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*993 TITLE IX OR COLLEGE FOOTBALL?

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I. INTRODUCTION

College football devours financial resources, and college football teams seem as big as invading armies. All college football players are male. Colleges sponsor no comparable sport for women in terms of funding or the number of athletic opportunities. Thus, in every college athletic program with a big-time football team, a substantially disproportionate share of money and athletic opportunities is awarded to male students.

Title IX, [FN1] enacted in 1972, prohibits sex discrimination in any educational program or activity receiving federal funds. [FN2] Through the operation of the Supremacy Clause, [FN3] every college *995 and university in the United States receiving such funds [FN4] is subject to this prohibition. Title IX, as interpreted by the Department of Education, requires that universities: (1) provide athletic opportunities to male and female students in substantial proportion to their student population percentages, (2) accommodate fully the interests and abilities of the sex that is underrepresented in intercollegiate sports, or (3) expand continuously the programs for the underrepresented sex. [FN5] Virtually no college or university in the country with a big-time football program can comply with this standard.

Despite federal mandate, Title IX has had surprisingly little effect on college football. Team sizes continue to grow, and the operating expense of football programs has increased substantially. [FN6] To be sure, women's college athletic programs have also grown since Title IX was enacted, but because they are substantially smaller and receive less financial assistance than men's programs, they continue to operate as second-class organizations. [FN7]

Recently, however, challengers of the status quo have won a series of court victories [FN8] and favorable settlements.
This Article evaluates the possibility of peaceful coexistence between Title IX and big-time college football programs. Part II sets the stage, providing an overview of the structure of athletic programs in the university setting. Part III examines Title IX and its application to college athletics. It first provides a descriptive account of the statutory and regulatory framework and then it gives an analytical account of the different meanings attached to Title IX's requirement of gender equality in college athletics. Part IV demonstrates that big-time college football programs and Title IX cannot coexist under the current structure of college athletics. Part V reviews suggestions for reform.

Donna Lopiano, the Executive Director of the Women's Sport Foundation, has characterized the tension between football and Title IX as follows: "No parent should be put in the position where they have to choose between a son or a daughter...Right now, it's a fight between football (and men's sports) and your daughter." [FN13] This Article takes the side of daughters.

II. ATHLETICS AND THE UNIVERSITY

The starting point for any discussion of the relationship between athletics and the university is this: athletics are supposed to be part of the university's essential function--the education of students. [FN14] This function extends to all forms of athletics sponsored by the university, including competitive intercollegiate athletics, club sports, intramural sports, and physical education, dance, and aerobics classes. [FN15] A complete education of the student includes training the body as well as the mind. As one university president explained, "educational ideals and principles...must be... (the university's) athletic policy." [FN16]

This is the framework within which athletic programs and policies are to be judged. Historically, both college football and women's college athletics have fallen far short of the ideal, but the failures arose for very different reasons. For football, an overemphasis on winning and profits has produced a game that often appears to be very far removed from the educational function of the university. [FN17] For women's sports, an underemphasis on the value of athletics results in the substantial exclusion of women from a significant part of the educational experience that a university should provide. If college sports are truly to serve the university's essential function, universities must bring football back within the educational framework [FN18] and make athletics fully available to women students. [FN19]

A. College Football--A Selective Overview

American football began as a college sport and is said to date from a game between Princeton and Rutgers in 1869. [FN20] In its early days, football was similar to both rugby and soccer, the sports from which it originated. [FN21] The ball was round, there were twenty-five players on a team, and the winner prevailed by scoring goals. [FN22] Soon however, football developed its own rules and became popular in colleges. [FN23] The game was violent and brutal. According to one source, eighteen players died in 1905 from injuries resulting from college football games. [FN24] Alexander Meiklejohn, then the dean of Brown University, said of college football in 1905 that "its influence for evil
is becoming so apparent in the forms of unfairness, untruthfulness, and brutality as to threaten the most vital interest of
the college training." [FN25] President Theodore Roosevelt, initially a supporter of college football as promoting a
manly virility, [FN26] grew concerned over the state of the game. [FN27] In 1905, Roosevelt invited representatives of
college football to meet with him at the White House, where he insisted that they clean up the sport and make it ethical.
[FN28]

In response to the concerns over football violence, representatives from a group of colleges met in New York City in
1905 with an agenda either to reform college football or to abolish it. [FN29] The gathered "reform group" formed an
organization that became the National Collegiate Athletic Association (NCAA) four years later, [FN30] an organization
that continues to act as the governing body for intercollegiate athletics in the United States today. [FN31] The NCAA's
first order of business was "to reform the rules (of football) by eliminating brutal conduct and bringing about a more open
game." [FN32] The NCAA succeeded in standardizing the rules and in removing some of the violence from the game.
[FN33]

College football flourished. By the 1920s, college football had become "a national mania and large-scale business
enterprise," with games played before large crowds in large *1000* stadiums. [FN34] It was television, however, that
turned the sport into a multimillion dollar entertainment industry. In the 1950s, the NCAA negotiated its first television
football contract, for slightly over $1,000,000. [FN35] Since that time, network payments to schools for the rights to
college football games have increased dramatically. [FN36] Football has become a major source of revenue for colleges
operating Division I-A football programs. [FN37] In 1993, football revenues for Division I-A schools averaged
$6,300,000 per school, with one school's football program generating $20,322,000. [FN38]

Somewhere along the way, football teams grew dramatically in size. In the early years of college football, players played
both offense and defense and substitutions were substantially limited. [FN39] Squad sizes were relatively small. Since
1965, however, NCAA rules have permitted unlimited substitutions and teams are now made up of players who play
offense or defense only, plus a host of special teams players. [FN40] Although a team never has more than 11 players
on the field at any one time, Division I-A football teams today have an average team size of 117. [FN41] with some teams
as large as 150. [FN42] When the NCAA was recently in the process of reducing the number of football *1001*
scholarships allowed per school to eighty-five, coaches argued that they could not possibly field a team if they had fewer
than eighty-five scholarships to award. [FN43] This "arms-race" mentality extends not only to squad sizes but to money
spent on football in general. The average expense of operating a Division I-A football program has increased from
$1,769,000 in 1981 [FN44] to $4,031,000 in 1993. [FN45] The cost of running a big-time football program is increased
substantially by the perceived need for fourteen coaches, [FN46] indoor practice facilities that cost nine to ten million
dollars, [FN47] and eighty-five football scholarships. [FN48]

There is a darker side to college football that is not chronicled as frequently as its alleged glories. Rick Telander, a
former college football player and former Sports Illustrated senior staff writer on college football, has rejected the sport
and written a diatribe against it. [FN49] Telander's work catalogues the "run-of-the-mill corruption" in college football,
including "under-the-table money given to athletes, ticket-scalping, phony entrance exams, doctored transcripts, (and)
clandestine recruiting visits." [FN50] However, his book takes on a more serious tone when it turns to the violence and
criminal behavior closely associated with college football, including "rapes, burglaries, assaults, drug-dealing,
drunkenness," [FN51] abuse of women, [FN52] and steroid use. [FN53] According to Telander, football coaches do not
build socially desirable character traits in their players, but rather endow them "with warped perspectives on *1002*
obedience, morality, and competition" [FN54] that lead to an "increase in subhuman behavior." [FN55]

Telander also addresses the on-field issues of tackling and injuries. He identifies tackling as "the primitive, essential
element that both thrills and terrifies the game's participants and viewers." [FN56] Some of football's best players find
tackling to be the best part of the game. [FN57] Not surprisingly, injuries result, not as an aberration or a regrettable by-product, but because ".(t)hey are essential to the game." [FN58]

College football today is a big business. It generates plenty of money along with strong emotions. For those who love the game, college football is one of the glories of American civilization, an important part of the college experience, a character builder, and the centerpiece of autumn weekends on campus. For others, college football is a brutal and violent corruption of the values of the university and, at least in its current form, has no place on the college campus.

B. Women in College Athletics

In stark contrast with the insatiable growth of men's college football, the history of women in college athletics is not one of continued progress, but rather of a series of starts, stops, and changes of direction. According to a report by the United States Commission on Civil Rights, women's colleges were developing women's sports programs as early as the 1860s. [FN59] Educators thought that physical activity would balance classroom work. [FN60] Women's colleges sponsored gymnastic exercises, bowling, horseback riding, swimming, flower gardening, and ice skating. [FN61] By the 1890s, the value of team sports for women became apparent, and the schools introduced the *1003* sports of basketball, volleyball, and field hockey. [FN62] Women and girls began to play team sports in large numbers, and basketball became the most popular sport for women and girls. [FN63]

During the 1920s, a different philosophy of women's sports became influential. Some physical educators felt that competition was not merely unwomanly but indeed physically dangerous to women. [FN64] According to this view, instead of emphasizing competition for the few most skilled athletes, college sports should promote physical activities for all women students regardless of skill. [FN65] During this time, competitive athletics for college women decreased, [FN66] and schools organized "play days and sports days," [FN67] which could be "so genteel as to be almost unrecognizable as athletic contests." [FN68]

By the 1960s, competitive athletics for college women had begun to re-emerge. In 1966, the Commission on Intercollegiate Athletics for Women was formed [FN69] and then became the *1004* Association for Intercollegiate Athletics for Women (AIAW) in 1971. [FN70] For almost the next decade, the AIAW was the national governing body for women's college athletics. [FN71] By 1980, AIAW had an active membership of 961 colleges and universities and total revenues of $824,000. [FN72] In 1981, the NCAA entered into the governance of women's college athletics by creating women's championships in nine sports and at three division levels. [FN73] Competition with the much better funded, more deeply entrenched NCAA caused a steep decline in AIAW revenues. [FN74] As a result, the AIAW went out of business in 1982. [FN75] This left the NCAA, by default, as the governing body for women's college athletics—a role for which its previous record would seem to make it unqualified.

C. The NCAA and Gender Equity

For most of its history, the NCAA ignored women athletes. [FN76] When the NCAA finally turned its attention to women athletes, it was actively hostile toward them. [FN77] Even after *1005* displacing the AIAW in 1982, the NCAA did little to advance college athletics for women until 1991. In that year, the NCAA began to take the issue of gender equity more seriously and commissioned its Gender-Equity Study, which was published in 1992. [FN78] The Study summarized information from member schools and confirmed what advocates for women's athletics had long claimed: ".Men have more sports, men have more participants, more scholarships, more coaches. Men's coaches are better-paid." [FN79] The advocates characterized the results as ".incredibly damning," but conceded that ".the NCAA (should be

given) credit for finally looking into this issue." [FN80]

On the heels of the publication of the Gender-Equity Study, in 1992 the NCAA created a Gender-Equity Task Force, charged with the task of "defining gender-equity, examining NCAA policies to evaluate their impact on gender equity, and recommending a path toward measuring and realizing gender equity in intercollegiate athletics." [FN81] The Task Force issued its Final Report in July of 1993. [FN82] The Report defined gender equity as "an environment in which fair and equitable distribution of overall athletics opportunities, benefits and resources is available to women and men" and as a program in which "the participants in both the men's and women's sports programs would accept as fair and equitable the overall program of the other gender." [FN83] This is a reasonably far-reaching conception of gender equity, both for its inclusion of resources as one of the factors to be distributed equitably and for its suggestion that each program should be assessed from the perspective of the opposite sex. The Report also endorsed Title IX's proportionality standard as the "ultimate goal" for each institution. [FN84]

On the other hand, the Report did not prescribe any sanctions for an institution's failure to work toward gender equity and said little about football, which is "at the heart of the emotional debate over sex equity." [FN85] Critics noted "its failure *1006 to call for any cut in the number of scholarships or players in football, without which many observers believe sex equity cannot be achieved on most campuses." [FN86] Even in this watered-down form, the Report did not reach the full membership of the NCAA. The NCAA Council, which recommends legislation for consideration by the full membership, did not endorse the entire report but rather sent four guidelines to the NCAA convention, including the bland observation that "(it) is the responsibility of each school to comply with Federal and state laws regarding gender equity." [FN87] The implication of this guideline is, of course, that it is not the responsibility of the NCAA to monitor or enforce compliance with Title IX. The NCAA adopted the four proposed guidelines by a vote of 804-1 at the January 1994 NCAA convention. [FN88] In the words of one columnist, the guidelines will probably have "the same impact as putting a .please drive 55' sign on an interstate." [FN89]

III. TITLE IX AND COLLEGE ATHLETICS

A. Title IX--A Descriptive Overview

1. Twenty Years Lost--Detours Along the Way . In 1972, Congress enacted Title IX of the Education Amendments of 1972. [FN90] Title IX prohibits sex discrimination in any educational program or activity that receives federal funds. [FN91] Modeled on Title VI of the Civil Rights Act of 1964, [FN92] its underlying principle is that schools should not use federal money to subsidize sex discrimination. [FN93]

However, the text of Title IX did not make clear what practices of university athletic departments were subjected to the statute or prohibited by it. In the absence of a clear statutory mandate, the statute needed to be interpreted by an appropriate federal agency. Yet the Department of Health, Education, and Welfare (HEW), the principal agency to which Congress delegated regulatory authority, [FN94] did not publish final regulations applying the statute to college athletics until three years later, in 1975. [FN95] These regulations established Title IX requirements for college athletics, but gave colleges and universities a three-year grace period for compliance. [FN96] This meant that by 1978, six years after Title IX was enacted, it had not been enforced against college athletic departments.

By the time the regulations were to take effect, a controversy had arisen over whether Title IX applied to college athletic departments at all. Because the statute prohibited discrimination in "any program or activity" that received federal funds, [FN97] some federal courts found that the statute's mandate extended only to the specific "program or activity" within an institution that received federal funds. [FN98] Because most university athletic departments did not receive federal
money directly, they were not, under this line of reasoning, subject to Title IX at all.

There was, of course, strong evidence to the contrary—that Title IX was intended to apply to the entire institution that received federal funds. [FN99] Nevertheless, in 1984, the Supreme Court in Grove City College v. Bell [FN100] took a narrower, program-specific view of Title IX. [FN101] As a result of Grove City, very few university athletic programs were subject to the statute. The Department of Education, the successor agency to HEW for the enforcement of Title IX, [FN102] dropped investigations it had been conducting. [FN103] This meant that by 1984, twelve years after Title IX was enacted, it still had not been enforced against college athletic departments.

In 1988, Congress responded to the Grove City decision. Finding that "certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of (T)itle IX," [FN104] Congress amended the statute to make clear that the term "program or activity" can include "all the operations" of a "college (or) university." [FN105] The HEW has also adopted an institution-wide interpretation. [FN106] The impact of this congressional mandate has been further strengthened by the First Circuit in Cohen v. Brown University, [FN107] reminding the judiciary of Supreme Court precedent indicating that courts should generally afford "great deference to the interpretation given the statute by the officers or agency charged with its administration." [FN108] Indeed, in the context of Title IX litigation, the First Circuit went even further to note that "(t)he degree of deference is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX." [FN109] Thus, the congressional will to apply Title IX on an institution-wide basis, assisted by favorable reception in the court system, finally indicates that Title IX may be adequately enforced against college athletic departments.

After the 1988 congressional amendments, one further change was necessary to move Title IX from the law books onto the playing fields: the statute needed a better enforcement mechanism. Under the terms of the statute, Title IX was to be enforced by administrative complaints to the Department of Education, which had the power to cut off all federal funds to an institution found to be in violation of the statute. [FN110] Yet the Department of Education had shown itself unwilling or unable to pursue complaints with any vigor. [FN111] The alternative remedy, by private cause of action, had been available since 1979, at least where plaintiffs sought injunctive relief only. [FN112] It was not until 1992, in Franklin v. Gwinnett County Public Schools, [FN113] that the Supreme Court approved the remedy of money damages for Title IX litigants. [FN114] Thus, it may be very expensive for a university athletic director to ignore Title IX. [FN115]

Since 1992, there has been a groundswell of Title IX litigation and settlements. [FN116] Student plaintiffs seemingly always win. [FN117] Colleges either settle or lose in court. However, these student victories are in fact very few considering the more than 1300 colleges that participate in intercollegiate athletics. [FN118] More importantly, these victories have not yet changed the face of college athletics in a substantial way.

