

THE CHANGING COLLECTIVE DEFINITION OF COLLEGIATE SPORT AND THE POTENTIAL DEMISE OF TITLE IX PROTECTIONS

TODD CROSSET* & LISA MASTERALEXIS**

INTRODUCTION

Although not universally admired, Title IX of the Education Amendments of 1972¹ has become far less controversial over the last fifteen years. The law mandated gender equity in educational programs and activities, including collegiate sport, among other things. The principle that women should receive similar support, opportunities, and experiences as men in varsity athletics is generally accepted, although the definition and implementation of Title IX are widely debated. Given the Civil Rights Restoration Act of 1988,² the U.S.

* Todd Crosset, Ph.D., is an Associate Professor in the Department of Sport Management in the Isenberg School of Management at the University of Massachusetts Amherst. His research interests in sport management include, gender, racism, and sexual assault in sport. Professor Crosset recently published *Capturing Racism: An Analysis of Racial Projects Within the Lisa Simpson vs. University of Colorado Football Rape Case* in the International Journal of the History of Sport.

** Lisa Pike Masteralexis is Department Head and Associate Professor in the Department of Sport Management at the University of Massachusetts, Amherst. Her primary research interests are in legal issues and labor relations in the sport industry. In 2000, Professor Masteralexis co-authored an amicus brief to the U.S. Supreme Court on behalf of disabled professional golfer Casey Martin. She is a certified player agent with the Major League Baseball Players Association and is a principal in DiaMMond Management Group, a professional athlete management firm. She holds a J.D. from Suffolk University School of Law and a B.S. in Sport Management from the University of Massachusetts-Amherst.

The authors would like to thank Rachael Zilboorg for her patient editing and Catherine Pieronek for her helpful comments, without which this paper would be far less than what it has become.

1. 20 U.S.C. §§ 1681–1688 (2000). The relevant section with respect to athletics is that “[n]o 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.” *Id.* § 1681.

2. Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended in scattered sections of 20, 29, 42 U.S.C.). The Civil Rights Restoration Act was passed in response to *Grove City Coll. v. Bell*, 465 U.S. 555 (1984), in which the Supreme Court ruled that only those programs which received Federal financial aid, and not the institution as a whole, had to abide by Title IX anti-discrimination regulations. The Act made clear that when any program or activity of an institution receives Federal funding, the entire institution must abide by Title IX.

Supreme Court's rulings in *Franklin v. Gwinnett County Public Schools*³ and *Jackson v. Birmingham Board of Education*,⁴ and the denial of certiorari by the Court in almost all Title IX cases involving collegiate sport,⁵ most advocates for women's sport seem confident that state support of gender equity in sport is reliable. Over the past fifteen years, women's sport advocates have become confident that federal courts will enforce their Title IX rights because of a history of federal courts upholding the Office of Civil Rights' (OCR) Title IX Policy Interpretations⁶—even in situations where men's sport teams are eliminated to bring the college or university into compliance with Title IX.⁷

This article challenges the prevailing assumption that federal courts will continue to interpret Title IX as specified by the OCR Policy Interpretations by finding that women's athletics programs must be equitable to men's. While legal precedent supports the continuation of Title IX protection for women's collegiate sport in the near future, there are long term socio-political movements foreshadowing that Title IX, as currently applied to collegiate sport, may be in danger. To be clear, Title IX is not in jeopardy because of an ideological backlash against women's rights, a right-wing political assault, or even the result of men's

3. 503 U.S. 60 (1992) (holding that damages and attorneys' fees were available in a Title IX action because Congress did not specify otherwise). The impact of this case was to increase the number and frequency of Title IX participation cases.

4. 544 U.S. 167 (2005) (holding that a coach who was retaliated against because he complained of Title IX violations could bring a private action for intentional discrimination, even though he was not the victim of the sex discrimination in his complaints). The impact of this case will be to provide protection for coaches and teachers who may be in a more knowledgeable position to file complaints in Title IX cases because they have greater maturity and experience; access to information, documents and forms; and knowledge of processes for filing complaints.

5. *E.g.*, *Boulahanis v. Bd. of Regents*, 198 F.3d 633 (7th Cir. 1999); *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996); *Kelley v. Bd. of Trs.*, 35 F.3d 265 (7th Cir. 1994).

6. Every circuit that has reviewed the 1979 Policy Interpretations and specifically the three-part test for proportionality has concluded that they are entitled to substantial deference; further, every circuit that has reviewed the proportionality prong of Title IX's three-part test has upheld its constitutionality under equal protection. *See, e.g.*, *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1046 (8th Cir. 2002); *Cohen*, 101 F.3d at 155; *Kelley*, 35 F.3d at 271; *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993); *Cohen v. Brown Univ.*, 991 F.2d 888, 896–97 (1st Cir. 1993).

7. *See, e.g.*, *Miami Univ. Wrestling Club*, 302 F.3d at 615 (eliminating men's athletic programs did not violate Title IX); *Chalenor*, 291 F.3d at 1048–49 (eliminating men's wrestling team not a violation of Title IX); *Boulahanis*, 198 F.3d at 639 (eliminating the men's soccer and wrestling teams to attain Title IX proportionality not a violation as long as men's participation continued to be substantially proportionate to their enrollment); *Neal v. Bd. of Trs.*, 198 F.3d 763, 765 (9th Cir. 1999) (holding Title IX does not bar institutions from taking remedial measures to ensure proportionality is met); *Kelley*, 35 F.3d at 272–73 (eliminating men's swim team was not a Title IX violation); *Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ.*, 263 F. Supp. 2d 82 (D.D.C. 2003), *aff'd*, 366 F.3d 930 (D.C. Cir. 2004) (dismissing suit that sought to enjoin the Department of Education's Title IX enforcement policies); *Harper v. Bd. of Regents*, 35 F. Supp. 2d 1118, 1122 (C.D. Ill. 1999) (permitting university to eliminate men's soccer and wrestling for Title IX compliance); *Gonyo v. Drake Univ.*, 879 F. Supp. 1000, 1006 (S.D. Iowa 1995) (eliminating men's wrestling team and its scholarships did not violate Title IX).

Olympic (non-revenue) sport efforts to undermine the law's protection. The ideological push for gender equity that brought Title IX into existence has been generally accepted.⁸ Rather, Title IX, as it is applied to sport, is in jeopardy because the fundamental assumptions that undergird Title IX are in flux and wrought with tension. These tensions have far less to do with social justice and gender equity than with the meaning of "sport" in American culture and the ongoing political debate regarding the extent of state intervention that ought to be allowed in democratic society. Fundamentally, the weak linchpin supporting Title IX's application to collegiate sport is the assumption that collegiate sport serves an educational purpose and is thus a matter of public concern and, therefore, a concern of the state.

