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Through the Looking Glass with Alice: The Current Application and Future of Title IX in Athletics

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Through the Looking Glass with Alice: The Current Application and Future of Title IX in Athletics

Josephine (Jo) R. Potuto*

ABSTRACT

This Article is a snapshot of the past pervasive discriminatory treatment of women in athletics and where women athletes and women's athletics currently stand. It discusses some of the new challenges for Title IX enforcement—female transgender athletes and treatment of name, image, and likeness revenues now open to college athletes. It reviews research regarding the physiological, hormonal, metabolic, body size and composition, and brain and neurological differences between men and women and how these factors impact both athletic performance and athletic interest. Finally, this Article concludes that the Title IX three-pronged test to assure gender equity in athletic participation opportunities takes us through the looking glass with Alice by failing to account for the realities of gender differences.

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I. INTRODUCTION

A father and his young son are severely injured in a car accident, and both require surgery. The boy is rolled into the operating room. The surgeon takes one look at him, gasps, moves away from the operating table, and says, “I cannot perform this surgery because this child is my son.”

Then the riddle asks, “Who is the surgeon?”

With women numbering over 30 percent of doctors today,¹ medical school enrollments divided about equally between men and women,² and every TV medical show with women among the doctor ranks, the answer to the riddle—that the surgeon is the child’s mother—is obvious. Not so in 1950, when women constituted only 6

1. Jeff Nilsson & Maude Radford Warren, *The Fight for Women Doctors*, SATURDAY EVENING POST (Jan. 14, 2016), <https://www.saturdayeveningpost.com/2016/01/fight-women-doctors/> [perma.cc/8GBL-JHWM].

2. *Id.*

percent of United States doctors, or in 1970, when only 7 percent were women,³ a twenty-year span during which virtually all television doctors were male.⁴

This Article briefly traces the historical discriminatory treatment of women, looks at Title IX⁵ and how it applies to women's athletic participation, describes the current state of women in sports, identifies new issues for Title IX enforcement, and assesses analytical deficiencies in the current application of Title IX that may overstate the extent to which gender inequitable treatment exists in athletics participation.

II. PAST AND PRESENT

There is no gainsaying the long history of pervasive societal discrimination against women that advanced a "romantic paternalistic"⁶ view of women's role and women's capabilities. Women were considered too dainty, too much the lovely delicate orchids needing special care and protection, to fend for themselves absent the protection of a father, husband, or brother.⁷ Indeed, the onset of social welfare legislation in the United States, offering workplace protection to workers from oppressive working conditions and long workdays, initially focused on women as well as children as needing special protection.⁸

Until at least the mid-nineteenth century, women had no separate identity after marriage,⁹ and could not hold property, initiate

3. *Id.*; *Physician Statistics Summary (1970-1999)*, PINNACLE HEALTH GRP. (Dec. 31, 1999), <https://www.phg.com/2000/01/physician-statistics-summary/> [<https://perma.cc/Y3SW-PQKE>] (noting that at the start of 2000, women constituted 23 percent of all doctors).

4. Tom Shale, *TV Docs*, WASH. POST (Oct. 8, 1989), <https://www.washingtonpost.com/archive/lifestyle/wellness/1989/10/08/tv-docs/3473c514-f14f-4b0b-a3fe-130314072cbc/> [perma.cc/XZ46-43DU].

5. Title IX, Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*

6. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

7. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

8. See *Muller v. Oregon*, 208 U.S. 412, 421 (1908) ("[W]oman has always been dependent on men."); K.R. Willoughby, *Mothering Labor: Difference as a Device Toward Protective Labor Legislation for Men, 1830-1938*, 10 J. L & POL. 445, 445 (1994).

9. See *Bradwell*, 83 U.S. at 141; Linda E. Speth, *The Married Women's Property Acts, 1839-1865: Reform, Reaction, or Revolution?*, in J. RALPH LINDGREN, *THE LAW OF SEX DISCRIMINATION* 13 (4th ed. 2011) (noting that it was only in 1882, with the Married Women's Property Act, that this changed in England, and that by 1865, in the United States, twenty-nine states had enacted some level of expansion of the rights of married women); JOYCE W. WARREN, *WOMEN, MONEY, AND THE LAW: NINETEENTH-CENTURY FICTION, GENDER, AND THE COURTS* 51-53 (2005) (noting that it was the latter part of the nineteenth century before the rights of married women were protected in all states).

lawsuits, enter binding contracts, or even serve as guardians for their children.¹⁰ If a husband and wife resided separately, the domicile of the husband was treated in law as the domicile of both.¹¹ Women faced barriers to their service on juries.¹² They could not testify in court.¹³ They were excluded from holding office or public policy-making.¹⁴ It took a constitutional amendment to ensure their right to vote.¹⁵

Women had limited access to higher education. Although substantially more girls than boys graduated from high school in the 1960s through the 1980s,¹⁶ until 1982 more men than women earned college degrees.¹⁷ Women's entrée to the professions, including the practice of law, similarly was limited.¹⁸ In 1972, women earned 7 percent of law degrees and 9 percent of medical degrees.¹⁹ In 1977, they earned 25 percent of doctoral degrees.²⁰

The story of women's and girls' athletic opportunities is part of that larger story. Nineteenth-century women engaged in calisthenics and played individual sports such as golf and croquet, where only a modicum of physical exertion was required.²¹ Lawn tennis was

10. *Frontiero*, 411 U.S. at 685; see 1 WILLIAM BLACKSTONE, COMMENTARIES ch. 15 (1765–1769).

11. See RESTATEMENT (FIRST) CONFLICT OF LAWS § 27 (AM. L. INST. 1934); Robert Lawrence & Elisa Rizzo, *Basic Conflict of Laws Principles*, in *A GUIDE TO INTERNATIONAL ESTATE PLANNING: DRAFTING, COMPLIANCE, AND ADMINISTRATION STRATEGIES, SECOND EDITION* 4 (Leigh-Alexandra Basha ed., 2013); *Barber v. Barber*, 62 U.S. 582, 584 (1858).

12. See Cristina Carmody Tilley, *A Feminist's Repudiation of the Rape Shield Laws*, 51 *DRAKE L. REV.* 45, 68–69 (2002).

13. *United States v. Anthony*, 24 F. Cas. 829, 830, 833 (N.D.N.Y. 1873) (noting, in her 1872 criminal prosecution for voting, Susan B. Anthony was barred from testifying, and the judge directed a verdict against her); see BARBARA ALLEN BABCOCK & ANN E. FREEDMAN, *SEX DISCRIMINATION AND THE LAW* 9–10 (1975) (providing the speech Anthony was permitted to give in lieu of testifying).

14. *Frontiero*, 411 U.S. at 684; ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 65 (Harvey C. Mansfield & Delba Winthrop, eds., trans. 1948).

15. U.S. CONST. amend. XIX.

16. See *Digest of Education Statistics, Table 187*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/programs/digest/d99/d99t187.asp> [perma.cc/RK5Y-QGGR] (last visited Feb. 28, 2023).

17. Mark J. Perry, *Prediction: No College Graduation Speaker Will Mention the 29% 'Gender College Degree Gap' for the Class of 2018*, AM. ENTER. INST.: AEIDEAS (May 1, 2018), <https://www.aei.org/carpe-diem/prediction-no-graduation-speaker-will-mention-the-29-gender-college-degree-gap-for-the-class-of-2018/> [perma.cc/T9WV-NL6E].

18. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 132 (1872).

19. See tasser10, *Title IX and UCLA*, BRUINS NATION: FANPOST (May 12, 2011, 2:32 PM), <http://www.bruinsnation.com/2011/5/12/2168151/title-ix-and-ucla> [perma.cc/48AN-VH9G].

20. *Id.*

21. JENNIFER HARGREAVES, *SPORTING FEMALES: CRITICAL ISSUES IN THE HISTORY AND SOCIOLOGY OF WOMEN'S SPORTS* 48 (1994).

tolerated.²² Informal recreational activities without rules also were acceptable,²³ at least if they were not strenuous.²⁴ Participation in team sports was discouraged, both because it entailed too much physical exertion and because it entailed an unwomanly display of competitive fervor.²⁵

In 1971, fewer than 295,000 girls participated in high school varsity athletics.²⁶ They constituted 7 percent of all high school athletes.²⁷ In 1971, fewer than 32,000 women competed in intercollegiate athletics. They constituted about 15 percent of all college athletes.²⁸ Both the ancient Olympic Games and the Modern Games initially barred women from competing and later provided only minimal opportunities.²⁹ In the view of Pierre de Coubertin, the founder of the Modern Olympic Games, female participation in the Games “would be incorrect, unpractical, uninteresting, and unaesthetic.”³⁰ According to him, their appropriate role was to “crown the victors.”³¹

The belief that women were physically, emotionally, and even psychologically ineligible for athletic competition had a dramatic impact on their opportunity to play sports, certainly. Equally dramatic: the sports that developed were tied to male physical characteristics, male interests, and the aggressive behavior associated

22. *Id.* at 53.

23. Richard C. Bell, *A History of Women in Sport Prior to Title IX*, 10 *SPORT J.* (2007), available at <https://go.gale.com/ps/i.do?id=GALE%7CA170414841&sid=googleScholar&v=2.1&it=r&linka-cess=abs&iissn=15439518&p=AONE&sw=w&userGroupName=anon%7Ed6d5604a> [perma.cc/X59H-R76L].

24. *Id.*

25. See SUSAN CAHN, *COMING ON STRONG: GENDER AND SEXUALITY IN TWENTIETH-CENTURY WOMEN'S SPORT* 55–82 (1994). There was not universal opposition to women's competitive activity. So-called industrial schools and historically black colleges and high schools supported and offered competitive opportunities to girls and women. *Id.* at 69.

26. Barbara Winslow, *The Impact of Title IX*, *GILDER LEHRMAN INST. OF AM. HIST.*, <https://www.gilderlehrman.org/history-resources/essays/impact-title-ix#:~:text=In%201971%2C%20fewer%20than%20295%2C000,Women%20and%20Girls%20in%20Education> [perma.cc/G3QC-N7S5] (last visited Feb. 28, 2023).

27. *Id.*

28. Genevieve Carlton, *How Title IX Impacts Women's Equality in College Athletics*, *BEST COLLS.*, <https://www.bestcolleges.com/news/2021/08/24/how-title-ix-impacts-womens-equality-in-college-athletics/> [perma.cc/L64J-2ENF] (Nov. 19, 2021).

29. See BRIAN I. DALY, *CANADA'S OTHER GAME* 58 (2013).

30. *Id.*

31. LINDA K. FULLER, *FEMALE OLYMPIANS* 1 (2016); see, e.g., Sohaila Shakib & Michele D. Dunbar, *The Social Construction of Female and Male High School Basketball Participation: Reproducing the Gender Order through a Two-Tiered Sporting Institution*, 45 *SOCIO. PERSPS.* 353, 353 (2002) (noting that girls' and women's sports were accorded less value than boys' and men's sports).

with male roles;³² and the organization of sports competition, and the rules of the game, also were developed by and for men.³³

Had women been in the picture when sports were developed, today there might be sports exclusively played by women that are as popular with modern audiences as football. There might be sports in which men aspire to compete, where women's performance on average exceeds that of men. There also might be more sports such as bowling where men and women compete on an equal basis. We will never know. Instead, male dominance of sports development translated to sports that are best suited to male interests and abilities.³⁴ It is that history that forms the context for gender equity policy.

III. TITLE IX

Title IX of the Educational Amendments of 1972³⁵ requires educational institutions that receive federal funds to offer equal opportunities to women and men in educational programs and activities.³⁶ The removal of barriers to higher education resulted in the admission of women to the military academies.³⁷ It also resulted in an

32. See generally Anne Klomsten, Herb Marsh & Einar Skaalvik, *Adolescents' Perceptions of Masculine and Feminine Values in Sport and Physical Education: A Study of Gender Differences*, 52 *SEX ROLES* 625 (2005); Danielle S. Berke & Amos Zeichner, *Paradigms and New Directions for Understanding and Preventing Masculine Aggression*, 10 *SOC. & PERSONALITY PSYCH. COMPASS* 83 (2016); Christopher Hickey & Lindsay Fitzclarence, *Educating Boys in Sport and Physical Education: Using Narrative Methods to Develop Pedagogies of Responsibility*, 4 *SPORT, EDUC., & SOC'Y* 51 (1999).

33. See *Sports and the Making of Men: Transforming Gender Norms on the Playing Field*, MENENGAGE ALLIANCE-UNFPA, available at <https://menengage.unfpa.org/sites/default/files/resource-pdf/Advocacy-Brief-Sports-and-the-making-of-men-transforming-gender-norms-on-the-playing-field.pdf> [perma.cc/ZYC5-ZCZT].

34. *The Issue*, WOMEN'S SPORTS POL'Y WORKING GRP., <https://womenssportspolicy.org/the-issue/> [perma.cc/2DNA-LGC9] (last visited Feb. 28, 2023) ("The Women's Sports Policy Working Group estimates the post-puberty performance gap between male and female athletes as 8 to 20 percent, and up to 50 percent for sports involving 'explosive power and complex movement skills.'").

35. 20 U.S.C. § 1681 *et seq.*

36. The original Title IX language was held to apply not to an institution in gross, but only to particular programs at that institution that themselves received federal funds. See *Grove City Coll. v. Bell*, 465 U.S. 555, 573–74 (1984). Congress thereafter amended Title IX to so that it applies to all programs at an institution that receives federal funds. See *Civil Rights Restoration Act of 1987*, 20 U.S.C. § 1687 (amended 1988).

37. *United States v. Virginia*, 518 U.S. 515, 557–58 (1996).

increase of women in the professions.³⁸ Today, for example, more than half of all lawyers are women.³⁹

Title IX was a clear engine for change, but its enactment likely also reflects the attitudinal shift and push for reform that already had occurred and had produced outside the province of Title IX. Women now have the same jury obligation as men, can claim husbands as dependents,⁴⁰ can act as estate administrators,⁴¹ can assume combat roles,⁴² and can be convicted of rape.⁴³

A. Athletic Programs and Title IX

The prevailing equal protection paradigm, rooted in cases dealing with discrimination on the basis of race, is that of a unitary

38. The distribution of doctoral degrees for women still reflects traditional gender roles. Although women now earn 53 percent of all doctoral degrees, they earn only 28 percent of engineering degrees, 32 percent of math and computer science degrees, and 40 percent of degrees in physical and earth sciences. See Mark J. Perry, *Women Earned the Majority of Doctoral Degrees in 2020 for the 12th Straight Year and Outnumber Men in Grad School 148 to 100*, AM. ENTER. INST. (Oct. 14, 2021), <https://www.aei.org/carpe-diem/women-earned-the-majority-of-doctoral-degrees-in-2020-for-the-12th-straight-year-and-outnumber-men-in-grad-school-148-to-100/> [perma.cc/DJ39-ZKZ8]. The Bureau of Labor Statistics for 2021 shows that 16.5 percent of women are employed as engineers and architects, 25 percent in computer and math work, 40 percent as chemists, and 46 percent as biological scientists. See *The STEM Gap: Women and Girls in Science, Technology, Engineering and Mathematics*, AAU, <https://www.aauw.org/resources/research/the-stem-gap/> [perma.cc/YB4J-MNZM] (last visited Mar. 1, 2023).

39. *Lawyer Demographics and Statistics in the U.S.*, ZIPPPIA, <https://www.Zippia.com/lawyer-jobs/demographics/> [perma.cc/3NUE-Y7DX] (last visited Mar. 1, 2023).

40. *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (holding unconstitutional statute that treated wives as servicemen's dependents but husbands as servicewomen's dependents only if servicewoman's income covered more than half of husband's support).

41. *Reed v. Reed*, 404 U.S. 71, 76–77 (1971) (holding it is unconstitutional to prefer men as estate administrators).

42. See Sarah Pruitt, *United States Military Lifts Ban on Women in Combat*, HISTORY, <https://www.history.com/news/u-s-military-lifts-ban-on-women-in-combat> [perma.cc/67N3-YGAQ] (Aug. 22, 2018); Brian Wagner, Opinion, *The Pentagon Should Drop the Ban on Women in Combat Units—No Exceptions*, WASH. POST (May 6, 2015, 11:01 AM), <https://www.washingtonpost.com/news/checkpoint/wp/2015/05/06/opinion-the-pentagon-should-drop-the-ban-on-women-in-combat-unit/> [perma.cc/8FSQ-3B5P] (noting no law barred women from combat, but historically they were excluded from combat roles). Women still formally are not required to register for the draft. See Rebecca Kheel, *Requirement for Women to Register for the Draft Back on the Table in Annual Defense Bill*, MILITARY.COM (June 27, 2022), <https://www.military.com/daily-news/2022/06/27/requirement-women-register-draft-back-table-annual-defense-bill.html> [perma.cc/6WGH-HKJR]; *Rostker v. Goldberg*, 453 U.S. 57, 77 (1981).