2. Statutory and Regulatory Framework. Title IX rules are derived from the statute itself, the Regulation that interprets the statute, and the Policy Interpretation that interprets the Regulation. This section examines each of these in turn.

   a. The Statute. Title IX provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." [FN119] According to the Supreme Court, courts should give the statute "a sweep as broad as its language." [FN120] Yet the absence of secondary legislative materials on the application of Title IX to intercollegiate athletics [FN121] makes it difficult to discern precisely what "discrimination" is prohibited, from what "participation" one may not be excluded, or what "benefits" may not be denied. "The statute sketches wide policy lines, leaving the details to regulating agencies." [FN122] Thus, the application of Title IX to college athletics
has had to develop with almost exclusive regard to the Regulation interpreting the law.

b. The Regulation. As enacted in 1972, Title IX included a general grant of authority to appropriate federal agencies "to effectuate (its) provisions . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of (its) objectives." [FN123] In 1974, after a controversy in the Senate over whether revenue-producing sports should be exempt from Title IX, [FN124] Congress granted the authority to the Secretary of HEW to publish regulations "relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions concerning the nature of particular sports." [FN125]

HEW adopted rules in 1975. [FN126] Two sections specifically addressed college athletics. The first, section 86.37, provides that if a college awards athletic scholarships, "it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in . . . intercollegiate athletics." [FN127]

*1012 The second, section 86.41, is the principal provision directed at college athletics. Subsection (a) reiterates the statutory prohibitions of discrimination, exclusion from participation, and denial of benefits, but explicitly applies those prohibitions to college athletic programs. [FN128] Subsection (b) provides that separate male and female teams are permitted and sets forth the grounds under which a school sponsoring a team for one sex must permit members of the other sex to try out for the team. [FN129] Subsection (c), entitled "Equal opportunity," requires colleges to provide "equal athletic opportunity for members of both sexes." [FN130] The regulation then lists a number of factors relevant to equal opportunity. The most significant is "(w)hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." [FN131] Other factors include provisions relating to equipment and supplies, scheduling, traveling expenditures, coaching and tutoring, locker rooms, practice and competitive facilities, medical and training facilities, housing and dining facilities, and publicity. [FN132] The Regulation does not require equal expenditures for men's and women's programs, but does indicate that "the failure to provide necessary funds for teams of one sex" is a factor in assessing equality of opportunity. [FN133]

c. The Policy Interpretation. By 1978, having received complaints and questions concerning the application of Title IX to college athletics, the HEW "determined that it should provide further guidance on what constitutes compliance with the law." [FN134] It therefore published a "Policy Interpretation" designed to clarify the meaning of "equal opportunity" in college athletics. [FN135] The Policy is divided into three sections: (1) Athletic Financial Assistance (Scholarships), (2) Equivalence in Other Athletic Benefits and Opportunities, and (3) Effective Accommodation of Student Interests and Abilities. [FN136] The first two sections have proven to be relatively straightforward and uncontroversial. The scholarship section makes it clear that a school's total amount of athletic scholarship aid, not its *1013 total number, must be proportional between the sexes based on their respective athletic participation rates. [FN137] The section on equivalence repeats the Regulation's laundry list of benefits and services that must be provided equally and adds two additional factors, recruitment and support services. [FN138]

The most important part of the Policy Interpretation is the third section, which addresses effective accommodation of student interests and abilities. The Policy divides this issue into three subsections: (1) determination of athletic interests and abilities, (2) selection of sports, and (3) levels of competition. [FN139] The first subsection permits an institution to determine interest and ability by any nondiscriminatory method, as long as it accounts for the nationally increasing levels of women's interest and ability, does not disadvantage the underrepresented sex, and responds to the expressed interests of students capable of intercollegiate competition who are members of the underrepresented sex. [FN140] The second subsection requires institutions to sponsor separate teams for men and women in certain situations. [FN141]
The third subsection, on levels of competition, has turned out to be the most influential. It utilizes three "benchmarks" [FN142] against which a college's compliance with Title IX are to be assessed: (1) "proportionality," meaning that the school provides intercollegiate participation opportunities for male and female students in numbers substantially proportionate to their respective enrollments in the school; (2) "continuing expansion," meaning that although the members of one sex are underrepresented in an institution's intercollegiate athletic program, the institution can show a history and continuing practice of program expansion for members of that sex; and (3) "accommodation," meaning that, although members of one sex are underrepresented, the interests and abilities of members of that sex are fully and effectively accommodated by the present program. [FN143] These benchmarks of proportionality, expansion, and accommodation have become the focus of Title IX litigation.

B. Title IX--Different Meanings of Gender Equality in College Athletics

What does Title IX actually prescribe regarding gender equity in college athletics? Title IX's prohibitions of discrimination, exclusion from participation, and denial of benefits are the effective equivalents of a requirement that college athletics treat men and women equally. [FN144] However, the assertion that men and women should be treated equally begins rather than ends the discussion, because equality has different meanings. This subpart examines six versions of equality under Title IX--separate but equal, equal funding, equality as proportional participation, equality as expansion of programs in the direction of equality, equality as fully accommodating interests and abilities, and equality as assimilation. Title IX and its regulations adopt five of these versions of equality; in other words, they adopt all but equal funding, which may be the most important.

1. Separate But Equal. The advancement of women in sports has very little to do with the occasional woman who wants to play on a men's team and everything to do with the creation and support of women's own sports programs and teams. However, (a) disproportionate amount of attention has been stirred up by the relatively few women participating alongside men. . . . Out of all relation to their impact on sports, these athletes . . . have engaged the attention and passion of chauvinists of both sexes. . . .

   What the overwhelming majority of women wants are sound programs of their own. . . . When even semi-adequate women's programs are provided, women's interest in joining men's teams all but disappears. [FN145]

However, if women are to have their own athletic programs, they must confront the specter of "separate but equal," a phrase made infamous by the Supreme Court in Brown v. Board of Education. [FN146] In the field of education, said the Court, separate is "inherently unequal." [FN147] It is therefore not without a certain irony that advocates of equality for women in sports often argue for separate but equal athletic programs. However, this irony does not suggest a constitutional inconsistency. The Court's rejection in Brown of separate but equal was in the context of race discrimination and segregation. [FN148] While analogies between race discrimination and sex discrimination are sometimes illuminating, there are constitutional limits to these similarities. [FN149] Athletics is one area in which the race analogy is not helpful: while race is never a relevant or legitimate criterion by which to classify athletes, gender is at times an appropriate tool for such classifications.

The next subpart examines separate but equal athletic programs. The first issue considered is whether separate but equal teams for men and women are constitutionally permissible, and if so, to what extent separate programs are required by Title IX.

a. Constitutional Issues. The issue of separate but equal arises when a female athlete wants to play on a male team
when there is already a female team in the same sport. [FN150] In these cases, a female argues that she has been denied equality of opportunity to try out or play on the presumably superior male team. For example, a girl wanting to play on the boys' basketball team brought a legal challenge to the school's policy of only allowing boys to try out for the boys' team, despite the existence of a girls' basketball team. [FN151]

An explicit gender classification by a state actor will receive intermediate scrutiny under the Equal Protection Clause of the Fourteenth Amendment. [FN152] This means that, to survive a constitutional challenge, the classification must be substantially *1016 related to an important governmental interest. [FN153] When women are excluded from men's teams or when men and women are placed on separate teams, defenders of these explicit gender classifications have advanced successfully three important governmental interests: (1) promoting safety, [FN154] (2) remedying the effects of past discrimination against women in sport, [FN155] and (3) promoting equality of opportunity for women in sport. [FN156] While the existence of an important governmental interest has been relatively easy to show, finding a substantial relation between the classification and the interest has proved more difficult.

Gender classifications previously have been held as not substantially related to the important governmental interest of promoting safety for players. [FN157] Certainly many women would be injured if they played competitive sports against bigger, stronger men, but a gender classification is not an appropriate way to prevent injury. Some women athletes are bigger, stronger, and quicker than many male athletes, and they could play safely in mixed competition. Some men who try out for sports teams are small and weak and at serious risk of injury when playing against stronger opponents, yet these weak men are not prevented from trying out. [FN158] Therefore, the try out can be used to determine who is strong enough and skilled enough to play at any particular competitive level, and no additional gender classification is needed to make this determination. The purported concern for the safety of women as a group—that they need protection from the rigors of athletics—turns out to be a manifestation of dated and stereotypical views concerning the proper roles for women in society. This view has over time turned out to "put women, not on a pedestal, but in a *1017 cage." [FN159] Of course, such views are no longer considered a constitutionally appropriate basis for gender classifications. [FN160]

It is somewhat easier to identify a relationship between a gender classification in athletics and the important governmental purpose of redressing the effects of past discrimination. Here also, though, are serious limitations on the relationship between the two. A remedial justification for separate men's and women's programs may require specific evidence of past discrimination and a connection between that discrimination and its present effects. [FN161] Such a justification looks backward, seeks to identify victims and, in theory at least, only temporarily justifies separate programs until the present effects of past discrimination are eliminated. [FN162] Thus, remedying past discrimination is not a permanent justification for separate women's programs.

There is definitely a substantial relationship between gender classification and the government's interest in promoting equality of opportunity for women in sports. [FN163] Women should have the same opportunities to participate in sports that men have. Indeed, without an explicit gender classification that separates men's and women's sports teams, some believe that a majority of female participants would be relegated to inferior roles or eliminated from participation altogether. [FN164] However, gender classifications are sometimes necessary because of the *1018 inherent biological differences between the sexes. Donna Lopiano, the Executive Director of the Women's Sports Foundation, [FN165] summarized these differences:

"Sport is basically a strength, speed and reaction time activity involving propelling a mass through space or overcoming the resistance of a mass. Physiologically and anatomically you cannot compare highly skilled male and female athletes on these parameters because of the inherent biological differences between the sexes. Men are stronger, faster, have better reaction time and more muscle tissue per unit of body mass. That is why athletic teams and competition are sex separate. Women compete against women and men compete against men. Women excel in balance, accuracy and fine motor skill activities while men excel in strength, speed and gross motor skills." [FN166]
There are, of course, dangers to the argument that women should be separated from men in sports. First, the argument appears to engage in exactly the kind of sex-role stereotyping that the Equal Protection Clause forbids. [FN167] From the argument that women need their own teams, some might draw the conclusion that women are weak, unskilled, unaggressive, and unable to succeed in competition with men. It is quite clear that as a historical matter, such views have been used as justifications for excluding women from sports. [FN168] There is a very fine line between accurate generalizations about the physical abilities of men and women that can be used to promote equality of opportunity and stereotypical notions about women's abilities that hold women back. The heightened level of scrutiny for gender classifications is one way in which a reviewing court can assure itself that a gender classification is being used to promote equality of opportunity rather than to exclude women from participation. Separate women's sports teams is a particularly clear example of a gender classification that promotes equality of opportunity.

A second danger associated with the argument that women should be separated from men in sports is that the argument invokes a generalization about a class without reference to individual members of that class. Donna Lopiano's generalized comments about the attributes of men and women as members of a class highlight this concern. [FN169] They ignore the fact that for most sports there will always be some individual female athletes who are superior to most male athletes and who would be successful competing against men. Generalizations about muscle tissue, strength, speed, and reaction time may not be true when applied to a particular person. If the Equal Protection Clause were a protector and guarantor of personal, individual rights, this observation would be more relevant to constitutional analysis. However, courts have long viewed the Equal Protection Clause as a limitation on government classifications, not a guarantee to any particular individual. [FN170] Thus, as long as the gender classification satisfies the test of being substantially related to an important governmental interest, the adverse impact on one individual will not invalidate the classification. As U.S. Supreme Court Justice Stevens explained, "the general rule can(not) be said to be unconstitutional simply because it appears arbitrary in an individual case." [FN171]

As a factual matter, the constitutionality of separate sports teams for males and females rarely has been presented directly to courts. However, when the issue is presented directly, a court should conclude that keeping separate sports teams for men and women does not violate equal protection because having separate teams is substantially related to the important governmental interest of promoting athletic opportunities for women and thus promoting equality of opportunity.

When a girl wants to play on a boys' team but is required to stay with the girls' team, it might at first appear anomalous to argue that denying an opportunity to a particular girl promotes opportunities for girls and women in general. However, if the best female players are siphoned off to a men's team or if a substantial number of women of any talent level leave for the men's program, then it will be more difficult to promote the growth of the women's program which, typically, will be smaller and have fewer and inferior resources. [FN172] In such a case, it is clear that the Equal Protection Clause permits separate but equal programs.

b. Statutory Issues . The issue of separate but equal also has a statutory dimension. As interpreted by the CFR's Regulation and Policy Interpretation, Title IX not only permits separate male and female teams, but in many cases it requires them. Section 106.41(b) provides that a school may sponsor separate teams for males and females. [FN173] When a school sponsors a team for one sex and not the other, members of the excluded sex must be allowed to try out for the team if (1) athletic opportunities for members of that sex previously have been limited and (2) the sport is not a contact sport. [FN174] To this point, the rule has said nothing about a requirement of sponsoring separate teams for each sex.

However, section 106.41(b) should be read in conjunction with the equal opportunity requirement of section 106.41(c), which requires institutions to accommodate the interests and abilities of both sexes. [FN175] Thus, an institution would
be required to provide separate teams for men and women in situations where the provision of only one team would not "accommodate the interests and abilities of members of both sexes." [FN176] When the Regulation is scant on details, the Policy Interpretation fills in the gaps. For example, the Policy Interpretation provides that a school need not integrate its teams or give exactly the same choice of sports for men and women. [FN177] But effective accommodation of the interests and abilities of students to the extent necessary to provide equal opportunity in *1021 the selection of sports frequently will require separate sports teams for men and women. Specifically, for a contact sport, if an institution sponsors a team for men, it must sponsor one for women, if (1) opportunities for women historically have been limited and (2) there is "sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team." [FN178] For noncontact sports, a third condition is added before a separate team must be provided; that is, (3) "(m)embers of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or to compete actively on such a team if selected." [FN179]

Thus, the application of this Policy to several collegiate sports is as follows. If a school sponsors a football team, a contact sport for men, it must also sponsor a football team for women if (1) athletic opportunities for women historically have been limited (which is surely the case) and (2) there is sufficient interest among women to sustain a viable team in intercollegiate competition (which is very unlikely at the present time). Thus, the rule likely will not require a women's football team. On the other hand, when considering basketball, which is also considered a contact sport, the rule would require a separate women's team because opportunities for women have been limited and there probably is sufficient interest to sustain a viable team. If the sport were track, a noncontact sport, a separate team for women would be required if in addition to (1) and (2) above, women did not possess sufficient skill to compete actively on an integrated team. Because at the intercollegiate level women could not compete successfully against men in track, [FN180] the rule would require a separate women's track team.

The Policy Interpretation thus makes it clear that Title IX requires separate men's and women's teams in many, but not all, situations. However, one might also ask the following question: Why does a school have to provide a separate team for women but not a separate team for short students or uncoordinated students? The legal answer to this question is clear: There is a statute that forbids sex discrimination, but no corresponding statute forbidding height or coordination *1022 discrimination. Why then has the statute selected sex as the criterion, rather than height, coordination, or any other classification? Certainly short or uncoordinated students would benefit from a rule requiring separate teams for themselves.

This problem arises because intercollegiate sports are inherently elitist and exclusionary. A student has to be athletic and talented to play for the varsity team. Uncoordinated students do not play for the varsity team because they are not good enough. So why under Title IX is it acceptable for sports to be elitist and exclusionary in general, but not elitist and exclusionary in relation to women? The answer to this question involves a judgment about how widespread participation in athletics should be and a social determination of the proper criteria by which to classify people athletically. In an ideal world, every person would have the opportunity to compete in athletics with his or her peers, with the peer group defined in some appropriate way. However, in our current society, competitive athletics is not available to everyone. [FN181] Title IX reinforces our collective judgment that this is appropriate.

2. Equal Funding.

a. Funding Disparities as a Violation of Title IX. Money talks, and on the issue of funding, Title IX barely whispers. From the beginning, women's sports advocates argued for equal dollars for men's and women's sports as the fairest and simplest way to implement Title IX. [FN182] Yet male athletics viewed equal spending on women's sports as a direct threat to their existing male programs. [FN183] It should not be surprising that *1023 equal funding was not adopted

as a basic principal of Title IX. [FN184]

Equal funding is elegant in its simplicity. It requires minimal continuing government involvement or regulation [FN185] and, once available funds are divided equally, it maximizes the liberty of athletic departments to make their own decisions about the most appropriate way to spend available funds to serve student athletes. [FN186] If the men's program wished to accommodate the interests of football players by spending a king's ransom on that sport, then there would be correspondingly less money available for other parts of the men's program. Under an equal funding scheme, the women's program would be unaffected by such a decision. Those in charge of the women's program would still be free to decide how best to spend their equal resources to advance the interests of women athletes.

Equal funding, however, is so far removed from the present realities of college athletics that it has never been considered seriously. Indeed, the statute makes no reference to funding. [FN187] The Regulation does not require equal funding for men's and women's programs, but does provide that

 unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams . . . will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex. [FN188]

In addition, the Regulation requires schools to award scholarship money in proportion to the percentage of athletes of each gender. [FN189]

When HEW initially proposed its Policy Interpretation in 1978, the Interpretation would have required equal per capita expenditures for male and female athletes. [FN190] As the proposal explained, "(e)quality of benefits and opportunities for men and women in many aspects of a recipient's intercollegiate athletic program can best be measured in financial terms." [FN191] This proposal was weak, for its emphasis on per capita equality conveniently overlooked the fact that women were disproportionately excluded from athletic programs [FN192] and that football teams often had more than 100 players. [FN193] Even with these limitations, the proposal would have made funding a measure of gender equality and would have required additional spending for women's sports.

