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IS TITLE IX REALLY TO BLAME FOR THE DECLINE IN INTERCOLLEGIATE MEN’S NONREVENUE SPORTS?

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I. INTRODUCTION

Title IX of the Educational Amendments of 1972 was enacted to provide equal educational opportunities for women. Recently, certain men’s sports have experienced sharp declines in the number of teams offered.1 Wrestling, in particular, has lost over 170 varsity programs between 1981 and 1999.2 Critics blame Title IX for these cuts to men’s teams,3 arguing that the law makes it economically impractical with limited budgets for universities to operate men’s non-revenue producing sports while providing for women’s sports.

This paper employs both the economic theory of higher education and the profit maximization theory of the firm to discount these critics by arguing that the trend to cut men’s sports in Division I-A is driven by profit-motivated athletic departments, and not tight budgets. Weakening gender equity laws

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2. Id.

will only make shifting resources from the minor sports to men’s football and basketball easier.

Large athletic departments are currently using the National Collegiate Athletic Association (NCAA) as an agent to procure monopoly revenues while benefiting from the services of unpaid athletes. As the financial incentive from lucrative bowl and/or Final Four appearances increases, the incentive to substitute away from non-revenue sports into men’s football and basketball increases. Division I universities, therefore, have a financial motive to reduce the number of non-revenue sports toward the minimum required by the NCAA.

Meanwhile, Division II and III athletic departments, operating on substantially smaller budgets and without the incentive to operate to maximize profitability, allocate resources across sports in a manner consistent with the educational mission of the university, and are not cutting men’s sports. Economic theory would predict that if Title IX had truly placed unreasonable financial constraints on athletic departments, the evidence suggesting a trend of dropping men’s sports should have been reversed.

Title IX, which was first enacted in 1972 and later strengthened by the Civil Rights Restoration Act of 1987, passed in 1988, prohibits educational institutions that receive federal funds from engaging in sex discrimination. It says simply, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” The law’s prohibition against sex discrimination is very broad. It applies to every aspect of a federally funded education program or activity (including athletics), and extends to elementary, high schools, colleges, and universities. By 1974, the administrative predecessor to the current Department of Education, the Department of Health Education and Welfare (“HEW”), promulgated a draft of the implementing regulations, received comments, and re-promulgated them in 1975. Congress then held


8. Id. at § 1681(c).

hearing and debated the regulations' fate. Attempts to weaken the regulations failed, putting the current regulations in effect when President Ford signed them. The regulations require institutions to provide male and female students with the following:

1) Equal opportunities to participate in sports;
2) An equitable allocation of scholarships monies; and
3) Equal treatment in all aspects of athletics, including coaching, facilities, equipment, medical treatment, travel, and support among other things.

The regulations required compliance in elementary schools by 1976, and high schools, colleges, and universities, to be in compliance by 1978.

By July 1978, HEW had received “nearly 100 complaints alleging discrimination in athletics against more than 50 institutions of higher education.” It became clear to investigators that universities and athletes needed further guidance on how to comply with Title IX. The central question became whether a school had provided sufficient sporting opportunities to play for their female student-athletes. In response, HEW issued a policy interpretation (the “Policy Interpretation”) in 1979 that further clarified the meaning of Title IX’s "equal opportunity" mandate.

The Policy Interpretation set forth three wholly independent ways for schools to demonstrate that students of both genders have equal opportunities to participate in sports. Institutions can comply by showing either that:

1) the percentage of male and female athletes is substantially proportionate to the percentage of male and female students enrolled in the school, (the so-called “proportionality test”) (“Prong 1”); OR
2) the school has a history and a continuing practice of expanding opportunities for female students because their gender is usually the one excluded from sports, (“Prong 2”); OR
3) the school is fully and effectively meeting its female students’

10. Id.
12. 34 C.F.R. § 106.41(d).
14. Id.
interests and abilities to participate in sports ("Prong 3"). If a school meets any one of these tests, it is in compliance with Title IX’s participation requirements. This three-part test has been in effect for more than two decades and has been upheld by every one of the eight federal appeals courts that has considered it. The theory is that if a school has not met demand for sports participation, if it does not have a history of continued expansion for its women’s athletics program, and it is not providing opportunities proportionately, then it is not fairly dividing these opportunities between men and women.

Schools retain the flexibility to decide how the opportunities they create are to be allocated among sports or teams, so long as they provide equal participation opportunities to men and women overall. Cutting men’s sports is a disfavored practice to the extent that the Office for Civil Rights has control over athletic department decisions—the OCR has already expressly prohibited schools from demonstrating compliance with either Prong 2 or Prong 3 by cutting men’s sports.

Advocates for both men’s and women’s sports agree that opportunities to participate in sports yield much more than the substantial life-long health benefits of running around a field or swimming up and down a pool: participation in sports is an important educational experience. The male wrestlers express the sentiment well in their motto: "Wrestling—Training for the Rest of Your Life!"