We are not making a legal argument. Rather, the discussion in this article is a broader socio-political one that has legal implications—placing Title IX, its implementation, and sport within a fluid, socio-historical context. The argument revolves around two presuppositions that are in flux: 1) the state's understanding of collegiate athletics as a voluntary association and the extent to which college and university athletic departments operate as private, voluntary associations;⁹ and 2) the state's assumptions about the educational value of sport.¹⁰ The prevailing view is that collegiate sport serves an educational purpose and is governed by private voluntary associations such as the National Collegiate Athletic Association (NCAA). But these presuppositions are not static.

Since the passage of the Civil Rights Restoration Act,¹¹ the educational value of collegiate sport, particularly Division I collegiate sport, has been consistently questioned. The once-established educational underpinnings are essential to the justification for regulation of sport by the state.¹² Without them, the justification diminishes. When combined with the fundamental reluctance of the state to intervene in the affairs of private associations, Title IX protection for women's collegiate sport may be in jeopardy. Moreover, the notion that collegiate sport is a voluntary association is changing as an increasing number of people view

8. The practice of gender equity in sport has not matched its ideological acceptance. There is an argument that less overt efforts steeped in assumptions of masculine privilege are working to undermine Title IX as applied to collegiate sport. *See, e.g.*, Michael A. Messner & Nancy M. Solomon, *Social Justice and Men's Interests: The Case of Title IX*, 31 J. SPORT & SOC. ISSUES 162 (2007). As we have witnessed in other areas of affirmative action for women at colleges and universities, "the structure of a large private government and the existence of social networks cutting across formal boundaries can work together to blunt the effectiveness of regulation." Stewart Macaulay, *Private Government*, in *LAW AND THE SOCIAL SCIENCES* 445, 461 (Leon Lipson & Stanton Wheeler eds., 1986). Clearly the study of regulators of public law in private governments is an important aspect of our concern as changes in public opinion will limit or encourage enforcement of Title IX. For the sake of this article, though, our focus is on political, structural, and legal shifts.

9. JOHN WILSON, *PLAYING BY THE RULES: SPORT, SOCIETY AND THE STATE* 193 (1994).

10. *Id.* at 280.

11. Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended in scattered sections of 20, 29, 42 U.S.C.).

12. *Id.*

collegiate sport as a business enterprise.¹³ If this understanding becomes the prevailing view of the state, application of Title IX to collegiate sport will be unjustifiable.

I. THE SOCIO-POLITICAL CONTEXT

1. Three Spheres

One way scholars understand liberal democratic societies is to divide them into three spheres: the State, the Market, and Civil Society.¹⁴ These three spheres of social action, although distinct, are interdependent. For example, the market depends on the state to regulate and police commercial behavior to ensure fair competition. As market innovations lead to technological advancements, we rely on a robust civil society to determine the ethically appropriate uses of new technology.¹⁵ However, for the most part, these are fairly clearly differentiated spheres of social action.¹⁶

The civil sphere encompasses a broad array of groups—from soccer leagues and family units to religious groups and trade associations. The civil sphere is populated with voluntary associations that have some sort of organizational structure and governance—or what some call “private governments.”¹⁷ For example, most athletic organizations have a private governance system that regulates league play.¹⁸

It is too simplistic to view private and public government as completely separate entities. “[P]ublic and private governments are interpenetrated.”¹⁹ Sometimes voluntary associations are sanctioned or licensed by the state to provide services that the state does not or cannot provide. For example, rather than provide assistance to the impoverished directly, the state may grant funding to a private group that provides the specialized services where needed.²⁰ Or, the state might sanction one private group to regulate or govern a field or profession, such as the training of medical doctors by the American Medical Association (AMA) or lawyers by the American Bar Association (ABA).²¹ The state might also direct a

13. KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, PUBLIC OPINION POLL EXECUTIVE SUMMARY (2006), <http://www.knightcommission.org/images/uploads/pollresults1-20-06.pdf>.

14. ALAN WOLFE, WHOSE KEEPER? SOCIAL SCIENCE AND MORAL OBLIGATION 7 (1989).

15. *Id.* at 241–56.

16. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 6–10, 21–26 (1983).

17. WILSON, *supra* note 9, at 194; *see also* Macaulay, *supra* note 9, at 447–48.

18. WILSON, *supra* note 9, at 193–98.

19. Macaulay, *supra* note 8, at 449.

20. DAVID WAGNER, WHAT’S LOVE GOT TO DO WITH IT?: A CRITICAL LOOK AT AMERICAN CHARITY 148–61 (2001).

21. In the United States, the federal government relinquishes regulatory control of a number of public services if private associations prove to be more knowledgeable or efficient. For example, in the early 1900s, the federal government recognized the AMA as the governing body regulating the practice of medicine and the ABA as the regulating body for the legal profession.

group to take control of an area that is normally regulated privately but that also serves the public, such as the United States Olympic Committee's (USOC) coordination of American athletes' training for international events.²²

However, the fact "[t]hat a private entity performs a function which serves the public does not make its acts [governmental] action."²³ The Supreme Court considered this question in *NCAA v. Tarkanian*.²⁴ The University of Nevada, Las Vegas (UNLV), a state university, suspended Tarkanian as a result of multiple NCAA rule violations.²⁵ The Court considered whether UNLV's actions, done in accordance with NCAA rules, made the NCAA a state actor.²⁶ The Court determined that even though UNLV participated in the creation of the rules, the state was not the source of the rules.²⁷ The Court concluded that UNLV "engaged in state action when it adopted the NCAA's rules to govern its own behavior."²⁸ The Court also determined, however, that the NCAA itself was not a state actor merely because it had formulated the disciplinary rules.²⁹ The Court noted that UNLV "retained the authority to withdraw from the NCAA and establish its own standards,"³⁰ and therefore was not acting under the color of state law.

2. The State and Organization of Collegiate Sport

Regulation of college and university athletics began in 1905 at the urging of the executive branch. In response to public criticism of college football and in an effort to reduce injuries in the game, President Theodore Roosevelt brought representatives of Yale, Harvard, and Princeton to the White House to discuss rule changes to make the game safer.³¹ This effort eventually led to the formation of the NCAA.³² The NCAA, governed by non-profit institutions of higher education, benefited from its association with institutions that were already franchised by the state to provide citizens with education, medical and scientific research, and

In other words, voluntary associations, regulating a public good, are franchised by the state.

22. Amateur Sports Act of 1978, 36 U.S.C. §§ 220501–220512 (2000). The USOC is not a governmental actor, but rather is the group that Congress directed "to correct the disorganization and the serious factional disputes that seemed to plague amateur sports in the United States." *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 543–44 (1987) (quoting H.R. REP. NO. 95-1627, at 8 (1978)). According to the Court, the Amateur Sports Act "merely authorized the USOC to coordinate activities that always have been performed by private entities." *Id.* at 544–45. In fact, "[n]either the conduct nor the coordination of amateur sports has been a traditional governmental function." *Id.*

23. *S.F. Arts*, 483 U.S. at 544 (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982)).