Joseph Califano, the Secretary of HEW at the time, has recounted how, after the proposed policy was published, congressmen representing areas with strong football programs lobbied intensely against it. [FN194] Califano remembers being told, "...You can lose an election on the sports pages that you'll never lose on the front pages. And that's what you'll do with this interpretation of Title IX."' [FN195] HEW withdrew the proposed interpretation requiring equal per capita expenditures with the explanation that "purely financial measures such as the per capita test do not in themselves offer conclusive documentation of discrimination." [FN196] As a result, Califano's boss Jimmy Carter was lucky enough not to lose the election on the sports pages. [FN197]

Since that time, funding issues have played an intermittent role in Title IX cases and settlements, although never achieving the central part for which advocates initially argued. Recent court decisions have confirmed that financial comparisons play at least some part in Title IX analysis. In Favia v. Indiana *1025 University of Pennsylvania, [FN198] the Third Circuit Court of Appeals affirmed a district court decision finding the university in violation of Title IX. [FN199] The court based at least part of its decision on financial inequities. Citing the HEW regulation, the court conceded that unequal expenditures do not necessarily establish noncompliance, [FN200] yet it concluded that "funding is at least an element in deciding whether the equality of opportunity Title IX requires is present." [FN201] Moreover, the court added that "many of the factors used to determine compliance depend on criteria directly related to funding levels, e.g., provision of equipment, travel and per diem allowances, compensation of coaches and provision of facilities." [FN202] Thus, replacing a gymnastics team costing $150,000 per year with a women's soccer team costing $50,000 per year, as the university had done, would increase the funding gap between men's and women's sports, "moving... (the
Likewise, in Cohen v. Brown University, [FN204] the district court noted at a preliminary stage of the proceeding that, under the Policy Interpretation, compliance relates in part to "(w)hether disparities of a substantial and unjustified nature in the benefits, treatment, services, or opportunities afforded male and female athletes exist." [FN205] This meant that "an examination of funding (was) appropriate under § 106.41(c) (of the Regulation)." [FN206] The court went on to explain that "funds" included both the revenues that the university allocated to the athletic department and monies raised by the Brown University Sports Foundation, a booster club that provided funds to specific male sports. [FN207] The record before the court was inadequate to identify how much was spent for men's and women's sports, but the court was able to determine that men's sports accounted for about 71 percent of operating expenses, 78 percent of recruiting expenses, and 72 percent of coaches' salaries. [FN208] The court then found that it was premature to determine whether the allocation of funds had "created legally significant inequities with respect to benefits and services, or where such allocations (were) infringing upon the equal opportunities of one sex." [FN209] However, the court indicated that it would give serious consideration to those issues when the case proceeded on the merits. [FN210]

On appeal, the First Circuit Court of Appeals affirmed the district court's judgment. [FN211] The appellate court did not specifically review the district court's comments on funding, but it did comment critically on Brown's budget cuts: although Brown eliminated an equivalent number of athletic opportunities for men and women, the cuts eliminated four times more money from women's programs than from men's. [FN212] As the court explained, citing playwright Moss Hart, ".where there is no money, there is no change of any kind." [FN213]

In one additional case, a federal district court based its finding of a Title IX violation largely on a finding of funding disparities between the men's and women's programs. In Cook v. Colgate University, [FN214] the men's hockey program had operating expenses of $238,561 [FN215] and coach-supported financial aid for male hockey players totaling $327,616. [FN216] The women's hockey program, which did not have varsity status, received only $4,600 in financial support. [FN217] This funding disparity created additional disparities between the men's and women's teams in terms of equipment, locker room facilities, travel, and coaching. [FN218] The court found that Colgate had violated Title IX "by not providing equal athletic opportunities to its women's ice hockey players." [FN219]

Outside the courts, the recent settlement of a lawsuit by the California chapter of the National Organization for Women against the California State University System included a commitment by the university to raise the percentage of funding for women's sports to within ten percent of the percentage of women enrolled. [FN220] Thus, if fifty percent of the students are female, then forty percent of athletic expenditures must be spent on women's athletics. A ten percent variance is hardly "equal," but it does represent a substantial advance over current funding levels. [FN221] While settlement agreements do not necessarily track the exact requirements of the statute, they are a good indication of how the parties perceive their bargaining positions. [FN222] Thus, although Title IX does not require equal funding expressly, provisions for more equal funding in settlements demonstrate that participants in settlement negotiations are aware of the significance of equal funding. In settling a case that women plaintiffs will almost certainly win in court, a college may be willing to include a funding clause, if only at forty percent, in order to avoid the expense of litigating a losing case and then having a federal judge manage its athletic program. [FN223]

If courts ever begin to give substantial weight to the issue of equality of funding, they will find an ocean of inequality. The National Collegiate Athletic Association has gathered and published substantial information concerning the revenues and expenses of intercollegiate athletic programs. [FN224] For 1993, the most recent year for which this information is available, the NCAA reported that the average level of expenses attributable to male athletic programs in Division I-A schools was $6,984,000; for women's programs, the average expense was $1,806,000. [FN225] Thus, expenditures for men's sports programs in Division I-A are almost four times the expenditures for women's programs. [FN226] The
average expense of running a Division I-A football program was $4,031,000; [FN227] this figure accounts for a substantial portion of the disparity between men's and women's programs.

For other divisions within the NCAA, the disparity in funding men's and women's athletic programs is substantial, but not as great as in Division I-A. For Division I-AA, the 1993 average support for men's programs was $2,147,000; for women's, $797,000. [FN228] Thus, in Division I-AA, expenditures for men's sports programs are close to three times the expenditures for women's programs. [FN229] In this division, once again the expenses of running a football program--here $990,000--accounted for a large portion of the disparity. [FN230] The NCAA's other divisions also spend disproportionately for men's sports, but to a lesser extent. [FN231]

b. The Appropriate Treatment of Revenue-Producing Sports. The enormous funding disparities between men's and women's programs do not, of course, raise even a blush on the faces of college football's defenders, who are ready with an elaborate defense. [FN232] College football programs, they say, operate at a profit. [FN233] These defenders add that the excess revenue generated by football teams funds women's athletic programs. [FN234] Any attempt to cut back on football in the name of gender equity would thus be positively harmful to women's sports, like killing the goose that lays the golden eggs [FN235]--or so the story goes.

The story, however, is substantially more myth than fact. First, most college football teams lose money rather than make it. [FN236] Second, those that make money do not use the profits to fund women's sports in any substantial way. [FN237] Third, even at those few schools that do use football profits to provide substantial support to women's athletics, Title IX does not exempt the football program from the law. [FN238] Finally, this interpretation of Title IX that provides no exemption for revenue-producing sports is correct. [FN239]

As to the facts, football operates at a profit in only a small percentage of colleges that have football teams. For 1993, the NCAA evaluated the profitability of football programs within the different NCAA divisions--I-A, I-AA, II, and III. [FN240] Outside of Division I-A--the division with all of the true big-time football powers--profits from football are negligible. [FN241] Of the 407 schools in these other three divisions responding to the survey, only 18, or 4.5 percent, operated football programs whose revenues exceeded expenses. [FN242] In those eighteen programs, the excess of revenue over expense was slight, nowhere near enough to fund other programs in any substantial way. [FN243] On the other hand, for the great majority of programs where football expenses exceeded revenues, the excess was substantial: an average loss of $664,000 in Division I-AA, [FN244] $289,000 in Division II, [FN245] and $97,000 in Division III. [FN246] For most colleges, it seems, football is a very costly enterprise that has to be subsidized heavily simply to break even. [FN247] For these schools, the assertion that football profits fund women's programs is pure myth.

In Division I-A, however, there may be at least some basis for that claim. Of the 106 Division I-A schools, 85 responded to the most recent NCAA survey of revenues and expenses. [FN248] Of these 85 schools, 57 (67 percent) operated their football programs at a profit, and the average profit was $3,883,000. [FN249] The other 28 Division I-A schools operated their football programs at an average loss of $1,020,000. [FN250] Of the 57 schools reporting a profit, 11 reported a profit in excess of $6,750,000. [FN251] It is clear that for a substantial number of Division I-A schools, football is a very profitable enterprise that could fund women's sports programs. However, a closer look at the statistics reveals that only a small share of the profit goes to women's athletics--a share that is totally disproportionate to the expenses of operating a football program.

The statistical information demonstrates a positive correlation between football profits and expenditures on women's sports, but that correlation is not nearly as great as football supporters would have the public believe. A comparison between the 57 Division I-A football programs that made an average profit of $3,883,000 with the 28 Division I-A football programs that had an average loss of $1,020,000 makes this point: the profitable schools spent an average of...
Football profits arguably allowed 57 Division I-A schools to spend about $700,000 more for women's sports than, on average, they would have spent without any football profits. But $700,000 is only about 18.5 percent of the average football profits for those schools. The rest goes elsewhere, quite possibly to other athletic programs for men.

Seven hundred thousand dollars is a lot of money, particularly for women's sports programs that are so poorly funded; but the arrangement just described is a position that no rational person, beginning from a position of equality, would ever freely enter. Title IX requires a position of equality. Women are asked to make the following bargain: agree to leave football out of Title IX calculations. That means the women athletes would have to ignore the 117 participation opportunities and the annual expenditures per football team that average $4 million in Division I-A; the total of more than 12,000 Division I-A participation opportunities for football players; and the total annual Division I-A football expenditures that exceed $340,000,000. In return, women would receive no off-setting participation opportunities and a mere $700,000 in additional funding at each of 57 schools. That adds up to about $42,000,000. If football coaches want to exclude football from Title IX because football helps women, they will have to offer a far better deal than that. The bottom line is that very few schools use football profits to support women's sports at all, and those that provide support do so in an amount that is minuscule in comparison to the expense and profits of the football program.

Even for the few schools that do use football profits to support women's athletics in a substantial way, Title IX provides no exemption from its equal opportunity requirement. This means, for example, that all 117 slots on a Division I-A football team must be counted in determining participation opportunities for men in comparison with the participation opportunities available to women.

In 1978, the General Counsel of HEW explained why there is no exemption for revenue-producing sports under Title IX. First, as a matter of statutory construction, while Congress had exempted certain organizations specifically (such as the Boy Scouts and the Girl Scouts) from the mandate of Title IX, it provided no similar exemption for revenue-producing sports. Thus, the initial language of the statute would most plausibly be read as providing no such exemption.

That plausible interpretation was strengthened by several post-enactment actions by Congress. In 1974, Senator John Tower proposed and the Senate adopted an amendment that specifically would have exempted revenue-producing sports from Title IX. That amendment never became law. A Conference Committee deleted the Tower amendment and in its place drafted a provision directing the Secretary of HEW to adopt regulations implementing Title IX, "which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of the particular sports." This amendment became law. HEW's General Counsel thus concluded that Congress, by rejecting the exemption of revenue-producing athletics and by adopting in the alternative a direction to HEW to draft regulations on athletics, had given clear indication that revenue-producing programs were to be within the scope of Title IX. The subsequent HEW Policy Interpretation accepted this conclusion.

But is it right? To a certain extent, the refusal to exempt revenue-producing sports from the reach of Title IX is inconsistent with the customs of the marketplace. If 100,000 fans want to buy tickets to see Notre Dame play Michigan on Saturday afternoons and if ABC wants to pay Notre Dame $32,000,000 to televised its football games, then why shouldn't the football programs at those schools reap the benefits of that success? At least part of the answer to this question must be that discrimination should not become acceptable simply because it is profitable. The analogous provisions of Title VII that prohibit sex discrimination in employment, for example, do not exempt gender discrimination that is profitable because of customer preferences.
Consider further the claim that ardent advocates of Title IX are killing the goose that lays the golden eggs. [FN271] Even if only a few schools are using football profits to provide substantial support for women's athletics, shouldn't these few schools be treated differently in order to benefit their women's programs? This argument is a version of John Rawls's difference principle—that departures from the principle of equality can be justified sometimes if an unequal distribution of resources is to the advantage of the least favored. [FN272] According to this argument, the football program should be allocated a larger, unequal share of athletic expenditures because the final result will be that women's programs will receive more money than they otherwise would have.

The first problem with this argument is that, as used by football proponents, it justifies allocating an extraordinarily large amount of resources to football in order to benefit women's sports programs in an extraordinarily small amount. In Rawls's view, these one-sided results from the application of the difference principle would not occur if the principle of "fair equality of opportunity" were given priority over the difference principle. [FN273] That is, even though a certain segment of society benefits from a particular application of the difference principle, there should be fair equality of opportunity for everyone to advance to membership in that favored group. Over time, the size of the differences would even out. [FN274] In sports, if over time women were to be given fair equality of opportunity in athletics, which is precisely what Title IX requires, then women eventually might have an equal chance to be in the group that receives a disproportionate amount of funds. If there were fair equality of opportunity, application of the difference principle might eventually produce a substantial advantage for women's athletics. In the present, however, it is more important to stress fair equality of opportunity first.

Furthermore, applying the difference principle to real world athletic programs would cause substantial practical difficulties. Consider the difficulty in defining what a revenue-producing athletic program is. [FN275] If the term meant any program that produced any revenue, then a substantial percentage of all college sports would be exempt from Title IX--a result clearly inconsistent with the statutory mandate. If the argument for exempting revenue-producing sports is that they benefit the university and thus the women's program, then revenue-producing must mean profitable. But if it means profitable, that is, revenues are to exceed expenses, then a series of new problems arise. Is profitability to be determined for the sport as a whole or for each team individually? Is it to be calculated annually, with the Title IX exemption coming and going as ticket sales ebb and flow, or should profitability be judged on a longer-term basis? How much profit would be needed to make a program exempt? And how much of that profit would have to be allocated directly to women's athletics?

No one is currently considering any of these questions. Any exemption that raised and tried to answer them would be cumbersome and complicated. No one is arguing for such a system today: only a small number of schools could take advantage of it. [FN276] The argument that revenue-producing sports should be exempt from Title IX is implausible, unfair, and unworkable.

There is a more limited, initially more plausible, argument about revenues and Title IX--that the university should fund men's and women's sports equally but that the funding levels should be measured by their net cost to the university. [FN277] If the men's program cost $2,000,000 and produced revenues of $900,000, then the net cost to the university would be only $1,100,000. Women's sports would need to be funded only at that $1,100,000 level. The argument in favor of such a plan is that each program is operated independently, with equal funding from the university, and each program is free to generate additional revenue to support itself. [FN278]

Although the plan has a certain initial attractiveness, it is seriously flawed. Like the earlier proposals on exempting revenue-producing programs entirely, it has serious practical problems. Current statistics do not reveal the net cost of operating the separate men's and women's programs. [FN279] For example, the NCAA report of revenues and expenses makes no attempt to allocate to the men's and women's programs the substantial indirect and overhead costs of operating...
the athletic department. [FN280] The profit figures for men's and women's programs also do not include debt service or capital expenditures. [FN281] Any calculation of net cost would have to take these factors into account.

But there are more basic problems with the net cost proposal. First, it ignores the basic educational function of sports. *1036 The role of athletics in the university is to educate students, not make money. [FN282] The university ordinarily is not divided into profit centers that have to pay for themselves in order to survive. [FN283] If the university were operated on the profit-center model, then all classes would be canceled because classes do not generate any money independent of tuition. Male and female students, who all pay the same tuition, should have the same opportunities to study economics and to play sports. The net cost proposal would give male students more education for their tuition dollar.

Second, the effect of implementing a net cost proposal would be to perpetuate the current effects of past exclusionary practices. In large measure, men's college athletics are successful and produce revenue because schools have promoted, endorsed, and marketed them for more than 100 years. [FN284] If college football were being introduced today for the first time, it might have little potential for revenue production in the near future. Because until recently colleges have not promoted women's athletics, they cannot fairly expect women's sports to have the same income potential as the heavily promoted men's program. [FN285] It has been recently demonstrated that a successful, well-promoted women's athletic program can generate substantial revenue, [FN286] but presently, the net cost proposal must be rejected because it rewards those who were preferred in the past and punishes those who were excluded.

Neither a complete exemption of revenue-producing sports nor a net cost calculation is fair or workable. The only administrable rule is the simple, straightforward, existing rule that there is no exemption for revenue-producing sports.

3. Equality as Proportional Participation. Notwithstanding the apparent fairness of the equal-funding standard discussed in the preceding section, Title IX has never demanded so much *1037 from the have in their relations with the have-nots. Instead of equal funding, the regulatory interpretation of Title IX requires only that a college satisfy one of the three benchmarks of proportionality, expansion, or accommodation of interests and abilities. [FN287] The problem with these benchmarks is that, even if fully enforced, they still leave men with the lion's share of resources.

Men would retain a disproportionate share of resources because Title IX adopts a conception of equality that turns out to be what Ronald Dworkin has called equality of welfare. [FN288] Under this conception, if I have developed expensive tastes, for caviar for example, then I should receive a larger share of resources so that I will enjoy a level of satisfaction equal to that of others whose tastes are less expensive. [FN289] Dworkin suggests that attempts to deal with this problem of expensive tastes make the theory of equality of welfare "idle or self-defeating." [FN290] Yet Title IX has effectively adopted equality of welfare as the norm. Even when the expenses of a football program exceed the entire budget for the women's sports program, Title IX is satisfied if there are equivalent participation opportunities. [FN291] Seventy women on the crew team, with a budget of $100,000, would be considered equivalent to seventy men on a football team, with expenses of $2,000,000.