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

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15. See U.S. GEN. ACCT. OFF., supra note 1, and accompanying text.
16. See Policy Interpretation, supra note 13, at 71,418.
17. See Policy Interpretation, supra note 13, at 71,418.
21. See Ken Chertow, Gold Medal Wrestling, available at http://www.kenchertow.com/index.html (last visited Nov. 17, 2003). Other slogans from sports advocates include “Study skills” with a photo of a young girl on the uneven parallel bars, “Career Move,” “Dare to Compete,” and “Game for Anything.” Nike, Advertisement (television broadcast, 1995). "If you let me play, if you let me play sports, I will like myself more; I will have more self-confidence. If you let me play sports, I will be sixty percent less likely to get breast cancer; I will suffer less depression. If you let me play sports, I will be more likely to leave a man who beats me. If you let me play, I will be less likely to get pregnant before I want to. I will learn what it means to be strong, if you let me play.")
education and athletics unlawful.\textsuperscript{22} It is not designed to protect sports or any particular men's or women's sport or team. Title IX does not prevent schools from abandoning the educational mission of athletics, and it cannot prevent schools from deciding to drop a men's team\textsuperscript{23} or indeed, its entire athletic department.\textsuperscript{24} It does not give pretext to schools that make indefensible decisions. The law is limited to providing both boys and girls, men and women, with educational experiences equitably.\textsuperscript{25}

II. ECONOMIC THEORY OF HIGHER EDUCATION

Economists generally assume that individuals seek higher education as a human capital investment. Human capital refers to the characteristics workers acquire to make them more productive and, hence, more valuable to firms. In general, the more valuable they are, the greater the earnings they can command in the marketplace. Human capital investment can take the form of job training or schooling. The notion that schooling offers a return on one's investment was suggested as far back as in 1776, when Adam Smith wrote: "The work which he learns to perform, it must be expected, over and above the usual wages of common labour will replace to him the whole expense of his education, with at least the ordinary profits of an equally valuable capital."\textsuperscript{26}

Support for the theory of human capital appears in the form of age-earnings profiles. U.S. Census data consistently reveals a positive correlation between age and earnings that tends to peak at around age fifty-five.\textsuperscript{27} This suggests an increase in productivity as workers gain experience. The data also show that at any age level, persons with a degree in higher education earn more than individuals with a high school education.\textsuperscript{28} Moreover, the rate of earnings growth is higher for college graduates.\textsuperscript{29}

Human capital is referred to as an "investment," not only because it

\textsuperscript{22} 34 C.F.R. § 106.1.
\textsuperscript{23} Horner, 43 F.3d at 275 (citing Cohen v. Brown Univ., 991 F.2d 888, 898-99 (1st Cir. 1993)).
\textsuperscript{24} See Michael Janofsky, Brooklyn College Drops Sports, N.Y. TIMES, July 2, 1992 at B13 (Brooklyn College dropped its entire athletics' program in response to a Title IX lawsuit); T. Jesse Wilde, Gender Equity in Athletics: Coming of Age in the '90s, 4 MARQ. SPORTS L.J. 217, 244-45 (1994).
\textsuperscript{25} 34 C.F.R.§ 106.31.
\textsuperscript{26} ADAM SMITH, THE WEALTH OF NATIONS 90 (Alfred A. Knopf, Inc. 1991) (1776).
\textsuperscript{27} U.S. BUREAU OF THE CENSUS, MONEY INCOME OF PERSONS AND FAMILIES IN THE UNITED STATES (2000).
\textsuperscript{28} Id.
\textsuperscript{29} Id.
increases the individual’s future earnings, but also because the student foregoes an opportunity to earn income as a full-time employee during his/her years of schooling. Moreover, any foregone earnings could have been invested at the going rate of interest. Consequently, the rate of return to schooling is treated as the incremental difference between a person’s lifetime earnings with and without a college degree discounted to its present value.\(^{30}\) Most of the private rate of return has been estimated to be in the neighborhood of 5% to 15%.\(^{31}\)

Although higher education provides monetary returns on investment, it also provides nonpecuniary benefits. A college education can steer the graduate away from tedious or dangerous work into a career with a more desirable working environment suitable to their tastes. Not only can this explain the choice to enter college, it can also explain why some entering college students choose majors that promise a lower return on the investment relative to other majors.

In addition to increasing worker productivity, higher education may provide a successful screening function. For employers seeking the most promising employees, a degree can signal intelligence, drive, and self-discipline. Moreover, a firm with positive experiences with graduates from a given college may look more favorably to future applicants from the same school. In the absence of these signals, the process of identifying applicants with desirable traits for the workplace can be tedious and expensive. Consequently, a completed degree can serve as a low-cost tool for identifying the most promising pool of applicants.

Various nonacademic elements within the university can also assist the screening function. Leadership in student organizations and participation in intercollegiate athletics can also signal the values sought by firms.

One might wonder whether higher education is necessary; after all, a worker could, as a substitute for education, become more productive through on-the-job training.\(^{32}\) The critical element in this discussion lies in the distinction between general training and firm-specific training. When a firm hires an intern or apprentice, it accepts the notion that the individual’s productivity is unlikely to justify its costs during the training period. The investment, however, should pay off due to the increased productivity of the


worker in the post-training period. If competing firms value the skills acquired during training, the current employer will have to increase its wage offer to retain the employee's services. Assuming the higher wage incorporates the full value of the increased productivity of the worker, the training firm will never recover its investment during the training period.

In contrast, if the skills acquired during training are specific to the firm, then the worker's increased productivity will not have to be met with higher wages, allowing the firm to recover its training investment. Collectively, this suggests that firms will be unwilling to pay for general training (such as the skills and generalized knowledge acquired through a college education), but will be willing to pay for firm-specific training. The individual seeking higher wages will, therefore, pay for general training.

Studies have demonstrated rather conclusively that students' choices regarding higher education are sensitive to its costs and benefits. The human capital models provide an explanation for many commonly observed trends. First, investments in higher education typically occur at younger ages. The younger an individual invests in human capital, the longer he/she can reap its benefits. Similarly, because a college education entails foregone earnings, the opportunity cost of attending college is lower for a younger and otherwise lower-paid employee. Second, the human capital theory is consistent with the shape of the age-earnings profile. College-educated workers earn more money at any age than non-college educated employees, although the gap diminishes with age.

Human capital investment theory can also explain trends in women's participation in higher education. The number of women seeking a college education has increased dramatically over the past several decades, undoubtedly coinciding with rising career opportunities. Between 1970 and 1999, for example, the number of women enrolled in institutions of higher learning increased by 235%, as compared to an increase of 129% for men.