24. 488 U.S. 179 (1988).

25. *Id.* at 180–81.

26. *Id.* at 181–82.

27. *Id.* at 193.

28. *Id.* at 194.

29. *Id.*

30. *Id.* at 194–95.

31. PAUL R. LAWRENCE, UNSPORTSMANLIKE CONDUCT: THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND THE BUSINESS OF COLLEGE FOOTBALL 8 (1987).

32. NCAA, The History of the NCAA, <http://www.ncaa.org/about/history.html> (last visited Apr. 2, 2008).

economic and military development.³³ By 1952, the NCAA had become the primary regulatory body of men's collegiate sport, with its own enforcement powers.³⁴ In 1955, NCAA Executive Director Walter Byers asked the president of each member institution to sign a statement that the institution would abide by NCAA rules and regulations, thereby significantly strengthening the NCAA's enforcement program.³⁵ Byers nurtured the NCAA into a regulatory powerhouse through three mechanisms: college football, the NCAA basketball tournament, and its rulemaking and enforcement processes.³⁶ Today, the NCAA is the primary regulatory group for collegiate sport. Member colleges and universities abide by the NCAA's governing authority in the arenas of rulemaking and enforcement.

The NCAA did not have to address the full weight of Title IX until the Civil Rights Restoration Act was passed in 1988.³⁷ Once it decided to govern women's athletics, the NCAA sought the demise of the Association for Intercollegiate Athletics for Women (AIAW) and Title IX.³⁸ It has since, however, left gender equity to the purview of the state. The NCAA Principle of Gender Equity,³⁹ adopted in 1994, states that "[i]t is the responsibility of each member institution to comply with federal and state laws regarding gender equity."⁴⁰ Further, the NCAA constitution states, "The Association should not adopt legislation that would prevent member institutions from complying with applicable gender-equity laws, and should adopt legislation to enhance member institutions' compliance with applicable gender-equity laws."⁴¹ Despite NCAA-developed guides on gender equity for administrators⁴² and the more recent adoption of rules that require the accountability of college athletic departments, the 1994 gender equity principle still governs.

NCAA member institutions are subject to Title IX because virtually all public and private institutions accept federal funds. The NCAA itself, however, has not

33. WAGNER, *supra* note 20, at 90–93; *see also* JEROME L. HIMMELSTEIN, *LOOKING GOOD AND DOING GOOD: CORPORATE PHILANTHROPY AND CORPORATE POWER* 14–38 (1997).

34. WALTER BYERS, *UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES* 17 (1995). Women's sports did not come under the authority of the NCAA until 1983. Joan S. Hult, *The Story of Women's Athletics: Manipulating a Dream 1890–1985*, in *WOMEN AND SPORT: INTERDISCIPLINARY PERSPECTIVES* 99, 100 (D. Margaret Costa & Sharon Guthrie eds., 1994). Prior to 1980, women's athletic programs were governed by the Association for Intercollegiate Athletics for Women (AIAW). *Id.* In 1981–1982, however, the NCAA offered women's championships in all three divisions in most AIAW sports. *Id.*

35. DON YAEGER, *UNDUE PROCESS: THE NCAA'S INJUSTICE FOR ALL* 13 (1991).

36. *Id.*

37. Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended in scattered sections of 20, 29, 42 U.S.C.). The NCAA did not cover women's athletics until 1984, the same year the Supreme Court gutted Title IX in *Grove City College v. Bell*. *See supra* note 2.

38. Hult, *supra* note 34, at 99; *see also* WELCH SUGGS, *A PLACE ON THE TEAM: THE TRIUMPH AND TRAGEDY OF TITLE IX* 45–80 (2005).

39. NCAA, 2006–07 NCAA DIVISION I MANUAL § 2.3 (2006), *available at* http://www.ncaa.org/library/membership/division_i_manual/2006-07/2006-07_d1_manual.pdf.

40. *Id.* § 2.3.1.

41. *Id.* § 2.3.2.

42. *Id.* § 22.2.3.1.

yet been subjected to the restrictions of Title IX. In *Smith v. NCAA*,⁴³ the United States Court of Appeals for the Third Circuit held that the NCAA's receipt of dues from federally-funded member institutions would suffice to bring the NCAA within the scope of Title IX.⁴⁴ The Supreme Court reversed, reasoning that such an application would be inconsistent with the governing statute and Court precedent. The Court held that "dues payments from recipients of federal funds [do not] suffice to subject the NCAA to suit under Title IX."⁴⁵

Despite the pronouncements made by the NCAA's own task force that an athletics program can be considered gender equitable when the participants in both the men's and women's sports programs would accept as fair and equitable the overall program of the other gender [and that] [n]o individual should be discriminated against on the basis of gender, institutionally or nationally, in intercollegiate athletics,⁴⁶

the NCAA has no gender equity policy independent of Title IX or similar state laws. The NCAA has left the door open on gender equity. If the state's view of Title IX as it is applied to collegiate sport shifts, NCAA member institutions are free to modify their stance on gender equity as well. As such, the broad focus of this article is on the relationship between the state and civil society with specific attention to shifts in the relationship between the state and collegiate sport.

3. State Interference with Voluntary Associations

The relationship between the state and civil society is fundamentally different from the state's relationship with the market. The state sets the rules that govern the market and protects commercial actors from dishonest non-competitive practices. The state, within the American liberal democratic state, is reluctant to interfere in the affairs of civil society. The tendency of the state is to allow voluntary organizations to run themselves.⁴⁷

In some arenas, the power of private associations exceeds that of the state. For example, the state considers mandatory, random, suspicionless drug testing of adults a violation of Fourth Amendment rights because it amounts to a warrantless search, due to the lack of reasonable suspicion.⁴⁸ Yet, the state allows the NCAA to test its athletes for a broad range of performance-enhancing drugs in order to ensure fair play,⁴⁹ and failed drug tests can lead to athletes' exclusion from

43. 139 F.3d 180 (3d Cir. 1998), *rev'd*, 525 U.S. 459 (1999).

44. *Id.* at 190–91.

45. *NCAA v. Smith*, 525 U.S. 459, 470 (1999).

46. NCAA, NCAA Gender Equity/Title IX, http://www1.ncaa.org/membership/ed_outreach/gender_equity/general_info/index.html (last visited Apr. 2, 2008).

47. WILSON, *supra* note 9, at 197.

48. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 664 (1989) (holding that employees may be forced to submit to random, suspicionless, mandatory drug testing where jobs involve drug interdiction or the carrying of weapons); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 613 (1989) (holding that employees may be subjected to random, suspicionless, mandatory drug testing where jobs involve public safety).