This subpart examines the benchmark that is most clearly welfarist, the benchmark of proportionality. Specifically, the Policy Interpretation provides that one way of complying with the statute is to operate an athletic program that affords participation opportunities for male and female students in intercollegiate sports "in numbers substantially proportionate to their respective enrollments." [FN292] If fifty percent of the undergraduate student body is female, then the percentage of student athletes who are female should be close to fifty percent.

Defenders of the status quo in college sports have strongly *1038 opposed the proportionality benchmark. The strongest argument against proportionality is that it is inconsistent with the language and purpose of the statute it purports to
implement. [FN293] While S 1681(a) of the statute prohibits universities from discriminating on the basis of sex, S 1681(b) states that S 1681(a) is not to 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. [FN294]

Opponents of proportionality argue that the proportionality standard is precisely the kind of "preference" for women that S 1681(b) says is not required. [FN295]

This argument fails for two reasons. First, in the literal language of the statute, the imbalance that may not be used to require a preference is an imbalance between the number of persons participating in an activity and the number of persons of that sex "in any community, State, section, or other area." [FN296] This means that it is not proper to compare participation figures with population figures from a particular geographic area. The statutory language does not prohibit a comparison between athletic participants in an institution and the student population within the same institution. Moreover, the next clause of the statute states that the previous clause does not forbid statistical evidence of an imbalance. [FN297] Under the terms *1039 of the statute, therefore, a statistical imbalance may be relevant to compliance with the statute.

Second, proportionality as a benchmark is only one of the ways by which an institution will be considered to be in compliance with the statute. It is a "safe harbor" that creates a presumption of compliance with the statute for "a university which does not wish to engage in extensive compliance analysis." [FN298] A failure to achieve proportionality is not a violation of the statute. [FN299] An institution with a disproportionate number of male athletes will still be in compliance with Title IX if it has fully accommodated the interests and abilities of female students or if it is in a process of continuing program expansion for women. [FN300] The three benchmarks are not cumulative requirements, but alternative avenues for compliance. [FN301] Thus, the proportionality benchmark does not transform Title IX into a "quota" statute. [FN302]

Contrary to the implications of its opponents, the proportionality benchmark is not extreme or demanding. Proportionality is a watered-down, very weak version of equality. It pales as a measure of equality in comparison to equality of resources, which would measure not proportionate participation rates but rather funding for men's and women's sports in proportion to their representation in the student body. Proportionate funding, unlike proportionate participation rates, would require men's programs to give up a substantial part of their current riches. Opponents of the proportionality benchmark should be grateful that the Policy Interpretation requires so little.

Five federal courts of appeal have endorsed the proportionality standard since April 1993. [FN303] Each of these courts has *1040 correctly adopted a policy of deference to the agency's interpretation of its own regulation. Perhaps the proportionality benchmark is not a necessary interpretation of the statutory language, but it is the interpretation adopted by the agency that is most experienced in these areas and to which regulatory authority has been delegated. [FN304] Thus, courts appropriately defer to the considered judgment of the agency. [FN305]

The mathematics of proportionality is not yet clearly defined, but some outer limits have been established. The Title IX Athletics Investigator's Manual for the Office of Civil Rights instructs that "(t)here is no set ratio that constitutes .substantially proportionate' or that, when not met, results in a disparity or a violation." [FN306] The Court of Appeals for the Third Circuit in Roberts v. Colorado State Board of Agriculture nevertheless noted that "the Manual suggests that substantial proportionality entails a fairly close relationship between athletic participation and undergraduate enrollment." [FN307] The Roberts court then affirmed the district court conclusion that Colorado State, where women made up 48.2
percent of the undergraduate population but only 37.7 percent of the athletic population. [FN308] failed to meet the proportionality benchmark. [FN309] A 10.5 percent disparity is not substantially proportionate. [FN310] In Cohen v. Brown University, the Court of Appeals for the First Circuit approved the lower court's ruling that an 11.6 percent disparity (48.2 percent of undergraduates were female while 36.6 percent of the varsity athletes were female) [FN311] was not *1041 substantially proportionate. [FN312] Similarly, the Court of Appeals for the Third Circuit in Favio v. Indiana University of Pennsylvania found that a nineteen percent disparity was not substantially proportionate. [FN313] 

There does not appear to be any reported case in which a university has satisfied the proportionality benchmark. Thus, although we can say with some confidence that a 10.5 percent disparity is too high to be proportional, [FN314] it is unclear how low the disparity would have to be to satisfy the proportionality standard. Evidence exists, however, to support the view that anything other than trivial disparities will prevent a program from being substantially proportionate. First, the district court in Roberts, when considering what steps Colorado State might have taken to bring itself into compliance, suggested changes that would have resulted in "an acceptable 1.7% gap between female athletic participation and female undergraduate enrollment." [FN315] Second, the Department of Education, entrusted with interpreting Title IX, in its one specific illustration of proportionality, has chosen an example in which there is no disparity at all (48 percent of all athletes are women in a student body that is 48 percent female). [FN316] 

Two recent settlements are also illuminating on the mathematics of proportionality. In 1993, the California State University System agreed that by the 1998-99 academic year, each campus with an NCAA athletic program will raise the level of female athletic participation to within five percent of female undergraduate enrollment. [FN317] Also in 1993, the University of Texas agreed to raise women's athletic participation to within three percent of enrollment by 1996. [FN318] These settlements do not have the force of court judgments, but like the funding *1042 settlements discussed earlier, they indicate how the parties in an adversarial setting predict the outcome if the case went to trial. [FN319] It is reasonable to conclude then, based on all the evidence, that any disproportion exceeding five percent does not satisfy the proportionality benchmark.

By this measure, very few athletic programs are able to comply. The NCAA's Gender-Equity Study revealed the following institutional averages: for the 253 Division-I schools responding to the survey, the institutional average for undergraduate enrollment was 50.3 percent female while the average percentage of female athletic participants was 30.9 percent. [FN320] This disparity of 19.4 percent is greatly in excess of any definition of proportionality. The Chronicle of Higher Education conducted a more recent study updating this information for the 1993-94 academic year. [FN321] For the 257 schools participating in the Chronicle survey, the disparity between men's and women's programs had improved only slightly. Female enrollment was 50.8 percent and female athletic participation was 33.6 percent, [FN322] for a disparity of 17.2 percent, still greatly in excess of that permitted under any definition of proportionality.

In 1992, the Big Ten Conference announced that it would require all of its member schools to increase their levels of women's athletic participation to forty percent of participation opportunities within five years. [FN323] This is about as admirable as a tax cheat announcing that within five years he will increase his level of federal income tax payments until he reaches the point where he is paying 80 percent of what he legally owes. That the Big Ten's meek goals are, first, in fact an advance for women's athletics, and second, considered something about which to brag demonstrates the size of the gap between current conditions and what proportionality requires. [FN324] 

The Chronicle survey also provided information about *1043 individual schools. Using the 5 percent standard, only 16 of the 257 Division-I schools responding to the survey had achieved proportionality. [FN325] In other words, 241 of 257 Division-I schools do not satisfy the proportionality standards and thus are in violation of Title IX unless they can satisfy the accommodation or expansion benchmarks. The sixteen schools that do come within five percent of the proportionality standard are atypical, for one of two reasons. First, at six of these schools the student body is
disproportionately male, as in the military academies or engineering schools. [FN326] In these schools, a small number
of women participating in sports is proportional to a very small number of women in the student body. Second, ten of
these institutions do not operate a Division I-A football program with the attendant hordes such a program requires.
[FN327] Currently then, the only Division-I schools that satisfy the proportionality benchmark are those with a
disproportionately male enrollment or those without a Division I-A football team. The Chronicle survey indicates only
one exception to this claim—that is, a university that is not predominantly male, that operates a Division I-A football
team, yet meets the proportionality safe harbor. [FN328] This case will be examined in Part IV, where it will be revealed
to be illusory.

4. Equality as Expansion in the Direction of Equality. Another way a school can comply with Title IX is to establish
"a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and
abilities of the members of that (underrepresented) sex." [FN329] This benchmark perhaps made sense when it was
adopted in 1979. [FN330] After all, athletic departments should not have been required to change their programs
drastically without adequate time. However, this benchmark was always a temporary device, effectively functioning as
a stay for a college that was out of compliance with Title IX but moving in the direction of compliance. [FN331] It makes
little sense in 1995, twenty-three years after the statute was enacted. And, after a flurry of activity in the 1970s and early
1980s, [FN332] most of the continuing "program expansion" has been in response to lawsuits. [FN333] In none of the
reported cases has a university won an expansion argument.

The burden of proving a history of and continuing practice of program expansion is on the school, not the plaintiff.
[FN334] The school must show that it has added teams and that the total number of female athletic participants has
increased. [FN335] Several schools argued for a looser, weaker interpretation of the term "expansion," but courts have
uniformly rejected their arguments. For example, Colorado State University argued in 1993 that the fact that it had added
women's sports teams in the early 1970s was sufficient evidence of continuing expansion. [FN336] The court rejected
that argument and examined the university practices only since 1983, when the Office of Civil Rights had given
the school notice of noncompliance. [FN337] Even this ten year period seems excessive when a court is supposed to
be looking for evidence of continuing expansion. Nevertheless, for Colorado State, even ten years was insufficient. After
1983, the school eliminated rather than added women's teams; therefore, the school's expansion argument failed. [FN338]
Colorado State also argued that expansion should be interpreted as increasing the percentage of participation
opportunities for women by reducing the number of male athletes. [FN339] The court rejected that argument, looking
instead at the increase or decrease in the actual number of participation opportunities for women and the number of
varsity teams added or subtracted. [FN340]

Brown University argued that the term "expansion" should refer not only to numerical participation, but instead should
be interpreted more broadly to include other evidence of growth and improvement in the women's program. [FN341]
Brown asked the court to consider as evidence of program expansion improved coaching, additional coaches, admissions
preferences for female athletes, and an increased level of competition. [FN342] The court rejected this argument, once
again insisting that the program expansion accommodation benchmark focuses on the number of teams and athletes
participating in intercollegiate competition, rather than on alleged improvements in the quality of the existing program.
[FN343] Improvements in an existing program are important and are relevant to Title IX in terms of comparing coaching
and levels of competition to the men's program. [FN344] However, improvements are not relevant to proof of program
expansion. [FN345]

Indiana University of Pennsylvania argued that its plan to add a women's soccer team at some point in the future was
evidence of program expansion. [FN346] The court rejected that argument, observing that the school could not "replace
programs with promises." [FN347] Too many plans for compliance with Title IX at some distant date in the future
have never been realized. The expansion benchmark requires actual evidence of increased opportunities, not promises

for the future. [FN348]

In sum, to satisfy the expansion benchmark, a school must show an increase in the actual numbers of female teams and female participants in the recent past. Neither ancient history, nor percentage calculations, nor program improvements, nor promises about the future constitute a continuing program of expansion.

5. Equality as Fully Accommodating Interests and Abilities. Because few schools can satisfy the proportionality or expansion benchmarks, the focus of Title IX litigation frequently will be on the accommodation benchmark. Even if a school has a disproportionate number of male athletes and is not creating new programs for women, it is still in compliance with Title IX if "the interests and abilities of that (underrepresented) sex have been fully and effectively accommodated by the present program." [FN349] If women are not really as interested as men in sports, then Title IX does not require schools to manufacture interest or create teams when there is no interest. Football coaches consider this "the loophole through which they may escape proportionality," [FN350] but they may be seriously mistaken.

In the courts, schools have had difficulty meeting the accommodation benchmark. As the Court of Appeals for the First Circuit explained in Cohen, the accommodation benchmark sets a high standard, "not merely some accommodation, but full and effective accommodation." [FN351] But the standard is not absolute. The mere fact that some female students are interested in a sport does not require a university to fund a team on the spot. There must be "sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team." [FN352]

According to the Cohen court, the accommodation benchmark is not comparative. [FN353] Even if student interests in sport *1047 are disproportionate by gender, in that a higher percentage of male students are interested in sports than female students, that does not mean that the interests and abilities of the underrepresented sex are to be accommodated proportionately. Such an interpretation "reads the .full' out of the du ty to accommodate .fully and effectively.'" [FN354] The benchmark draws its authority from the language of the statute in that its purpose is "to determine whether a student has been .excluded from participation in, (or) denied the benefits of' an athletic program .on the basis of sex." [FN355]

In identifying the interests and abilities that are to be accommodated fully, an institution may consider the expressed interests of female students; however, the institution must also "take into account the nationally increasing levels of women's interests and abilities." [FN356] It is not enough to consider only the expressed interests of current students. Such a practice would perpetuate the earlier policies of excluding women athletes by not providing programs for them. [FN357] Students do not arrive on campus by random selection. They are recruited. If a school spends $139,000 annually to recruit male athletes but less than $29,000 to recruit female athletes, [FN358] then the student body will probably have more males than females interested in sports. If a school has a substantial athletic program already in existence for men, then male high school athletes are more likely to apply to that school. If a school has a second-rate athletic program for women, then first-rate female high school athletes will not matriculate there. Thus, the determination of interests and abilities requires a college to look beyond its current student body, recognizing the nationally increasing levels of interest in women sports, at least to include feeder schools, and regional and community sports programs. [FN359]

With regard to the expressed interest of current students, a *1048 university will find it virtually impossible to satisfy the accommodation benchmark when it attempts to drop an existing women's team. Most of the Title IX cases concerning intercollegiate athletics that have reached the courts of appeals have involved this very fact pattern. [FN360] In each case, the college is unable to prevail on the accommodation benchmark when the plaintiffs in the courtroom are student athletes, members of the underrepresented sex who have been competing in intercollegiate sports, and whose interests and abilities currently are not accommodated. Where the plaintiffs are members of a club team seeking advancement to the intercollegiate level, [FN361] they must show a reasonable expectation of intercollegiate competition, a showing that
may be difficult to make because their team has not yet competed at that level. [FN362] If the argument is for a varsity women's team in any of the major women's sports, however, women athletes will probably prevail. [FN363]

The legal arguments over full accommodation of interests and abilities appear to be based on very different views of the actual levels of interest of men and women in sports. In the view of many male coaches, women do not have the same level of interest that men have, and thus the proportionality standard is an artificial attempt at social engineering. [FN364] For these coaches, the interests and abilities of women are satisfied fully by a program that is a fraction the size of the men's program. To support the view that men are more interested in sports than women, coaches marshal the following evidence. At the high school level, boys make up 63.1 percent of those playing interscholastic sports while girls constitute only 36.9 percent. [FN365] At the college level, many more men than women play intercollegiate sports as "walk-ons"—nonscholarship athletes who play varsity sports. [FN366] If women were as interested in sports as are men, the argument goes, they would play sports in similar numbers in high school and would try out as walk-ons for varsity teams in similar numbers in college.

There is, of course, a very direct response to these arguments and to the view that women have a lesser interest in sports than men: interest follows opportunity. Whenever well-organized, well-funded, and well-promoted athletic opportunities have been made available to women, women's interest in athletics has flourished. Consider the follow statistics. In 1971, before Title IX became law, 294,000 girls in the United States participated in high school athletics; by 1978, the number had increased to more than 2 million. [FN367] We could surmise that during that seven year period the essential nature and character of American girls had changed dramatically, so that high school girls who had been totally uninterested in sports in 1971 had become interested by 1978. More logically, we can conclude that as sports programs for girls increased dramatically, the level of interest also grew dramatically. It is hard to have a high level of interest in playing in a sports program that does not exist. In Iowa, where girls' high school basketball is supported and promoted with the same enthusiasm and vigor as is the boys' program, almost half of the high school athletes are female. [FN368]

The argument that male walk-ons evidence greater levels of interest is also flawed. There are probably more male walk-ons because (1) there are more male teams and male participation opportunities to walk on, (2) male walk-ons are recruited while women are not, (3) males who walk on are more likely to have access to experienced coaching, (4) existing sports programs are male-oriented, typically dominated by football, a sport that women do not play, and (5) in the current sports world, players on men's teams are given greater rewards in terms of fan support, publicity, and alumni connections. [FN369] An apparent lack of interest flows from the absence of opportunity.

The numbers tell the story on interest and ability: there are more than 1.9 million girls participating in sports at the high school level, but only about 96,000 women athletes participating in intercollegiate sports. [FN370] These figures demonstrate a pool of about 1.8 million high school girls whose choices have already indicated an interest in sports but for whom colleges have not provided opportunity. If colleges had a strong institutional commitment to creating a strong women's athletic program, if female high school athletes were recruited as actively as males, if female athletes were offered as many athletic scholarships as are males, if female athletes were given as many admissions preferences as males, [FN371] and if, on their arrival at college, women had as many participation opportunities as males, then in a very short time, the interests and abilities of women in relation to sports participation would be at similar levels to those of men. "If you build it, they will come." [FN372] The interests and abilities benchmark ought not to be used as a deflector behind which to hide the football team.