Beyond serving as a human capital investment, individuals may view a college education as a "consumption good." The lifestyle of a college student may be viewed as an enjoyable experience. In this regard, the college experience provides an opportunity to join student organizations, participate in or serve as a spectator to athletic events, or simply to make new friends.


34. U.S. NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS, Table 172 (2002).

35. Id.
III. THE EFFICIENT PROVISION OF AN EDUCATION

A critical difference distinguishes higher education from primary and secondary education. Primary and secondary education are compulsory. In contrast, investment in higher education is a personal choice. This creates a burden on the university to not only induce the individual to invest in a college education, but to enroll in that particular institution.\(^{36}\) In attracting students, therefore, a college must devote its resources to suit the investment/consumption needs of its market.\(^{37}\)

Despite the fact that most colleges and universities are tax-exempt organizations, institutions of higher learning behave as firms because they must attract consumers. Assuming the students' choice of which college to attend is motivated by an interest in both investment and consumption opportunities, a university must allocate its budget in such a way as to provide a package of benefits that further these needs at a competitive price.

To better understand this process, we can retreat to the theory of the firm. Because a firm's resources are fixed in supply, profit-maximization requires the firm to allocate its scarce resources in the most efficient manner. Suppose, for example, that a firm produces two goods, A and B. Because a worker cannot simultaneously produce both products, the manager must allocate its labor between goods A and B in such a way as to maximize profit. Given that the worker's hourly wage is the same regardless of which product he/she produces, assigning the worker to the good for which his/her efforts generate the most profit will maximize overall firm profits. Put another way, if switching a worker from good A to good B will cause B's profits to increase by a greater amount than A's profits decrease, the firm's overall profits will rise.

If reallocating resources away from good A into good B invariably caused the firm's overall profits to rise, the firm would maximize its profits by transferring all of its resources into the production of good B (and ceasing to produce good A altogether). For the multiproduct firm, this is rarely the optimal strategy due to the laws of diminishing marginal utility and the law of

\(^{36}\) At the primary/secondary level, one could argue that a similar burden exists for private schools.

\(^{37}\) Although this paper concentrates on an individual's decision to enter college based on the costs and benefits to that person, some argue that a college education generates "positive externalities" or benefits to third parties. For example, a better-informed society makes for better government. This would justify state or federal subsidies and a not-for-profit tax status.
diminishing marginal returns in production. The law of diminishing marginal utility refers to the value consumers place on various goods and services. If society preferred good B to good A, it would be willing to pay more to get it. Assuming production costs are the same, all resources would be allocated to the production of B because it promised greater profits. The law of diminishing marginal utility asserts, however, that the added satisfaction consumers receive from consuming additional units gradually decreases.

The existence of the “law” can be inferred from a simple example. Suppose an individual attended a football game with $1.00, which could either be spent on a hot dog or a soft drink (which are both priced at $1.00). Since the prices of the goods are identical, the person would clearly choose the product that gave him/her the most satisfaction. Suppose in this case, he/she opted for the hot dog. If the person had a second dollar to spend, he/she would have to choose between a second hot dog and the first soft drink. If the person purchases a second hot dog, we can conclude that the second hot dog provided more satisfaction than the first soft drink. If the individual chose the soft drink, the reverse must be true. Note the inferred set of preferences should the buyer select the soft drink. We already know that the first hot dog was preferred to the first soft drink. We now observe that the first soft drink was preferred to the second hot dog. Logically, therefore, we can also infer that the first hot dog must be preferred to the second hot dog. This is the law of diminishing marginal utility. If it were not valid, the buyer would spend all of his/her money on hot dogs. The mere fact that consumers spend their money on varieties of goods and services serves as implicit proof of the validity of the law.

The law of diminishing returns in production refers to the notion that as resources are added to the production of a good, each additional resource causes production to rise by progressively smaller amounts. As an analogy, consider a single person trying to move a heavy piece of furniture up a flight of stairs. If another individual offered to help, the two persons, each carrying an opposite end, would be able to carry the furniture up the stairs in a fraction of the time. If a third person offered to help, the process would probably go even faster. However, it is unlikely that the third person’s contribution made as much of a difference as the second person. If the workers were not volunteers, but rather, employees who must be paid a market wage, the third worker, whose contribution is smaller than the second worker, would generate less profit as well.

If we use this analogy to generalize about production, we know that a profit-maximizing firm will reassign a worker to the production of B if it increases B’s profits by a greater amount than it reduces A’s profits. However, due to the laws of diminishing marginal utility, each additional unit
of B produced is valued less and less by consumers. Consequently, the marginal benefit of producing additional units of B decreases. Moreover, as workers are reassigned from A to B, the law of diminishing marginal returns asserts that each additional worker will cause B’s production (and hence, profit) to rise by increasingly smaller increments. Together, the laws of diminishing marginal utility and returns to production suggest that the marginal profit to the firm from reallocating resources from A to B will get progressively smaller. Eventually, the firm will reach the point beyond which additional reallocations of resources will cause B’s profits to rise by less than the amount for which A’s profits fall. Note the implications: A firm’s overall profits will rise by reallocating resources from A to B as long as the marginal profit to B exceeds the marginal (lost) profit to A. Once the marginal profits to each good are identical, any additional reallocation to B will cause the firm’s overall profits to decrease. In other words, the firm’s profits are maximized by allocating resources until the marginal profit of each good is identical.