49. *Hill v. NCAA*, 865 P.2d 633, 669 (Cal. 1994) (holding that the NCAA had not violated plaintiffs' privacy rights through its ban on drug use and its adoption of a drug testing program).

participating on teams or in certain competitions.⁵⁰ In other contexts, such as the market sphere, exclusion is a violation of basic rights—life, liberty or property.⁵¹ But the state views membership on a collegiate team as voluntary and as a privilege, not as a right.⁵² Therefore, the NCAA can set its own rules with regard to exclusion and eligibility, drug testing, and season and practice length.⁵³

While the state intervenes in the affairs of members of private associations very reluctantly, there are times when the state has become involved with the operations of the NCAA and its member institutions. In the mid-1990s, for example, Congress passed the Equity in Athletics Disclosure Act⁵⁴ and the Student Right to Know Act,⁵⁵ which forced the NCAA and its member institutions to disclose gender equity data and a breakdown of graduation rates by race, sex, and sport.⁵⁶

With regard to voluntary associations, what we consider within the purview of the state is a political issue.⁵⁷ Wilson argues that the state is unlikely to meddle in the affairs of a private association when: 1) members enjoy easy exit from the group or have other options available in lieu of a specific group membership; 2) members of the group embrace the goals of the organization and do not seek state intervention to solve disputes; 3) the settlement of disputes would require specific, technical, or insider knowledge; or 4) the organization does not provide important public services (e.g., health and well being, education, arts).⁵⁸

Note, for example, the following Congressional findings from the Equity in Athletics Disclosure Act, in which lawmakers expressed the state's view of college athletic participation in society and justified its intervention into the affairs of the NCAA:

that was reasonably calculated to further its legitimate interest in safeguarding intercollegiate athletic competition).

50. See, e.g., NCAA, WRESTLING: 2008 MEN'S RULES AND INTERPRETATIONS, RULE 6.6.1, WI-16, available at http://www.ncaa.org/library/rules/2008/2008_wrestling_rules.pdf.

51. WILSON, *supra* note 9, at 206.

52. *Id.* at 215.

53. See *NCAA v. Smith*, 525 U.S. 459 (1999) (upholding rule preventing undergraduate student athlete from participating in athletics while enrolled in a graduate program at a different institution); *Banks v. NCAA*, 977 F.2d 1081, 1089–90 (7th Cir. 1992) (upholding rules revoking athlete's eligibility to participate in intercollegiate sport if athlete chose to enter a professional draft or hire agent); *McCormack v. NCAA*, 845 F.2d 1338, 1345 (5th Cir. 1988) (upholding rules limiting football players' compensation to scholarships); *Hennessey v. NCAA*, 564 F.2d 1136, 1153 (5th Cir. 1977) (upholding rule limiting number of assistant football and basketball coaches that Division I institutions could employ); *Gaines v. NCAA*, 746 F. Supp. 738, 744 (M.D. Tenn. 1990) (upholding rules revoking athlete's eligibility to participate in intercollegiate sport if athlete chose to enter a professional draft or hire an agent); *Justice v. NCAA*, 577 F. Supp. 356, 382 (D. Ariz. 1983) (upholding rule denying athlete eligibility to participate if the athlete accepted pay for participation in the sport).

54. Pub. L. No. 103-382, § 360B, 108 Stat. 3518, 3969 (1994) (codified as amended at 20 U.S.C. § 1092(g) (2000)).

55. Pub. L. No. 101-542, 104 Stat. 2381 (1990) (codified as amended at 20 U.S.C. § 1092(e) (2000)).

56. 20 U.S.C. § 1092(e), (g) (2000).

57. WILSON, *supra* note 9, at 200–01.

58. See *id.* at 197.

The Congress finds that—

- (1) participation in athletic pursuits plays an important role in teaching young Americans how to work on teams, handle challenges and overcome obstacles;
- (2) participation in athletic pursuits plays an important role in keeping the minds and bodies of young Americans healthy and physically fit;
- (3) there is increasing concern among citizens, educators, and public officials regarding the athletic opportunities for young men and women at institutions of higher education.⁵⁹

The first two findings demonstrate that lawmakers perceive sport as educational. In the third finding, lawmakers' general concern for equal opportunities for men and women in education trumps the tendency of lawmakers to leave well enough alone.⁶⁰ Further, the concern here was not about the specific rules, but about a broad policy—gender equity—that required only general knowledge to enforce properly.

Because the judiciary has adopted a position of limited judicial review, courts rarely intervene, instead standing in deference to a private association's decision.⁶¹ Yet courts "have demonstrated more of a willingness to intervene in the internal matters of private associations when they conclude that there are inadequate procedural safeguards to protect members' rights."⁶² Courts have also shown a willingness to intervene in private association decisions when:

- (1) the rule, regulation, or bylaw challenged by the plaintiff exceeds the scope of the association's authority;⁶³
- (2) the rule, regulation, or bylaw challenged by the plaintiff violates an individual's constitutional rights;⁶⁴

59. Equity in Athletics Disclosure Act, § 360B(b).

60. *Id.*

61. MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 22–23, 433 (2005).

62. *Crouch v. NASCAR*, 845 F.2d 397, 401 (2d Cir. 1988).

63. *See, e.g., Atlanta Nat'l League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213, 1226 (N.D. Ga. 1977) (overturning the Commissioner of Baseball's decision where it exceeded the scope of authority granted to him); *Bunger v. Iowa High Sch. Athletic Ass'n*, 197 N.W.2d 555, 564 (Iowa 1972) (striking down an athletic association's good conduct rule because it exceeded the association's scope of authority by controlling conduct outside of the athletic season); *Am. League Baseball Club of N.Y. v. Johnson*, 179 N.Y.S. 498, 504–06 (N.Y. Sup. Ct. 1919), *aff'd*, 179 N.Y.S. 898, 899 (N.Y. App. Div. 1920) (granting equitable remedy when League President's action exceeded scope of authority).

64. *See, e.g., Menora v. Ill. High Sch. Ass'n*, 683 F.2d 1030, 1034–36 (7th Cir. 1982) (holding that an athletic association's ban on the wearing of yarmulkes by basketball players violated the First Amendment Freedom of Religion); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 383 F.2d 988 (8th Cir. 1967), *rev'd*, 393 U.S. 503, 513–14 (1969) (striking down efforts to discipline students for constitutionally-protected freedom of expression in school); *Ludtke v. Kuhn*, 461 F. Supp. 86, 93–94 (S.D.N.Y. 1978) (holding that league rule restricting female reporters from locker room violated Fourteenth Amendment's Equal Protection Clause).