43. By 1980, thirty-four states provided that a woman could rape a man. See *Country v. Parratt*, 684 F.2d 588, 590 n.2 (8th Cir. 1988) (citing Comment, *Rape Laws, Equal Protection, and Privacy Rights*, 54 TULANE L. REV. 456, 459 (1980)). Statutory rape is gender neutral in all fifty states. See Carolyn E. Cocca, *Prosecuting Mrs. Robinson? Gender, Sexuality, and Statutory Rape Laws*, 16 MICH. FEMINIST STUD. (2002), available at <http://hdl.handle.net/2027/spo.ark5583.0016.003> [perma.cc/FJ63-7QUQ].

system, where separate is unconstitutional even if separate is equal.⁴⁴ As described above, the sports played today were developed by and for men and, therefore, match their interests and abilities.⁴⁵ In consequence, a unitary paradigm for athletics, where women compete against men for spots on a team, would produce relatively few competition opportunities for women⁴⁶—unless, that is, the rules of the game were changed or different criteria were applied to men and women competing in the same game.⁴⁷ In competitive varsity athletics, neither occurred.⁴⁸ Instead, a dual system (separate men's and women's teams) accounts for the accommodation of women's athletics opportunities.⁴⁹

In Genesis, to name was to create.⁵⁰ In athletics, creation comes from the rules of the game. Sports in the United States aptly have been described as our secular religion.⁵¹ Americans, as both fans and participants, are passionate about their sports, and little is as sacrosanct to them as athletic competition. Changing a sport's rules is, therefore, a risky business.

Rules changes have occurred over the course of years (designated hitter in baseball, three-point shot in basketball), but these changes were instituted by the governing bodies of the sports themselves.⁵² These changes also were not without

44. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *City of Richmond v. Croson*, 488 U.S. 469, 493 (1989); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954).

45. See Bell, *supra* note 23; Klomsten et al., *supra* note 32, at 626.

46. See *infra* notes 160–72 and accompanying text. For a full discussion of the physical and other differences between men and women, as well as the comparative differences in their interests in sports, see *infra* Section X.A.

47. For gender cases outside athletics, this is the precise remedy applied. See *United States v. Virginia*, 518 U.S. 515, 557–58 (1996). A third way to assure that women have meaningful participation opportunities on unitary teams would be to set aside places for them. This currently is done in social softball leagues. The playing field remains relatively equal because each team has women players who do not meet the skills level of the men. The rules of the game remain the same. The tenor of the game changes, however. In addition, setting aside a defined number of places on unitary teams is to create quotas, unconstitutional except where purposeful discrimination by a particular government actor is proved in court, and then only in limited numbers and for a limited time.

48. See Bell, *supra* note 23.

49. See *Equity in Athletics, Inc. v. Dep't of Educ.*, 504 F. Supp. 2d 88, 107 (W.D. Va. 2007), *aff'd sub nom*, *Equity in Athletics, Inc. v. U.S. Dep't of Educ.*, 291 F. App'x 517 (4th Cir. 2008).

50. See generally *Genesis* 1:1–29.

51. See A. BARTLETT GIAMITTI, TAKE TIME FOR PARADISE 11–12 (2011).

52. See Ron Juckett, *Designated Hitter: The Controversial Rule Turns 40 Years Old*, BLEACHER REP. (Jan. 11, 2013), <https://bleacherreport.com/articles/1480375-designated-hitter-the-controversial-rule-turns-40-years-old#:~:text=Friday%20marks%20the%2040th%20anniversary,for%20a%20three%2Dyear%20trial> [perma.cc/W3LC-F5VJ]; Bethlehem Shoals, *The NBA Has a Three-Pointer Problem—but Don't Blame Steph Curry*, GQ (Mar. 25, 2016), <https://www.gq.com/story/the-nba-has-a-3-pointer-problem-but-dont-blame-steph-curry> [perma.cc/E74H-B249].

controversy⁵³—controversy that would increase were judges to impose the changes.

Moreover, the rules of a game are arbitrary.⁵⁴ There is no science to explain why it is ten yards in four tries to a first down, why it is ninety feet between bases, or why a ball hitting the line is fair in volleyball and baseball but out in basketball and football.⁵⁵

In an arbitrary world, there are no standards by which a judge may evaluate whether and which rules of a sport are not essential and may be eliminated without changing the fundamental nature of that sport.⁵⁶ In an arbitrary world, there also are no standards by which a judge may decide whether and which rules may be retained for men but adjusted for women without changing the fundamental nature of that sport.⁵⁷ This absence of standards is the very essence of nonjusticiability.⁵⁸

In 1975, the Department of Health, Education, and Welfare (HEW) published a nonexclusive list of ten factors to evaluate whether women and women's teams were afforded equal opportunity and

53. See Juckett, *supra* note 52; Shoals, *supra* note 52.

54. See *PGA Tour v. Martin*, 532 U.S. 661, 700-01 (2001) (Scalia, J., dissenting).

55. See *id.* This, of course, circles back to the fact that the rules of the most popular games played and watched today were developed exclusively by and for men. See Klomsten et al., *supra* note 32, at 626.

56. See *e.g.*, *Martin*, 532 U.S. at 678, 685. The Supreme Court addressed adjusting the rules of a game to provide access otherwise denied in a case brought under the Americans with Disabilities Act by golfer Casey Martin. *Id.* at 678. Martin suffered from a debilitating disease that necessitated his riding a cart to negotiate a golf course. *Id.* at 668–69. Martin challenged a PGA Tour rule that prohibited golf carts in elite pro events. *Id.* Under the Act, accommodations for disabilities are required unless they “fundamentally” alter the nature of an activity. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12102, 12182(b)(2)(A)(ii). The Supreme Court described two ways that might happen: by changing an “essential aspect” of a game even though the change applied to all competitors (increasing the circumference of golf holes) or by altering a “peripheral” aspect of a game to accommodate a disabled competitor against the rest of the field. *Martin*, 532 U.S. at 682–83. *Martin* seems an easy case for deciding the activity in question was not fundamental. The *Martin* Court found statutory authorization (meaning the concurrence of the two other branches) to review a sports rule. *Id.* at 690. In addition, golf is an individual sport, not a team sport, and certainly not a team sport as embedded in American culture as football, baseball, and basketball are.

57. In addition, in fast-paced team sports it may be impractical to apply different standards in a way that sufficiently equalizes the field of play for women and also may be reasonably administered by game officials. See *id.* at 702–03.

58. As a doctrine, nonjusticiability is an aspect of separation of powers and resides in the area of political question. See *e.g.*, *Baker v. Carr*, 369 U.S. 186, 228–29 (1962). A fundamental aspect of nonjusticiability is the absence of “judicially describable and manageable standards by which a court may resolve a matter before it.” *Id.*; *Zivotofsky v. Clinton*, 566 U.S. 189, 197–98 (2012). As a general matter, this absence of standards means that the matter may be outside the judicial function.

treatment compared to men and men's teams.⁵⁹ The factors: (1) the effective accommodation of the interests and abilities of men and women in the selection of sports and the level of competition, (2) equipment and supplies, (3) scheduling, (4) travel and per diem expenses, (5) coaching and tutoring, (6) work assignments and pay for coaches and tutors, (7) locker rooms and facilities, (8) medical and training services, (9) housing and dining services, and (10) publicity.⁶⁰ The prime focus of controversy and litigation has been, and continues to be, on the first factor in the list: the effective accommodation of interests and abilities.⁶¹ Effective accommodation focuses on equality of opportunity and treatment in athletic participation.⁶²

Evaluating equality of opportunity and treatment in a unitary system is relatively straightforward.⁶³ Consider a hypothetical involving law college admissions at Hypo State Law College. Assume

59. See 34 C.F.R. § 106.41.

60. *Id.* § 106.41. Particularly in the early years of Title IX enforcement, women athletes challenged the provision of services to them (items 2 to 10 on the list) as unequal. Even today, complete equivalence is illusive. In 2021, the disparity in weight rooms at early rounds of the Men's and Women's Basketball Tournament generated massive publicity. See e.g., Grace Arnis, *Viral Tiktok Highlights Differences Between Men's And Women's NCAA Tournament Weight Rooms*, KREM2, <https://www.krem.com/article/sports/ncaa/ncaab/march-madness/viral-tiktok-of-march-madness-weight-rooms/293-f8dbd43c-b496-42c6-a5db-3b95ded1e410> [perma.cc/VJ3Y-Z4KA] (Mar. 19, 2021, 1:16 PM). Although the NCAA is not subject to Title IX, the publicity led to a formal review to examine NCAA treatment of the genders and to rectify any disparity. See Becky Sullivan, *Under Fire, The NCAA Apologizes and Unveils New Weight Room For Women's Tournament*, NPR (Mar. 20, 2021, 8:56 PM), <https://www.npr.org/2021/03/20/979596524/under-fire-the-ncaa-apologizes-and-unveils-new-weight-room-for-womens-tournament> [perma.cc/D3UD-YV7J]. For equivalence of all the listed items except the first one, the question is whether women's teams are treated equally with men's teams. Even here, however, there may be issues related to gender preferences. Women student-athletes, for example, are more focused on matters outside athletics. See Josephine Potuto & James O'Hanlon, *National Study of Student-Athletes Regarding Their Experiences as Students*, 41 COLL. STUDENT J. 964 (2006). If these preferences play out in team lounges, then one might expect the lounge of a men's team to have more video games and several very large screen TVs while women's lounges might have these but also gravitate toward study space, conversation space, and kitchens. The ultimate question is whether there is overall equivalence in funds expended. For a fuller and more particularized exposition of the regulations, see A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 C.F.R. § 239 (1979).

61. The first case to address this factor was *Cohen v. Brown University*. See 991 F.2d 888, 907 (1st Cir. 1993).

62. See *Reed v. Reed*, 404 U.S. 71, 77 (1971).

63. There are issues even in a unitary system, of course. It may be difficult to prove a purpose to discriminate, to determine the relevant population for comparison purposes, to decide whether individuals claiming discrimination are similarly situated within that population compared to those to whom they claim dissimilar treatment, to decide whether their treatment in fact is dissimilar, and, if so, whether legally acceptable reasons justify the dissimilar treatment. See *Cohen*, 991 F.2d at 907. Similarly, identifying the relevant population may be difficult. For a state law college, we might use gender percentages of the state's population or national numbers of college graduates. For purposes of the hypothetical, it makes no difference.

that women comprise 35 percent of enrolled students at Hypo State. Further, assume that, nationally, women comprise 75 percent of all college graduates. This 40 percent disparity will be one element in proving gender discrimination. By itself, it does not so prove, however, unless one presumes that there are no gender differences between men and women in their interests and abilities regarding law college and a career in law. Instead, any such presumption will be tested by the evidence. Among other things, a judge will evaluate whether the admissions criteria are relevant to success in law college or pretextual and assess whether the criteria were applied evenhandedly to all applicants. A judge also may consider surveys and statistical evidence regarding the interest of women college graduates in a legal career. If a judge decides that law college admissions decisions were made on a gender-neutral basis using criteria relevant to legal education, then there is no equal protection violation in the gender demographics at Hypo State Law College no matter the percentage of enrolled men and women or how those percentages compare to the total population of college graduates.

Sports participation as enforced via Title IX is a dual system, where male and female athletes do not compete against each other for the same participation opportunities.⁶⁴ Evaluation for gender equity in a dual system is less straightforward than in a unitary one because there is no way directly to evaluate comparative qualifications.

IV. EQUAL PROTECTION, RACE, GENDER, AND TITLE IX

The elements of a violation of the equal protection guarantee of the Fourteenth Amendment are that there is a governmental actor⁶⁵ that purposefully discriminates among similarly qualified and situated individuals.⁶⁶ Race-based discrimination is constitutional only if it both serves a compelling governmental interest and is the least restrictive means to further that interest (i.e., strict scrutiny review).⁶⁷

In *Brown v. Board of Education*,⁶⁸ the Supreme Court held that separate treatment based on race violated the Fourteenth Amendment Equal Protection Clause even if the separate treatment were factually

64. See Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681.

65. U.S. CONST. amend. XIV.

66. *Washington v. Davis*, 426 U.S. 229, 241 (1976). See *infra* note 253 for further articulation of equal protection criteria.

67. See *supra* note 44.

68. 347 U.S. 483, 495 (1954) (involving racially segregated public schools).

equal.⁶⁹ Since *Brown*, the equal protection paradigm for race has been unitary.⁷⁰ Although a dual system theoretically is constitutional for race cases, no dual system has passed the test under strict scrutiny analysis.⁷¹

A unitary paradigm may be applied seamlessly to racial classifications as there are no differences between the races for which a dual system is required to provide equal opportunity. Gender is a different story. Nonetheless, when the US Supreme Court addressed gender discrimination, it borrowed the analytical approach of the race cases and adopted the unitary model.⁷² While so doing, the Supreme Court also accommodated for the reality of gender differences.⁷³ First, in gender discrimination cases, the Court employs intermediate, not strict, scrutiny,⁷⁴ whereby government action that discriminates between the genders nonetheless is constitutional if there is an important interest (an "exceedingly persuasive justification")⁷⁵ and the means chosen are substantially related to achieving it.⁷⁶ This less stringent standard presumably leaves room for dissimilar treatment that neither disadvantages women nor upholds debilitating stereotypes. Second, courts and legislatures admit for gender what they do, and should, reject for race: that in certain contexts separate treatment is permissible.⁷⁷ In gender discrimination cases outside of athletics, the universal remedy for discrimination is to adjust the

69. *Id.* at 487–88. The *Brown* Court specifically addressed only a formally dual public school system. Subsequent to *Brown*, a series of cases applied its reasoning to other governmental services and programs. *See e.g.*, *Watson v. Memphis*, 373 U.S. 526, 529–39 (1963).

70. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 11–12 (1971).

71. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214, 216 (1944). In fact, strict scrutiny almost always results in the unconstitutionality of a challenged practice or policy. *See, e.g.*, *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring). Pre-*Brown*, a separate-but-equal paradigm was constitutional so long as separate treatment was factually equal treatment. *See Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896). Between *Plessy* and *Brown*, a line of Supreme Court cases rejected dual systems on a factual finding that the systems were not equal. *See, e.g.*, *Sweatt v. Painter*, 337 U.S. 629 (1950); *Mitchell v. United States*, 313 U.S. 80, 94 (1941).

72. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

73. *See id.*

74. *United States v. Virginia*, 518 U.S. 515, 532 (1996); *Mississippi Univ. v. Hogan*, 458 U.S. 718, 723–724 (1982).

75. *Hogan*, 458 U.S. at 723–724.

76. *Virginia*, 518 U.S. at 524; *Hogan*, 458 U.S. 718, 724 (1982). Administrative convenience is not an important governmental interest. *See Reed v. Reed*, 404 U.S. 71, 76–77 (1971); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973). Stereotypes as to traditional male and female roles or assumptions about interest will not be entertained. *See Virginia*, 518 U.S. at 550.

77. *See Virginia*, 518 U.S. at 551 (discussing whether there were factually equal higher education opportunities in separate colleges for men and women).

criteria within the unitary system, not to maintain a dual one for each gender.⁷⁸

Title IX regulations for gender equity in athletic participation opportunities formally follow the Supreme Court's lead, by designating a unitary system (one team on which both men and women compete) as the paradigmatic norm for assuring equality of athletic participation opportunity for women.⁷⁹ Using the unitary system as= norm, however, means that it is the fallback for assuring equality when discrimination is found in the dual system (separate teams for men and women). For gender equality in athletic participation, however, a unitary system disadvantages women. A paradigm that retains a unitary system as fallback for athletics participation works only if criteria in the unitary system are adjusted to accommodate for differences between men and women in their physiology, body size, neurology, and their metabolic and hormonal systems.⁸⁰ For reasons discussed above,⁸¹ this has not happened. Formally designating a unitary system as paradigm for athletic participation, therefore, is new age doublespeak⁸² that forces constitutional doctrine through the looking glass with Alice.

As proof, consider what would happen if university athletic departments replaced separate women's and men's teams with one team for each sport. Independent of interests of economy or efficiency that universities might claim, this move simply would locate intercollegiate athletics squarely in the unitary system the courts and Title IX regulations declare to be the constitutional norm. The

78. *E.g., id.* at 556; *see also infra* notes 265–67 and accompanying text for further discussion.