6. Equality as Assimilation. One of the classic definitions of equality is a formal one—that likes should be treated alike. [FN373] The problem with this formal view of equality is that when applied in a world dominated by males and the male perspective, it allows equality only to the extent that they are like men. Women must assimilate themselves to a male standard and then the law will require that they be treated like men. [FN374] To the extent men have what women want,
this is a *1051 useful version of equality; however, it is also very limiting. A fuller version of equality requires that laws take a full account of the interests and concerns of women, not just accord them the same interests and concerns that men have. [FN375]

Title IX, with its emphasis on intercollegiate sports, has been criticized as assimilationist, adopting a male standard as the norm. [FN376] Would not the interests of female students be better served by less emphasis on competitive intercollegiate athletics for a relatively few very talented athletes and more emphasis on, and funding for, aerobics and dance classes, physical education classes, and intramural sports? [FN377] If Title IX adopted equal funding as the measure of equality, for example, then women's programs could fund the activities most desired by women.

This critique of Title IX has not been made in the courts, probably because the courts seem quite comfortable with the assimilationist view of equality. But the critique is telling, up to a point. Title IX and its Regulations and Policy Interpretation do emphasize intercollegiate sports at the expense of other athletics. To the extent that competitive sports are "male," to the extent that they are brutal and corrupt, then women are given the same chance as men to be brutal and corrupt. But if, on the other hand, competition is neither male nor female, and if a genuine spirit of competition uplifts, promotes excellence, and develops the inner resources of the competitor, then the promotion of the competitive spirit through intercollegiate athletics is of great value to women. Donna Lopiano has expressed this view:

Sports is where boys traditionally learn about teamwork, goal-setting and the pursuit of excellence--critical skills necessary for success in the workplace. In an economic environment in which the quality of our children's lives will be dependent *1052 on two-income families, we must prepare our daughters for a highly competitive workplace as well as we prepare our sons. [FN378]

It is problematic to identify particular traits as "feminine" or "masculine." [FN379] Men may be more competitive than women, but like the question of interests and abilities, it is prudent to hold off judgment on the masculinity of competition until women have had equal opportunities to compete over an extended period of time.

IV. CAN COLLEGE FOOTBALL AND TITLE IX COEXIST?

The numbers do not add up. If a school operates a Division I-A football program, it is violating Title IX. [FN380] With 117 players and $4,000,000 in expenditures, the typical I-A football program dwarfs the entire women's athletic program and makes proportionality impossible, and it is unlikely that these schools are continuously adding programs or have fully accommodated the interests and abilities of women students. Although Title IX does not require equal funding, it is telling to note that the football program at an average Division I-A school costs more than twice as much as the entire women's sports program. [FN381]

A college that is committed to achieving equality for women and complying with Title IX can take one of two obvious approaches. The first is to build up the women's program until it is as big as the men's. That could cost about $5,000,000 per year at each Division I-A school. [FN382] That is simply not going to happen. The second is to downsize the men's program until it is as small as the women's program. If that means reducing football, then it will not happen if football coaches have their way. [FN383] Schools have shown some willingness to eliminate a *1053 few men's teams that do not produce revenue, [FN384] and when such teams are dropped, the women's program and Title IX are cast as the villains. [FN385] Athletic directors never point a finger at the over $4,000,000 of expense in the football program. [FN386]

A third, more moderate approach would be to combine additions to the women's program with subtractions from the men's program. However, given the absence of millions of additional sports dollars per school, the subtractions from the

men's program would have to be substantial. With football engulfing by far the biggest portion of the men's program, a school cannot do this without cutting back on football. Even if football were taken entirely out of the picture, most Division I-A schools would still have substantially larger and better funded programs for men than women. [FN387] The numbers are not so far off that a commitment to growth in the women's program could not make the programs equal within a few years, but football is different--bigger, better financed, better supported by influential allies on and off campus, and better able to stave off budget cuts.

Is there any evidence that a college can sponsor a successful Division I-A football team and still comply with Title IX? In 1992, the Washington Post answered this question affirmatively. In an article entitled "Only One School Meets Gender Equity Goal," the Post identified Washington State University as the only "big-time college athletic program in America (that) comes close to offering equal sports opportunities and scholarships to women." [FN388] Further praise for Washington State followed. Commentators called it the "guiding light" of gender equity [FN389] and praised it for having taken "the moral high ground in the fight for gender equity." [FN390] A 1994 survey by the Chronicle of Higher Education revealed that Washington State was right on the numbers in terms of proportionality: a 46.4 percent female undergraduate student body with female athletic participation of 47.2 percent. [FN391] The moral of all these reports suggest that Title IX and big-time college football can coexist, if only there is a will to make it work.

Yet Washington State, on closer examination, turns out to be very far from a model of gender equity. First, the school's "interest" in gender equity arose only after a court found that its athletic program violated the state Equal Rights Amendment and ordered the university to increase levels of funding, scholarships, and participation opportunities for women. [FN392] You get less credit for doing something when you do it as an alternative to being found in contempt of court. The lesson football coaches could take from the Washington State experience is that you do not have to do anything until you get sued. Second, regarding expenditures for men's and women's sports, Washington State is very far from perfect. The Washington Post article that praised Washington State also reported that forty-four percent of its athletes were women, but only twenty percent of the athletic budget was spent on women's sports. [FN393] Third, the scholarship budget, a specific concern of Title IX, is allocated disproportionately to male athletes. Males make up 47.2 percent of the athletes, but receive 59 percent of the scholarship dollars. [FN394] Fourth, the participation percentages, which appear to be so healthy, include seventy female participants from a recently established women's crew team. [FN395] Crew is a sport in which very few high school girls have participated and which is a relatively (at least relative to football) inexpensive way to increase the female participant count in the proportionality percentages. [FN396] Finally, Washington State receives special state funding in the form of tuition waivers to promote gender equity; in 1991, the sum was $380,000. [FN397] While it is admirable for the Washington Legislature to appropriate this sum for gender equity, that kind of money is not available to other schools that have to achieve gender equity without a special subsidy.

The point is that Washington State is very far from a model for gender equity. If it has done the best that any school with a big-time football program can do, then big-time football cannot coexist with Title IX.

V. PROPOSALS FOR REFORM

There is no shortage of existing proposals to reform college football. Attempts to reform the sport go back at least to the founding of the NCAA in response to the brutality of the game. [FN398] This Part will cover no new ground, but simply will review existing proposals that would have positive implications for compliance with Title IX. The problem with every suggestion is in convincing the football powers that there is any need for reform. Football coaches would support amending Title IX and leaving football untouched.
A. Keep the College Game the Way It Is But Separate It from the College

Rick Telander, formerly a college football writer for Sports Illustrated, [FN399] has made the most extreme proposal. To eliminate the hypocrisy of the current game, in which teams are supposed to be represented on the field by real students, Telander proposes the creation of the Age Group Professional Football League (AGPFL) for players between eighteen and twenty-two years of age who need not be college students and who would be paid for their services. [FN400] Big-time college football would not be changed on the field, but the relationships between the schools and the players would change. The teams in this league would be associated with the existing big-time football schools, which would own the teams, develop the players, offer an exciting game to the public, and turn a profit. [FN401] Those colleges choosing not to enter the AGPFL could still sponsor football teams that would be known as college football teams. These teams could not offer athletic scholarships, charge \*1056 admission to games, allow freshmen to play, hold spring practice, or play more than eight games per year. [FN402]

Telander's proposal is probably intended more as commentary on the current state of the game than as a serious suggestion for action, and it certainly stands in no danger of adoption. The proposal was not made with reference to gender equity, but its adoption would be a substantial advance in that direction because it would move big-time football out of the university. The much smaller, much less costly "college football teams" left remaining could fit within a reasonable program of gender equity.

B. Downsize Football

The perceived importance of winning in college football has created an arms race in which each school feels the need to spend more, recruit more, build more, coach more, and practice more than its competitors. [FN403] Because no team can disarm unilaterally without being run over on the field by those still spending, the NCAA should require substantial reductions in Division I-A football programs as follows.

1. Limit Team Size. A team that is playing a game with 11 players on the field does not need 140 players or even 100 players. Professional teams in the National Football League have 47 players. [FN404] Schools spend large amounts of money to provide equipment, coaching, and support for all those extra players. College football coaches excel at the mathematics of proving that they cannot field a team with fewer than 100, 88, or even 85 players. [FN405] but these self-serving arguments are *1057 entirely unconvincing. There is currently no limit on the size of a college football team. [FN406] An appropriate rule would limit each team to fifty players.

2. Limit Football Scholarships. The NCAA currently allows 85 football scholarships per school. [FN407] Even if the size of the teams were not limited as suggested above, eighty-five football scholarships are too expensive and unnecessary. An appropriate rule would limit football scholarships to fifty. A better rule would eliminate football scholarships entirely and award all money on the basis of financial need. [FN408]

3. Limit Coaching Staffs. The NCAA rules for Division I-A football currently allow one head coach, nine assistant coaches, and two graduate assistant coaches. [FN409] If the size of the teams is reduced to fifty, an appropriate rule would reduce the number of coaches proportionately, to six.

4. Single Platoon Football. In order to facilitate the reductions just proposed, an appropriate rule would mandate a return to single platoon football, which flourished during those glorious days of the giants when brave men played both offense and defense. [FN410] This suggestion may seem implausible, but Joe Paterno, currently one of the most highly regarded college football coaches, has endorsed the proposal: "I'd love to go back to one-platoon football right now.
It would get us back to a lot of basic values. . . . Wouldn't that be great?” [FN411] One supporter of one-platoon football contends that expenses would be cut, the players would love it, the game would bring out the best in the players: the all-around athlete would predominate, the players would be better conditioned, and there would be fewer *1058 injuries. [FN412] If this proposal were adopted, team sizes could be reduced well below fifty.

5. Reductions in Wasteful Spending. Why do football teams need to stay in a hotel the night before a home game? Why do football teams need a $10,000,000 indoor practice facility? [FN413] Why do football teams need spring practice? An appropriate rule would eliminate unnecessary expenses.

6. Tiering. A "tiering" rule would allow schools to operate some sports on a national level and others at a regional, much less expensive level. [FN414]

VI. CONCLUSION

Football is the problem, and it must be the largest part of the solution. Title IX could save football from itself, but it will not, at least not without years of litigation. The NCAA Gender-Equity Task Force made a prescient comment in this regard:

We hope and believe that continued court judgments, new legislation and heightened governmental oversight will not be necessary. . . . If, having recognized and documented that our members have neither achieved the spirit of gender equity nor complied with the letter of the law, we fail to act to ameliorate those conditions, others will be justified in finding means to do so. [FN415]

To date, neither the NCAA nor its individual members have acted to ameliorate these conditions. Change will come about, then, if at all, through further litigation. There also likely will be further battles on the legislative and administrative fronts. The College Football Association is said to be, once again, lobbying Congress for its holy grail—a legislative exemption from Title IX. [FN416] College football, like the British Empire, will not give up power easily or without a fight.

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[FN3]. U.S. Const. art. VI, S 2, cl. 2.

[FN4]. See 45 C.F.R. S 86.2(g)(1)(ii) (1994) (defining the term "federal financial assistance" to include "(a) grant or loan of Federal financial assistance, including funds made available for . . . (s)cholarships, loans, grants, wages or other funds

extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity\(^\text{(*)}\). In Grove City College v. Bell, 465 U.S. 555 (1984), the Supreme Court held that the receipt of federally funded Basic Educational Opportunity Grants by students of Grove City College subjected the college itself to Title IX, even though the college did not receive direct federal funding. Id. at 563. Today, the presumption that at least some students at any given college receive federally assisted loans or scholarships is so strong that the Title IX plaintiff often is not required to prove this. See, e.g., Roberts v. Colorado State Univ., 814 F. Supp. 1507, 1510 (D. Colo.) ("Defendants concede that Colorado State University is an educational institution receiving federal financial assistance, and . . . is subject to the provisions of Title IX."), aff'd in part and rev'd in part sub nom. Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir.), cert. denied, 114 S. Ct. 580 (1993); Cohen v. Brown Univ., 809 F. Supp. 978, 983 (D.R.I. 1992) (concluding that the entire university, including the athletic department, is subject to Title IX because Brown received federal financial assistance), aff'd, 991 F.2d 888 (1st Cir. 1993).

\[\text{[FN5]. See Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,414 (1979) (hereinafter Policy Interpretation) (summarizing the requirements for compliance).}\]

\[\text{[FN6]. Refer to notes 39-48 infra and accompanying text.}\]

\[\text{[FN7]. See Debra E. Blum, Slow Progress on Equity, Chron. Higher Educ., Oct. 26, 1994, at A45 (hereinafter Blum, Slow Progress) (noting that although women comprise the majority of undergraduate students, women's athletic programs still lag behind men's).}\]

\[\text{[FN8]. See, e.g., Favia v. Indiana Univ. of Pa., 7 F.3d 332, 334-35 (3d Cir. 1993) (ordering the university to reinstate women's varsity field hockey and gymnastics); Roberts, 998 F.2d at 833 (compelling the university to reinstate its women's varsity fast pitch softball program); Cohen, 991 F.2d at 891 (requiring the university to reinstate varsity status to women's gymnastics and volleyball teams).}\]

\[\text{[FN9]. In 1993, Cornell University agreed "to reinstate women's gymnastics and fencing as full varsity sports rather than mount a protracted court fight it seemed certain of losing." Robert M. Thomas Jr., Cornell Reinstates Two Women's Sports, N.Y. Times, Dec. 9, 1993, at B26. In 1993, the California State University system settled a suit filed by the state's chapter of the National Organization for Women. Robert Facchet, Women's Sports Strengthened in Calif., Wash. Post, Oct. 23, 1993, at G2. Under the terms of the settlement agreement, by 1998-99 athletic opportunities for women students will be proportionate, within 5%, to the number of women undergraduates at the school. Id. In addition, funding of women's sports will be proportionate to that number of women, within 10%. Id. In 1993, UCLA rescinded its decision to cancel women's gymnastics, given the risk of "a potentially expensive Title IX lawsuit." Jane Gottesman, Gymnastics Rescued at UCLA, S.F. Chron., Aug. 21, 1993, at F2. Also in 1993, the University of Texas settled a Title IX lawsuit, agreeing to raise the level of women's participation in intercollegiate sports to within 3% of the percentage of women in the student body. David Barron, Settlement by UT Could Spawn Title IX Lawsuits, Hous. Chron., July 17, 1993, at 1C, 2C. Moreover, Cal State Fullerton recently added women's soccer and promised to increase sporting opportunities for women. David Barron, Title IX Battlegrounds, Hous. Chron., June 27, 1993, at 8B. New Mexico also suspended plans of dropping women's gymnastics, and it added a women's soccer program. Id.}\]
[FN10]. See Debra E. Blum, Officials of Big-Time College Football See Threat in Moves to Cut Costs and Provide Equity for Women, Chron. Higher Educ., June 16, 1993, at A35 (discussing the "pot shots" lodged at college football). The Reverend Edmund Joyce, a former executive vice-president of the University of Notre Dame, spoke out against the "strident, irresponsible, and irrational campaign" against football at a meeting of the College Football Association. Id. He further added, "Frankly, I have been dismayed at the publicity and apparent support the militant women have received on their irrational attack of football as their bugaboo." Id.


[FN14]. See, e.g., NCAA Const., art. 1.3.1, in The National Collegiate Athletic Association, 1993-94 NCAA Manual (Laura E. Bollig ed., 1993) ("The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program . . . .").

[FN15]. See id. at art. 1.2 (delineating the purposes of the Association, which include promoting various athletic activities).


[FN17]. See Knight Foundation Comm'n on Intercollegiate Athletics, Keeping Faith with the Student-Athlete: A New Model for Intercollegiate Athletics 5 (1991) (discussing how educational value becomes lost in the income stream of "big-time athletics programs"). The Knight Foundation Commission reported that (i) these (athletic) programs appear to promise a quick route to revenue, recognition and renown for the university. But along that road, big-time athletics programs often take on a life of their own. Their intrinsic educational value, easily lost in their use to promote extra-institutional goals, becomes engulfed by the revenue stream they generate and overwhelmed by the accompanying publicity. Id.

[FN18]. See id. at 11 (defining the "real problem" facing intercollegiate athletics as "insuring that those on the field are students as well as athletes").

[FN19]. See Final Report of the NCAA Gender-Equity Task Force 1 (1993) (hereinafter Task Force). According to the Task Force: Intercollegiate athletics offer interested and able students opportunities to experience the lessons of competition, develop physical and leadership skills, be part of a team, and enjoy themselves. Good intercollegiate athletics programs require competitive parity, universal and consistently applied rules, and an opportunity to participate. For many years, the NCAA has sought to assure those conditions, but there is clear evidence that it has not succeeded in providing the last one to women. Id.


[FN22]. Id.

[FN23]. Id. at 505-06.

[FN24]. Id. at 508 (discussing a Chicago Tribune article that tabulated the number of deaths related to football injuries).

[FN25]. Smith, supra note 20, at 191 (citation omitted). To be fair, Meiklejohn also noted that football had a potential for some social good. Id.

[FN26]. Id. at 95.

[FN27]. Id. at 193.

[FN28]. Id. at 193-94.

[FN29]. Id. at 199.
[FN 30]. Id. at 202.

[FN 31]. See NCAA Const., art. 1, supra note 14 (enumerating the purposes and policies of the modern NCAA).

[FN 32]. Smith, supra note 20, at 204.