(3) the rule, regulation, or bylaw challenged by the plaintiff violates an existing law, such as the Sherman Antitrust Act or the Americans with Disabilities Act;⁶⁵

(4) the rule, regulation, or bylaw challenged by the plaintiff is applied in an arbitrary and/or capricious manner;⁶⁶ or

(5) the association breaks one of its own rules, regulations, or bylaws.⁶⁷

What constitutes a private association and what falls under the purview of the state shifts with changing societal norms, as well as the political will of lawmakers. For example, in the early 1980s, Grove City College, a private coeducational liberal arts college, chose not to accept direct federal assistance so as to maintain its institutional autonomy.⁶⁸ Grove City College's students, however, received federal educational grants and loans. The issue before the Court in this Title IX case centered on whether Title IX applied to the entire institution because the student aid was non-earmarked funding or whether Title IX applied simply to that program or department receiving federal assistance, in this case, the Financial Aid Office.⁶⁹ The U.S. Supreme Court held that the latter interpretation was correct.⁷⁰ The effect of that decision was to remove athletics from the reach of Title IX. In 1987, however, Congress responded to this judicial narrowing of civil rights legislation by passing the Civil Rights Restoration Act,⁷¹ making it clear that sport and other school-sponsored extra-curricular activities were part of the overall education of young people.

65. See, e.g., *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 662 (2001) (holding that professional sport organization is reviewable where it violates the Americans with Disabilities Act); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 86 (1984) (holding that private athletic association rule is reviewable where it violates the Sherman Antitrust Act).

66. See, e.g., *Tiffany v. Ariz. Interscholastic Ass'n*, 726 P.2d 231, 236 (Ariz. Ct. App. 1986) (holding that the Executive Board of the Arizona Interscholastic Association acted unreasonably, capriciously, and arbitrarily when it refused to consider a request of waiver); *Clements v. Bd. of Educ. of Decatur Pub. Sch. Dist. No. 61*, 478 N.E.2d 1209, 1211 (Ill. App. Ct. 1985) (holding student-athlete can prevail if he or she can establish the actions of school are arbitrary and capricious); *Ind. High Sch. Athletic Ass'n v. Avant*, 650 N.E.2d 1164, 1167-68 (Ind. Ct. App. 1995) (holding that athletic associations' decisions are reviewable under arbitrary and capricious standard).

67. See, e.g., *Atlanta Nat'l League Baseball Club, Inc.*, 432 F. Supp. at 1226; *Christ the King Reg. High Sch. v. Catholic High Sch. Athletic Ass'n*, 624 N.Y.S.2d 755, 756 (N.Y. Sup. Ct. 1995).

68. *Grove City Coll. v. Bell*, 465 U.S. 555, 559 (1984).

69. *Id.* at 559-63. Although it recognized that Title IX's provisions are program-specific, the Third Circuit likened the assistance flowing to Grove City through its students to non-earmarked aid and declared that "[w]here the federal government furnishes indirect or non-earmarked aid to an institution, it is apparent to us that the institution itself must be the 'program.'" *Id.* at 562 (quoting *Grove City Coll. v. Bell*, 687 F.2d 684, 700 (3d Cir. 1982)).

70. *Id.* at 573-74.

71. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended in scattered sections of 20, 29, 42 U.S.C.).

4. Private Associations, Commercial Activities, and the Concept of Public Accommodation

The state is also more likely to intervene in the affairs of a private association if the association engages in commercial activities.⁷² In order to ensure fair competition in the marketplace, the state may step in to regulate the commercial activities of private associations. Even if these private associations are non-profit in nature, the state may still intervene, because “the absence of profit is no guarantee that an entity will act in the best interest of consumers.”⁷³

The distinction between the civil and market spheres is not always clear. Over the past two decades, profit-making organizations have been providing public services that were once the exclusive realm of charitable non-profit organizations.⁷⁴ Health clubs, child care facilities, and after-school programs are just as likely to be operated by for-profit entities as they are to be operated by not-for-profit entities. Further, charitable organizations support a variety of market-oriented activities in an effort to raise funds (e.g., museum restaurants and shops) or compete directly with profit-making competitors by servicing more affluent clients (YMCA).

The state has interfered in the affairs of the NCAA where those affairs are business-like and where the NCAA has violated the formal rationality of the market.⁷⁵ In the mid 1990s, for example, assistant coaches were subject to salary caps.⁷⁶ The intent of the caps was to maintain a level playing field. In 1998, the Tenth Circuit ruled that by limiting the salaries of assistant coaches, the NCAA violated the Sherman Antitrust Act.⁷⁷ Likewise in 1984, the Supreme Court found in *NCAA v. Board of Regents of the University of Oklahoma*⁷⁸ that the NCAA violated antitrust laws when it limited the ability of colleges and universities to enter into contracts for televising games.⁷⁹ The Court also found that the NCAA’s plan that limited the number of games that a college or university could televise was an unreasonable, horizontal restraint of trade because it limited the games available to the public and barred negotiation between broadcasters and institutions.⁸⁰ If the structure of a private association becomes increasingly commercial over time, the state is more likely to intervene.

If a private association is seen as a place of public accommodation and is

72. JANE JACOBS, *SYSTEMS OF SURVIVAL: A DIALOGUE ON THE MORAL FOUNDATIONS OF COMMERCE AND POLITICS*, 34–38, 204 (1994).

73. *United States v. Brown Univ.*, 5 F.3d 658, 665 (3d Cir. 1993) (affirming district court’s application of antitrust law to non-profit educational institutions and holding that scholarship and financial aid decisions implicated trade or commerce).

74. WAGNER, *supra* note 20, at 144.

75. See MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 85 (Guenther Roth & Claus Wittich eds., 1978).

76. *Law v. NCAA*, 134 F.3d 1010, 1012–14 (10th Cir. 1998).

77. *Id.* at 1012–15.

78. 468 U.S. 85 (1984).

79. *Id.* at 98–99.

80. *Id.*

engaged in discriminatory behavior, the likelihood that the state will intervene increases.⁸¹ “State public accommodations laws were originally enacted to prevent discrimination in traditional places of public accommodation—like inns and trains.”⁸² Over time, the definition of “place of public accommodation” expanded from clearly commercial entities, such as restaurants, bars, and hotels, to include membership organizations such as the Jaycees and the Boy Scouts.⁸³ As such, conflict between state public accommodations laws and the First Amendment rights of organizations—including the right to freely associate and the right of organizations to express ideas—has increased.⁸⁴ These rights often conflict with public accommodations laws that are based in a state’s compelling interest in eliminating discrimination.⁸⁵ Sometimes a private association will be redefined by the state as a place of public accommodation because of broader societal changes or political activism—an approach upheld by the Supreme Court until *Boy Scouts of America v. Dale*.⁸⁶ When the state is determining whether to identify a private organization as a place of public accommodation, the decision is inherently a political one.