79. 34 C.F.R. § 106.41(a) (2020) (emphasis added) (“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.”). Club and intramural sports often are played for recreation or exercise. *See, e.g., Intramural Sports*, VIRGINIA STATE UNIV., <http://www.vsu.edu/student-life/sport-leisure/intramural-sports/index.php> [perma.cc/2G2Q-JV5X] (last visited Mar. 3, 2023). Club teams compete across campuses; some are highly competitive. *See, e.g., Intramurals*, GEORGIA STATE UNIV., <https://recreation.gsu.edu/programs/intramurals/> [perma.cc/FW94-V79G] (last visited Mar. 3, 2023). The talent levels do not match those of student-athletes on varsity teams, and no scholarships are provided. *See* *Cohen v. Brown Univ.*, 991 F.2d 888, 904 (1st Cir. 1993). The focus of Title IX judicial decisions primarily has been on varsity sports. *See e.g., id.*; *Kelley v. Bd. of Trs.*, 35 F.3d 265 (7th Cir. 1994); *Roberts v. Colo. State Bd.*, 998 F.2d 824 (10th Cir. 1993); *Neal v. Bd.*, 198 F.3d 763 (9th Cir. 1999).

80. *See infra* Section IX.B–X.A.

81. *See supra* notes 72–78 and accompanying text.

82. The phrase was coined by George Orwell in his novel, 1984. *See* GEORGE ORWELL, 1984 (1949).

consequence would be a dramatic decrease in women's athletic opportunities. Would the courts accept this? Would Congress?

Although Title IX regulations formally engage in doublespeak, in practice they reflect reality and expressly authorize separate men's and women's teams for sports whose "major activity" or purpose is bodily contact (including boxing, wrestling, rugby, ice hockey, football, and basketball) and also when team selection is based on competitive skill.⁸³ Virtually all varsity sports use competitive skill as a selection criterion.⁸⁴ In consequence, the regulatory exceptions are the rule, and athletic participation for men and women is a dual system under Title IX.⁸⁵

Articulating the unitary model as paradigm, and then avoiding its consequences, leads to analytical confusion. It works only because no one takes it at its word. We understand fully how things are, but we nonetheless talk and make policy as if they were not. The unitary paradigm also means that women athletes are treated as the potentially injured party in a dual system, no matter that separate women's teams are employed to advantage them.

83. 34 C.F.R. § 106.41(b) (2020) ("Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact."). The regulations also expressly require that women be permitted to try out for men's teams when there is no counterpart women's team, their opportunities historically have been limited, and the sport is not a contact sport. *Id.* The regulations are stated in gender neutral terms. But the opportunity to try out applies only to a gender whose athletic opportunities "have previously been limited." *Id.* That translates almost exclusively to women. The proviso that this tryout opportunity is not required for contact sports underscores this.

84. See generally *Differences Between College, Club, and Intramural Sports*, CAPPEX, <https://www.cappex.com/articles/college-life/college-club-vs-intramural-sports> [perma.cc/D7A7-Q4MG] (last visited Mar. 3, 2023).

85. See *Equity in Athletics, Inc. v. Dep't of Educ.*, 504 F. Supp. 2d 88, 107 (W.D. Va. 2007), *aff'd sub nom*, *Equity in Athletics, Inc. v. U.S. Dep't of Educ.*, 291 F. App'x 517 (4th Cir. 2008). This is a tad overstated. Rifle, fencing, and skiing are NCAA sports in which men and women both compete. See NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA DIVISION I MANUAL, BYLAWS 18.3.1, 20.8 (2022), available at <https://web3.ncaa.org/lstdbi/reports/getReport/90008> [perma.cc/56F4-5MVU] [hereinafter BYLAWS]. Except for rifle, however, this means only that men's and women's scores are combined to determine winners. *Id.* Men still compete against men and women against women. There also are separate races for men and women in several skiing events with scores reported by event and not separately. *Id.* NCAA has three divisions (I, II, III). *Id.* Division I institutions include the largest and most well-funded research universities. *Id.* Institutions that sponsor football teams that play in bowl games are in the Football Bowl Subdivision (FBS) of Division I. *Id.* at 20.01.

Deciding equality of treatment in a dual system is more difficult than in a unitary one. It requires both a comparison of male and female programs and an evaluation of what constitutes numerical equivalency between them. In a dual system, monitoring for compliance is also more difficult.

A. *The Three Prongs of Athlete Participation*

In 1979, the Department of Education⁸⁶ established a three-pronged test to guide educational institutions to provide effective accommodation for women's athletic participation (factor one in the ten-factor list):

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
- (3) Where the members of one sex are underrepresented among intercollegiate athletes and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.⁸⁷

Prong 1 requires that the percentage of women on a university's athletic teams must closely match the percentage of its enrolled women.⁸⁸ Prong 2 requires continuing program expansion, and that typically means adding sports.⁸⁹ Prong 3 requires satisfaction of 100 percent of the interests and abilities of women.⁹⁰ In *Cohen v. Brown University*, the US Court of Appeals for the First Circuit upheld the three-pronged test as a means to determine gender equity for women.⁹¹ In dicta, the court

86. The Office of Civil Rights (OCR) currently oversees compliance with Title IX. Initially oversight was in the HEW but was eventually transferred to the Department of Education. See *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993).

87. See *Cohen*, 991 F.2d at 897.

88. See, e.g., Lee Green, *Title XI Compliance—Part I: The Three-Prong Test*, NAT'L FED'N OF STATE HIGH SCHS. ASS'N (Feb. 8, 2022), <https://www.nfhs.org/articles/title-ix-compliance-part-i-the-three-prong-test/> [perma.cc/A57W-EQKJ].

89. See *id.*

90. See *id.*

91. 991 F.2d at 895. Other circuit courts followed the First Circuit's lead. See, e.g., *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 275 (6th Cir. 1994); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 272 (7th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995); *Roberts v. Colo. State Bd.*, 998 F.2d 824, 833 (10th Cir. 1993); *Neal v. Bd.*, 198 F.3d 763, 772 (9th Cir. 1999).

named Prong 1 proportionality a “safe harbor” for Title IX compliance.⁹² As will be discussed later in this Article, Prong 1 numerical proportionality fails to account for what now is known about gender differences and, in consequence, may overstate what gender equitable treatment requires.⁹³

B. Money Makes Prong 1 the Prong of Choice

We live in an age of reduced public financial support for higher education and a continued scramble by colleges to do more with less.⁹⁴ Academic departments and programs are cut.⁹⁵ Course offerings are limited.⁹⁶ Class sizes are increased.⁹⁷ Multiple class sections are eliminated.⁹⁸ Faculty and staff positions go unfilled.⁹⁹ At all but a few institutions, money for athletics comes at the cost of academic and campus facility, staffing, and administrative needs.¹⁰⁰ There also are financial tradeoffs within athletic departments. Funding a particular team may come at the cost of funding other teams, facility maintenance or expansion, student athletic scholarships, and staff salaries.¹⁰¹

92. *Cohen*, 991 F.2d at 897.

93. *See infra* Section X.B.

94. *See* Elaine S. Povich, *To Balance Budgets, Governors Seek Higher Education Cuts*, HUFFINGTON POST (Mar. 27, 2015), <https://www.huffpost.com/topic/higher-education-cuts> [perma.cc/TDZ7-TG8A]; Niraj Chokshi, *The Economy's Bouncing Back. But Higher Education Funding Isn't*, WASH. POST (May 13, 2015, 9:05 AM), <https://www.washingtonpost.com/blogs/govbeat/wp/2015/05/13/the-economys-bouncing-back-higher-education-funding-isnt/> [perma.cc/72MW-ZD8H].

95. *See* Chokshi, *supra* note 94.

96. *See id.*

97. *See id.*

98. *See id.*

99. *See id.*

100. *See* Matt Zimmer, *Summit Schools Rely on Subsidies for Athletic Programs*, SIOUX FALLS ARGUS LEADER, <https://www.argusleader.com/story/sports/college/2015/05/28/summit-schools-rely-subsidies-athletic-programs/28054437/> [perma.cc/2JHP-YE6T] (May 27, 2015, 11:29 PM); *see, e.g.*, Joe Nocera, *At Rutgers, It's Books vs. Ballgames*, N.Y. TIMES (May 18, 2015), https://www.nytimes.com/2015/05/12/opinion/joe-nocera-at-rutgers-its-books-vs-ball-games.html?_r=0 [perma.cc/DGY5-HVJA]. Even the most well-funded athletic programs receive subsidies.

101. This is particularly true of universities whose football teams are not part of the College Football Playoff. Even universities with major football programs are not immune, however. The need to find funds drives athletic programs to become more commercial, to seek more corporate sponsors and donor support, and to concede athletic schedules and other campus issues to the strictures of broadcast schedules. This, in turn, has led to increased claims that college athletics are more professional than educational. *See* Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [perma.cc/49YU-YX8H]. The best-funded programs generally have

Funding shortfalls promise to continue or even increase.¹⁰² Adding sports (Prong 2) costs money. Meeting 100 percent of women's interests (Prong 3) also costs money. Women's interests are a moving target, moreover, as what is 100 percent of interest one day may be less than that the next.¹⁰³ Meeting Prong 1, by contrast, need not cost money as proportionality may be achieved at any funding level. The consequence is that the majority of colleges attempt to satisfy effective accommodation through Prong 1.¹⁰⁴

V. HEAD COACHES AND MANAGEMENT

Title IX addresses equality of opportunity and treatment for employees of educational programs as well as students enrolled at them.¹⁰⁵ It applies directly to women coaches and administrators who claim to be the victims of gender discrimination.¹⁰⁶ It applies indirectly to coaches and athletic administrators, whether female or male, who claim discrimination in the resources and treatment afforded a women's athletic program or women athletes.¹⁰⁷ Although Title IX has had a

student-athletes with the best academic performances. *See, e.g., Wealthiest NCAA Programs Have Best Academic Progress*, INDIANAPOLIS STAR (May 27, 2015, 6:27 PM), <https://www.indystar.com/story/sports/college/purdue/2015/05/27/wealthiest-ncaa-programs-best-academic-progress/28037379/> [perma.cc/CFV4-UA38]. A part of this success, at least, comes from well-funded and fully functioning athlete academic support services. *See id.*

102. *See* Mary Ellen Flannery, *State Funding for Higher Education Still Lagging*, NAT'L EDUC. ASS'N (Oct. 25, 2022), <https://www.nea.org/advocating-for-change/new-from-nea/state-funding-higher-education-still-lagging> [perma.cc/LX94-V63Y].

103. *See* Kay Hawes, *Proportionality not the only compliance option*, NCAA NEWS (March 1, 1999), <https://ncaanewsarchive.s3.amazonaws.com/1999/19990301/active/3605n03b.html> [perma.cc/LX94-V63Y]. Accommodation under Prong 3, moreover, admits no cuts to women's sports unless post-cuts there is proportionality under Prong 1. *See* *Cohen v. Brown Univ.*, 991 F.2d 888, 898 (1st Cir. 1993); *Balow v. Mich. State Univ.*, 24 F.4th 1051, 1061 (6th Cir. 2022).

104. *See, e.g.,* B. Glenn George, *Forfeit: Opportunity, Choice, and Discrimination Theory Under Title IX*, 2010 YALE J.L. & FEMINISM. 1, 3 (2010).

105. *See* *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520 (1982).

106. *See id.* at 512.

107. *See* Complaint ¶¶ 10–54, *Miller v. Bd. of Regents of the Univ. of Minn.*, No. 15-cv-03740-RHK-LIB, 2015 WL 5721601 (D. Minn. Sept. 28, 2015). Miller was the head coach of a woman's hockey team, who filed a Title VII sex discrimination for employment discrimination and a Title IX retaliation claim for retaliation against her for speaking about disparities in resources and unequal treatment afforded her team and athletes. *Id.* ¶¶ 10–45. The discussion of the progress, or lack thereof, regarding the current status of women as coaches and administrators also may trigger policy, statutory, and constitutional claims in addition to Title IX. *Id.*; *see e.g.,* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (private employers with at least 15 employees for 20 or more weeks); Equal Pay Act, 29 U.S.C. § 206(d) (equal work requiring substantially equal skill and responsibility in similar working conditions); *Stanley v. Univ. of Southern Cal.*, 178 F.3d 1069, 1077 (9th Cir. 1999). There also may be a viable claim under the

dramatic, positive impact on opportunities for women athletes, the same cannot be said for coaches and administrators.

A. Head Coaches

Before the enactment of Title IX, women's college athletic programs were administered by a women's athletic association, the Association for Intercollegiate Athletics for Women (AIAW), not the NCAA.¹⁰⁸ At that time, women coached 90 percent of collegiate women's teams.¹⁰⁹ In 2004, only 44 percent of the head coaches of women's teams were women, and that number dropped each year until at least 2015.¹¹⁰ In 2022, there were only four (of fourteen) women head volleyball coaches in the Big Ten Conference,¹¹¹ the conference currently ranked as the top conference for women's volleyball.¹¹²

Not only are there more male than female coaches coaching female teams at the collegiate and professional levels, but also there is a dearth of women as head, or even assistant, coaches on male teams.¹¹³ This is particularly true for team sports.¹¹⁴ It likely is undisputed that persons cannot teach what they do not know. Translated to sports, that is understood to mean that coaches not only must know the rules,

Equal Protection Clause of the Fourteenth Amendment, at least if challengers can show a state actor that purposefully caused the discrimination and that the relief sought is remedial, proportional, and congruent. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 253 (1977); *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997).

108. See *Ass'n for Intercollegiate Athletics for Women v. Nat'l Collegiate Athletic Ass'n*, 735 F.2d 577, 579 (D.C. Cir. 1984).

109. See Dvora Meyers, *Title IX Gave Women More Chances To Coach In College. But It Gave Even More Opportunities To Men*, FIVETHIRTYEIGHT (Jun. 23, 2022, 6:00 AM), <https://fivethirtyeight.com/features/title-ix-gave-women-more-college-coaching-opportunities-but-it-gave-even-more-chances-to-men/> [perma.cc/728K-Z3JW].

110. *Id.*

111. See *Your Guide to the Big Ten's 14 Teams*, VOLLEYBALL WORLD (Aug. 25, 2022, 1:00 PM), <https://en.volleyballworld.com/news/big-ten-teams-in-review> [perma.cc/N24F-53AK].

112. See *Women's College Volleyball - Conference RPIs*, REALTIMERPI, http://realtimerpi.com/college_volleyball/rpi_conf_Women.html [perma.cc/W9WY-ZM9N] (Nov. 28, 2018). Part of the decline, at least in sports like track and field, comes from consolidation of male and female programs and then retaining one head coach over both (where the head coach retained was male). Part of the decline derives from the greater money flowing into women's programs, and the concomitant greater male interest in the positions. Part of the decline also may be due to life style differences and different balances between men and women in their priorities. See Carol Hutchins, *Where Are All the Women Coaches?*, N.Y. TIMES, (Dec. 31, 2019), <https://www.ny-times.com/2019/12/31/opinion/Women-coaching-sports-title-ix.html> [perma.cc/8C9L-828Z].

113. See *Men Far Outnumber Women on Coaching Staff in College Sports*, USA FACTS, (Sept. 28, 2022, 12:00 AM), <https://usafacts.org/articles/men-far-outnumber-women-on-coaching-staffs-in-college-sports/> [perma.cc/43Q7-9BQ2].

114. *Id.*

strategy, and playing criteria of a sport, but at least at elite levels of competition, they also must have played the sport they coach.¹¹⁵

It is not surprising, therefore, to see an absence of women's coaches in predominantly male sports—like football—that, until recently, were exclusively played by men and boys.¹¹⁶ There is also an absence of women head coaches for male teams, however, in sports like basketball, in which women compete on high school, college, club, and professional teams.¹¹⁷

In 2020, Mesabi Range College, a junior college in Minnesota, hired the first woman to coach a men's college basketball team.¹¹⁸ When she was hired, there were no female head coaches of an NCAA men's basketball team or an NBA team.¹¹⁹ There are also very few female assistant men's basketball coaches in college or the NBA.¹²⁰

B. Management

Management positions at educational institutions require intelligence, acumen, education, and judgment, as well as the ability to interact with various constituencies, to manage budgets, to fundraise, and to supervise staff.¹²¹ These positions do not require upper body

115. See Brian Leigh, *Top 10 College Football Head Coaches Who Never Played*, BLEACHER REP. (April 23, 2014), <https://bleacherreport.com/articles/2038878-top-10-college-football-head-coaches-who-never-played> [perma.cc/EX5C-VT6H].

116. There is no woman head football coach in professional sports and only one in all of NCAA football. See Anfernee Patterson, *Defying Odds, Challenges of Being A Women's Football Coach*, ATLANTA J.-CONST. (Dec. 23, 2021), <https://www.ajc.com/story/news/sports/2021/12/23/being-a-women-s-football-coach/8254277002> [perma.cc/2C20-challenges%20of%20being%20a%20women's%20football%20coach]. Caption&text=There%20are%20very%20few%20women,is%20one%20of%20the%20few [perma.cc/G3RN-BC4P]. In the past several years, girls' flag football teams have emerged at the high school level and there has been an increase of girls competing on boys' teams. See Nate Perry, *Girls Flag Football on Rise in High Schools, State Associations*, NAT'L FED. OF STATE HIGH SCHS. ASS'N (Oct. 6, 2021), <https://www.nfhs.org/articles/girls-flag-football-on-rise-in-high-schools-state-associations/> [perma.cc/F3DB-2RAP].