The noncompulsory nature of higher education forces the institution to behave in a manner similar to the firm. Because students can choose from a variety of colleges, each institution must provide a desirable package at a competitive price to attract applicants. Because higher education services are seen by prospective consumers as both a source of human capital investment and as a consumption good, each college must allocate its resources to achieve maximum benefit. Owing to its desire to attract students, we can easily apply the theory of the firm. If we were to focus on college as a human capital investment, the school would normally choose to allocate all of its resources to the major that promises the greatest post-graduation earnings. However, the law of diminishing marginal utility suggests that additional expenditures on, say, the business major will eventually do less to attract students than applying the resources to other majors. Similarly, as the law of diminishing marginal returns to production applies, additional expenditures on one major will do less to increase the students’ post-graduation earnings than dedicating the funds to other majors. Consequently, the implications for the profit-maximizing firm apply to the institution of higher learning: scarce resources will be allocated until the marginal benefit on the last dollar spent on each program is the same for each program. Recalling that higher education can serve as both an investment and a consumption good, the “marginal benefit” reflects both elements of consumer demand.

38. If one follows the logic of diminishing marginal utility and returns to production, he/she should also see that by reassigning resources from A to B, the foregone profits from each unit of A get progressively larger.
Robert Simon reflected on the role of athletics at a university.\textsuperscript{39} The consequentialist function of athletics refers to the benefits that sports participation confers upon the student-athlete.\textsuperscript{40} According to this argument, athletics is consistent with the mission of a university because it develops desirable traits "such as courage, integrity and coolness under pressure."\textsuperscript{41} Clearly, developing these traits is consistent with the view of college as a human capital investment.

Simon also posed an alternative view of intercollegiate athletics.\textsuperscript{42} According to the utilitarian perspective, college athletics garner local and/or national support for the university, generate revenue to support the university mission, and create a sense of community among students, faculty, and alumni.\textsuperscript{43} Note that the utilitarian focus is not just on the benefits of athletics to student-athletes but to the entire university community.\textsuperscript{44} From this viewpoint, intercollegiate athletics are promoted as spectator sports, contributing to the "consumption good" component of the university "product."\textsuperscript{45}

In evaluating the consequentialist and utilitarian perspectives, we should first note that they are not mutually exclusive. Clearly, the consequentialist benefits can be enjoyed at any NCAA divisional level. Similarly, regardless of whether tickets are sold to athletic contests, members of the university community are free to consume any of these events as spectators. The key is the relative mix of consequentialist/utilitarian emphasis in the program.

IV. NCAA DIVISIONAL MEMBERSHIP AND ECONOMIC INCENTIVES

The NCAA is made up of three divisions: Division I, Division II, and Division III. According to the Division III philosophy, members "place special importance on the impact of athletics on the participants rather than on the spectators and place greater emphasis on the internal constituency (students, alumni, institutional personnel) than on the general public and its entertainment needs."\textsuperscript{46} Each member school must field at least five men's


\textsuperscript{40} \textit{Id.} at 47.

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} \textit{Id.} at 57.

\textsuperscript{43} \textit{Id.}

\textsuperscript{44} Simon, \textit{supra} note 39, at 57.

\textsuperscript{45} \textit{Id.}

\textsuperscript{46} NCAA MEMBERSHIP SERVS. STAFF, 2003-04 NCAA DIVISION III MANUAL Art. 20.11
and five women's sports. As a rule, Division III schools do not give athletic scholarships.

Similar to Division III, the Division II philosophy states its belief that "a well-conducted intercollegiate athletics program, based on sound educational principles and practices, is a proper part of the educational mission of a university or college and that the educational welfare of the participating student-athlete is of primary concern." However, unlike Division III, Division II schools believe "in offering opportunity for participation in intercollegiate athletics by awarding athletic-related financial aid to its student-athletes." Further, the membership believes that "funds supporting athletics should be controlled by the institution and that the emphasis for an athletics department should be to operate within an institutionally approved budget.

Division II members must sponsor at least five men's and five women's sports (or four men's and six women's sports).

In sharp contrast to the philosophies of Divisions II and III, the Division I philosophy "recognizes the dual objective in its athletics program of serving both the university or college community (participants, student body, faculty-staff, alumni) and the general public (community, area, state, nation)." More specifically emphasizing football and basketball, Division I "sponsors at the highest feasible level of intercollegiate competition one or both of the traditional spectator-oriented, income-producing sports of football and basketball." Further, Division I membership "strives to finance its athletics program insofar as possible from revenues generated by the program itself." Division I schools must sponsor a minimum of seven men's and seven women's sports or six men's and eight women's sports.

Division I football programs are separated into two groups: Division I-A,
Division I-AA. Effective in 2004, Division I-A schools must average at least 15,000 in attendance per home football game. In addition, the football program must offer at least 90% of the permissible maximum number of scholarships and offer at least 200 athletic scholarships overall or at least $4 million in scholarship expenses. A third Division I category, Division I-AAA, meets the Division I criteria, but does not sponsor football.

In inferring the relative emphasis on the consequentialist/utilitarian perspectives, Division I overtly favors promoting intercollegiate athletics as spectator sports, with the income potential of football and basketball specifically identified in its statement of philosophy. In emphasizing the spectator-orientation of sports, the philosophy specifically notes the goal of a self-financing athletic department. Division II and III members, in contrast, explicitly assert that the primary goal of their athletic programs is to benefit the student-athletes.

An examination of the self-reported finances of the corresponding divisions bears out the differences in philosophy. Table 1 reveals the percentage of teams in each NCAA division with profitable athletic departments in 2001. Thirty-five percent of the reporting Division I-A schools reported their athletic programs were profitable (after institutional support was excluded). In sharp contrast, only 14 (or 5.6%) of the 249 reporting Division II schools reported their athletic programs were profitable.