Quite possibly no sport case illustrates the political nature of private associations better than the legislative work of Lana Pollack. In 1991 and 1992, Pollack, a Michigan state senator, pushed the state of Michigan to intervene into the affairs of what many consider to be a very private association—private golf country clubs.⁸⁷ Pollack took her cue from *Roberts v. United States Jaycees*,⁸⁸ in which Kathryn Roberts, the Human Rights Commissioner of Minnesota, enforced the Minnesota Human Rights Act against the Jaycees, requiring them to admit women to membership.⁸⁹ Relying on the principles set forth in *Roberts*, Pollack shepherded a law through the Michigan legislature that declared public and private golf clubs as places of public accommodation.⁹⁰ As a result, state officials demanded that golf clubs uphold the principle of equal opportunity.⁹¹ The law prohibited the exclusion of women from country clubs and exclusionary tee times

81. See *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

82. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) (citing *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 571–72 (1995)); *Romer v. Evans*, 517 U.S. 620, 627–29 (1996) (describing the evolution of state public accommodation laws).

83. *Romer*, 517 U.S. at 627–29.

84. *Id.*

85. *Id.*; see also *Bd. of Dirs. of Rotary Int’l*, 481 U.S. at 548–49.

86. 530 U.S. 640 (2000). In dissent, Justice Stevens notes that until this case, the Supreme Court had “never once found a claimed right to associate in the selection of members to prevail in the face of a State’s antidiscrimination law.” *Id.* at 679 (Stevens, J., dissenting).

87. George Kehoe, *Getting Equal: The Real Difference Between Women's and Men's Golf*, GOLF FOR WOMEN, Aug. 1993, at 22.

88. 468 U.S. 609 (1984).

89. *Id.* at 621–22.

90. Kehoe, *supra* note 87.

91. *Id.*; see also MARCIA CHAMBERS, *THE UNPLAYABLE LIE: THE UNTOLD STORY OF WOMEN AND DISCRIMINATION IN AMERICAN GOLF* 205–07 (1995).

or eating and drinking rooms within a club.⁹² Over the last twenty-five years, as a result of this legislation and other political and court actions, private golf and country clubs in other states have either become more inclusive of women or have taken steps (such as limiting memberships and prohibiting the discussion of business) to retain their status as a private club.⁹³

Within the courts, what constitutes a place of public accommodation can change and is subject to political struggles, as illustrated by *Boy Scouts of America v. Dale*⁹⁴ and *PGA Tour v. Martin*.⁹⁵ In *Dale*, James Dale rose to the rank of Eagle Scout and was invited to become an assistant scoutmaster, only to be forced out in 1990 by the Boy Scouts of America (BSA) when the organization's leaders learned from a newspaper article that he is gay.⁹⁶ Dale filed a lawsuit for reinstatement in the BSA. The New Jersey Supreme Court ruled that the BSA was a place of public accommodation under the New Jersey state statute.⁹⁷ Factors in the decision included: 1) the Boy Scouts were not expressly exempt in the statute; 2) they were nonselective; 3) they engaged in broad recruitment; 4) they adopted inclusive practices; 5) they made invitations to nonmembers; and (6) they are not sufficiently personal or private to warrant constitutional protection.⁹⁸ That is, despite being a private non-profit group, the mission of BSA was so broad and inclusive that the courts no longer considered it a private association. However, the U.S. Supreme Court, by a 5–4 majority, overturned the unanimous New Jersey Supreme Court decision and ruled, in part, that applying the public accommodations statute to BSA was unconstitutional.⁹⁹ The Court found that the First Amendment protected BSA's rights to instill values in youth through the adult leaders' expressions and examples.¹⁰⁰ Because Dale admitted to public advocacy of homosexuality, his presence as a group leader would have forced a message on the group that was counter to BSA's public position.¹⁰¹ Thus, BSA had a state-protected right to set its own rules, including, as in this case, the exclusion of openly-gay people from leadership positions. Even in the strongly-worded dissent by Justice Stevens, the debate was less about the position of BSA as a private association or a place of public accommodation than it was about the interpretation of BSA's stated mission and the right to exclude gay men from leadership.¹⁰²

Similarly, in *PGA Tour v. Martin*,¹⁰³ the PGA Tour argued that it was a private association and as such should set its own rules regarding the play of the game of

92. Kehoe, *supra* note 87.

93. Benjamin Leedy, *Recent Trends in Anti-Discrimination Lawsuits Against Private Golf Clubs*, CLUB MGMT., Oct. 2006, at 24.

94. 530 U.S. 640 (2000).

95. 532 U.S. 661 (2001).

96. *Dale*, 530 U.S. at 645.

97. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1219 (N.J. 1999).

98. *Id.*

99. *Dale*, 530 U.S. at 661.

100. *Id.* at 656.

101. *Id.* at 660–61.

102. *Id.* at 667–79 (Stevens, J., dissenting).

103. 532 U.S. 661 (2001).

golf.¹⁰⁴ This case challenged the rights of a sport organization to set its own rules against the reach of the Americans with Disabilities Act (ADA).¹⁰⁵ Under the ADA, it is illegal to discriminate against people with physical or mental disabilities in places of public accommodation, such as golf courses.¹⁰⁶ Lawyers for the PGA Tour conceded that, because golf tournaments are open to the public, they must make reasonable accommodations for spectators who are disabled.¹⁰⁷ However, the PGA Tour argued that it did not need to do the same for competitors because the competitors are not clients or customers, but rather employees or independent contractors, and are therefore not subject to the ADA public accommodation clause.¹⁰⁸ The Supreme Court read the law more simply, however, and ruled that the PGA Tour offers two “privileges” to the public: first, to spectators as entertainment, and second, to athletes in the form of an invitation to compete to join the Tour.¹⁰⁹ The Supreme Court found that the PGA Tour must accommodate both groups in accordance with the ADA.¹¹⁰ As a result, the PGA Tour’s walking rule was scrutinized to determine whether riding in a cart would fundamentally alter the sport and the competition. The 7–2 majority ruled that the use of a cart was not inconsistent with the character of golf, the essence of which was shot-making.¹¹¹ Justice Scalia issued a fierce sixteen page dissent in which he argued against intervention into the governance of a private association, particularly as it relates to matters requiring specific knowledge.¹¹² “[T]he rules are the rules,” he wrote.¹¹³ “They are (as in all games) entirely arbitrary, and there is no basis on which anyone—not even the Supreme Court of the United States—can pronounce one or another of them to be ‘nonessential’ if the rule maker (here the PGA Tour) deems it to be essential.”¹¹⁴

These cases illustrate that it is not always clear whether an organization is a private association (and relatively free of government oversight) or a place of public accommodation (and subject to the legal rules governing commerce). Defining groups as private associations or places of public accommodation is a political matter. The outcome of the battle over definitions will have much to do with who holds political power, as well as the social context within which the organization operates.

104. *Id.* at 669.

105. *See generally* 42 U.S.C. §§ 12101–12213 (2000).

106. Americans with Disabilities Act, 42 U.S.C. § 12181(7)(L) (2000).

107. *Martin*, 532 U.S. at 678.