117. See Wilson Wong, *Former WNBA Player Tamara Moore Becomes Only Female Head Coach in Men's College Basketball*, NBC NEWS (Apr. 27, 2020, 8:35 AM), <https://www.nbcnews.com/news/nbcblk/former-wnba-player-tamara-moore-becomes-only-female-head-coach-n1183091> [perma.cc/V53X-3YKY].

118. Mesabi Range is a member of the National Junior College Athletic Association and is not a Division I program. *Id.*

119. It appears that there still are no women head coaches. *Id.*

120. There were only eleven women assistant coaches in the NBA during the 2019–20 season. *Id.*

121. See e.g., JOB TITLE: ASSISTANT COACH MEN'S BASKETBALL/ATHLETIC COORDINATOR, WILLIAM JESSUP UNIV. at 1–2 (2020), available at <https://jessup.edu/wp-content/uploads/2020/08/JD-MBB-Assistant-Coach-8.24.2020.pdf> [perma.cc/V53X-3YKY].

strength or experience playing a sport. Nonetheless, there is a dearth of women in athletic management positions.¹²²

Before Title IX, women ran the AIAW, the association that administered women's collegiate athletics.¹²³ The incorporation of women's sports into the NCAA saw the end of the AIAW.¹²⁴ There is not now, nor has there ever been, a woman at the head of the NCAA¹²⁵ (or a woman commissioner of an FBS autonomy conference).¹²⁶

Before Title IX, there also were separate women's college athletic programs, predominantly headed by women.¹²⁷ Over time, virtually all separate collegiate women's athletic departments were eliminated.¹²⁸ Today, just 24 percent of all athletic directors are women.¹²⁹ That number drops to 15 percent among Division I universities,¹³⁰ and to just under 8 percent (five out of sixty-five) in universities in the FBS autonomy conferences.¹³¹

Part of the reason for the low number of athletic directors, particularly in the FBS autonomy conferences, relates directly to the

122. See NCAA Demographics Database, NCAA, <https://www.ncaa.org/sports/2018/12/13/ncaa-demographics-database.aspx> [perma.cc/LH27-VMP6] (last visited Mar. 3, 2023).

123. See *Ass'n for Intercollegiate Athletics for Women v. Nat'l Collegiate Athletic Ass'n*, 735 F.2d 577, 579 (D.C. Cir. 1984).

124. *Id.* at 580.

125. Cf. *Timeline*, NCAA, <https://www.ncaa.org/sports/2021/6/14/timeline-2000s.aspx> [perma.cc/5YJD-GZJC] (last visited Mar. 3, 2023).

126. Elizabeth A. Taylor, Jessica L. Seigle, Allison B. Smith & Robin Hardin, *Career Insight from Eight Women Who Lead NCAA Division I Conferences*, ATHLETIC DIRECTOR U, (July 2018), <https://athleticdirector.u.com/articles/career-insights-women-conference-commissioners/> [perma.cc/4QN7-NKQE]. The FBS is comprised of universities whose football teams compete in bowl games. See Daniel Wilco, *How College Football Bowl Games Work*, NCAA.COM (Dec. 26, 2018), ncaa.com/news/football/article/2018-12-26/how-college-football-bowl-games-work [perma.cc/5B8K-Y3A7]. The FBS autonomy conferences are the SEC, ACC, Big Ten, Big 12, and PAC 12 and are the big players in college athletics, whose members include virtually all the major football powers. See Michelle Brutlag Hosick, *Council Approves Methods for More FBS Conferences to Hold Football Championships*, NCAA (Jan. 13, 2016, 6:38 PM), <https://www.ncaa.org/news/2016/1/13/council-approves-methods-for-more-fbs-conferences-to-hold-football-championships.aspx> [perma.cc/E7GF-E596].

127. See Bonnie J. Morris, *Title IX at 50*, AM. HIST. SOC'Y (June 23, 2022), <https://www.historians.org/research-and-publications/perspectives-on-history/summer-2022/title-ix-at-50-approaches-to-womens-sports-history> [perma.cc/SE48-ZJX3].

128. *Id.*

129. NCAA Demographics Database, *supra* note 122.

130. See Patti Phillips, *Women Athletic Directors? Not In Most Elite NCAA Conferences, Where Men Still Hold Outsize Advantage*, USA TODAY (May 10, 2021, 3:19 PM), <https://www.usatoday.com/story/opinion/2021/05/10/ncaa-title-ix-equity-women-athletic-director-power-schools/4989933001/> [perma.cc/QT5T-XH8R].

131. *Id.*

centrality of football to universities in these conferences.¹³² Football is both their revenue driver and also their most visible sport.¹³³ Hiring, firing, and overseeing head football coaches may be the most scrutinized part of an athletic director's job. At major college football schools, expectations for a successful football team run high, and the wrong head football coach hire (or fire) can lead to the firing of the athletic director.¹³⁴ Universities seek athletic directors that they believe can best handle the football program. Historically, and to some extent still true today, athletic directors are former football players or coaches, hired because of their visibility connected to their football participation and with the expectation that their football background will assist them to oversee the football program.¹³⁵

VI. SPONSORSHIPS, MEDIA, FANS

Sport, team, and player popularity translates to media coverage and name, image, and likeness (NIL) deals. There is no doubt that female athletes and female sports have increased in popularity since the enactment of Title IX, and their popularity has accelerated over the past several years.¹³⁶ There also is no doubt that their popularity still lags behind the popularity of male athletes and male sports.¹³⁷ Their revenue potential, therefore, also still lags behind.¹³⁸

Consider television. Sports is the most popular category for television viewers.¹³⁹ Although women's soccer,¹⁴⁰ women's tennis,¹⁴¹

132. *Id.*

133. *Id.*

134. See, e.g., Jackson Caudell, *Georgia Tech Fires Athletic Director Todd Stansbury*, FAN NATION (Sept. 26, 2022, 12:34 PM), <https://www.si.com/college/georgiatech/football/georgia-tech-fires-athletic-director-todd-stansbury> [perma.cc/Z7HF-MTCY].

135. *Id.*

136. See Sara Guaglione, *Why Growth of Women's Sports Coverage and Advertiser Interest is Bogged Down by Small Steps Forward*, DIGIDAY (Apr. 8, 2021), <https://digiday.com/media/why-growth-of-womens-sports-coverage-and-advertiser-interest-is-bogged-down-by-small-steps-forward/> [perma.cc/DA3F-GMTP]; Brad Adgate, *Popularity Of Women's Sports Surges Approaching 50th Anniversary Of Title IX*, FORBES (Apr. 7, 2022, 11:52 AM), <https://www.forbes.com/sites/bradadgate/2022/04/07/popularity-of-womens-sports-has-been-surg-ing/?sh=66c24b253613> [perma.cc/6K5S-6PWW].

137. See Guaglione, *supra* note 136.

138. *Id.*

139. See Rick Porter, *How Much Sports Matter (or Don't) to Network Viewership*, HOLLYWOOD REP. (May 9, 2022, 3:15 PM), <https://www.hollywoodreporter.com/tv/tv-news/how-much-broadcast-networks-depend-sports-1235143456/> [perma.cc/9XXX-F3M7].

140. See Adgate, *supra* note 136.

141. The women's final in the 2021 U.S. Tennis Open had more viewers (2.4 million) than the men's final (2.1 million). See *id.*

and women's Olympic events are increasingly popular, men's sports still dominate, with the NFL, NCAA Men's Basketball Tournament, NBA Finals, and World Series generating more advertising dollars and attracting more viewers than any other television programming.¹⁴² Consider also that in 2022 there were 17.3 million brackets filled out for the NCAA Men's basketball tournament, compared to 1.5 million for the women's brackets.¹⁴³

Attendance at women's competitions also lags behind attendance at men's events, even though ticket prices for women's events are lower than for men's.¹⁴⁴ Lower attendance at women's competitive events means fewer dollars are generated through box office or concessions sales. Lesser fan interest and viewership of women's competition means less commercial value to a team logo and less money from team gear sales. Lesser fan interest, in turn, limits a team's sponsorship money.¹⁴⁵

Interest in athletes relates to star power. Star power tracks playing success, but also the popularity and visibility of the sport an athlete plays. That, in turn, affects the money female athletes can make off the field or playing court.

Currently, only 0.4 percent of sports sponsorships and endorsements go to women's sports and athletes.¹⁴⁶ Only three women were among the top 100 highest earning athletes (prize money or salary plus endorsements) in 2021,¹⁴⁷ and only four female athletes made at

142. See *id.*

143. *Id.*

144. For example, NBA teams averaged 18,000 people in attendance per game with an average ticket price of \$89, while WNBA teams averaged 6,738 people in attendance with an average ticket price of \$17.42. See Richard Janvrin, *NBA vs WNBA: Revenue, Salaries, Viewership, Attendance and Ratings*, WSN (Nov. 9, 2022), <https://www.wsn.com/nba/nba-vs-wnba/> [perma.cc/74M8-W9GG].

145. See *id.*

146. Meredith Cash, *The WNBA Players' Union Has a New Strategy to Get Its Players Paid and Increase Investment in Women's Sports*, BUS. INSIDER (Aug. 26, 2021, 10:00 AM), <https://www.insider.com/wnba-players-deal-parity-boosts-sponsorship-opportunities-womens-sports-investment-2021-8> [perma.cc/G2WT-6A2L].

147. Naomi Osaka earned \$58 million from endorsements, more than any other female athlete, but that was only 2/3 the \$90 million earned by LeBron James. Brett Knight, *Naomi Osaka And Serena Williams Make A Fortune But Remain Outliers Among The Highest-Paid Athletes*, FORBES (May 18, 2022, 6:00 AM), <https://www.forbes.com/sites/brettknight/2022/05/18/naomi-osaka-and-serena-williams-make-a-fortune-but-remain-outliers-among-the-highest-paid-athletes/?sh=73298b3b7a9c> [perma.cc/W9CB-6HJ4]; Madison Williams, *LeBron James Top List of Highest Paid Athletes in 2021*, SPORTS ILLUSTRATED (May 12, 2022), <https://www.si.com/nba/2022/05/12/lebron-james-tops-list-highest-paid-athletes-sportico-2021> [perma.cc/7B2W-4PQD].

least \$10 million in endorsements.¹⁴⁸ By contrast, more than thirty male athletes made at least that much.¹⁴⁹

Individual sponsorship deals and media coverage are not controlled by teams, associations, or schools.¹⁵⁰ These organizations are better able to control telecasting or streaming games, but the monetary value of these contracts nonetheless still is driven by demonstrated fan interest in the sport.¹⁵¹

The endorsement picture is improving, however, with increased interest in women's sports and competition.¹⁵² Digital technology and social media also have had a positive impact.¹⁵³ Digital technology permits women's teams to livestream games, offering greater opportunities to generate fan interest in a given team.¹⁵⁴ Social media permits players to reach fans and build their own brand.¹⁵⁵ The more followers a player has on social media, the more known that player becomes, and the more that player's NIL value increases.¹⁵⁶ In other words, dollars follow tweets.

VII. WAGES AND PRIZE MONEY

Currently, college athletes are not considered employees by the National Labor Relations Board (NLRB),¹⁵⁷ and NCAA bylaws preclude

148. Knight, *supra* note 147.

149. *Id.*

150. Consistent with NCAA bylaws, athletic departments may facilitate access, however. Should they do so, it must be done on a gender equitable basis. See *BYLAWS*, *supra* note 85, at 11.1.3.

151. Adgate, *supra* note 136.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Cf.* Rohan Nadkarni, *Full coverage of Northwestern Football's Unionization Effort*, DAILY NORTHWESTERN, [https://dailynorthwestern.com/sports/northwestern-nlrb-union-effort/\[perma.cc/2P7M-XM58\]](https://dailynorthwestern.com/sports/northwestern-nlrb-union-effort/[perma.cc/2P7M-XM58]) (last visited Mar. 3, 2023). In the past few years there have been efforts at classifying college athletes as employees of their universities. There appears to be interest in the NLRB to certify athletes as employees, should another group of athletes petition it. *Cf. NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, NLRB (Sept. 29, 2021), <https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of> [perma.cc/MH4K-Z6NE]. Ruling against a motion for summary judgment, the court in *Johnson v. NCAA* directed that litigation might go forward to decide whether athletes are employees of a university; the case is on appeal. In February 2022, the National College Players Association (NCPA) filed an unfair labor practice against UCLA, the University of Southern California, and the NCAA. It alleged that football players, and men's and women's basketball players, are employees. See *Johnson v. NCAA*, 556 F. Supp. 3d 491 (E.D. Pa. 2021).

college athletes from being paid for their athletic participation.¹⁵⁸ Consequently, any current discussion of wages and prize money is a discussion independent of Title IX considerations.¹⁵⁹ Nonetheless, the increased visibility of women's collegiate athletes and competition likely has spillover effects on the earnings potential of these women as professional athletes. Moreover, should efforts to classify college athletes as employees succeed, then questions of wage disparity and the potential of Title IX oversight likely will surface.¹⁶⁰

There clearly is a difference in wages and prize money paid to professional male and female athletes, whether they compete in team sports or in individual sports such as tennis and golf.¹⁶¹ In general, it is not easy to parse the extent to which wages and prize money differences represent discriminatory treatment by teams and associations.¹⁶²

158. See BYLAWS, *supra* note 85, at 12.2.3.2.

159. See 20 U.S.C. § 1681.

160. Should the NLRB certify college athletes as employees, major implementation issues would arise. One set of issues relates to the different categories of college athletes, from revenue producing team sports athletes to individual Olympic sport athletes and from full scholarship to partial scholarship to walk-on athletes. The second set of difficulties relates to NLRB jurisdiction. The NLRB covers private employers only. Most athletes are likely to believe they would benefit from union representation yet attend public universities. Should athletes unionize, a question regarding the applicability of Title IX would also be on the table. In September 2021, the General Counsel for the NLRB issued an opinion memo that some college athletes are employees under the NLRA. See OFF. OF THE NLRB GEN. COUNS., MEMORANDUM GC 21-08 (Sept. 29, 2021), available at <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of> [perma.cc/MH4K-Z6NE]. Subsequently, football college athletes in California are pursuing a case with the NLRB Regional Office. See Daniel Libit, *NLRB Region Finds USC, Pac-12 And NCAA Employ Trojan Athletes*, SPORTICO (Dec. 15, 2022, 5:50 PM), https://www.sportico.com/leagues/college-sports/2022/nlr-usc-pac-12-ncaa-trojan-athletes-1234698669/?cx_testId=9&cx_testVariant=cx_1&cx_artPos=1&cx_experienceId=EXAKGDTXOYL0#cxrecs_s [perma.cc/H8AN-23CU].

161. As of 2021, for example, a WNBA player's minimum salary is \$57,000, while an NBA player's minimum salary is \$898,310. In 2019, an average NBA player made over \$5 million while an average WNBA player made \$75,181. The NBA also subsidizes the women's game. See *Male vs Female Professional Sports Salary Comparison*, ADELPHI UNIV. (May 20, 2021, 9:12 AM), <https://online.adelphi.edu/articles/male-female-sports-salary/> [perma.cc/U6XU-NQJ2].

162. There also is disparity in pay for college coaches. See Alex Traugutt, Nicole Sellars & Alan Morse, *Salary Disparities Between Male and Female Head Coaches: An Investigation of the NCAA Power Five Conferences*, 6 J. SPORT 40, 54 (2018). According to the authors, the pay gap resulted from several revenue-specific factors and not specifically to gender. *Id.*

Wages and prize money depend on revenues.¹⁶³ Revenues depend on all the factors discussed above.¹⁶⁴ As women's soccer demonstrates, however, disparity exists even when a women's team is more successful than a men's team, or when women compete in individual sports that are more popular than the men.¹⁶⁵ Women's soccer teams have won Olympic gold medals and World Cups.¹⁶⁶ The men's teams have done neither.¹⁶⁷ Women's soccer teams also generate more revenue than the men's teams.¹⁶⁸ Yet, until recently, the US Soccer Federation paid women players only 40 percent of what men were paid. They had to sue to achieve parity.¹⁶⁹

VIII. PAST IS PROLOGUE

For the present, and at least for the immediate future, media attention and fan interest for women's sports center predominantly on individual rather than team sports,¹⁷⁰ and often on those individual

163. See Michael Margulis, *Money in Sports: Where it all Comes From, and Where it Goes...*, MEDIUM (Nov. 17, 2015), <https://medium.com/@michaelmargulis/money-in-sports-where-it-all-comes-from-and-where-it-goes-48461c192031> [perma.cc/84WC-QCNI]. An additional complication for women athletes in individual sports is that the different tournaments have different organizing bodies and sponsors. There is no one entity responsible for prize money paid and, therefore, differential pay issues must be litigated separately against each. At the professional level, wages reflect collective bargaining by the league and players' association and agent negotiation with teams.