[FN 33]. See Football, supra note 21, at 508 (demonstrating how changes made to football by the NCAA were able to save the game).

[FN 34]. Id. at 511.


[FN 36]. See, e.g., Big Eight Gets Rich TV Deal, Star Trib., Mar. 10, 1994, at C2 (noting that the Big Eight Conference has recently signed five-year college football contracts with ABC-TV and Liberty Sports for a total of $100 million).


[FN 38]. Fulks, supra note 37, at 15 tbl. 3.3.

[FN 39]. One author has reminisced:
Imagine a return to iron-man football, a time when men were men and football players played real football. Which is to say, a time when the same guys played offense, then defense, then offense. All afternoon.

. . . .

Sadly, those marvelous days lasted only through 1964, when unlimited substitution . . . was again foisted upon us.

[FN 40]. Id.

[FN 41]. National Collegiate Athletic Ass'n, NCAA Gender-Equity Study tbl. 5 (1992) (hereinafter Gender-Equity Study).


[FN43]. Id. at A32. "We're scared,' says Ken Hatfield, football coach at Clemson University. (Reducing the number of football scholarships below 85) . . . would be the most serious blow. If you keep cutting, you hurt our ability to produce a quality product. That's something to be afraid of." Id.


[FN45]. Fulks, supra note 37, at 17 tbl. 3.10.

[FN46]. See Gender-Equity Study, supra note 41, at 10 tbl. 7 (noting that Division I-A football averages 1 head coach, 8.85 assistant coaches, 3.98 graduate assistant coaches, and .64 volunteer assistant coaches for an overall average of 14).


[FN48]. Operating Bylaws, art. 15.5.5.1, supra note 37 (placing an 85 scholarship limit on Division I-A football teams).

[FN49]. See generally Rick Telander, The Hundred Yard Lie: The Corruption of College Football and What We Can Do to Stop It (1989) (blazing a trail against the current culture of college football).

[FN50]. Id. at 20-21.

[FN51]. Id. at 19.

[FN52]. Id. at 88, 89.

[FN53]. See id. at 140-49 (chronicling various incidents of steroid abuse in college football that helped players intensify their training).

[FN54]. Id. at 86.
[FN55]. Id. at 20.

[FN56]. Id. at 168.

[FN57]. See id. (noting how Mike Singletary, several times the National Football League's Defensive Player of the Year, described a particularly hard tackle: "I don't feel pain from a hit like that. . . . What I feel is joy. Joy for the tackle. Joy for myself. Joy for the other man. You understand me; I understand you. It's football, it's middle-linebacking. It's just . . . good for everybody." (second alteration in original)).

[FN58]. Id. at 178 (citing a Mike Oriard essay in the New York Times).


[FN60]. Id. at 670-71.

[FN61]. Id. at 671.

[FN62]. Id.

[FN63]. Id.

[FN64]. Id.

[FN65]. Id. at 672.

[FN66]. Id.

[FN67]. Athletic women who went to college in the late 1950s remember with horror the "play days" that took the place of competition for women. The field hockey teams of, say, Vassar and Smith would meet, but rather than squaring off against each other, the players would intermingle for an afternoon's "recreation." Most women found it unbearably frustrating. "We'd be out there playing what should be a competitive game, but we weren't allowed to take it seriously or take any pride in winning," says one woman who is now a college administrator. "You could never develop a sense
of teamwork because your teammates were always changing."

[FN68].
Early in this century there was widespread participation by girls in competitive athletics. Baseball, bike racing and track and field were popular pastimes for girls. Basketball was played extensively, and often girls' games were scheduled as doubleheaders with boys' contests. Then, in 1923, a national committee of women headed by Mrs. Herbert Hoover was formed to investigate the practice of holding such doubleheaders. The committee was shocked to find the girls wearing athletic costumes performing before crowds that included men. Mrs. Hoover and her friends believed the girls were being used as a come-on and that the practice was disgraceful and should be stopped. State after state followed the advice and either abolished all girls' sports or made them so genteel as to be almost unrecognizable as athletic contests.


[FN70]. Id.

[FN71]. Id. at 491.

[FN72]. Id.

[FN73]. Id. at 492.

[FN74]. Id. at 493.

[FN75]. Id. at 494.

[FN76]. Id. at 490.
In 1966, an organization known as the Division for Girls and Women in Sport . . . approached the NCAA to ascertain whether NCAA planned to offer a women's program and, if not, to seek the NCAA's views on its doing so. (It was told that the NCAA's "jurisdiction and authority" under its organic documents were "limit(ed) to male student-athletes"; (and) that women were prohibited from participating in NCAA events . . . .
Id. (third alteration in original).

[FN77]. See Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from

Federal Financial Assistance, 40 Fed. Reg. 24,128, 24,134 (1975) (originally codified at 45 C.F.R. pt. 86, currently codified at 34 C.F.R. pt. 106) (hereinafter Nondiscrimination Regulation) (explaining that the NCAA unsuccessfully worked to keep the reach of Title IX, and its requirements of equality for women, out of college athletics by trying to exempt revenue-producing sports from the Title IX regulations). Refer to note 102 infra (discussing how Congress divided the HEW and how the regulations were reissued after the division).

After the NCAA was unsuccessful in attacking Title IX at the administrative level, it sued in federal court, arguing that the Office for Civil Rights of the Department of Health, Education and Welfare (HEW) had exceeded its regulatory authority by issuing the Title IX regulations. NCAA v. Califano, 444 F. Supp. 425, 428 (D. Kan. 1978), rev'd, 622 F.2d 1382, 1383 (10th Cir. 1980). However, a decision on the merits was never reported. After the district court dismissed the NCAA's complaint for lack of standing, id. at 435, the Tenth Circuit reversed on appeal, holding that the complaint was sufficient to establish standing where it disclosed that association members would have standing in their own right, that the association was a suitable proponent of its members' interests, and that the issues to be resolved did not require the individual participation of the members. NCAA v. Califano, 622 F.2d 1383, 1387 (10th Cir. 1980).

[FN78] See Gender-Equity Study, supra note 41.

[FN79] Carol Herwig, Study Results Echo Inequity Women Know All Too Well, USA Today, Mar. 12, 1992, at 7C (quoting Christine Grant, women's athletic director at the University of Iowa).

[FN80] Id. (quoting Ellen Vargyas, director of the Women's Law Center in Washington, D.C.).


[FN82] Id. at 2.

[FN83] Id.

[FN84] Id. at 3.


[FN86] Id.

[FN87] See N.C.A.A. Will Not Mandate Gender Equity, N.Y. Times, Aug. 7, 1993, at 33. The National Collegiate Athletic Association will not adopt an all-encompassing set of gender equity rules, the group's president, Joseph Crowley, said today.
"It's a fact of life, given all the differences among the N.C.A.A. institutions, that ultimately it will have to be up to each institution to address these issues," Crowley said after meetings of the NCAA Council . . . . Instead, the council will put a set of four gender equity guidelines to a vote of N.C.A.A. schools at its January meeting. Id.


[FN89]. Id.

[FN90]. Refer to note 1 supra.


[FN92]. Pub. L. No. 88-352, 78 Stat. 252 (codified at 42 U.S.C. S 2000d (1988)) ("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.").

[FN93]. See Cannon v. University of Chicago, 441 U.S. 677, 704 (1979) (noting that both Title IX and its model Title VI are aimed at avoiding "the use of federal resources to support discriminatory practices").

[FN94]. 20 U.S.C. S 1682 (granting regulatory authority to "(e)ach Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty" although not identifying HEW by name).

[FN95]. See generally Nondiscrimination Regulation, supra note 77.


[FN99]. See 45 C.F.R. S 86.2(h) (1994) (defining a recipient as "any public or private agency, institution, or
organization" that receives Federal funding (emphasis added)). The Scope of Application section of the Regulation explains that, by analogy to Title VI, federal funds may be terminated when "they are . infected by a discriminatory environment." Nondiscrimination Regulation, supra note 77, at 24,128 (citing Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1078-79 (5th Cir. 1969)). Congress must have assumed that Title IX applied on an institution-wide basis when it instructed the HEW Secretary to adopt regulations "which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Education Amendments of 1974, Pub. L. No. 93-380, S 844, 88 Stat. 612 (codified at 20 U.S.C. S 1681 note (Regulations; Nature of Particular Sports: Intercollegiate Athletic Activities)). Indeed, the Third Circuit adopted the institution-wide approach to Title IX in two cases. See Haffer v. Temple Univ., 688 F.2d 14, 17 (3d Cir. 1982) (reasoning that if the "University as a whole is to be considered the .program or activity' for Title IX purposes, it follows that because the University as a whole receives federal monies, its intercollegiate athletic department is governed by Title IX"); Grove City College v. Bell, 687 F.2d 684, 697 (3d Cir. 1982) (concluding that the legislators who enacted Title IX "did not contemplate that separate, discrete, and distinct components or functions of an integrated educational institution would be regarded as the individual programs" referred to in Title IX), aff'd on other grounds, 465 U.S. 555 (1984).


[FN101]. See id. at 573 (concluding that the receipt of federal grants by some of a private university's students does not trigger institution-wide coverage under Title IX).

[FN102]. In 1979, Congress divided the Department of Health, Education and Welfare (HEW) into the Department of Health and Human Services (HHS) and the Department of Education (DED). See generally 20 U.S.C. SS 3401-3510 (1994) (detailing the specific shifts in responsibility from the former HEW to the HHS and DED). As part of this division, the Department of Education reissued the Title IX Regulation in 1980, without substantial changes, as 34 C.F.R. pt. 106. See generally Nondiscrimination Regulation, supra note 77. However, "(i)n a wonderful example of bureaucratic muddle, the existing Title IX regulations were left within HHS's arsenal while, at the same time, DED replicated them as part of its own regulatory armamentarium." Cohen v. Brown Univ., 991 F.2d 888, 895 (1st Cir. 1993).

[FN103]. See Cohen, 991 F.2d at 894 n.5 (noting that following the Grove City decision, the Department of Education "dropped or curtailed seventy-nine ongoing Title IX cases") (citing Statements on Civil Rights Restoration Act, Daily Lab. Rep. (BNA) No. 53, at D1 (Mar. 20, 1981)).


[FN106]. Refer to note 99 supra.
[FN107]. 991 F.2d 888 (1st Cir. 1993). The Cohen case was remanded to the trial court level. Cohen v. Brown Univ., 879 F. Supp. 185 (D.R.I. 1995). The court considered whether "disparities . . . in the number of intercollegiate participation opportunities" existed between men and women at Brown University. Id. at 193. Ultimately, the court found that a Title IX violation existed. Id. at 185-86.

[FN108]. Cohen, 991 F.2d at 895 (quoting Udall v. Tallman, 380 U.S. 1, 16 (1965)).

[FN109]. Id.


[FN111]. See Debra E. Blum, New Head of Civil-Rights Office Vows to Get Tough on College Sports, Chron. Higher Educ., Sept. 15, 1993, at A39 ("Institutions have simply not complied with Title IX, and (the Department of Education's Office for Civil Rights) (OCR) has simply not forced them to,' says Ellen J. Vargyas, senior counsel of the National Women's Law Center. .There's little to no faith that going to OCR with a complaint will get anything accomplished.").

[FN112]. See Cannon v. University of Chicago, 441 U.S. 677, 693-94 (1979) (finding that Title IX is enforceable through an implied right of action).


[FN114]. Id. at 72, 73.

[FN115]. See, e.g., Christine Brennan, 2.4 Million Reasons to Comply With Title IX, Wash. Post, June 27, 1993, at D11. Howard University learned this lesson when a jury "quickly put a price tag on gender-based inequality in college sports: nearly $2.4 million." Id. The jury award, which had been made to the women's basketball coach at Howard University, was later reduced to $1.1 million. Christine Brennan & Gabby Richards, Women Taking to the Courts: Title IX Inaction Now Costing Schools, Wash. Post, Aug. 7, 1993, at F1.

[FN116]. Refer to notes 8-9 supra.

[FN117]. Id. The unreported case of Ashbaugh v. Ramo, No. 92-0511 (D.N.M., dismissed with prejudice Mar. 9, 1993) appears to be an exception to this claim. See Andrew Blum, Athletics In the Court, Nat'l L.J., Apr. 5, 1993, at 1, 30 (discussing the Ashbaugh holding). In Ashbaugh, alternative grounds were used to dismiss the plaintiff-student's case. First, the plaintiff failed to prove intentional discrimination. Id. Second, the plaintiff failed to prove a program-wide Title IX violation. Id. However, it seems that both grounds for dismissal were improper in light of case law. First, in Roberts, the Tenth Circuit held that a plaintiff who has proven a violation of Title IX need not also prove intentional
discrimination. See Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 833 (10th Cir.), cert. denied, 114 S. Ct. 580 (1993). Second, in Grove City, the U.S. Supreme Court held that athletic programs were to be attacked on a program-specific basis instead of an institution-wide basis. See Grove City College v. Bell, 465 U.S. 555, 573 (1984). Refer to notes 100-09 supra and accompanying text (discussing the impact of the Grove City holding).

[FN118]. See Fulks, supra note 37, at 5 tbl. 1.1 (noting that there are 892 member institutions of the NCAA); National Ass'n of Intercollegiate Athletics, 5-Year NAIA Varsity Participation Survey, (1992), reprinted in Women's Sports Foundation, Participation Statistics Packet (1994) (hereinafter Statistics Packet) (noting that as of 1991-92, there are 439 member institutions of the NAIA).


[FN121]. "Part of the confusion about the scope of Title IX's coverage and the acceptable avenues of compliance arose from the absence of secondary legislative materials. Congress included no committee report with the final bill and there were apparently only two mentions of intercollegiate athletics during the congressional debate." Cohen v. Brown Univ., 991 F.2d 888, 893 (1st Cir. 1993).

[FN122]. Id.


[FN124]. See Title IX of the Education Amendments of 1972; A Proposed Policy Interpretation, 43 Fed. Reg. 58,070, 58,075-76 (1978) (hereinafter Proposed Policy). In 1974, Senator John Tower introduced an amendment to Title IX that would have exempted revenue-producing athletics from the statute. Id. The amendment was adopted on the floor of the Senate, but deleted by the Conference Committee on the Education Amendments of 1974. Id. Instead, the Committee adopted what was to become section 844 of the 1974 Education Amendments. Refer to text accompanying notes 266-69 infra.


[FN126]. See generally Nondiscrimination Regulation, supra note 77.

[FN128]. Id. S 86.41(a) (1994).

[FN129]. Id. S 86.41(b).

[FN130]. Id. S 86.41(c).

[FN131]. Id. S 86.41(c)(1).

[FN132]. Id. S 86.41(c)(2)-(10).

[FN133]. Id. S 86.41(c)(10). Finally, in subsection (d), colleges and universities were given a three-year adjustment period to comply with the new rules. Id. S 86.41(d).

[FN134]. Policy Interpretation, supra note 5, at 71,413.

[FN135]. Id. at 71,415.

[FN136]. Id. at 71,415-18.

[FN137]. Id. at 71,415.

[FN138]. Id. at 71,415-17. Refer to note 132 supra and accompanying text.

[FN139]. Id. at 71,417-18.

[FN140]. Id. at 71,417.

[FN141]. Id. at 71,418. Refer to subpart III(B)(1)(b) infra.

[FN142]. The regulation itself does not use the term "benchmark," but that term has been adopted by the courts. See, e.g., Cohen v. Brown Univ., 991 F.2d 888, 897 (1st Cir. 1993) (mandating that the university must meet at least one of the three benchmarks to prove that it is not conducting its athletic programs in violation of Title IX).
[FN143]. Policy Interpretation, supra note 5, at 71,418. The quoted terms of art are not, however, used in the Policy.

[FN144]. See, e.g., Jeldness v. Pearce, 30 F.3d 1220, 1228 (9th Cir. 1994) (holding that Title IX imposes an equality standard although that standard is not necessarily coextensive with the Equal Protection Clause).


[FN147]. Id. at 495.

[FN148]. Id.


[FN150]. The more commonly litigated situation arises when a female athlete wants to play on the male team because no female team exists. In this situation, the issue of separate but equal does not arise. See, e.g., Hoover v. Meiklejohn, 430 F. Supp. 164, 167, 170 (D. Colo. 1977) (holding that a female plaintiff was denied equal protection when she was barred from participation in the all-male soccer program, but noting that the situation could be remedied by providing for separate but equal soccer programs for both male and female students).


[FN153]. Id.


[FN155]. See, e.g., Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982) (legitimizing the government's interests of redressing past discrimination against women in athletics and promoting of athletic opportunity.

[FN156]. See, e.g., B.C. v. Board of Educ., 531 A.2d 1059, 1061 (N.J. Super. Ct. App. Div. 1987) (stating that the purpose of a statute prohibiting males from playing on any female sports team is supported by the important governmental interest of equal athletic opportunities for females according to the local Athletic Association resolution).


[FN158]. See id. at 1029 (noting that under the school district rules any male could play regardless of physical attributes).


[FN160]. See id. at 686 (noting that the "sex characteristic frequently bears no relation to ability to perform or contribute to society").