108. *Id.*

109. *Id.* at 680.

110. *Id.*

111. *Id.* at 684.

112. *Id.* at 700–04 (Scalia, J., dissenting).

113. *Id.* at 700.

114. *Id.*

II. COLLEGIATE SPORT DEVELOPMENTS SINCE 1987

Much has changed in and around collegiate sport since the passage of the Civil Rights Restoration Act. Some of the changes will shape the state's perception of collegiate sport and, therefore, the way and extent to which Title IX will be applied to collegiate sport in the future. Below we explore four areas of change that affect state justifications for the intervention into sport as it relates to Title IX: 1) increased alternative sport offerings for collegiate women, 2) NCAA restructuring and structurally-encouraged commercialization, 3) the sport reform movement, and 4) the advent of school-affiliated athletic associations.

1. Increased Options for Collegiate Women

Recall Wilson's first observation regarding the unlikelihood of state intervention when members of a private association enjoy easy exit from the group or have other options available to them.¹¹⁵ If college and university women have reasonable competitive sport alternatives that resemble varsity experiences, the state is less likely to intervene.

In the mid-1980s, outside of the occasional intramural game or club rugby team, there were no alternative sport options for women athletes other than participation on varsity teams. In the last five years, however, the club system has grown substantially. At the time of this writing, college and university students across the country are organized into 12 divisions, including more than 175 club women's lacrosse teams,¹¹⁶ 90 volleyball teams,¹¹⁷ and over 110 women's soccer teams.¹¹⁸ Although this trend is, in part, a response to efforts by athletic departments to reduce the overall number of varsity sports on campus, the club sport movement has an appeal all its own. Student-run teams hold regular practices, have regional leagues, and participate in national championships.¹¹⁹ They have the look and feel of intercollegiate athletics without the burden of NCAA rules and restrictions.

Women now enjoy access to a wide variety of participatory sports, such as road races and triathlons, which were not readily available to women when Title IX was passed. The first year the Boston Athletic Association officially sanctioned women in the Boston Marathon was 1971, when the Amateur Athletics Union permitted it to do so.¹²⁰ Eight women entered and finished the race the following

115. WILSON, *supra* note 9, at 197.

116. US Lacrosse, WDIA Teams, <http://www.uslacrosse.org/wdia/teams.phtml> (last visited Apr. 2, 2008).

117. National Intramural-Recreational Sports Association, Volleyball Leagues, http://www.nirsa.org/sports/volleyball/sport_club/leagues.aspx (last visited Apr. 2, 2008).

118. National Intramural-Recreational Sports Association, Collegiate Soccer Sport Club Championships http://www.nirsa.org/sports/soccer/sport_club/leagues.aspx (last visited Apr. 2, 2008).

119. *See id.*; *see also* US Lacrosse, *supra* note 116; National Intramural-Recreational Sports Association, Volleyball Leagues, *supra* note 117.

120. Boston Athletic Association, History, <http://www.bostonmarathon.org/BostonMarathon/History.asp> (last visited Apr. 2, 2008).

year.¹²¹ In 2007, more than eight thousand women started the race.¹²² Furthermore, much has changed since Congress passed the Civil Rights Restoration Act in 1988. Take, for example, the annual Thanksgiving Day 10K road race in Cincinnati, Ohio. In 1987, of the 1872 participants, 22.8% were women.¹²³ Ten years later, 3689 participants crossed the finish line, with women representing 35% of the field.¹²⁴ In 2007, 10,623 participants finished the race, 51% of whom were women.¹²⁵ Clearly, varsity sport is not the only option for women athletes.

Granted, the club sport movement and independent road races are not direct substitutes for varsity athletics.¹²⁶ Neither the state nor the courts would look favorably on a school that tried to count club sport participation as a varsity offering.¹²⁷ Further, the OCR might apply Title IX to club sports.¹²⁸ Nonetheless, club sport is becoming an avenue for women to play a fairly high level of competitive sport while in school without participating in varsity—and NCAA-regulated—sport. As club sport opportunities increase and as organizational structures become more standardized, the state may view club sport as a viable alternative for varsity athletes. This distinction may decrease the likelihood that the state will intervene on behalf of varsity women athletes.¹²⁹

2. Commercialization

Because collegiate sport looks and acts more and more like a business, the state is more likely to regulate it as such. The Supreme Court decision in 1984,¹³⁰ allowing colleges and universities to pursue their own broadcast contracts, enabled colleges and universities to make millions of dollars and, in doing so, brought greater economic competition to collegiate sports.¹³¹ The NCAA and its member institutions now have the dual mission of regulating collegiate athletics while operating to generate millions of dollars in revenue. The most obvious evidence of

121. *Id.*

122. Boston Athletic Association, Boston Marathon 2007—Statistics, <http://www.bostonmarathon.org/2007/cf/public/statistics.htm> (last visited Apr. 2, 2008).

123. Bob Roncker's Running Spot, *Thanksgiving Day 10K Official Race Results: Cincinnati*, (Nov. 16, 1987) (on file with author).

124. See Cool Running, Bob Roncker's Thanksgiving Day 10K Race Results, <http://www.coolrunning.com/results/97/oh/ronc1127.htm> (last visited Apr. 2, 2008).

125. See Online Race Results, 98th Thanksgiving Day Race 2007: 10K Run/Walk, http://www.onlineraceresults.com/race/view_race.php?race_id=7104 (last visited Apr. 2, 2008).

126. For instance, varsity teams provide additional benefits beyond competition for their athletes that club teams would likely not provide. Among them are access to top coaches, publicity, academic advising, and prestige.

127. See *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996).

128. See *id.*

129. See Sarah K. Fields, *Intramural and Club Sports: The Impact of Title IX*, 33 J.C. & U.L. 521 (2007) (discussing application of Title IX to intramural and club sports).

130. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 98–99 (1984).

131. Welch Suggs, *Football, Television, and the Supreme Court*, CHRON. HIGHER EDUC. (Wash., D.C.), July 9, 2004, at A32.

increased commercialization in collegiate athletics are the coaches' extraordinary salaries and endorsement contracts,¹³² donations provided by boosters to Division I programs, and the revenues generated from corporate sponsorships and television rights.¹³³ Beyond the financial benefits to the institutions, coaches, and the NCAA, it is also important to emphasize the actions taken by the NCAA Division I members in the past decade to restructure the division to make it more compatible with commercialization.¹³⁴ Commercialization has been institutionalized in the NCAA Division I structure.