164. See *supra* Part VI.

165. The women's soccer team has won four World Cups, including in 2019 when the men failed to qualify. The 2019 Women's World Cup attracted more viewers than the Men's World Cup in 2018 (when the United States competed). The Women's team also has generated more money than the men for the US Soccer Federation. See Agate, *supra* note 136.

166. See *id.*

167. See *U.S. Soccer Awards*, US SOCCER, <https://www.ussoccer.com/history/awards/us-soccer-awards> [perma.cc/CBP5-A5X4] (last visited Mar. 3, 2023).

168. Abigail Johnson Hess, *US Women's Soccer Games Now Generates More than the Men's – but the Players Still Earn Less*, CNBC (July 10, 2019, 1:21 PM), <https://www.cnbc.com/2019/06/19/us-womens-soccer-games-now-generate-more-revenue-than-mens.html> [perma.cc/5EJV-9AZK].

169. The reason given for the differential treatment was that the Women's World Cup Soccer Team earlier had rejected a pay structure similar to that used for the men. The case was on appeal when, in 2022, the US Soccer Federation settled the lawsuit. The women's team now will receive pay equal to the men's team. See Andrew Das, *U.S. Soccer and Women's Players Agree to Settle Equal Pay Lawsuit*, N.Y. TIMES, [nytimes.com/2022/02/22/sports/soccer/us-womens-soccer-equal-pay.html](https://www.nytimes.com/2022/02/22/sports/soccer/us-womens-soccer-equal-pay.html) [perma.cc/ZLG5-9FXZ] (May 18, 2022); Agate, *supra* note 136.

170. Women's soccer is the exception here. The 2015 Women's World Cup final was the most-watched soccer game ever in the United States. In 2019, the Portland Thorns FC of the National Women's Soccer League had an average attendance of just under 21,000, higher than the majority of NBA, NHL, and MLS teams and higher than six MLB teams. While that is significant progress, it remains true that the NFL, NCAA Men's Basketball Tournament, NBA Finals, and

sports—such as figure skating and gymnastics—that are scored on points by a judge rather than resolved by direct play on the field.¹⁷¹ The focus seems to track the age-old picture that women do not belong in the competitive team arena.

More than ninety years ago, Pierre de Coubertin opined that interest in women's sports focused more on how women looked than on how they played.¹⁷² Still today, at least some media and fan interest revolves around player appearance, uniform style, and sex appeal, and not solely or even primarily on athletic competition.¹⁷³ Men's and women's volleyball and gymnastics, to name two sports as examples, involve similar skill sets and athletic performance, yet the women's uniforms are much scantier.¹⁷⁴ In gymnastics, moreover, the uniforms typically have glitter and jewels.¹⁷⁵

IX. NEW CHALLENGES

Title IX was enacted in 1972.¹⁷⁶ Fifty years later there are new issues regarding its scope and applicability.

World Series generate more money from advertising and attract more viewers than any other programming. See Adgate, *supra* note 136.

171. Some studies show that women's interest in sports gravitates to sports such as gymnastics and figure skating in which participants participate independently, are not in direct, simultaneous competition with each other, and where they are judged on style points by judges. See Robert Deaner, Shea Balish & Michael Lombardo, *Sex Differences in Sports Interest and Motivation: An Evolutionary Perspective*, 10 *EVOLUTIONARY BEHAV. SCI.* 73, 77 (2016) (internal citations omitted).

172. See Martin Polley, *Sport, Gender and Sexuality at the 1908 London Olympic Games*, in *ROUTLEDGE HANDBOOK OF SPORT, GENDER AND SEXUALITY* (Jennifer Hargreaves & Eric Anderson, eds., 2014); Pierre de Coubertin, *Educational Use of Athletic Activity*, in *PIERRE DE COUBERTIN, OLYMPISM: SELECTED WRITINGS* (Int'l Olympic Comm. ed., 2000). In Ancient Greece, women athletes competed with long hair down their backs, a short tunic, and their right breast uncovered. See Stefan Lovgren, *Ancient Olympics Mixed Naked Sports, Pagan Partying*, *NAT'L GEOGRAPHIC* (Aug. 8, 2004), <https://www.nationalgeographic.com/history/article/ancient-greece-olympics-sports> [perma.cc/Y7SA-WUG3]. Of course, males competed nude. *Id.*

173. See, e.g., MICHAEL A. MESSNER, *TAKING THE FIELD: WOMEN, MEN, AND SPORTS* (2002); CAHN, *supra* note 25.

174. See Julie Compton, *Photo Series Explores 'Sexploitation' in Athletic Uniforms*, *NBC NEWS*, <https://www.nbcnews.com/feature/nbc-out/photo-series-explores-sexploitation-athletic-uniforms-n635781> [perma.cc/CMR9-RWU8] (Aug. 22, 2016, 7:45 AM).

175. See Dvora Meyers, *The Complete Evolution of the Gymnastics Leotard From the 1930s to Today*, *ELLE* (June 27, 2016), <https://www.elle.com/fashion/a37371/evolution-of-gymnastics-leotard/> [perma.cc/NU2F-3DNT].

176. See *Title IX of the Education Amendments of 1972*, U.S. DEP'T. OF HEALTH & HUM. SERVS., [https://www.hhs.gov/civil-rights/for-individuals/sex-discrimination/title-ix-education-amendments/index.html#:~:text=Title%20IX%20of%20the%20Education%20Amendments%20of%201972%20\(Title%20IX,activity%20receiving%20federal%20financial%20assistance](https://www.hhs.gov/civil-rights/for-individuals/sex-discrimination/title-ix-education-amendments/index.html#:~:text=Title%20IX%20of%20the%20Education%20Amendments%20of%201972%20(Title%20IX,activity%20receiving%20federal%20financial%20assistance) [perma.cc/S7J6-VC3G] (last visited Mar. 3, 2023).

A. Female Transgender Athletes

A New Zealand female transgender weightlifter won two gold medals at the Pacific Games.¹⁷⁷ Another transgender athlete was the NCAA Division II national champion in the women's 400-meter run,¹⁷⁸ the prior year she competed as a male and finished eighth of nine runners in a men's collegiate meet.¹⁷⁹ Two high school transgender athletes finished first and second in the Connecticut Girls Track and Field Open Finals,¹⁸⁰ they ended their high school careers with fifteen girls state championships between them.¹⁸¹ A transgender athlete at the University of Pennsylvania broke women's records in the Ivy

177. See Bradford Richardson, *Weightlifter Sets New Zealand Records For Second Time*, WASH. TIMES (Apr. 30, 2017), <https://www.washingtontimes.com/news/2017/apr/30/transgender-weightlifter-sets-new-zealand-records/> [perma.cc/NE7J-QHCU]. When she qualified for the Tokyo Olympic Games, her participation was controversial and criticized. See, e.g., Alex Raskin & Charlie Walker, *Ex-New Zealand Olympic Weightlifter Weighs in on Transgender Athletes After Laurel Hubbard Qualified for Tokyo Games Warning It Will 'Knock Women Out of Sport'*, DAILY MAIL, <https://www.dailymail.co.uk/news/article-9718233/Ex-New-Zealand-Olympic-weightlifter-weighs-transgender-athletes-Laurel-Hubbard.html> [perma.cc/94SZ-MA7C] (June 23, 2021, 4:10 PM). She did not win a medal in Tokyo. See James Ellingworth & Sally Ho, *Transgender weightlifter Hubbard makes history at Olympics*, ASSOC. PRESS (Aug. 2, 2021), <https://apnews.com/article/2020-tokyo-olympics-sports-weightlifting-laurel-hubbard-e721827cdaf7299f47a9115a09c2a162> [perma.cc/5ZM7-6EXP].

178. See Karleigh Webb, *30 Moments of Pride: Cecé Telfer wins NCAA Title*, OUTSPORTS (June 4, 2020, 5:00 AM), <https://www.outsports.com/2020/6/4/21277745/pride-2020-cece-telfer-ncaa-track-and-field-division-ii-nationals-championship-transgender-athlete> [perma.cc/K385-PBV5]. US Track and Field ruled her ineligible to compete in the 2021 Olympic trials because she failed to meet criteria regarding testosterone levels. See Jill Martin, *Transgender Runner CeCe Telfer Is Ruled Ineligible to Compete in US Olympic Trials*, CNN (June 25, 2021, 1:08 PM), <https://www.cnn.com/2021/06/25/sport/transgender-athlete-cece-telfer-trials-olympics-spt/index.html> [perma.cc/KM38-4DXJ].

179. See Chris Pastrick, *Transgender Woman Who Last Year Competed as a Man Wins NCAA Track Championship*, TRIB. LIVE (May 29, 2019, 7:34 AM), <https://triblive.com/sports/biological-male-wins-ncaa-womens-track-championship/> [perma.cc/RP6V-M7QS].

180. See Karma Allen, *Transgender Teens Outrun Track and Field Competitors but Critics Close Behind*, ABC NEWS (June 13, 2018, 3:02 PM), <https://abcnews.go.com/US/transgender-teens-outrun-track-field-competitors-critics-close/story?id=55856294> [perma.cc/FJ8X-YGME]. Between 2017 and 2019, these teens combined to win fifteen championship races, prompting a lawsuit. See David Crary & Lindsay Whitehurst, *Lawmakers Can't Cite Local Examples of Trans Girls in Sports*, ASSOC. PRESS (Mar. 3, 2021), <https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls-sports-914a982545e943ecc1e265e8c41042e7> [perma.cc/TSY5-NE9G].

181. See Crary & Whitehurst, *supra* note 180.

League competition;¹⁸² she was Penn's nominee for NCAA woman athlete of the year.¹⁸³

These and other news stories have generated controversy over inclusion of female transgender athletes in women's sports.¹⁸⁴ Although it is unknown how many female transgender athletes have competed in college sports, that number necessarily is small.¹⁸⁵ One study of those 13 and older estimates the number of transgenders (both male to female and female to male) at 0.6 percent of the general population.¹⁸⁶ The question for Title IX is how to balance their interests with those of women whose gender was determined at birth.¹⁸⁷

The debate rages as to what constitutes the correct balance between the competitive interests of females whose gender was determined at birth and those of female transgender athletes who seek to compete in a women's sport. The response of state legislatures is decidedly mixed.¹⁸⁸ Longtime and outspoken advocates for women's

182. See Kenneth Garger, *UPenn Transgender Swimmer Continues Dominant Season with More Record-breaking Wins*, N.Y. POST (Dec. 7, 2021, 2:30 AM), <https://nypost.com/2021/12/07/upenn-transgender-swimmer-lia-thomas-continues-dominant-season-with-more-record-breaking-wins/> [perma.cc/5BBA-BA6A]; Pat Ralph, *Penn Swimmer Lia Thomas Sets Six Records at Ivy League Championships*, THE PHILLY VOICE (Feb. 21, 2022), <https://www.phillyvoice.com/lia-thomas-penn-transgender-swimmer-ivy-league-championships/> [perma.cc/N757-73AG].

183. See Justine Kenin & Erika Ryan, *Lia Thomas Nominated for NCAA Woman of the Year*, NPR (July 18, 2022, 4:50 PM), <https://www.npr.org/2022/07/18/1112116235/lia-thomas-nominated-for-ncaa-woman-of-the-year> [perma.cc/Y9KY-7UD7].

184. *Id.*; Ralph, *supra* note 182; Raskin & Walker, *supra* note 177; Allen, *supra* note 180; David Wharton, *As Title IX Turns 50, It Plays a Surprise Role in Transgender Athlete Access Debate*, LOS ANGELES TIMES (June 20, 2022, 3:45 AM), <https://www.latimes.com/sports/story/2022-06-20/title-ix-limiting-transgender-women-athlete-access-debate> [perma.cc/W2H3-FY6N].

185. Thirty-two transgender athletes have publicly disclosed that they were transgender. See Cyd Zeigler & Karleigh Webb, *These 32 Trans Athletes Have Competed Openly in College*, OUTSPORTS, <https://www.outsports.com/trans/2022/1/7/22850789/trans-athletes-college-ncaa-lia-thomas> [perma.cc/KU5K-6UQV] (Feb. 23, 2023, 11:30 AM).

186. Jody L. Herman, Andrew R. Flores & Kathryn K. O'Neill, *How Many Adults and Youth Identify as Transgender in the United States?*, UCLA WILLIAMS INST. (June 2022), <https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/> [perma.cc/92ZH-KTDW].

187. However small the number, fairness dictates that the competition interests of women whose gender was determined at birth must be accommodated. Fairness also dictates recognition of the interests of transgender athletes. The American Medical Association has said that "barring transgender females from participating in school-sponsored organized sports consistent with their gender identity frustrates the treatment of gender dysphoria." AM. MED. ASS'N., MAR. 26, 2021: STATE ADVOCACY UPDATE, available at <https://www.ama-assn.org/print/pdf/node/66096> [perma.cc/6YFY-DWWV].

188. See *Girls'/Women's Competitive Sport Needs to be Affirmed and Trans Girls'/Women Need to be Included with Appropriate Conditions*, WOMEN'S SPORTS POLY WORKING GRP., <https://womenssportspolicy.org/the-issue/> [perma.cc/KT7H-KGE5] (last visited Feb. 2, 2023). Under a proposed new Title IX regulation, states no longer could impose outright bans on transgender athlete participation in female sports. See *infra* note 197.

sports,¹⁸⁹ including Martina Navratilova and Billie Jean King, are on opposite sides.¹⁹⁰ Since 2023, the NCAA has enforced the same policy as the Olympics movement, one which remits to the governing board of each sport the requirements that must be met by a female transgender athlete to be competition eligible in a women's sport.¹⁹¹ The Women's Sports Policy Working Group, comprised of "former elite athletes and sports administrators with significant experience in women's sports policy making and LGBTQ advocacy,"¹⁹² offers a more nuanced approach than the current NCAA and Olympics policy, one that specifically accounts for what it believes may be sex-based advantages (called "legacy") of female transgender athletes who only begin transition postpuberty.¹⁹³

No federal legislation explicitly governs competition eligibility for transgender athletes. A presidential executive order requires all federal agencies, including the Department of Education in its enforcement of Title IX, to assure against discrimination based on sexual identity.¹⁹⁴ A regulation specific to transgender athlete sports participation is now under consideration.¹⁹⁵ Under the regulation, schools could exclude transgender athletes from sports participation based on the sport, age of participants, and the level of skill involved to compete.¹⁹⁶

189. See Wharton, *supra* note 184.

190. Compare Wilton Jackson, *Megan Rapinoe, Billie Jean King, More Support Brief for Trans Youth in Sports*, SPORTS ILLUSTRATED (Oct. 14, 2021), <https://www.si.com/high-school/2021/10/15/megan-rapinoe-billie-jean-king-support-brief-trans-youth-in-sports> [perma.cc/YC8Q-U7AZ], with Wharton, *supra* note 184.

191. Sport Science Institute, *Transgender Student-Athlete Participation Policy*, NCAA (Jan. 27, 2022), <https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx> [perma.cc/GXS4-BNUQ]. For the international Olympics competition, the sports of track and field and figure skating require transgender male to female athletes to show a testosterone level below five nanomoles per liter for twelve months prior to competition; the sport of softball requires ten nanomoles per liter; the sport of swimming both requires testosterone levels and excludes from competing male to female transgender athletes who transitioned after the age of twelve. See Wharton, *supra* note 184.

192. *About Us*, WOMEN'S SPORTS POL'Y WORKING GRP., <https://womenssportspolicy.org/about-us/> [perma.cc/2RNS-2ZLZ] (last visited Mar. 4, 2023).

193. *The Resolution*, WOMEN'S SPORTS POL'Y WORKING GRP., <https://womenssportspolicy.org/the-resolution/> [perma.cc/K34G-EKTL] (last visited Mar. 3, 2023).

194. See, e.g., Carlos Jamieson, *The Current Landscape for Transgender Students*, EDNOTE (Oct. 11, 2022), <https://ednote.ecs.org/the-current-landscape-for-transgender-student-athletes/> [perma.cc/B84N-MMSN]. It contains no specific guidance for sports guidance, however.

195. See Laura Meckler, *Biden Administration Says Schools May Bar Trans Athletes from Competitive Teams*, WASH. POST, https://www.washingtonpost.com/education/2023/04/06/trans-athletes-school-sports-title-ix/?utm_source=alert&utm_medium=email&utm_campaign=wp_news_alert_revere&location=alert [perma.cc/MP3T-ZAFD] (Apr. 6, 2023, 7:15 PM).

196. *Id.*

It is likely too soon to know the extent to which, and how many, female transgender athletes have an advantage in women's competition that derives from being transgender or the extent to which that advantage may undermine the athletic opportunities of women whose gender identity was determined at birth. It also is too soon to predict the nature and scope of any Title IX regulation.