57. Id. at Art. 20.9. All of the other sports sponsored by Division I-A, I-AA, and I-AAA schools are simply classified as "Division I."
59. Id. at Art. 20.9.6.4(a)-(b).
60. Id. at Art. 20.9.
61. Id.
62. Id. at Art. 20.10; Division III Manual, supra note 46, at Art. 20.11.
63. The financial performance of Division III athletic departments is not included in the tables because the NCAA's Revenues and Expenditure of Division III Intercollegiate Athletics Programs (2002) report shows that none of the Division III sports generate sufficient revenue (absent institutional support) to pay its expenses.
The financial status of the entire athletic department can potentially cloud the profitability of football and basketball. For the department to be profitable, the profits from “revenue” sports must not only subsidize the losses from the “nonrevenue” sports, but also the expenses of the infrastructure of the athletic department (i.e. the athletic director’s salary and the salaries of his staff). With this in mind, it should not be altogether surprising to see that few athletic departments are actually self-supporting.

Table 2 reveals the 2001 profitability of football, men’s basketball, and women’s basketball, respectively, by NCAA Division. As one can see, football and men’s basketball are overwhelmingly profitable at most Division I-A schools. The average football and men’s basketball profit at the I-A level was $7.4 million and $2.7 million, respectively.

The percentage of profitable football/men’s basketball programs at the I-AA and I-AAA levels is substantially less than at I-A, with 19% of I-AA teams generating football profits, and 25% and 35% of basketball programs showing profits at the I-AA and I-AAA levels, respectively. The level of profit is also significantly lower than at I-A. For I-AA teams showing profits,
the average profit was $280,000.00 in football and $430,000.00 in men's basketball. The average profit for the I-AAA profitable basketball teams was $390,000.00.

Although the percentage of Division II schools with profitable football or basketball programs is somewhat commensurate with Divisions I-AA and I-AAA, the level of profit is substantially less. The twenty-one Division II schools with profitable football teams averaged $63,000 in profits. Men's basketball profits averaged $34,000.00 and $22,000.00 for Division II schools with and without football programs, respectively.

Although women's basketball is the most significant women's sport in terms of revenue at most schools, it rarely generates sufficient revenues to cover its costs, even at the Division I-A level. Only six I-A schools supported profitable women’s basketball teams, with an average profit of $510,000.00. Although the percentage of women’s teams with profits is higher at other divisional levels, the average profit is significantly lower. The profitable I-AA women’s basketball teams averaged $180,000.00 in profits. The average profit for women’s basketball at I-AAA was only $40,000.00. Finally, at the Division II level, the average women’s basketball profit was $22,000.00 and $13,000.00 for schools with and without football programs, respectively. Aside from football and basketball, the remaining men’s sports are invariably unprofitable. In 2001, for instance, only ice hockey showed an average profit at the Division I-A, I-AA and Division II (with football) levels.66

Similarly, although women’s basketball loses money at the majority of universities, it is the only women’s sport with a realistic hope of generating a profit. In 2001, only synchronized swimming (at the I-AA level), and fencing, ice hockey, lacrosse, rowing, and water polo (at the Division II without football level) showed small profits.67

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66. Id. Water polo exhibited small profits at the Division I-AA and Division II (without football) levels. Id. Rowing and skiing also reported small profits at the Division II (with football) level. Id.

67. Id. With the exception of rowing (10 schools), the number of colleges sponsoring these sports is less than five. Id.
How do the varying philosophies of the NCAA divisions affect the resource allocation incentives of the corresponding athletic departments? We

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can begin with Division III. As noted in its philosophy statement, Division III athletic departments emphasize sport to benefit student-athletes rather than spectators. Because the Division III athletic departments enter into each fiscal year knowing their teams are a net financial cost to the university, the institution must weigh the marginal value of athletics as both an investment and a consumption good against the marginal benefits of other academic and nonacademic programs. Within the athletic department, the incentives are much the same. Each sport is viewed as an asset to its human capital investment/consumption good mission—no sport is perceived as a potential source of profit. For this reason, we would expect athletic directors to allocate money in such a way that the marginal benefit per last dollar spent is the same across all sports.

At the opposite extreme, Division I expressly advertises football and men's basketball as spectator-oriented, income-producing sports: a philosophy supported by NCAA data. This places the athletic director in a dual role of allocating money toward potentially profitable sports as well as a dozen or so "nonrevenue" sports. Most economists routinely assume Division I athletic directors act as profit-maximizers. In fact, the NCAA has been repeatedly criticized by economists for acting as an economic cartel that seeks to maximize profits for its members by wielding monopoly power in the product market (i.e. acting as college football's sole agent for negotiating television broadcast contracts until the 1980s) and monopsony power in the labor market (by barring and enforcing a prohibition on payment to student-athletes).

In contrast, Leeds and von Allmen suggest that athletic director behavior conforms to the bureaucrat who attempts to deliver a product in return for an increased budget. Ultimately, the distinctions between the "profit-maximizer" and the "budget-maximizer" become blurred in predicting the behavior of athletic directors. Similar to the Division III athletic department, efficient resource allocation at the Division I level requires that the marginal benefit of the last dollar spent on each sport be equal. Because football and men's basketball are seen as income-generating sports at the Division I level,

69. Division III Manual, supra note 46, at Art. 20.11.
70. Division I Manual, supra note 53, at Art. 20.9
71. See Table 2, supra.
however, the "marginal benefit" of a dollar spent on football and basketball exceeds the "marginal benefit" of the same sports at the student-athlete-oriented Division III schools. As a result, athletic directors at the Division I level have an economic incentive to pour greater resources into the "revenue" sports relative to "nonrevenue" sports than do Division III athletic departments.\textsuperscript{75}

This theory is strongly supported by NCAA data, as shown in Table 3. Table 3 compiles the expenditures on football and basketball at each division level and divides them by the number of participants in the corresponding sports. Beginning with Division III, the average per football player was $1,940.00. The average expenditure per male basketball player was $3,391.00, as compared to an average expenditure of $3,220.00 per female basketball player. For the remaining men’s (nonrevenue) sports, the average expenditure per athlete was $1,487.00, as compared to $1,382.00 per woman (nonbasketball) athlete. In other words, for each $1.00 spent on a male nonrevenue sport participant, $1.55 was spent on a football/men's basketball player. Similarly, for each dollar spent on a female nonrevenue sport participant, $1.07 was spent on a male nonrevenue sport participant.