[FN161]. See Califano v. Webster, 430 U.S. 313, 317, 318 (1977) (indicating that a "mere recitation of a benign, compensatory purpose is not an automatic shield" against a constitutional attack, but nevertheless, approving a statutory scheme that "operate(s) directly to compensate women for past economic discrimination" (citations and internal quotations omitted)).

[FN162]. Cf. Richmond v. J.A. Croson Co., 488 U.S. 469, 504 (1989) ("While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.").


[FN164]. See, e.g., Cape v. Tennessee Secondary Sch. Athletic Ass'n, 563 F.2d 793, 795 (6th Cir. 1977) ("It takes little imagination to realize that were play and competition not separated by sex, the great bulk of the females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement."); Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659, 662 (D.R.I.) ("Open competition would, in all probability, relegate the majority of females to second class positions as benchwarmers or spectators."), vacated, 604 F.2d 733 (1st Cir. 1979).

[FN165]. See Blum, Coaches, supra note 42, at A33.


[FN167]. See Califano v. Webster, 430 U.S. 313, 317 (1977) (rejecting the use of archaic and overbroad generalizations about women, the role-typing that society has long imposed on women, and the use of assumptions that women are the weaker sex or are more likely to be child-rearers or dependents).

[FN168]. See Dodson v. Arkansas Activities Ass'n, 468 F. Supp. 394, 398 (E.D. Ark. 1979) (explaining that girls historically had been prohibited from playing the more rigorous full-court game of basketball because with their "bustles, long trains, and high starched collars," they could not "get up and down the court fast enough"); Hoover v. Meiklejohn, 430 F. Supp. 164, 169 (D. Colo. 1977) ("Any (previously held) notion that young women are so inherently weak, delicate or physically inadequate that the state must protect them from the folly of participation in vigorous athletics is a cultural anachronism unrelated to reality.").

[FN169]. Refer to note 166 supra and accompanying text.

[FN170]. See, e.g., O'Connor v. Board of Educ., 449 U.S. 1301, 1306 (1980) (stating that an equal protection analysis does not depend on whether there was discrimination against an individual, but rather that the analysis should be based on whether it is permissible for the state to use sex as an eligibility requirement when structuring an athletic program affecting all participating individuals as a group).

[FN171]. Id.

[FN172]. See Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 657-58 (6th Cir. 1981). When considering the constitutionality of Title IX and its regulations, a blanket requirement of one team at each age level might result in male dominance of all teams . . . . It is desirable to maximize the opportunities for individual women, but a requirement that boys play only on boys' teams while girls may compete either with the boys or in an all-girls' program (as they wish) might have a similar undesirable effect on the fledgling women's athletic programs; women's athletics may be significantly harmed if the best female competition is lost to the boys' program. Id.


[FN174]. See id.

[FN175]. Id. S 106.41(c).
[FN176]. See Nondiscrimination Regulation, supra note 77, at 24,134.


[FN178]. Id. at 71,418.

[FN179]. Id.

[FN180]. See Haffer v. Temple Univ., 678 F. Supp. 517, 525 n.5 (E.D. Pa. 1988) (citing to supporting evidence that at Temple University, "the best times recorded by female swimmers and runners were generally far slower than the worst times recorded in the same events by male swimmers and runners").


[FN182]. See Joseph A. Califano, Jr., Governing America 265 (1981) ("Most women's groups wanted a dollar spent on women's athletics for each dollar spent on men's athletics, proportional to the number of men and women students enrolled in the college.").

[FN183]. Bil Gilbert & Nancy Williamson, Programmed To Be Losers, Sports Illustrated, June 11, 1973, at 60, 62. Just as many men feel menaced by the athletic activities of women, many organizations are becoming nervous over the rising expectations of women in sport. . . . The bedrock reason for this institutional fear--and the fierce resistance to improving girls' athletics--has been pinpointed by Harvard's Dr. Clayton Thomas: "Women traditionally have not been allowed the same share of funds for athletics and recreational equipment." . . .

. . .
If they found it necessary to provide something more than token programs for girls and women, athletic executives would have only two alternatives. The first would be to raise funds to be used for women's facilities, coaching salaries and other operating expenses. But faced with financial crises and taxpayers' revolts, most schools and communities are looking for ways to decrease sports expenditures, not increase them. . . . So the only practical way to finance substantial new programs for girls is to take resources from the programs now operated for the benefit of males.

Id.

[FN184]. Policy Interpretation, supra note 5, at 71,414-15 (discussing ways an institution can be found "in compliance" based on factors other than funding).

[FN185]. The current requirements, which include a "not exhaustive" list of ten factors that the Director of the Office of Civil Rights may consider when determining the existence of equal opportunity, do require governmental involvement.
Id. at 71,415.

[FN186]. Gilbert & Williamson, supra note 183, at 66 (describing the Cantonsville (Md.) Community College's equal funding policy).

[FN187]. While the statute does authorize termination of federal financial assistance in order to affect compliance, it does not dictate the manner in which federal funds should be allocated by the recipient institutions. 20 U.S.C. § 1682.

[FN188]. 34 C.F.R. § 106.41(c)(10).

[FN189]. 34 C.F.R. § 106.37(c) (1994).

[FN190]. Proposed Policy, supra note 124, at 58,072.

[FN191]. Id. (emphasis added).

[FN192]. Within the introduction to the very policy that proposed a per capita standard, HEW indicated that, at that time, women made up 47.7% of the students at the nation's institutions of higher education, but made up only 26% of those participating in intercollegiate athletics. Id. at 58,071.

[FN193]. Gender-Equity Study, supra note 41, at 4 tbl. 1 (reporting the average number of males participating in Division I football as 108.07).

[FN194]. Califano, supra note 182, at 266-68.

[FN195]. Id. at 268.

[FN196]. Policy Interpretation, supra note 5, at 71,414.

[FN197]. Steven R. Weisman, Epilogue for America, A Painful Reawakening, N.Y. Times, May 17, 1981, S 6 (Magazine), at 114 (discussing the role of the Iran Hostage Crisis in President Carter's loss of the 1980 presidential election, as opposed to other factors).

[FN198]. 7 F.3d 332 (3d Cir. 1993).
[FN199]. Id. at 334-35.

[FN200]. Id. at 343.

[FN201]. Id.

[FN202]. Id.

[FN203]. Id.


[FN205]. Id. at 990 (quoting Policy Interpretation, supra note 5, at 71,418).

[FN206]. Id. at 994.

[FN207]. Id. at 995, 996.

[FN208]. Id. at 995.

[FN209]. Id. at 996.

[FN210]. Id.


[FN212]. Id. at 906 n.23.

[FN213]. Id.

[FN215]. Id. at 744.

[FN216]. Id. at 744 n.3.

[FN217]. Id. at 744.

[FN218]. Id. at 744-45.

[FN219]. Id. at 751. The district court's decision was later vacated as moot because the ice hockey season had ended and each of the plaintiffs would graduate before the beginning of the next hockey season. Cook v. Colgate Univ., 992 F.2d 17, 17 (2d Cir. 1993).

[FN220]. Debra E. Blum, Big Step for Sex Equity, Chron. Higher Educ., Oct. 27, 1993, at A35. The Cal State System agreed that, within 5 years of the date of the agreement "institutions must increase the proportion of their sports budgets that they spend on women's programs to within 10 per cent of the proportion of women on their campuses." Id.

[FN221]. See Task Force, supra, note 19, at 1 (finding that while undergraduate enrollment was fairly evenly divided by sex, men's athletic programs received approximately 70% of scholarship funds, 77% of recruiting money, and 83% of operating budgets).

[FN222]. See Andrew Blum, Athletics in the Court: New Wave of Title IX School Bias Suits Hit, Nat'l L.J., Apr. 5, 1993, at 1, 30 (quoting Arthur H. Bryant of the Trial Lawyers for Public Justice as saying that "once these cases get to court, schools generally have no valid defense. That is why schools we threatened decided not to litigate. And why the ones which we have sued are losing"); see also Thomas E. Kauper & Edward A. Snyder, An Inquiry Into the Efficiency of Private Antitrust Enforcement: Follow-On and Independently Initiated Cases Compared, 74 Geo. L.J. 1163, 1170 (1986) (observing that "[l]ike merit, the beliefs of plaintiffs and defendants about their probability of success if the case is litigated are also important, but unobservable, determinants of whether parties settle or litigate").

[FN223]. Refer to note 220 supra and accompanying text.

[FN224]. See generally Fulks, supra note 37.

[FN225]. Id. at 14 tbl. 3.1.

[FN226]. This number is derived by dividing the average expenditure for men's programs by the average expenditure
for women's programs ($6,984,000 divided by $1,806,000 equals 3.87).

[FN227]. Id. at 17 tbl. 3.10.

[FN228]. Id. at 28 tbl. 4.1.

[FN229]. This number is derived by dividing the average expenditure for men's programs by the average expenditure for women's programs ($2,147,000 divided by $797,000 equals 2.69).

[FN230]. Id. at 31 tbl. 4.10. Football programs accounted for 25% of the total expenditure on men's sports. Id.

[FN231]. For Division II schools with football teams, the average expense of operating the men's sports program was $793,000; for the women's program the expense was $314,000. Id. at 55 tbl. 6.1. For Division III schools with football teams, the average expense of operating the men's sports program was $357,000, for the women's program, $172,000. Id. at 80 tbl. 8.1.

[FN232]. See, e.g., Bob Oates, Football Is Necessary for Gender Equity to Be Attained, L.A. Times, Dec. 12, 1993, at C3 (arguing that the budgets of football programs at the "Big 70" universities should not be considered when trying to achieve equality in men's and women's sports and that football programs should be left alone to concentrate on their primary function: raising money).

[FN233]. Id. (reporting that football profits at the nation's largest 70 universities averaged $2.3 million in 1992).

[FN234]. Id. at C11 (contending that the downsizing of football would be a gamble for women's sports, which rely on football profits for support).

[FN235]. Id.


[FN237]. Id. ("(T)he theoretical financial surplus' provided by revenue from men's intercollegiate sports programs to non-revenue producing athletic endeavors (such as women's intercollegiate athletics) seems to be virtually (if not totally) non-existent.").

[FN238]. Policy Interpretation, supra note 5, at 71,421.

[FN239]. See id. (responding to commentary that such football programs are exempt from Title IX).

[FN240]. See generally Fulks, supra note 37.


[FN242]. The number 18 is derived as follows: In Division I-AA, four schools reported operating football programs at a profit. Fulks, supra note 37, at 34 tbl. 4.18. In Division II, eight schools operated football programs at a profit. Id. at 61 tbl. 6.18. In Division III, six schools operated football programs at a profit. Id. at 86 tbl. 8.18.

[FN243]. In Division I-AA, the 4 schools reporting a football profit had an average profit of $75,000. Id. at 34 tbl. 4.18. In Division II, the 8 schools reporting a football profit had an average profit of $144,000. Id. at 61 tbl. 6.18. In Division III, the 6 schools reporting a football profit had an average profit of $16,000. Id. at 86 tbl. 8.18. This means that, outside of Division I-A, the total profits for all 407 schools reporting was approximately $1,548,000.

[FN244]. Id. at 34 tbl. 4.18.

[FN245]. Id. at 61 tbl. 6.18.

[FN246]. Id. at 86 tbl. 8.18.

[FN247]. Schools that fail to generate sufficient revenues to meet expenses must seek funding elsewhere in order to break even. See id. at 39, tbl. 4.27, 65 tbl. 6.27, 90 tbl. 8.27 (reporting sources of additional funding, including alumni contributions, direct governmental support, and institutional support).

[FN248]. Id. at 5 tbl. 1.1.

[FN249]. Id. at 20 tbl. 3.18.

[FN250]. Id.

[FN251]. Id. at 23 tbl. 3.24.

[FN253]. See Fulks, supra note 37, at 20 tbl. 3.18 (reporting average profits of $3,883,000 for the 57 Division I-A football programs operating at a profit).

[FN254]. Division I-A football programs have average revenues of $6,300,000 with average costs of $4,031,000. Id. at 15 tbl. 3.2. Other Division I-A sports programs for men, including basketball, have average revenues of $2,517,000 with average costs of $2,497,000. Id. If only $700,000 of football profits are spent on women's programs, large amounts of profits remain to fund other men's programs.

[FN255]. See 45 C.F.R. § 86.41(c) (requiring equal athletic opportunities for both sexes); Jeldness v. Pearce, 30 F.3d 1220, 1228 (9th Cir. 1994) (interpreting Title IX to require the provision of equal opportunities).

[FN256]. Gender-Equity Study, supra note 41, at 8 tbl. 5 (reporting that the average number of football players at a Division I-A school is 117.03).

[FN257]. Fulks, supra note 37, at 17 tbl. 3.10 (reporting that the average expense of a Division I-A football program is $4,031,000).

[FN258]. The number 12,000 is derived by multiplying the 106 Division I-A NCAA schools by the average number of 117 football players at each school. See id. at 5 tbl. 1.1; Gender-Equity Study, supra note 41, at 8 tbl. 5. The exact figure is 12,402.

[FN259]. The number $340,000,000 is derived by multiplying 85 (the number of Division I-A schools that responded to the survey) by $4,031,000 (the average expense of football at a Division I-A school). Fulks, supra note 37, at 5 tbl. 1.1, 17 tbl. 3.10. The exact number is $342,635,000. Actual total expenditures for Division I-A is higher because this number does not include the expenditures of the 21 Division I-A schools that did not respond to the survey.

[FN260]. This number is derived as follows: the 57 Division I-A schools reporting a profit spent an average of $2,043,000 on women's sports. Letter from Ursula R. Walsh, supra note 252. An additional $700,000 for each women's sports program at these 57 schools would amount to $39,900,000. Added to the $2,043,000 already spent on women's sports, the total figure would be $41,900,000.

[FN261]. See 45 C.F.R. § 86.41(c) (listing factors to be considered in determining whether equal opportunity has been afforded but providing no exemption from its mandate).
[FN262]. Proposed Policy, supra note 124, at 58,075 (attaching as an appendix the memorandum of Apr. 18, 1978 from F. Peter Libassi to the Secretary).

[FN263]. Id.

[FN264]. Id. (citing Cong. Rec. S8488 (daily ed. May 20, 1974)).

[FN265]. See id. (discussing the rejection of the exemption).


[FN268]. See Proposed Policy, supra note 124, at 58,075.

[FN269]. See Policy Interpretation, supra note 5, at 71,421.

[FN270]. See, e.g., Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir.) (rejecting airline's claim that being female is a bona fide occupational qualification for the position of flight attendant), cert. denied, 404 U.S. 950 (1971).

While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices that the Act was meant to overcome.

Id.

[FN271]. See Oates, supra note 232, at C3 (arguing that downsizing a football program would hurt, not help, women's sports).


[FN273]. Id. at 302.

[FN274]. Id. at 158.

The operation of the principles of equal liberty and open positions prevents these contingencies from occurring. For as
we raise the expectations of the more advantaged the situation of the worst off is continuously improved. Each such increase is in the latter's interest, up to a certain point anyway. For the greater expectations of the more favored presumably cover the costs of training and encourage better performance thereby contributing to the general advantage. While nothing guarantees that inequalities will not be significant, there is a persistent tendency for them to be leveled down by the increasing availability of educated talent and ever widening opportunities. Id.

[FN275]. Senator Tower's proposed amendment defined a revenue-producing activity as one that provides "gross receipts or donations to the institution necessary to support that activity." 120 Cong. Rec. 15,322 (1974). No definition was provided for "necessary." See id.

[FN276]. Refer to notes 242-43 supra and accompanying text (using the "profitable" definition of a "revenue-producing" program, only 18 schools outside of Division I-A would be included).

[FN277]. See Walter B. Connolly, Jr. & Jeffrey D. Adelman, A University's Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios, 71 U. Det. L. Rev. 845, 912 (1994) (arguing that "an enlightened analysis" would consider only the net costs in a comparison of men's and women's programs).

[FN278]. Id.

[FN279]. See generally Fulks, supra note 37.

[FN280]. Id.

[FN281]. Id.

[FN282]. Refer to text accompanying notes 14-16 supra.

[FN283]. See Melody Harris, Hitting 'Em Where It Hurts: Using Title IX Litigation to Bring Gender Equity to Athletics, 72 Denv. U. L. Rev. 57, 77 (1994) (arguing that educational institutions receive tax dollars and are not departmentally profit-driven).

[FN284]. See Proposed Policy, supra note 124, at 58,071 (concluding that colleges have historically emphasized men's programs, resulting in higher participation rates).
[FN285]. See id. (stating that lack of emphasis on women's programs contributed to reduced participation and that not until 1977 were recruitment funds of any significance provided to female athletes).

[FN286]. Jackie Fitzpatrick, Here Come The Mighty Lady Huskies, N.Y. Times, Feb. 12, 1995, S 13 (Conn. Weekly), at 1 (reporting that the University of Connecticut women's basketball team plays before sold out crowds and sometimes before a national television audience).

[FN287]. Policy Interpretation, supra note 5, at 71,418.


[FN289]. See id. at 189 (arguing that expensive tastes require greater resources to achieve welfare equality).

[FN290]. Id. at 240.