B. NIL

In 1984, more than a decade after the enactment of Title IX, the Supreme Court decided *NCAA v. Board of Regents*.¹⁹⁷ The Court held that NCAA bylaws limiting television appearances of football teams constituted an antitrust violation.¹⁹⁸ That decision opened wide the doors for the major football powers to reap large amounts of money from broadcast deals.¹⁹⁹ The money separated major football powers from the rest of NCAA universities.²⁰⁰ Coach salaries skyrocketed and athletic facilities became increasingly elaborate.²⁰¹ The game was on for universities both to spend money and to find more—and more lucrative—sponsorships and exclusive licensing arrangements. The money also brought claims by and on behalf of athletes that they were entitled to a share²⁰² The application of Title IX to a world never contemplated at the time of its adoption obviously is not explicitly covered in any statutory language.

Over the past several years, there has been a spate of litigation challenging NCAA bylaws that limit benefits that can be provided to

197. See, e.g., Joe Schafer, *The Supreme Court Helped Create Today's NCAA Cartel*, UBL SPORTS & ENTMT FORUM (May 12, 2018), <https://ublawsportsforum.com/2018/05/12/the-supreme-court-helped-create-todays-ncaa-cartel/> [perma.cc/V5HE-HZBP].

198. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984).

199. See e.g., Mary H. Tolbert & D. Kent Meyers, *The Lasting Impact of NCAA v. Bd. Of Regents of The University of Oklahoma: The Football Fan Wins*, OKLA. BAR ASS'N. (Oct. 2018), <https://www.okbar.org/barjournal/oct2018/obj8926tolbertmeyers/#:~:text=Freedy%20from%20the%20plan%2C%20the,leading%20to%20increased%20live%20attendance>[perma.cc/JY3X-C3JE].

200. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2150 (2021). In 2021, the NCAA broadcast contract for the Men's Basketball Tournament was \$1.1 billion, and the FBS College Football Playoff produced \$470 million. *Id.* at 2150–51.

201. See Josephine R. Potuto, William H. Lyons & Kevin N. Rask, *What's in a Name: The Collegiate Mark, the Collegiate Model, and the Treatment of Student-Athletes*, 92 ORE. L. REV. 879, 900 (2014).

202. See e.g., Jon Solomon, *The History Behind the Debate Over Paying NCAA Athletes*, ASPEN INST. (Apr. 23, 2018), <https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/> [perma.cc/8ZEY-JP3E].

college athletes.²⁰³ In response, the NCAA suspended all such bylaws and engaged in a review to determine what bylaws it will adopt.²⁰⁴ Meanwhile, athletes are permitted to make any NIL deals they choose, consistent with state law,²⁰⁵ unless their university or the athletic conference to which it belongs limits NIL activity.²⁰⁶

It is likely that the factors that affect NIL deals for professional women athletes also will affect collegiate women athletes. If so, then it is likely that some male athletes will have lucrative deals worth more than those of female athletes. It follows that as a group, male athletes at a university will likely earn more from NIL deals than will female athletes as a group.

Title IX focuses on the treatment of women—and opportunities provided to them—by educational institutions, not by independent third parties.²⁰⁷ NIL money may be negotiated by athletes without any involvement by a university, an athletic conference, or the NCAA.²⁰⁸ These deals are not insulated from Title IX scrutiny, however, as Title IX can be triggered by treatment and opportunities provided by sources

203. *E.g., Alston*, 141 S. Ct. at 2154; *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 2010 WL 445190, at *1 (N.D. Cal. Feb. 8, 2010); *Keller v. Elecs. Arts, Inc.*, 2010 WL 530108, at *1 (N.D. Cal. Feb. 8, 2010), *aff'd sub nom.*, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1270–71 (9th Cir. 2013).

204. See Division I Decentralization Committee, *Building the Future of DI Athletics*, NCAA, <https://www.ncaa.org/sports/2021/11/3/division-i-transformation-committee.aspx> [perma.cc/UUN3-F2WR] (last visited Mar. 4, 2023).

205. Many states have enacted legislation governing NIL. See Pete Nakos, *How NIL legislation varies on a state-by-state basis*, ON3 (July 8, 2022), <https://www.on3.com/nil/news/how-nil-legislation-varies-on-a-state-by-state-basis/> [perma.cc/BRY4-QTAU].

206. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> [perma.cc/GC5L-M4SA]. The NCAA interim policy directs athletes to report NIL activities to their university. At the 2023 NCAA Convention, the NCAA Transformation Committee provided its report. There are no recommendations for specific NIL bylaws; instead, the Committee urged congressional action. See NCAA: DIVISION I TRANSFORMATION COMMITTEE, FINAL REPORT (Jan. 3, 2023), available at https://ncaaorg.s3.amazonaws.com/committees/d1/transform/Jan2023D1TC_FinalReport.pdf [perma.cc/PP2V-A9E8] [hereinafter FINAL REPORT]. The NCAA Board of Governors approved the recommendations. See Associated Press, *NCAA Board Approves Recommendations for Division I Reform*, US NEWS (Jan. 12, 2023, 4:58 PM), <https://www.usnews.com/news/sports/articles/2023-01-12/ncaa-board-approves-recommendations-for-division-i-reform> [perma.cc/8N3N-CMNJ]. The Board president also stated that the NCAA is hamstrung to deal with NIL and other issues and needs the Congress to act. See FINAL REPORT, *supra*.

207. See Office of Civil Rights, *Title IX and Sex Discrimination*, U.S. DEP'T. OF EDUC. (Aug. 8, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [perma.cc/J75X-AASC].

208. See *e.g., Institutional Involvement in a Student-Athlete's Name, Image, and Likeness Activities*, NCAA (Oct. 22, 2022), available at https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL_InstitutionalInvolvementNILActivities.pdf [perma.cc/34HB-XYSE].

external to universities if universities maintain some degree of control or otherwise become entangled in these third party deals.²⁰⁹

Collectives have entered the NIL arena. They are created by a university's alumni and donors independent of a university athletic department.²¹⁰ Some are straightforward and use collected funds to pay athletes directly.²¹¹ Others work through charities that the collective designates. Collectives have an explicit purpose to help their athletic departments recruit.²¹² The Foundation at Ohio State, for example, both solicits donations and then uses the money to pay football and basketball players for charitable work.²¹³

An alternative to collectives is reflected by a Learfield-Opendorse collaboration.²¹⁴ Outside entities in this model facilitate matches between corporate brands—typically those that have sponsorship deals at a particular university—and student-athletes at that university who best fit brand needs.²¹⁵

If a university maintains a hands-off policy regarding outside entities and the deals that athletes make, then it should be true that any differential in money earnings between male and female athletes will not violate Title IX. An analogue is media coverage of athletes and teams. Universities are expected to make equal efforts to gain media coverage for men and women, to provide the same assistance for men's and women's teams to reach media representatives and outlets, and to provide the same in-house sports information director assistance to all teams and athletes on a basis commensurate with the size of the team and championship season.²¹⁶ After that, universities are not deemed responsible for unequal media coverage. Nonetheless, the close relationship between these outside NIL entities and a university, and

209. See Bill Landis, *How 2 Emerging Collectives Are Aiming To Keep Ohio State Competitive In The NIL Race*, ATHLETIC (Apr. 25, 2022), <https://theathletic.com/3267780/2022/04/25/how-2-emerging-collectives-are-aiming-to-keep-ohio-state-competitive-in-the-nil-race/> [perma.cc/ZSU2-F8X3].

210. *Id.*

211. *Id.*

212. *Id.*

213. See Becky Raspe, *Schottenstein's 'The Foundation' Now Live at Ohio State*, COLUMBUS JEWISH NEWS, https://www.columbusjewishnews.com/news/sports/schottensteins-the-foundation-now-live-at-ohio-state/article_3b46cb70-b12a-11ec-b3a6-8b7c77e1a388.html [perma.cc/8KKN-LJ8N] (Apr. 6, 2022, 1:58 PM).

214. See Sam Weber, *Learfield, Opendorse Join Forces to Maximize NIL Opportunities For Student-Athletes*, OPENDORSE (Apr. 27, 2022), <https://biz.opendorse.com/blog/learfield-opendorse-nil/> [perma.cc/8LR5-L48G].

215. *Id.* Many of these arrangements will involve local brands.

216. *Cf. Requirements Under Title IX of the Education Amendments of 1972*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/interath.html> [perma.cc/3Q8T-6WBX] (last visited Mar. 5, 2023).

the fact that a stated goal of a collective is to assist a university in recruiting, creates the potential that under Title IX a university may be subject to Title IX review for the deals that are made. The point at which that occurs will involve a fact-based inquiry of the particular arrangement.²¹⁷

X. REVISITING THE THREE-PRONGED TEST

In the fifty years since enactment of Title IX, there has been a huge uptick in the number of women athletes and the sports in which they compete.²¹⁸ Great strides have been made both in societal attitudes toward women athletes and women's sports, and in their popularity and visibility.²¹⁹ These developments are cause for celebration, clearly. The Title IX three-pronged test was instrumental in the advancement of women's sports opportunities. It provided a much-needed jump start to remedy the pervasive discriminatory past.²²⁰

The past fifty years also have seen substantial research on gender, athletic performance, and athletic interest. It is time now to reexamine the three-pronged test in light of that research.

A. Gender Differences and Their Import

In general, men have larger body frames than women.²²¹ They are taller, have larger hearts, and proportionately more muscle and bone mass.²²² They have greater lung capacity than women of the same height and age.²²³ Their larger and stronger muscles store more glycogen, a "quick-release fuel for speed."²²⁴

217. Were athletes to be considered employees, the application of Title IX enters completely uncharted territory and may mean that Title VII becomes the statutory predicate for action.

218. George, *supra* note 104, at 2.

219. *See id.* at 45.

220. *See id.*

221. *See* Marianne J. Legato & Jaswinder K. Legka, *Gender and the Heart: Sex-Specific Differences in Normal Myocardiovascular System Principles of Gender-Specific Medicine*, in PRINCIPLES OF GENDER-SPECIFIC MED. 3, 185 (Marianne Legato ed., 2004).

222. *Id.*; Virginia H. Huxley, *Sex and the Cardiovascular System: The Intriguing Tale of How Women and Men Regulate Cardiovascular Function Differently*, 31 ADV. PHYSIOLOGY EDUC. 21 (2007); Craig A. Harms, *Does Gender Affect Pulmonary Function and Exercise Capacity*, 151 RESPIRATORY PHYSIOLOGY NEUROBIOLOGY 124–31 (2006).

223. François Bellemare, Alphonse Jeanneret & Jacques Couture, *Sex Differences in Thoracic Dimensions and Configuration*, 168 AM. J. MED. 305 (2003).

224. Hilary Brueck, *Women Are Faster Long-Distance Runners Than Men, And It's Probably Because They've Got More Estrogen*, INSIDER (Jan. 7, 2020, 8:51 AM), insider.com/women-are-faster-long-distance-runners-estrogen-2020-1 [perma.cc/N2UU-NH25].

These structural differences have an impact on physiological function²²⁵ and are most pronounced in the high-intensity physical activity of elite athletes.²²⁶ Among other things, they mean that men, on average, are faster than women in sprints and shorter distance races.²²⁷ As described by the Women's Sports Policy Working Group,²²⁸ the postpuberty performance gap between male and female athletes ranges from eight to twenty percent, and it can be as much as fifty percent when "explosive power and complex movement skills are pivotal."²²⁹

A large, and growing, database—described as too much to be ignored—shows statistically significant biological gender-based differences in how men's and women's brains are wired and how they work.²³⁰ Among the gender-based behavioral differences: women on average have greater verbal ability, reading comprehension and writing ability, fine-motor coordination, and perceptual speed.²³¹ They also are more adept at accessing information from long-term memory.²³² By contrast, men on average are more adept in using "working memory," have greater perception,²³³ and have enhanced visual-spatial skills, including tracking and handling moving objects.²³⁴

225. Tove S. Rosen & David Bateman, *The Role of Gender in Neonatology*, in PRINCIPLES OF GENDER-SPECIFIC MED. 3 (Marianne Legato ed., 2004).

226. Paolo B. Dominelli & Yannick Molgat-Seon, *Sex, Gender and the Pulmonary Physiology of Exercise*, 31 EUR. RESPIRATORY REV. (2022). By contrast, woman may equal or even out-perform men when endurance is a factor in sports competition. See Brueck, *supra* note 224.

227. See Brueck, *supra* note 224.

228. WOMEN'S SPORTS POLY WORKING GRP., *supra* notes 188, 192–93.

229. WOMEN'S SPORTS POLY WORKING GRP., *supra* note 188.

230. See Bruce Goldman, *Two Minds: The Cognitive Differences Between Men and Women*, STANFORD MED. (May 22, 2017), <https://stanmed.stanford.edu/how-mens-and-womens-brains-are-different/> [perma.cc/QE3W-4CWL]; Madhura Ingahalikar, Alex Smith, Drew Parker & Ragini Verma, *Sex Differences in the Structural Connectome of the Human Brain*, 111 PNAS 823–28 (Dec. 2, 2013); Gaolang Gong, Yong He & Alan C Evans, *Brain Connectivity: Gender Makes a Difference*, 17 NEUROSCIENTIST 575–91 (2011).

231. See Goldman, *supra* note 230.

232. *Id.*

233. Ingahaliker et al., *supra* note 230; Gong et al., *supra* note 230.

234. Goldman, *supra* note 230. Even assuming all differences in interest between men and women fall on the nurture, not nature, side of the line, the three-pronged test contradicts Fourteenth Amendment equal protection doctrine that forecloses government corrective action for societal discrimination and, even for official government discrimination, dictates that corrective action may go no further than to rectify that part of discrimination that is produced by government action. See, e.g., *City of Richmond v. Croson*, 488 U.S. 469; *Milliken v. Bradley*, 433 U.S. 267 (1977) (remedy to target with "reasonable precision" only effects caused by purposeful discrimination by particular actor); *Regents v. Baake*, 438 U.S. 265 (1978); *Adarand v. Peña*, 515 U.S. 200 (1995); *Ward's Cove v. Atonio*, 490 U.S. 642 (1989); *Local 28 v. EEOC*, 478 U.S. 421, 501 (1986). The only time societal discrimination was treated as sufficient was when Congress exercised its authority

Gender differences in sports interest are well documented and “often of significant proportions.”²³⁵ Males compete and consume sports at a two-to-one level as compared to women.²³⁶ They attend more sports events, including women’s events;²³⁷ have greater sports knowledge; more strongly identify with sports; express greater interest in sports; watch more televised sports; listen to more television and radio sports talk shows;²³⁸ prefer sports to general exercise;²³⁹ more often play fantasy sports;²⁴⁰ and more often participate in voluntary sports activities such as club sports²⁴¹ and pickup games,²⁴² the latter at a frequency ten times more often than females.²⁴³

These differences are not large in absolute terms.²⁴⁴ They nonetheless are important in evaluating equality of athletic opportunity in collegiate athletes because the male advantages are more pronounced among elite athletes.²⁴⁵ By themselves, however, differences address neither the extent to which they have an impact on the performance of athletes, particularly elite athletes, nor the extent to which they produce gender-related interest in sports.

over federal programs under the Fifth Amendment, but these cases have been overruled. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980) (no majority opinion); *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990). *But see* *Adarand v. Pena*, 515 U.S. 200 (1985); *City of Richmond v. Croson*, 488 U.S. 469 (1989).

235. *See* Allie Grasgreen, *Equal Opportunity, Unequal Interest*, INSIDE HIGHER EDUC. (Nov. 15, 2012), <https://www.insidehighered.com/news/2012/11/15/lower-female-interest-sports-calls-title-ix-application-question-study-says> [perma.cc/9EKH-67KA]. Men’s interest also may increase women’s interest and also influence what sports they are interested in. *See* Janet S. Fink, Sarah Fields & Annemarie Farrell, *Women’s Sports Spectatorship: An Exploration of Men’s Influence*, 25 J. OF SPORT MGMT. 190 (2011).

236. *Deaner et al.*, *supra* note 171.

237. *Andrei S. Markovits & David T. Smith, Sports Culture Among Undergraduates: A Study of Student-Athletes and Students at the University of Michigan*, SCHOLARLY MONOGRAPH SERIES, <https://quod.lib.umich.edu/s/spobooks/5099288.0001.001/1-6/-sports-culture-among-undergraduates-a-study-of-student?rgn=div1;view=fulltext> [perma.cc/Z9DH-VH7K] (last visited Mar. 4, 2023). For female college students, their attendance, watching, and talking about sports tends to relate to their college teams or college experiences. *Id.*

238. *See* Karen Given, *Sports Talk Radio Doesn’t Want Women (But TV Does!)*, WBUR (Oct. 5, 2018), <https://www.wbur.org/onlyagame/2018/10/05/sports-radio-sexism-advertising> [perma.cc/5X8T-VUJ8].