\textsuperscript{75} See Koch, supra note 73 (suggesting that the relatively high number of nonrevenue sports required at the Division I level serves as an effective market barrier to protect the lucrative television broadcast revenues).
## Table 3

**Expenditure per Participant by Division, 2001**

<table>
<thead>
<tr>
<th>Sport</th>
<th>Division I</th>
<th>Division II</th>
<th>Division III</th>
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</thead>
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<tr>
<td></td>
<td>Expenditure</td>
<td>Expenditure</td>
<td>Expenditure</td>
</tr>
<tr>
<td></td>
<td>per Participant</td>
<td>per Participant</td>
<td>per Participant</td>
</tr>
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<td>$78,486</td>
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<td>$3,391</td>
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<tr>
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<tr>
<td>MEN'S NONREVENUE</td>
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<td>$51,627</td>
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<td>WOMEN'S NONREVENUE</td>
<td>$10,661</td>
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<td>$1,382</td>
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</table>

As we progress toward Division I, the expenditures are becoming increasingly stilted toward football and men’s basketball. The average expenditure per football player at the Division II level was $5,641.00. The average expenditure per male basketball player was $13,378.00, as compared to the $12,672.00 expenditure per female basketball player. For the remaining sports, the average expenditure was $3,432.00 per male athlete and $4,198.00 per female athlete. Overall, for each dollar spent on a men’s nonrevenue athlete, $2.19 was spent on a football/men’s basketball player. Similarly, for each dollar spent on a female nonrevenue sport athlete, $.81 was spent on a men’s nonrevenue sport athlete.

At the Division I level, as Table 3 also shows, the budget allocation between income/non-income producing sports becomes even more uneven. The average expenditure per Division I football player was $38,895.00. The

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average expenditure per male basketball player was $78,486.00, as compared to $51,627.00 per woman basketball player. An average of $8,442.00 was spent per men's nonrevenue sport participant. In comparison, an average of $10,661.00 was spent per female nonrevenue sport participant. Collectively, for each dollar spent on a male nonrevenue sport participant, $5.00 was spent on each football/men's basketball player. For each dollar spent on a female nonrevenue sport athlete, $.79 was spent on a male nonrevenue participant.

Note that at the Division III level, football and men's basketball receive only a mild budgetary preference relative to other sports. Commensurate with theory, this suggests that these sports (and perhaps women's basketball as well) serve as "consumption goods" for non-student athletes. In other words, although football or men's basketball have no realistic potential for profits, they are most likely to attract students as spectators and, hence, complement the students' nonacademic consumption-oriented experiences. For the sports that are least likely to attract students as spectators, the budget allocation across men and women's sports are almost identical.

Although the Division II philosophy emphasizes the student-athlete, the potential for profitable football or basketball programs rises. Not surprisingly, we begin to see a greater allocation of resources toward these sports than was evidenced at the Division III level. More than twice as much money was spent on each football/men's basketball player than on each nonrevenue male athlete. In contrast to the Division III level, women nonrevenue sport athletes receive greater expenditures per participant than do male nonrevenue sport athletes.

At the Division I level, the budget shifts dramatically to favor football and men's basketball. Here, five times as much money is spent on a football/men's basketball player compared to a men's nonrevenue sport athlete. In comparing the budget allocation between men's and women's sports, the data reveal that for each dollar spent on a woman basketball player, $1.52 was spent on a male basketball player. This compares with the $1.05 per dollar split at both the Division II and III levels. Once football and men's/women's basketball are removed, women receive a mild preference in the budget allocation process. For each dollar spent on a woman nonrevenue sport athlete, a male nonrevenue sport participant receives $.79.

Complicating the budget allocation process for Division I athletic directors is the "arms race." The "arms race" is better known among economists as the "prisoner's dilemma."77 When Saturday afternoon approaches, exactly 50%
of the football teams will emerge as winners. Athletic directors, whose budgets and job security is likely to be tied to the success of the higher profile sports, have an incentive to be among the winning 50%. Although paying athletes is prohibited by the NCAA, athletic departments can seek to "tip the scales" by spending more money on recruiting, a larger coaching staff, a higher quality (and, therefore, more expensive) coach, or by investing in state-of-the-art facilities and/or equipment as a means to attract choice recruits. In short, a department can increase its chances of fielding a winning team by spending more money. For the profit-maximizing athletic director, the incentive to increase spending in an effort to win more games also makes sense as long as the expected increase in revenues from ticket sales and broadcast revenues exceeds the added cost.

However, since winning is a zero-sum game, any additional games won by one team implies an increase in the number of games lost by other teams. Because an opposing athletic department's increasing spending jeopardizes another athletic director's budget/job security/revenue base, the self-interested athletic director must match the spending increase to maintain the status quo. Note that both teams wind up spending more money on their teams, but the percentage of teams that win on Saturday is still mathematically fixed at 50%.

