrepancies in expenditures among sports. Travel to competition halfway across the country is of necessity by airplane, and it makes no sense to fly to contests that are relatively close by. Accommodations and meals are more expensive in large urban areas than in smaller college or university towns. But with due regard for these nuances, equal treatment can be achieved by equalizing per student per diem expenditures and by treating all teams alike in travel arrangements, depending on the distance to be covered.

183. Weistart, supra note 13, at 213.
184. On disparities between travel, meals, and accommodations for men’s and women’s teams at some universities, see id.: Brian A. Snow and William E. Thro, Still on the Sidelines: Developing the Nondiscrimination Paradigm Under Title IX, 3 Duke J. Gender L. & Pol’y 1 (1996); Title IX Compliance Review Committee, University of Mississippi-Oxford, Report, at 1-12: Joan O’Brien, Gender Inequity: Women at University Still Get Short End of the Stick, Salt Lake Trib., Dec. 23, 1994, at C1. As Professor Weistart put it:

This secondary, contingent status that is described here extends to all nonrevenue sports, men’s and women’s. It should be clear, though, that in the present environment, women’s sports are going to be more severely affected than men’s. Men’s nonrevenue sports are already established and presumably have assumed a place that presents no threat to the existing balance that clearly prefers two expensive men’s sports.

Weistart, supra note 13, at 213-14.
4. **Equipment, Training, and Access to Facilities**

Student athletes in the revenue sports often have access to vastly superior training facilities and equipment. Indeed, big-time football and basketball programs often employ their state-of-the-art facilities as recruiting tools in the battle for highly sought recruits. It is not unusual to find an entire building, with the most modern workout and rehabilitation facilities and ample locker, office and meeting space, devoted just to the football team on a Division I-A campus. Athletes in other sports, by contrast, often find themselves scrambling for access to older training equipment in sometimes antiquated facilities and sharing locker space, while their coaches have cramped and inadequate offices in on old gymnasium. Part of this, of course, is a normal function of the aging and replacement of a school's facilities. No school can afford to replace all its athletic facilities and equipment at one time, and thus inevitably some of it is older and less desirable.

Moreover, the decision to build or renovate an athletic facility is not always a function of resource allocation decisions related to intercollegiate athletics. We offer two recent examples at our institution, the University of Virginia. A new natatorium was constructed and opened in 1996, in large measure to afford students and faculty a good facility for swimming. The men's and women's swimming teams were also beneficiaries of this decision, for they now have a state-of-the-art facility for training, practice, and competition that puts the facilities of many other teams to shame. At roughly the same time, a decision was made to expand seating at the football field, Scott Stadium, significantly. This decision has been criticized by some as a misallocation of resources, but it was the result of a huge restricted gift from an alumnus whose loyalty, for whatever reason, was primarily to the football program.

Thus it is unrealistic to ask any college or university to equalize completely the quality of training and competition facilities available

185. "A comfortable, up-to-date weight room and training area is an advantage in recruiting. Thus, a school that wants to be in the running for the best players must be 'competitive,' which means that it must be prepared to offer comparable or better facilities." Weistart, supra note 13, at 210. See also Martha Quillin, The Home Improvement Game, Raleigh News & Observer, Oct. 12, 1995, at 1C. On the impulse to escalate spending in the revenue sports generally, see Harry Edwards, The Collegiate Arms Race: Origins and Implications of the "Rule 48" Controversy, 8 J. Sport & Soc. Issues 4 (1984).

across its spectrum of intercollegiate sports. And Title IX does not require it to do so. But it does prohibit discrimination on the basis of sex in this area. Such discrimination is difficult to measure. Dollars are often not terribly helpful as a measure, for the cost of equipment and uniforms and the useful life of items of equipment vary tremendously from sport to sport. But it is hardly impossible to determine whether certain sports are systematically favored or disfavored in the relative quality of equipment purchased or to estimate the useful life of facilities and equipment and to compare the age of various teams’ amenities to this standard. Such comparisons should assist strongly in eliminating disparities based on sex.

Difficult to identify and deal with, but a source of annoyance to many, are disparities in access to facilities that are used for training, practice, and competition by more than one team. Student athletes have in essence two full-time jobs, and convenient scheduling of training, practice, and playing times can make a huge difference in their ability to fulfill their educational responsibilities. It is perhaps understandable that revenue-producing sports have first call on playing facilities for scheduling events at desirable times for attendance and broadcast. And, as we have seen, some sports will inevitably be blessed with more up-to-date practice facilities than others. There is also doubtless more than enough inconvenience to go around. But there is no reason why the athletes in some sports should systematically be treated better from a convenience standpoint than others, and it is a violation of Title IX if inconveniences are regularly distributed unequally between the sexes. This brand of discrimination can only be uncovered through careful analysis of a school’s scheduling of access to its practice and training facilities.

V. CONCLUSION

In this article, we have proposed a single, basic change in existing interpretations of Title IX: abandon parity with enrollment as the litmus test for allocating positions between women’s and men’s teams in intercollegiate sports. In no other civil rights statutes has such a simplistic test for compliance been used as widely or as rigidly. Under the most analogous of these statutes, Title VII of the Civil Rights Act of 1964, equal opportunity has been measured with far more

sophisticated and flexible standards for statistical evidence. Abandoning the test of parity with enrollment would have several beneficial consequences. It would put an end to attempts to achieve equal opportunity for women by eliminating opportunities for men, mainly by cutting men's teams in sports other than football and basketball. It would put more emphasis on the statutory language prohibiting the exclusion of men or women from participation in intercollegiate athletics and allow a broader range of statistical and other evidence to be brought to bear on this question. And, lastly, it would enlarge the focus of interpretation and enforcement of Title IX to other forms of discrimination against women in the conditions under which they participate in college sports. Taking all of these steps would require a great change in attitude, but no change in the literal terms of the statute, or even the three-part test of the Policy Interpretation, which on its face does not purport to set out the exclusive means of compliance with Title IX. The statute should not be interpreted to yield only a Pyrrhic victory for equality, in which men get football and women get compensating advantages in all nonrevenue sports. Instead, Title IX should be interpreted to promote a more flexible and less fragile ideal of equality, one in which the increasing number of female athletes have the same opportunity to participate as their male counterparts. The demand that colleges and universities do more to promote equality in intercollegiate athletics remains timely and urgent. It is, however, both more justifiable and more durable than a rigid insistence on parity with enrollment. That standard for compliance has outlived whatever usefulness it once possessed.