239. *See* Grasgreen, *supra* note 235.

240. *See* Abigail Lorge, *In Fantasy Football Leagues, the Field is Level*, N.Y. TIMES (July 28, 2007), [https://www.nytimes.com/2007/07/28/sports/othersports/28fantasy.html?referer=&_r=0%2520\(15%2520percent%2520female%2520participants\)](https://www.nytimes.com/2007/07/28/sports/othersports/28fantasy.html?referer=&_r=0%2520(15%2520percent%2520female%2520participants)) [perma.cc/3EWG-H643].

241. *See* Grasgreen, *supra* note 235.

242. For example, boys and men play pickup games, organized and administered by themselves, ten times as often as girls and women. *Deaner et al.*, *supra* note 171, at 76.

243. *Id.*

244. The differences still are statistically significant. *See* Goldman, *supra* note 230.

245. *See id.*

When Title IX was enacted, differences in athletic interest between men and women rightly could be and were attributed to the historical treatment of women, their exclusion or discouragement from sports opportunities, their differential socialization, and the different societal expectations for them.²⁴⁶ There is now a wealth of research studies presenting consistent and “unambiguous” evidence of a substantial difference in athletic interest between men and women that cannot be satisfactorily or completely explained by reference to historical discrimination and socialization.²⁴⁷ The directive in Prong 1 to assess compliance based solely on outcomes—enrolled students versus sports participants—takes no account of the alternative explanation to which the research points.²⁴⁸

B. Prong 1 and Proportionality

As set forth above, university compliance with the Title IX mandate to provide equal athletic opportunities for women most often equates to attempts to comply with Prong 1.²⁴⁹ In its focus exclusively on numerical equivalency, however, Prong 1 (and, indeed, Prongs 2 and 3) discounts all physiological, biological, hormonal, metabolic, body size and composition, and brain and neurological differences between men and women and the potential that these differences produce gender-based differences regarding athletics and athletic participation.²⁵⁰ As described below, Prong 1 also produces practical difficulties in the administration of teams.²⁵¹ Further, it appears contrary to explicit language in Title IX that eschews mandated or preferential treatment based on statistical evidence or different

246. Deaner et al., *supra* note 171.

247. *See id.* at 73. The authors conducted a review of multiple research studies that showed more interest in sports by males than females. Among other things, the studies examined male and female sports participation in small and large current societies and across cultures, their historical participation in sports activities, patterns of attendance at sports events, sports interest as expressed through questionnaires and otherwise, degree of sports knowledge, and television viewership patterns. They also evaluated explanations other than different interest in sports to account for the consistent findings of the studies. Among the alternatives considered was that women and girls have less free time to engage in sports. They concluded that there is “unambiguous evidence for a substantial sex difference in interest in sports participation and spectatorship.” *Id.* at 74.

248. *See* EILEEN MCDONAGH & LAURA PAPPANO, PLAYING WITH THE BOYS 52–58 (Oxford Univ. Press 2007).

249. *See* Deaner et al., *supra* note 171, at 89.

250. *See id.*

251. *See* Cohen v. Brown Univ., 991 F.2d 888, 898 (1st Cir. 1993).

outcomes.²⁵² Finally, Prong 1 appears to contradict Fourteenth Amendment Equal Protection doctrine that forecloses government corrective action for societal discrimination or that rectifies more than those effects of discrimination produced by government action.²⁵³ A prime component for showing an equal protection violation is identification of the relevant populations for comparison. This also is a prime component of a violation of Title VII, which governs employment discrimination.²⁵⁴

Title VII provides “the most complete relief possible” for discriminatory treatment²⁵⁵ and is the “the most appropriate analogue”

252. 20 U.S.C. § 168 1(b) (“Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this 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.”).

253. See *supra* notes 66, 252 and accompanying text for the elements of an equal protection violation. There are several factors used to assess whether the elements are met. First, societal discrimination is not unconstitutional discrimination and therefore may not underpin a race-conscious court-ordered remedy. See, e.g., *City of Richmond v. Croson*, 488 U.S. 469, 470; *Milliken v. Bradley*, 433 U.S. 267, 269 (1977) (remedy to target with “reasonable precision” only effects caused by purposeful discrimination by particular actor). Second, a relevant population must be identified as comparator. See, e.g., *Croson*, 488 U.S. at 501; *Ward’s Cove v. Atonio*, 490 U.S. 642, 650–51 (1989); see also *Podberesky v. Kirwan*, 38 F.3d 147, 156, 159–60 (4th Cir. 1994) (Maryland scholarship program open only to African Americans unconstitutional unless current African-American retention and graduation rates proved to be present effects of past discrimination; Maryland student body not the relevant comparison population). Third, any remedial plan must be temporary and have an end point. See, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616, 625, 630 (1987); *Gruber v. Bollinger*, 539 U.S. 306, 342 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 250 (1991) (remedy lifted when good faith compliance for a reasonable time eliminates vestiges of past discrimination to the extent practicable); *Milliken*, 418 U.S. at 718 (even “unpardonable recalcitrance” is no exception to lifting remedy). Fourth, quotas are unconstitutional. See, e.g., *Gruber*, 539 U.S. at 309; *Gratz*, 539 U.S. at 258.

254. Title VII of the Civil Rights Act of 1964, 28 U.S.C. § 2000e-16 (1964).

255. See *Local 28 of Sheet Metal Workers’ Int’l. Ass’n. v. E.E.O.C.*, 478 U.S. 421, 464–69, 476, 487 (1986); *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979). Title VII relief is broader than that available under either Title VI of the Civil Rights Act of 1964. See 42 U.S.C.A. § 2000d *et seq.* (race discrimination in programs that receive federal funds). Title VII application is also broader than the application of Title IX outside the area of athletic competition. See *Johnson*, 480 U.S. at 627–29 (Title VI and by implication Title IX); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998).

to Title IX's substantive reach.²⁵⁶ Yet, unlike Prong 1 of the three-pronged test, Title VII requires identification of a relevant population²⁵⁷ as comparator to show discrimination. Counted as comparators under Prong 1, by contrast, are every university student, no matter their athletic skill set, conditioning, age, interest, or even whether they are physically capable of athletic participation.²⁵⁸

To date, courts have upheld the legality and constitutionality of Prong 1 by emphasizing that Title IX regulations do not compel educational institutions to employ it and that institutions instead may comply with either Prong 2 or Prong 3.²⁵⁹ In this view, a university that complies with Prong 1 has made a voluntary choice. If in fact voluntary, this choice is not prohibited by statutory language but is expressly sanctioned.²⁶⁰ To conclude that Prongs 2 or 3 are viable options for a university so as to make a Prong 1 choice constitutional, however, is to discount the practical and implementation constraints associated with these ways to provide women's opportunities as well as the potential constitutional impediment embodied in Prong 3.²⁶¹

The first court to discuss Prong 1 concluded that Title VII's focus on a relevant population is inapposite for Title IX's regulation of athletics, both because the gender composition of an athlete population at a university is substantially in its control and because Title VII operates in a unitary system while Title IX for athletics is a dual one.²⁶² Even if unqualifiedly true, however, these factors are outweighed by deficiencies in the three-pronged test.

256. See *Roberts v. Colo. State Bd.*, 998 F.2d 824, 832 (10th Cir. 1993). Title VII remedies also are restricted in scope and duration and eschew displacement of current employees. See, e.g., *Johnson*, 480 U.S. at 636; *Local 28*, 478 U.S. at 464-69, 476, 487 ("egregious," "pervasive," "persistent," contumacious, purposeful discrimination but remedy still temporary and restricted in scope).

257. See, e.g., *Johnson*, 480 U.S. at 622, 626, 630, 636 (1987); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 577 (1984); *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 232 (1982); *Connecticut v. Teal*, 457 U.S. 440, 446-47 (1982); *Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 339 (1977); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). These criteria mirror those to evaluate the constitutionality of race-conscious schemes under the Fourteenth Amendment.

258. Similarly, Prong 3 does not limit to a particular population a decision as to the number and level of women's athletic interest and ability. In addition, the three-pronged test requires no showing of a discriminatory purpose to disadvantage women. Disparate impact independent of purpose also is authorized under Title VII, but it is limited to challenges to the use of a test or other employment device or practice that causes the disparity. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971). Title VII remedies also are different from what is permitted under the three-pronged test—ceasing use of the test or practice and compensating those injured, not employing numerical quotas or preferences.

259. See, e.g., *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993).

260. 45 C.F.R. § 86.3.

261. See *infra* notes 291-93 and accompanying text.

262. See *Cohen*, 991 F.2d at 897.

1. Control

An athletic department controls coaching choices, the geographical recruiting area of a team, and the number of athletes on a team roster.²⁶³ Subject to NCAA bylaws, an athletic department controls the number of sports offered, and what sports they are,²⁶⁴ as well as the amount of scholarship money expended.²⁶⁵ An athletic department also decides the type of athlete to be recruited.²⁶⁶ For example, a head track and field coach could distribute scholarship money evenly among all track athletes and field athletes. Alternatively, that coach could spend most scholarship money on distance runners, in the hope that the team will become a powerhouse in one area of track and field.

These choices may be more apparent than actual, however. An athletic department is constrained by the level of funding available to it, its geographical location, and the admissions standards of its university.²⁶⁷ Subject to debate, moreover, is how much difference there is between a university's ability to control the demographics of its student population and an employer's ability to control the demographics of its workforce. An employer, after all, also decides the nature of the work to be performed and the qualities of the workers it employs.²⁶⁸

2. Dual System

The second, and likely prime, reason the courts give for rejecting the Title VII relevant population analogue is that Title VII operates in a unitary system where decisions are made on a gender-neutral basis

263. See *infra* notes 291–93.

264. For example, see Figure 20-1, *General Requirements for Division I Membership*, 2020-21 NCAA DIVISION I MANUAL 415 (2020), available at <https://www.ncaapublications.com/productdownloads/D121.pdf> [perma.cc/UD6W-PLBK].

265. There are constraints on the allocation and amount of financial aid that may be awarded to athletes, however. See *infra* note 291 and accompanying text.

266. See generally *College Recruiting Process: How Do Colleges Recruit Athletes?*, NCSA COLLEGE RECRUITING, <https://www.ncsasports.org/recruiting/how-to-get-recruited/college-recruiting-process> [perma.cc/8YGG-VSL3] (last visited Mar. 4, 2023).

267. *Id.*

268. An employer in the same industry also may have a different product focus, and that difference may affect the workers it seeks to hire. Ford, for example, may make low price compact cars. The cars may lack features that Mercedes includes in its high-end, luxury cars.

while athletic participation under Title IX is a dual system that is explicitly gender-specific.²⁶⁹

Consider an employer with a workforce of 100 chemists, sixty men and forty women, where the area population is 60 percent women and 40 percent men. If women claim discrimination, the Fourteenth Amendment and Title VII both foreclose comparison to the general population and instead require comparing the workforce to properly credentialed male and female chemists.²⁷⁰ Yet, according to the courts, if this same employer legally could maintain separate male and female chemist workforces, then general population figures, not the population of qualified chemists, should be used to decide if there is discrimination. Even if general population figures were used, however, and a 60 percent female target goal were set, constitutional limits on remedies ameliorate the problem for an employer as both long- and short-term goals are waivable if female chemists are in short supply.²⁷¹

Under Prong 1, by contrast, proportionality must be reached.²⁷² A university with proportionately more male than female athletes has three ways to satisfy Prong 1. First, it may be able to add a sufficient number of women commensurate with its existing standard for team membership and athletic performance. Second, it may add a sufficient number of women by changing its standards for team membership and athlete performance. Third, it may decrease the number of male athletes.²⁷³ Only the last option saves money.

The men's sport that has suffered the most cuts is men's gymnastics, which now has only sixteen teams in all three NCAA

269. See *Cohen*, 991 F.2d at 893. Although several circuit courts have upheld the three-pronged test, the *Cohen* Court alone addressed its constitutionality at any length, and no court discussed the analogue to Title VII in detail. See *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 275 (6th Cir. 1994) (brief constitutional discussion but no mention of Title VII); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 272 (7th Cir. 1994) (two paragraphs referencing now overruled *Metro Broadcasting*; no Title VII); *Roberts v. Colo. State Bd.*, 998 F.2d 824, 833 (10th Cir. 1993) (Title VII relevant; no constitutional discussion).

270. See generally Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*; U.S. CONST. amend. XIV. These likely must be chemists in the close geographical area and not nationally.

271. Indeed, waiver applies even though a relevant population is targeted and the goal supposedly achievable. Training may be ordered under Title VII but only under specified conditions: all other criteria for a constitutional remedy must be met and there must be proof that the employer engaged in longstanding, egregious discrimination of unskilled, entry-level applicants that thereby limited the pool of skilled workers.

272. See *supra* Section X.B. It is theoretically possible for a university to search the world for female players, and, in fact, many international student-athletes compete on university teams. The purpose of Title IX was to assure gender equity for American women, not to provide university opportunities for women around the world.

273. A variation on a theme of recruiting women athletes and cutting male athletes is known as roster management. See *infra* notes 287-88.

divisions.²⁷⁴ Among those eliminated was a UCLA men's gymnastics program whose team accounted for one half of the athletes on the US gold medal-winning 1984 Olympic team.²⁷⁵ Other affected sports are men's wrestling, men's fencing, and men's swimming and diving, including a UCLA program whose teams won an NCAA national championship and whose student-athletes accounted for sixteen Olympic gold medals.²⁷⁶

Not only may Prong 1 proportionality be reached without adding women's sports and opportunities, but Prong 1 seems to permit a university to ignore what are demonstrable women's interests by cutting (or not adding) women's teams and instead adding roster positions to existing teams or substituting a sport with a large squad for an existing women's sport.²⁷⁷ For Prong 1 purposes, for example, a university could eliminate its women's basketball,²⁷⁸ volleyball, tennis, and golf teams²⁷⁹ (49.6 roster places on average; average roster sizes of 14.6, 16.9, 9.6, and 8.5 respectively)²⁸⁰ and substitute women's rowing (average roster size of 50.2).²⁸¹ Coach salaries and athlete grants in aid

274. See NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT (1956-57 THROUGH 2020-21) 116 (2022), available at https://ncaaorg.s3.amazonaws.com/research/sportpart/2021RES_SportsSponsorshipParticipationRatesReport.pdf [perma.cc/5DL6-G96Y]; Assoc. Press, *Billions for March Madness, but Pennies for Olympic Gold*, USA TODAY (Apr. 16, 2014, 2:45 AM), <https://www.usatoday.com/story/sports/ncaab/2015/04/06/billions-for-march-madness-but-pennies-for-olympic-gold/25348503/> [perma.cc/3776-3STS]; *infra* Section X.D for a discussion whether athletic departments actually comply with Prong 1.

275. See tasser10, *supra* note 19; Alex Goodman, *Title IX Tries to Promote Gender Equality in Sports*, DAILY BRUIN (May 11, 2011, 2:39 AM), https://dailybruin.com/2011/05/11/title_ix_tries_to_promote_gender_equality_in_sports [perma.cc/4L56-Q5PB].

276. See *UCLA Builds \$10M Aquatic Center But No Men's Swim & Dive Teams*, FAIRNESS IN SPORTS FOUND. (July 18, 2008), <https://momss.wordpress.com/2008/07/18/ucla-builds-new-center-no-mens-swimming/> [perma.cc/3ZQU-MEGY]. There not only have been cuts to men's programs, but club sports are prevented from moving to varsity status, despite interest and ability. See tasser10, *supra* note 19.

277. See Mary Leonard, *Northeastern Gymnasts Take the Fall for Title IX*, BOSTON GLOBE (May 11, 1998); see also *Cohen v. Brown Univ.*, 991 F.2d 888, 906-07 (1st Cir. 1993).

278. Current NCAA bylaws would preclude eliminating women's basketball. *E.g.*, BYLAWS, *supra* note 85, at 20.02.6.

279. The average roster size for a Division I women's tennis team is 9.3 and women's golf is 8.5. See NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT, *supra* note 274.