Figure 1 constructs a matrix with hypothetical data to convey the prisoner's dilemma assuming a two-team league. The number on the left side of each cell represents the percentage of games team X can be expected to win given the corresponding expenditures for teams X and Y. Similarly, the number on the right side within each cell represents the percentage of games team Y will win under the same pair of expenditures. For example, if each team continues to spend $5 million/year on its football team, both teams X and Y will win 50% of their games. If team X increases its expenditures to $6 million, it can expect to win 75% of its games. This also implies that team Y will win only 25% of its game. The reverse is true if team Y increases its expenditures to $6 million while X's spending remains constant at $5 million. Finally, it both teams increase their spending to $6 million, each team can expect to win 50% of its games.

78. In fact, illegal payments to athletes have plagued intercollegiate athletics since its earliest days. See WALTER BYERS, UNSPORTSMANLIKE CONDUCT (1995).

79. A "two-team" league is unrealistic, but it allows for a two-dimensional graphical analysis.
According to the matrix, if Y continues to spend $5 million, X will choose to spend $6 million because doing so will increase the percentage of games won from 50% to 75%. On the other hand, if Y decides to spend $6 million, X is compelled to match the spending increase to keep the expected percentage of wins at 50%. In other words, regardless of what Y does, X has an incentive to increase spending to $6 million. Note that Y’s scenarios echo that of X. Consequently, regardless of X’s actions, Y also has an incentive to spend $6 million. We can, therefore, assert that both teams will opt to spend $6 million rather than $5 million. The prisoner’s dilemma is described by the following result: both teams wind up increasing spending, yet the expected number of wins is the same as if neither team had increased spending.

NCAA data on program expenditures illustrate the arms race. As Table 4 indicates, the average expenditure for a I-A football team increased by $2.135 million between 1993 and 2001. In contrast, football expenditures increased by an average of $320,000.00 and $180,000.00 per Division I-AA and Division II member, respectively, during this time frame. Similarly, the expenditures for men’s basketball at the I-A level rose by an average of $880,000.00 from 1993-2001, as compared with increases of $260,000.00 and $310,000.00, respectively, at Divisions I-AA and I-AAA. Men’s basketball

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80. This analysis is derived from game theory. The notion that X has an incentive to spend $6 million regardless of Y’s action is called a dominant strategy.

81. In game theory, this is referred to as a Nash equilibrium, following the implications derived mathematically by Nobel Prize winner John Nash.

82. Critics of the NCAA assert that the association acts as a cartel. See sources cited supra note 73. One of its functions is to bar payments to athletes (which is the Nash equilibrium) and increase its members’ profits in doing so. Id.
expenses increased by $70,000.00 for Division II schools with football programs and by $220,000.00 for Division II schools without football. Women's basketball, which has the most revenue-generating power among the women's sports, witnessed spending increases of $660,000.00 at the I-A level ($220,000.00 less than the spending increase on men's basketball), and increases of $280,000.00 and $350,000.00 at levels I-AA and I-AAA, respectively. At the Division II level, women's basketball expenses rose by an average of $90,000.00 per school.

In contrast to the revenue sports, the increased spending on the average nonrevenue sport is substantially lower. At the I-A level, the average men's nonrevenue sport saw an increase of $148,000.00 over the same time frame. For women, the average nonrevenue sport experienced an increase of $204,000.00. At the I-AA and I-AAA levels, the average men's and women's nonrevenue sport expenditures rose by $73,000.00 and $85,000.00, respectively. For Division II schools housing football programs, the average men's nonrevenue sport evidenced an increase of $34,000 as compared to $30,000 for women. Finally, the increased expenditure for the average men's and women's nonrevenue sport at the Division II (without football) level was $34,000 and $52,000, respectively.

**TABLE 4**

*Average Expenditures by Sport by Division, 1993-2001 (in thousands of dollars)*

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<tr>
<th>Sport</th>
<th>Division I-A</th>
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The scenario becomes even more problematic if the revenue potentials of the teams vary. If X is a revenue-rich team, it will always benefit by outspending Y. But as Y’s expenses are driven upward by the “arms race,” it feels increasingly compelled to match spending increases, or its revenues will suffer as its number of games won tumbles. The result is an “arms race” through which the rich get richer and the poor get poorer.

This “arms race” is illustrated in Table 5. The table shows both the average profit and average loss at each division level for football and men’s basketball programs between 1993 and 2001. As the table indicates, the average profit for football and basketball programs at the Division I-A level has nearly doubled since 1993. At the same time, however, size of the average loss at the I-A level increased by $300,000.00 in football and $140,000.00 in basketball. At the I-AA level, the average football profit increased from $80,000 to $280,000.00 from 1993-2001, but the average football loss rose from $660,000.00 to $780,000.00 during the same time frame. The average basketball profit/loss did not change much at the I-AA level, whereas the average profit actually decreased at the I-AAA level.84 Note that these trends do not exist at the Division II level, where the average profits and losses have not changed significantly during this time frame.85 In sum, the arms race appears to be at its most insidious at the Division I (and especially I-A) level.

84. One should note that some perennial basketball powerhouse schools such as Georgetown, Villanova, and St. John’s moved from I-AAA to 1-AA during this time frame.
85. Average profit figures have fluctuated significantly from year to year. This is undoubtedly a function of the small number of teams that profit at the Division II level in any given year.
### TABLE 5

*Average Size of Profit/Loss by Sport by Division, 1993-2001 (in thousands of dollars)*

<table>
<thead>
<tr>
<th>Year</th>
<th>Division I-A</th>
<th>Division I-AA</th>
<th>Division I-AAA</th>
<th>Division II with football</th>
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**FOOTBALL**

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**MEN'S BASKETBALL**

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### V. TITLE IX: A CASE OF MISPLACED BLAME?