[FN291]. See 45 C.F.R. § 86.41(c) (requiring "equal athletic opportunit(ies)" for men and women); Proposed Policy, supra note 124, at 58,074 (requiring that the "interests and abilities of men and women be equally accommodated").

[FN292]. Policy Interpretation, supra note 5, at 71,418.

[FN293]. See, e.g., Cohen v. Brown Univ., 809 F. Supp. 978, 987 (D.R.I. 1992), aff'd, 991 F.2d 888 (1st Cir. 1993). In addition, Brown vehemently disputes plaintiffs' focus on the comparison of the ratio of men and women participating in intercollegiate athletics to their relative ratio in the undergraduate population. From Brown's vantage point, the Title IX statute itself states that it does not require a strict "proportionality" test in assessing violations of the law. In support, they quote the following language contained in 20 U.S.C. § 1681(b): (quoting statute). Brown avers that this provision explicitly recognizes that equal opportunity does not require proportionality.


[FN295]. See Cohen, 809 F. Supp. at 987 (reciting defendant Brown's argument that § 1681(b) "precludes preferential treatment" to one sex).

[FN297]. Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter 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 or activity by the members of one sex.

Id.

[FN298]. Cohen, 991 F.2d at 897-98. The plaintiff has the burden of proving that the university's program disparages an underrepresented gender. Id. at 901-02; see also Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265, 275 (6th Cir. 1994) (stating that the plaintiff must prove statistical disparity and that a showing of "substantial proportionality" provides a safe harbor).

[FN299]. See Horner, 43 F.3d at 275 (stating that merely substantial proportionality will satisfy Title IX).

[FN300]. Cohen, 991 F.2d at 898.

[FN301]. Id. at 897 (noting that a university must meet only one of the three benchmarks).

[FN302]. See Kelley v. Board of Trustees, 35 F.3d 265, 271 (7th Cir. 1994) (stating that Title IX does not demand the statistical balancing of a quota system), cert. denied, 115 S. Ct. 938 (1995).

[FN303]. See Horner, 43 F.3d at 275; Kelley, 35 F.3d at 270; Favia v. Indiana Univ. of Pa., 7 F.3d 332, 343-44 (3d Cir. 1993); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 828-29 (10th Cir.), cert. denied, 114 S. Ct. 580 (1993); Cohen, 991 F.2d at 897-98.

[FN304]. Policy Interpretation, supra note 5, at 71,415 (stating that HEW uses the proportionality standard as a measure of compliance for comparing scholarships and participation rates of men and women). "In order to encourage self-policing and thereby winnow complaints, HEW proposed a Policy Interpretation" which the DED promulgates. Cohen, 991 F.2d at 895-96. The DED is treated by courts as the "agency charged with administering Title IX." Id. at 895.

[FN305]. See, e.g., Cohen, 991 F.2d at 895 (recognizing that "(t)he degree of deference is particularly high in Title IX cases because Congress explicitly delegated to (DED) the task of prescribing standards for athletic programs under Title IX"). Refer to notes 303-04 supra and accompanying text (discussing the deference given to agency interpretations of its regulations).


[FN307]. Roberts, 998 F.2d at 830.


[FN309]. Roberts, 998 F.2d at 830.

[FN310]. Id.


[FN312]. Cohen, 991 F.2d at 903.

[FN313]. See Favia v. Indiana Univ. of Pa., 7 F.3d 332, 343 (3d Cir. 1993) (finding that, irrespective of the funding issue, the university "would still appear not to be in Title IX compliance" because the student body was made up of 56% females and 44% males). The Third Circuit relied on figures put forth by the district court. See Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 585 (W.D. Pa. 1993) (noting that although 55.61% of the student body was female, only 36.51% of the school's intercollegiate athletes were women, thus comprising a clear Title IX violation).

[FN314]. Refer to notes 308-10 supra and accompanying text.


[FN318]. See Carol Herwig, Texas Case Advances Gender Equity Quest, USA Today, July 19, 1993, at 8C.

[FN319]. Refer to note 222 supra and accompanying text.
[FN320]. Gender-Equity Study, supra note 41, at 4 tbl. 1 (reporting that the average enrollment for each institution was 5324 men and 5395 women and that the average number of athletic participants per institution was 250.10 men and 111.71 women).

[FN321]. See Blum, Slow Progress, supra note 7, at A45.

[FN322]. Id.

[FN323]. Sherman, Gender Equity, supra note 13, at B14.

[FN324]. Of course, proportionality requires a comparison of athletic participation rates with undergraduate enrollment. The percentage of women undergraduates at the Big Ten schools taken as a whole is not readily available; however, the Chronicle survey does report this information for individual Big Ten schools for 1993-94, including Indiana University (53.5%), Ohio State University (46.9%), University of Illinois Urbana-Champaign (44.3%), University of Iowa (51.3%), and University of Michigan (47.3%). Blum, Slow Progress, supra note 7, at A49-50.

[FN325]. Id. at A51.

[FN326]. The disproportionately male schools, along with their percentages of women undergraduates and women athletes, are as follows: Drexel University (32.7% female undergraduates/32.3% female athletes), Georgia Tech (23.6%/27.2%), Lehigh (36%/35.5%), Oregon State (42.5%/38.5%), U.S. Military Academy (11.6%/24.2%), and U.S. Naval Academy (12.2%/23.4%). Id. at A48-A50.

[FN327]. The 10 schools that do not operate a Division I-A football program, along with their percentages of women undergraduates and women athletes are: La Salle (49.9% women undergraduates/46% women athletes), Manhattan (42.2%/48.9%), Robert Morris (47.7%/48.2%), St. Bonaventure (49.7%/46.9%), St. Joseph's (52%/47.8%), Santa Clara (51.5%/58.5%), Stetson (58.2%/53.3%), University of Maryland Baltimore County (49.0%/48.7%), University of Missouri Kansas City (52.8%/49.7%), and University of Wisconsin Green Bay (60%/56.5%). Id. at A49-A51. That these schools do not operate a Division I-A football team is indicated in the NCAA's list of Active NCAA Member Institutions (1994) (on file with the Houston Law Review).

[FN328]. See Blum, Slow Progress, supra note 7, at A51 (reporting statistics for Washington State). Refer to notes 388-91 infra and accompanying text.

[FN329]. Policy Interpretation, supra note 5, at 71,418.

[FN330]. As one court has noted,
The regulations which implemented Title IX were promulgated for the very purpose of rectifying historical inequities between men's and women's intercollegiate athletic programs. Indeed, the program expansion prong of the Effective Accommodation test was not intended to stop the compliance inquiry as to any institution that can demonstrate that it has added a women's sports team . . . .


[FN331]. See id.

[FN332]. See, e.g., id. at 1514 (noting that although Colorado State University had no women's athletics prior to 1970, they added eleven women's sports during the 1970s).

[FN333]. Id.

[FN334]. According to the language of the Policy Interpretation, the third benchmark is satisfied if "the institution can show a history and continuing practice of program expansion." Policy Interpretation, supra note 5, at 71,418 (emphasis added). The courts of appeal have agreed that the burden here is on the institution. See, e.g., Cohen v. Brown Univ., 991 F.2d 888, 902 (1st Cir. 1993) (stating that a university must prove this as an affirmative defense); Roberts v. Colorado State Univ., 998 F.2d 824, 830 n.8 (10th Cir.) ("[T]he language of the Policy Interpretation clearly places the burden of proof on the institution . . . ."), cert. denied, 114 S. Ct. 580 (1993).


[FN337]. Id. at 1514-15.

[FN338]. Id.

[FN339]. Id. at 1514.

[FN340]. See id.; see also Kelley v. Board of Trustees, 35 F.3d 265, 269-70 (7th Cir. 1994) (noting that reducing opportunities for men is an appropriate way to achieve proportionality but does not constitute expansion).

[FN342]. Id.

[FN343]. Id.

[FN344]. Id.

[FN345]. Id.


[FN347]. Id.

[FN348]. Id.

[FN349]. Policy Interpretation, supra note 5, at 71,418.


[FN352]. Policy Interpretation, supra note 5, at 71,418; see also Cohen, 991 F.2d at 898 (citing Policy with approval).

[FN353]. Cohen, 991 F.2d at 899.

[FN354]. Id.

[FN355]. Id. at 899-900 (alteration in original) (quoting 20 U.S.C. § 1681(a)).

[FN357]. See, e.g., Cook v. Colgate Univ., 802 F. Supp. 737 (N.D.N.Y. 1992), vacated as moot, 992 F.2d 17, 20 (2d Cir. 1993). In defending a Title IX suit, Colgate argued that female students at the school did not have sufficient interest to support a women's hockey team. Id. at 746. They argued that most Colgate students came from public high schools, where there were no girls' hockey programs. Id. The court responded by pointing out that although 75% of Colgate students attended public high schools, virtually none of Colgate's male hockey players had attended public high school. Id. Colgate had recruited them from prep schools or from Canadian hockey programs. Id.

[FN358]. These are the rounded average recruiting expenses for Division I schools. Gender-Equity Study, supra note 41, at 5 tbl. 2.


[FN360]. See, e.g., Favia v. Indiana Univ. of Pa., 7 F.3d 332, 334 (3d Cir. 1993) (dropping women's gymnastics and field hockey teams); Roberts v. Colorado State Bd. of Educ., 998 F.2d 824, 826 (10th Cir.) (discontinuing women's softball team), cert. denied, 114 S. Ct. 580 (1993); Cohen v. Brown Univ., 991 F.2d 888, 891 (1st Cir. 1993) (eliminating women's gymnastics and volleyball teams).

[FN361]. See, e.g., Cook, 802 F. Supp. at 739 (concerning action by former members of women's club ice hockey team).

[FN362]. See id. at 749 (discussing the unrealistic expectations of varsity level play without varsity level funding, coaching, and recruiting).

[FN363]. Refer to notes 8-9 supra and accompanying text.

[FN364]. See, e.g., Robert L. Simon, Proportionality Concept Might Not Equate to Equity, USA Today, July 2, 1993, at 12C. (1) proportional participation by each gender a reasonable goal in a society where nearly twice as many males as females participate in high school sports and where females on specific campuses might have less interest in participating than males?

It is one thing to divert funds to new sports to meet the interest of actual students but quite another to require creation of sports simply to achieve proportionality.

Id.

[FN365]. Martin Henderson, Fair Ball? Women Coaches Seem to Come up Short, L.A. Times, Jan. 19, 1994, at C6 (Orange County edition) (reporting that, for the 1992-93 school year, there were 1,997,489 female participants in high school athletics and about 3,400,000 male participants).
[FN366]. Ed Sherman, Weighing Women's Interests: Equity Means Counting Walk-Ons, Chi. Trib., Apr. 29, 1993, S 4, at 1, 2 (hereinafter Sherman, Weighing Interests) (reporting on Tribune survey of Big Ten schools that showed that men walk-ons outnumber women walk-ons by a 3 to 1 ratio).

[FN367]. Policy Interpretation, supra note 5, at 71,419 (citing figures obtained from the National Federation of High School Associations).


[FN370]. Gender-Equity Study, supra note 41, at 4.

[FN371]. For example, the former Athletic Director at Brown University testified that the Director of Admissions told him that "90% of the athletes who were accepted by Brown would not have been admitted if they weren't on a coach's admissions preference list." Cohen v. Brown Univ., 809 F. Supp. 978, 999 n.19 (D.R.I. 1992), aff'd, 991 F.2d 888 (1st Cir. 1993).

[FN372]. Sherman, Weighing Interests, supra note 366, S 4, at 2 (reporting Christine Grant, Women's Athletic Director at the University of Iowa, as quoting the movie Field of Dreams).

[FN373]. See, e.g., Joseph Tussman and Jacobus tenBroek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341, 344 (1949). "The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated." Id. (footnote omitted).


[FN375]. See id. at 1297. The focus of equality as acceptance, therefore, is not on the question of whether women are different, but rather on the question of how the social fact of gender asymmetry can be dealt with so as to create some symmetry in the lived-out experience of all members of the community. . . . On this view, the function of equality is to make gender differences, perceived or actual, costless relative to each other, so that anyone may follow a male, female, or androgynous lifestyle according to their natural inclination or choice without being punished for following a female lifestyle or rewarded for following a male one.

Id.

[FN377]. Id.

[FN378]. Donna A. Lopiano, Don't Make Us Choose, Newsday, May 9, 1993, at 15.

[FN379]. But see Carol Gilligan, In a Different Voice 6-7 (1982) (noting that recent scientific studies show, however, that some traits seem inherent in specific genders).

[FN380]. This is true unless the enrollment at the school includes a very small percentage of women students. Refer to subpart III(B) supra.

[FN381]. In 1993, the average level of expenditures for a Division I-A football program was $4,031,000. Fulks, supra note 37, at 17 tbl. 3.10. The average level of expenditures for women's sports programs at Division I-A schools was $1,806,000. Id. at 14 tbl. 3.1.

[FN382]. The average expense for Division I-A men's programs was 6,984,000 in 1993; for women's programs, $1,806,000. Id. at 14 tbl. 3.1. Of course, building up the women's program would not necessarily mean equal funding, but merely equal participation. Cook v. Colgate Univ., 802 F. Supp. 737, 751 (N.D.N.Y.), vacated as moot, 992 F.2d 17 (2d Cir. 1993).

[FN383]. See Ron Grossman, Women Win Each Battle in the Gender-Equity War, Chi. Trib., Nov. 19, 1994, S 3, at 1, 4 (reporting that College Football Association is lobbying for a Title IX exemption).

[FN384]. See, e.g., Kelley v. Board of Trustees, 35 F.3d 265, 267 (7th Cir. 1994) (noting the elimination of the men's swimming team at the University of Illinois).

[FN385]. See Alexander Wolff, Trickle-Down Economics: Cuts in College Football Would Help Fund Women's and Other Nonrevenue Programs, Sports Illustrated, Oct. 25, 1993, at 84, 84 (noting that "(a)s colleges struggle in a time of fiscal hardship to belatedly comply with Title IX, it's inexcusable to eliminate a nonrevenue men's sport, such as wrestling or swimming, and blame the women, as many schools are doing").

[FN386]. See Fulks, supra note 37, at 15 tbl. 3.2.

[FN387]. For Division I-A, the average expense of the men's program, after subtracting football, is $2,953,000 ($6,984,000 less $4,031,000). Id. at 15 tbl. 3.1. The average expense of the entire women's program is $1,806,000. Id.
at 14 tbl. 3.1.


[FN391] See Blum, Slow Progress, supra note 328, at A51.


[FN394] Blum, Slow Progress, supra note 328, at A51.


[FN396] See id. (discussing how, for example, crew teams travel less when competing).


[FN399] Refer to notes 49-58 supra and accompanying text.


[FN401] Id. at 216-17.

[FN402]. Id. at 214-16.

[FN403]. See Gary Roberts, Yes: Trends Make Change Inevitable, USA Today, June 8, 1994, at 2C.


[FN405]. Grant Teaff, the athletic director at Baylor University said, ".There has been talk of limiting squads to 100 (players) . . . . From what I know about gender equity and Title IX, that would be the worst thing you could do." Danny Robbins, Convention Ends, But Meetings Go On, L.A. Times, Jan. 17, 1993, at C2 (first alteration in original). Chuck Neinas, the executive director of the College Football Association, said, ".An issues committee (in the College Football Association) concluded that with it being a 22-man game and you have four years of eligibility, that the limit (for football scholarships) should be 88." Dave Koerner, Louisville Courier-J., Dec. 27, 1993 available in LEXIS, News Library, CURNWS File. Other coaches use a different calculation to demonstrate that 85 should be the minimum number of scholarships:
A team, they say, needs to be at least two deep in each position on the offensive and defensive sides. That's 44 players. Add in a couple more back-up quarterbacks, kickers (one each for kickoffs, punts, and field goals), and special-teams players for kickoffs and kick returns. That's 55 players. Remember that there are probably 15 athletes who are injured at any given time. That's 70 players. Consider that 15 or so athletes are red-shirted each season--sitting out a year of competition--and you need 85 players to field a team.
Blum, Coaches, supra note 42, at A33.

[FN406]. There is, however, a limit to the number of scholarships offered per team. Operating Bylaws, art. 15.5.5.1, supra note 34.

[FN407]. Id.

[FN408]. "The elimination of athletic scholarships would help return college sports to .the amateur student-athlete model' that most college presidents desire, the head of the American Council on Education told the National Collegiate Athletic Association today." N.C.A.A. Told to Review Aid, N.Y. Times, Jan. 12, 1988, at D24.

[FN409]. Operating Bylaws, art. 11.7.2, supra note 34.

[FN410]. See Looney, supra note 39, at 28.

[FN411]. Id.

[FN412]. Id. at 28, 30, 35.

[FN413]. Purdue, Ohio State, and Wisconsin have built indoor football practice facilities at costs of $9.3 million, $10.5 million, and $9.5 million respectively. Sherman, Cost Crunch, supra note 47, S 4, at 1, 3.

[FN414]. See Sherman, Gender Equity, supra note 13, at 14 (noting the suggestion of University of Michigan President Jim Duderstadt).

[FN415]. Task Force, supra note 19, at 10.


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