280. See *id.* Roster averages are for Division I teams in academic year 2013-14.

281. The sport of equestrian (average roster size 39.2; fifteen grants in aid) offers savings additional to that described for rowing. Equestrian has a novice competition level and can be relatively inexpensive to administer as horses do not travel to competitions (athletes ride the horses of the host school) and athletes may be required to own and house their horses. See, *e.g.*, April Lee, *Eventing Levels Explained – The Equestrian Triathlon*, HELPFUL HORSE HINTS, <https://www.helpfulhorsehints.com/eventing-levels-overview/> [perma.cc/8Y33-3CQP] (last visited Mar. 4, 2023); 45 C.F.R. § 86.3 (1975); *Recruiting Tips For Prospective College Equestrians*,

account for approximately 30 percent of an athletic department's annual expenses.²⁸² By substituting rowing, an athletic department would save the value of twenty-one athletic grants in aid.²⁸³ The coach salary budget also would be reduced, both because there would be fewer coaches on salary and also because women's basketball and volleyball coaches are among the highest paid coaches of women's teams.²⁸⁴

Another mechanism for Prong 1 compliance is what is euphemistically called roster management and, in any other context, is called quotas: women's teams must maintain a specified minimum number of players while men's teams have player caps.²⁸⁵ Roster management decisions can ignore or discount the best judgment of women's coaches regarding the maximum number of athletes a coaching staff can handle and the best judgment of men's coaches regarding the minimum number needed for teams to compete effectively.²⁸⁶ Roster-managed added women likely will have athletic ability inferior to a team's core players and they may be dissatisfied with the amount of playing time afforded them. Roster-managed added

COLLEGE EQUESTRIAN CONSULTING, [https://www.collegeequestrianconsulting.com/recruitment/\[perma.cc/FVU3-LNDP\]](https://www.collegeequestrianconsulting.com/recruitment/[perma.cc/FVU3-LNDP]) (last visited Mar. 4, 2023); Angie Dickson Finn, *Is Your Horse College Bound?*, HORSE ILLUSTRATED (Dec. 19, 2005), <https://www.horseillustrated.com/horse-community-is-your-horse-college-bound-25012> [perma.cc/55VC-N8U3]; *Bringing Your Own Horse to College*, UNIV. OF FINDLAY, <https://www.findlay.edu/sciences/equestrian-studies/bring-your-horse-to-college> [perma.cc/5WZ8-7PP8] (last visited Mar. 4, 2023).

282. *The 25 Universities That Spend the Most on Athletics*, SPORTS MGMT. DEGREE HUB, <https://www.sportsmanagementdegreehub.com/the-universities-that-spend-the-most-on-athletics/> [perma.cc/UX7P-G7WV] (last visited Mar. 4, 2023). Facility, recruiting, and team travel expenses cost less for one rather than four separate teams.

283. The total amount of scholarships permitted in women's basketball, volleyball, tennis, and golf is forty-one; the total amount in women's rowing is twenty. See BYLAWS, *supra* note 85, at 15.5.2.1., 15.5.3.1.2., and 15.5.2.

284. Women's basketball coaches are the highest paid coaches of women's teams. See Lindsay Schnell, Erick Smith & Steve Berkowitz, *'Tip of the iceberg': Pay for Women's College Basketball Coaches is Skyrocketing. How High Can It Go?*, USA TODAY, <https://www.usatoday.com/story/sports/ncaaw/2022/03/11/womens-college-basketball-coaches-pay-salary-analysis/9350209002/?gnt-cfr=1> [perma.cc/5EB3-85ET] (Mar. 11, 2022, 10:14 PM). Successful Division I women's volleyball coaches earn upwards of \$500,000 annually. See Sam McKewon, *Nebraska Volleyball coach John Cook Makes \$675,000 after Latest Raise, Extension*, OMAHA WORLD HERALD (June 4, 2018), https://omaha.com/sports/college/huskiers/teams/volleyball/nebraska-volleyball-coach-john-cook-makes-675-000-salary-after-latest-raise-extension/article_d9c8d594-53f6-54ae-a42d-a326b8f8b871.html [perma.cc/V58G-3J6B]. The head volleyball coach at Penn State is estimated to make \$500,000 annually. See bright, *15 Highest Paid College Volleyball Coaches | Best Countries*, KIIKY WEALTH (Oct. 27, 2022), <https://kiiky.com/wealth/highest-paid-college-volleyball-coaches/> [perma.cc/FZ5W-HNGB].

285. See Janice Johnson, *Who Said Roster Management for Title IX Compliance is Painless?*, LINKEDIN (Oct. 16, 2015), <https://www.linkedin.com/pulse/who-said-roster-management-title-ix-compliance-painless-johnson/> [perma.cc/S9FB-292P].

286. *Id.*

players also may be insufficiently interested in the competitive experience to play or practice hard. If so, their conduct may have a negative impact on overall team morale.

For most sports, coaches may divide the total amount of scholarship money permitted among as many players as they choose.²⁸⁷ Scholarship money that goes to roster-managed added players is scholarship money that core players do not receive.²⁸⁸ Taken to the extreme, roster management can ignore or discount the tenor of an athletic experience. Even if extreme exercises of roster management would be viewed by the courts as contrary to Prong 1 because the

287. All NCAA sports have limits on the number of scholarships a team may provide. See BYLAWS, *supra* note 85, at 15.5.1, 15.5.2, 15.5.3. Except for football, men's and women's basketball, women's gymnastics, women's tennis, and women's volleyball (known as head count sports), all NCAA sports are equivalency sports. *Id.* at 15.5.2. In head count sports, coaches have a specified number of student-athletes to whom they can award scholarships, and every scholarship counts as a full ride no matter whether a full amount is awarded. *Id.* Each scholarship athlete in a head count sport receives at least tuition, room and board, and books, and may receive the full cost of attendance at a university. In equivalency sports, a coach has a maximum amount of scholarship money to distribute among team members but no minimum limit on the amount of aid. *Id.* at 15.5.3. Equality of men's and women's participation, therefore, does not equal distribution equality of scholarship support. Additional variables include the number of out-of-state student-athletes on each team, as tuition costs are substantially different between in- and out-of-state athletes. Title IX regulations specify that total scholarships spent on men and women should be within in one percentage point of each other or be explained. See *What is Title IX?*, WOMEN'S SPORTS FOUND. (Sept. 10, 2019), [womenssportsfoundation.org/advocacy/what-is-title-ix/](https://www.womenssportsfoundation.org/advocacy/what-is-title-ix/) [perma.cc/S8DE-49VU]. The Women's Sports Foundation estimates that women athletes receive \$183 million less in scholarships than males. *Form 990 Return of Organization Exempt From Income Tax*, WOMEN'S SPORTS FOUND. (Dec. 2014), <https://projects.propublica.org/nonprofits/organizations/237380557/201533009349301353/full> [perma.cc/RD79-4SVN].

288. As a general rule, roster size is inversely related to individual athlete practice and playing time. The smaller the roster, the more each player is expected to do and the greater the likelihood players will be tired. Injuries frequently occur when athletes are tired. Injury risks are exacerbated by size and speed. See, e.g., Jennifer M. Hootman, Randall Dick & Julie Agel, *Epidemiology of Collegiate Injuries for 15 Sports: Summary and Recommendations for Injury Prevention Initiatives*, 42 J. ATHLETIC TRAINING 311, 312 (2007); Bob Adams & Frédéric Depiesse, *Specific Injuries by Anatomic Site*, in IAAF MED. MANUAL ch. 10, available at [https://www.worldathletics.org/download/download?filename=3f74b21a-2a83-4f92-9a30-759603533e5d.pdf&urlslug=Medical%20Manual%20\(complete\)](https://www.worldathletics.org/download/download?filename=3f74b21a-2a83-4f92-9a30-759603533e5d.pdf&urlslug=Medical%20Manual%20(complete)) [perma.cc/UD57-KPDU] (explaining that athletes return too soon after an ankle injury). *But see* Sean D. Turbeville, Linda D. Cowan, Willis L. Owen, Nabih R. Asal & Mark A. Anderson, *Risk Factors for Injury in High School Football Players*, 31 AM. J. SPORTS MED. 974, 977 (2003). Smaller than optimum rosters may therefore increase the injury risk for athletes. See SEMYON M. SLOBOUNOV, *INJURIES AND ATHLETICS CAUSES AND CONSEQUENCES* 91 (2008); Anthony Luke, Rony M. Lazaro, Michael F. Bergeron, Laura Keyser, Holly Benjamin, Joel Brenner, Pierre d'Hemecourt, Matthew Grady, John Philpott & Angela Smith, *Sports-Related Injuries In Youth Athletes: Is Overscheduling A Risk Factor?*, 21 CLIN. J. SPORTS MED. 307 (2011); Jordana B. Foster, *Fatigue Facilitates ACL Injury*, THE DOCTOR WILL SEE YOU NOW (July 16, 2008), https://www.thedoctorwillseeounow.com/content/sports_medicine/art2452.html [perma.cc/K8WB-DVK9].

compliance would be only surface level, less extreme versions might well pass muster.²⁸⁹

C. Prongs 2 and 3: No Panacea

Prong 2 of the three-pronged test entails adding teams, and it requires a continuous pattern of so doing.²⁹⁰ Adding teams is not simply a matter of finances, though. Some sports are not a geographical fit, such as, for example, alpine skiing in Nebraska. Competition, moreover, requires a critical mass of teams; achieving a critical mass is not in the control of one athletic department, no matter how well-funded. Adding teams also means matching the interests and abilities of women in the teams that are added.

Prong 3 of the three-pronged test requires that 100 percent of interests and abilities must be met. A number of factors go into this calculation.²⁹¹ Prime among them is that interest and ability need to be matched with a reasonable expectation of competition.²⁹² Meeting Prong 3, therefore, entails the same issue of critical mass as does Prong 2.²⁹³ Compliance with Prong 3 also entails a different concern. In its silence regarding the percentage of the interests and abilities of men that may go unfilled, it raises the specter of unconstitutional adverse differential treatment of them.²⁹⁴

Prongs 2 and 3 share one thing, however. Compliance with them costs money. In consequence, athletic departments typically attempt to meet the Title IX mandate through compliance with Prong 1.²⁹⁵

289. The Author spoke to a head coach of both a men's (total scholarships available: 4.5) and women's (total scholarships available: 8) varsity tennis team who roster managed both teams. See BYLAWS, *supra* note 85, at 15.5.2.1, 15.5.3.1.1. The coach turned away male athletes who sought team membership without scholarship aid. He had difficulty finding women players even when he offered scholarship aid. For reasons of team morale and general fairness, he did not provide scholarship aid to roster-managed added women at the expense of aid to his more talented players. Women's tennis is a head count sport. The coach therefore could not award partial scholarships to the roster-managed added players.

290. See *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, U.S. DEP'T OF EDUC. (Jan. 16, 1996), <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html> [perma.cc/757U-ZGP6].

291. *Id.*

292. *Id.*

293. *Id.*

294. To date, men's teams that make this argument have been unsuccessful. See *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 765–66 (9th Cir. 1999).

295. See, e.g., *George*, *supra* note 104, at 10.

D. Compliance, or Not

There are data, consistent over time,²⁹⁶ that suggest that a critique of the necessary consequences of compliance with the three-pronged test is misplaced, or at least overstated, since institutions in any event are not currently meeting their Title IX compliance obligations.²⁹⁷ A 2020 NCAA Division I Study, for example, found that women comprised 54 percent of the student body in Division I institutions but only 47 percent of student-athletes.²⁹⁸ Although some disparity might be due to factors other than noncompliance,²⁹⁹ the data strongly suggest that noncompliance is at play.

This Article criticizes the three-pronged test.³⁰⁰ It advocates for a reassessment and suggests that a new metric for assuring gender equity in athletics may more closely approximate the level of women's interest in competitive athletics.³⁰¹ Whatever its failings, however, the three-pronged test is currently legally sanctioned as the operative test. Noncompliance should not be an option.

It is understandable that a pervasive history of gender discrimination would make courts and Title IX regulators wary to depart from a test whose ease of application permits close overview. It is equally understandable that courts and Title IX regulators would be reluctant to leave a wide berth of decision-making to the same athletic departments that, prior to Title IX, failed to provide equitable athletic opportunities for women. Elimination of the three-pronged test, however, does not mean elimination of oversight to assure equitable

296. In 2000, for example, women constituted 54 percent of college enrollments at 832 schools that responded to an NCAA gender equity study; in 2000, however, females at these institutions only accounted for 41 percent of the athletes. Greg Garber, *Landmark Law Faces New Challenges Even Now*, ESPN.COM (June 22, 2019), <https://www.espn.com/gen/womenandsports/020619title9.html> [perma.cc/QN52-JEBQ]. According to 2000–01 information, moreover, men's college programs still awarded more scholarships on average (60.5%), had greater operating (64.5%) and recruiting expenses (68.2%) and paid more in head coach salaries (59.5%). *Id.* There also is evidence that the elimination of men's athletic opportunities is caused by meeting the perceived requisites of football and not by increased women's participation. *Id.*

297. See Amy Wilson, *NCAA Managing Director for the Office of Inclusion, Said the Disparity is Concerning but Does Not Necessarily Equate to a Violation of Title IX. A New NCAA Report Shows the Stark Gap in Funding for Women's Sports*, ASSOC. PRESS (June 24, 2022, 3:33 AM), <https://www.npr.org/2022/06/24/1107242271/the-ncaa-says-that-funding-for-women-in-college-sports-is-falling-behind> [perma.cc/5HQ2-6YL8].

298. *Id.* The study also found that men's programs had more than double the allocated resources, with an even larger gap in comparative recruiting budgets and coach compensation.

299. *Id.* For example, it is possible that some universities that comply with Prong 3 have a relatively low bar to meet 100 percent of women's interests and abilities.

300. See *supra* Part X.

301. See *supra* Part X.

treatment of women athletes and athletics. Per contra, it simply means identifying a substitute test that better captures the scope and level of women's interests.

There is good reason to believe, moreover, that elimination of the three-pronged test would not in any event lead the fox to again circle the chicken coop. The environment for women's sports is very different from when Title IX was enacted. Women's sports and women athletes are now firmly fixed in the athletic landscape.

Male athletes and associations have come forward to support the efforts of women.³⁰² For example, when the US women's soccer players brought a lawsuit challenging the disparity between their salaries and those of the men, the men's soccer players filed an amicus brief in the women's support.³⁰³ As another example, the NBA subsidizes the WNBA, on average, \$10 million annually.³⁰⁴

Efforts that adversely affect women's sports opportunities would be widely publicized, and they would be doubtless criticized in vocal fan bases and by active advocacy groups.³⁰⁵ The media regularly publicizes possible adverse discriminatory treatment of women athletes and teams.³⁰⁶ The "social media shaming" produced when a women's basketball player posted a photograph of the training facilities provided to women athletes in the Women's Final Four³⁰⁷ underscores that social media outlets would widely circulate news of any curtailing of women's athletic opportunities. It seems likely that lawmakers would block any effort at wholesale retreat and review closely any incremental changes.

If, as discussed above, the three-pronged test overstates the interest of women in competitive athletics, then some reduction in women's opportunities may be anticipated. Were that reduction to comply with a more realistic metric to assess gender equity in sports, then that reduction simply would rebalance equality of opportunity for both men and women.

302. See Meg Linehan, *U.S. Women's Soccer Players Get Support from Men's Team in Equal Pay Lawsuit*, THE ATHLETIC (July 30, 2021), <https://theathletic.com/4203728/2021/07/30/u-s-womens-soccer-players-get-support-from-mens-team-in-equal-pay-lawsuit/> [perma.cc/R37X-SSJS].

303. *Id.*

304. See Gidget Alikpala, *Does the NBA subsidize the WNBA?*, DIARIO AS (Mar. 7, 2022, 4:00 PM), https://en.as.com/en/2022/03/07/nba/1646677389_970277.html [perma.cc/3YJ8-5CDP].

305. See Liz Clark, *After Social Media Shaming, NCAA Tries to Get Gender Equity Right for 2022 March Madness*, WASH. POST (Mar. 11, 2022, 8:00 AM), <https://www.washingtonpost.com/sports/2022/03/11/ncaa-womens-tournament-changes/> [perma.cc/V4TH-A852].

306. *Id.*

307. *Id.*

XI. CONCLUSION

This Article describes the discriminatory history of women in athletics.³⁰⁸ It explores the substantial advances in athletic participation achieved by women since the enactment of Title IX. It identifies new challenges for Title IX enforcement.³⁰⁹ It looks critically at the three-pronged test currently employed to evaluate whether women are provided equality of athletic opportunity.³¹⁰ It discusses gender differences in the physiological, hormonal, metabolic, body size and composition, and brain and neurological functions of men and women, and how those differences influence athletic interest.³¹¹ It concludes that the Title IX three-pronged test to assure gender equity fails adequately to consider these gender differences.³¹²

At the time that the three-pronged test was established, and over the time that courts first evaluated its legality and constitutionality, much of the data on biological, physiological, and neurological differences between men and women, and their import on gender-driven interest, were not as fully developed or understood.³¹³ Those data, therefore, were not part of the consideration that led to formulation of the three-pronged test.

Women athletes are a fundamental and visible aspect of sports competition. They must be afforded their fair share of athletic opportunities. Realistically accounting for gender differences, however, would neither turn back the clock nor erase the deservedly prominent role that women athletes and women's athletic competition now hold in American society.

308. See *supra* Part II.

309. See *supra* Part IX.

310. *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, *supra* note 290.

311. See *supra* Section X.A.

312. See *supra* Section X.A.

313. Deaner et al., *supra* note 171.

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