A target of considerable controversy since its inception, Title IX has undergone its most recent attack on behalf of the National Wrestling Coaches' Association. Critics of the legislation assert that Title IX's proportionality component has forced schools to eliminate some of the men's nonrevenue sports. At face value, the implicit cause-and-effect seems logical. Only

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87. See sources cited, supra note 3.
women's basketball has any real chance of generating profits for the athletic program; consequently, women's sports must be viewed as a financial drain on scarce athletic budget resources. Facing a need to allocate the budget in such a way as to satisfy Title IX proportionality, the athletic director has little alternative but to cut some men's nonrevenue sports.

Compelling as the argument may be, the facts speak otherwise. If Title IX requirements placed an undue burden on athletic budgets, one would expect to see the axe fall disproportionately on Division III men's nonrevenue sports, since neither football nor men's basketball can be counted on to generate profits to help foot the bill. In contrast, football and men's basketball are often profitable (overwhelmingly so at the Division I-A level). Therefore, we would expect the profits from these sports to effectively cross-subsidize the men's nonrevenue sports, sparing it from the "deleterious" effects of Title IX.

Curiously, the reverse is true. Table 6 shows data compiled by the Women's Sports Foundation on the number of men's sports added and eliminated between 1978 and 1996. The data shows that at the Division II and III levels, the number of men's sports offered actually experienced a net increase of 58 and 131, respectively. Only at the Division I-A and I-AAA levels did the number of men's offerings experience a net decline. The largest net decrease, interestingly, occurred in Division I-A.

**TABLE 6**

*The Net Outcome of Men's Sports Added and Eliminated During 1978 - 1996 by NCAA Division – Figure 2*

<table>
<thead>
<tr>
<th>NCAA Division</th>
<th>Number of Sports Added</th>
<th>Number of Sports Eliminated</th>
<th>Net Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>I-A</td>
<td>22</td>
<td>113</td>
<td>-91</td>
</tr>
<tr>
<td>I-AA</td>
<td>68</td>
<td>129</td>
<td>-61</td>
</tr>
<tr>
<td>I-AAA</td>
<td>93</td>
<td>56</td>
<td>+37</td>
</tr>
<tr>
<td>II</td>
<td>344</td>
<td>286</td>
<td>+58</td>
</tr>
<tr>
<td>III</td>
<td>400</td>
<td>269</td>
<td>+131</td>
</tr>
<tr>
<td>TOTAL</td>
<td>927</td>
<td>853</td>
<td>+74</td>
</tr>
</tbody>
</table>

88. See Table 2, supra.
Although the evidence appears to be counterintuitive, it follows the economic model of budget allocation. Because the "marginal benefit" of a dollar spent on football and men's basketball at the Division I (especially I-A) level exceeds the marginal benefit of the same sports at Divisions II and III, Division I athletic directors have an economic incentive to dedicate a greater proportion of the budget to these sports. The evidence clearly supports this contention. In fact, the largest allocation of resources in favor of football and men's basketball occurs at the Division I-A level, where significant profits in these sports serve as the norm.

If Division I athletic directors behave as profit-maximizers (or as "budget-maximizers," whose budget increases and/or salaries are tied to the success of the football and/or men's basketball teams), then any expenditure on a nonrevenue sport will reduce the athletic department's profit. In time, expenditures on nonrevenue sports would be reduced until the last dollar spent on a nonrevenue sport serviced the investment/consumption interests of the university as much as the last dollar spent on football and men's basketball (as investment/consumption and profit-generating programs). If the athletic director has significant autonomy in decision-making and does not stand to benefit materially from the investment/consumption interests of the university, the incentive is to phase out nonrevenue sports entirely.

In practice, the profit-maximizing athletic director cannot eliminate all nonrevenue sports because of NCAA requirements. Division I-A, for example, will require a minimum of sixteen sponsored intercollegiate sports beginning in 2004.90 Most of these, of course, will be nonrevenue sports. Given the economic incentives of the profit-maximizing athletic director, one would expect "surplus" nonrevenue sports to be cut or their budgets reduced in favor of the income-generating sports.

In this regard, Title IX serves to insulate women's nonrevenue sports from the budgetary axe. This is exhibited in the "expenditures per participant" data. At the Division I level, the expenditures per football/men's basketball player dwarf those of the other sports.91 To allow for unbridled growth in their budgets (driven primarily by the prisoner's dilemma), athletic directors resort to exempting football and men's basketball from budgetary considerations and cut men's nonrevenue sports as a means to comply with Title IX.92

A questionnaire administered for a GAO study on intercollegiate athletics found that gender equity ranked second as a reason to discontinue a men's

90. Division I Manual, supra note 53, at Art. 20.9.3.
91. See Table 3, supra.
92. See U.S. GEN. ACCT. OFF., supra note 1, at 16.
This analysis reveals why the blame may be misplaced. As long as football and men's basketball budgets are essentially exempted from budgetary restraints, Title IX proportionality burdens are shifted to the nonrevenue sports. This begs the question: is Title IX responsible for a sport's discontinuation, or is it the incentive to favor the growth in the football/men's basketball budget? In answering this question, we should note that the net decrease in men's nonrevenue sports occurred only at the Division I level despite the fact that football and men's basketball are frequently in a position to cross-subsidize the nonrevenue sports. At the Division III level, where the expenditures per participant are substantially more equal between "revenue" and nonrevenue sports, and also between men's and women's sports in general, the net change in the number of men's sports is positive.

If the analysis provided in this study is correct, weakening the proportionality component of Title IX will not spare men's nonrevenue sports at the Division I level. Rather, it will only serve to further accelerate the arms race, with men's and women's nonrevenue sports experiencing equivalent budgetary casualties.

93. Id.
94. See Table 6, supra.
95. See Tables 2, 5, supra.
96. See Table 3, supra.
97. See Table 6, supra.