At the 1996 NCAA Convention, members voted to implement a more federated organization structure to take effect in August 1997.¹³⁵ Prior to the NCAA restructuring of 1997, all member institutions voted on NCAA legislation.¹³⁶ Even rules specifically designed for Division I institutions had to meet the approval of the majority of the membership, including Division II and III institutions. At that time there were 328 Division I institutions and well over 500 Division II and III institutions.¹³⁷ The big revenue-producing colleges and universities have long complained about this structure because their legislative actions were tempered by the votes of the Division II and III members.¹³⁸ In the new system, rules that apply only to Division I are voted on by Division I institutions.¹³⁹ The restructuring of the NCAA redistributes power to the Division I institutions and allows them to self-regulate.

The philosophy of Division I institutions is outlined in the NCAA Manual, § 20.9.¹⁴⁰ Section 20.9 contains three provisions that push Division I college and university sport toward the business of entertainment and, we argue, toward potential conflict with educational goals. Specifically, § 20.9 requires that a Division I member:

- (c) Recognizes the dual objective in its athletics program of serving both the university or college community . . . and the general public . . . ;
- (f) Believes in scheduling its athletic contests primarily with other members of Division I, especially in the emphasized, spectator-oriented sports, as a reflection of its goal of maintaining an appropriate competitive level in its sports program;

132. Jodi Upton & Steve Wieberg, *Million-Dollar Coaches Move Into Mainstream*, USA TODAY, Nov. 16, 2006, at 1A.

133. Michael Lewis, *Serfs of the Turf*, N.Y. TIMES, Nov. 11, 2007, at D13.

134. *Id.*

135. LISA PIKE MASTERALEXIS, ET AL., *PRINCIPLES AND PRACTICES OF SPORT MANAGEMENT* 147–50 (2d ed. 2005). There are currently 330 active Division I institutions, 290 Division II and 445 Division III member schools. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. NCAA, 2007–08 NCAA DIVISION I MANUAL § 20.9 (2007), available at http://www.ncaa.org/library/membership/division_i_manual/2007-08/2007-08_d1_manual.pdf. [hereinafter 2007–08 MANUAL].

- (g) Strives to finance its athletics program insofar as possible from revenues generated by the program itself. All funds supporting athletics should be controlled by the institution.¹⁴¹

Taken together, these three precepts de-emphasize the primacy of the athlete and promote the concerns of the spectator and the financial concerns of the department. In each case, the educational component of the activity takes a back seat to the more pressing demand to entertain and generate revenue.

In 1996, Sharon Shields, a leader in sport reform and an advocate for women's sport, argued, "It's time for us to face the reality that sports in college is a business, and it's revenue-generating and it's entertainment and it sacrifices the student-athlete. If we believe that is a reality, then there may be a need for a separation of sport from education."¹⁴² This comment reflects the sentiment of a large and growing segment of the general public. In a 2006 poll conducted for the Knight Commission on Intercollegiate Athletics, roughly three out of four Americans (74%) agree that commercial interests often prevail over academic values and traditions.¹⁴³ Three out of four Americans (73%) believe there is a conflict between the commercialization of college and university athletics and academic values.¹⁴⁴ If this perspective continues to dominate views of collegiate sport, the public comes to accept the professionalization of collegiate sport, and the structures and rules of the NCAA continue to emphasize the commercial aspects of collegiate sport, the state is less likely to feel a compulsion to apply Title IX to collegiate sports. The state is more likely to regulate Division I-A sports like a business. The same 2006 Knight Commission poll found that most Americans (83%) have an overall positive opinion of college and university sports.¹⁴⁵ However, they are divided as to whether college and university sports are "out of control:" 44% believe they are, while 47% believe they are not.¹⁴⁶ But from a longitudinal analysis, Americans appear to be increasingly comfortable with the direction of college and university sports.¹⁴⁷ A Louis Harris poll conducted for the Knight Commission in 1990 found that 75% of people tended to agree that intercollegiate athletics were out of control;¹⁴⁸ a 1993 poll for the Commission found that 52% of the public agreed with the above statement.¹⁴⁹ By 2006, however, less than half population thought college and university sports were out of control. Taken together, the studies suggest that the general public is increasingly comfortable with highly commercialized college and university sport even when it is in conflict with educational values of the institution.

141. *Id.*

142. Sharon Shields, *Educational and Athletic Pursuits Should Be Separate*, USA TODAY, Sept. 20, 1996, at C20.

143. KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, *supra* note 13.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

3. Education and the Reform Movement

Since 1987, we have witnessed a host of academics and other insiders emphasize the growing dissonance between sport and education.¹⁵⁰ Robert Benford has identified twenty-five reform organizations such as the Knight Commission, the Drake Group, and the National Coalition Against Violent Athletes, most of which focus on intercollegiate athletics.¹⁵¹ Academics like Murray Sperber and former Princeton President William Bowen have written popular books on the problem of athletics.¹⁵²

Collectively, these sports reform movements constitute a social movement industry—“the clustering of a set of social movements around a broadly related set of goals and interests.”¹⁵³ Each reform movement is first and foremost engaged in a battle over the framing of sport. Framing entails not only identification of problems in sport, “but also attributions of blame and the delineation of solutions.”¹⁵⁴ Benford found that collegiate sport reform movements argue that, in addition to the commercialization discussed previously, collegiate sport: 1) damages the integrity of higher education, 2) exploits athletes, and 3) contributes to the harm of non-athletes.¹⁵⁵ In a phrase, varsity sport, as it is currently structured and practiced, is anti-educational.

Sport reformers question the educational value of sport. For example, in *The Game of Life*, Bowen and Shulman argued that while athletes get preferential treatment at admissions, they do not contribute to the broader mission of the college or university.¹⁵⁶ While on campus, they do not excel academically as a group, nor do they contribute to the diversity of the campus.¹⁵⁷ Preferential admission treatment for athletes, Bowen and Shulman argue, is fundamentally different than affirmative action admission policies for minority students, which have long-term benefits for both the institution and society as a whole.¹⁵⁸ Athletics, on the other hand, do not contribute to the educational mission of the college or university.¹⁵⁹

150. See Robert D. Benford, *The College Sports Reform Movement: Reframing the “Edutainment” Industry*, 48 SOC. Q. 1 (2007).

151. *Id.* at 8.

152. JAMES L. SHULMAN & WILLIAM G. BOWEN, *THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES* (2001); MURRAY SPERBER, *BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION* (2001).

153. Benford, *supra* note 150, at 8.

154. *Id.*

155. *Id.* at 9.

156. SHULMAN & BOWEN, *supra* note 152, at 258–67.

157. *Id.* at 261–62.

158. *Id.* at 191–93.

159. *The Game of Life* had a significant impact on collegiate sports, particularly at elite institutions and conferences, despite significant methodological and analytical problems. See, e.g., Hal S. Scott, *What Game Are They Playing? A Review of The Game of Life by James L. Shulman & William G. Bowen*, 28 J.C. & U.L. 719, 753–54 (2002); see also RICHARD F. DALLINGER ET AL., *HOW DOES THE GAME OF LIFE PLAY AT LIBERAL ARTS INSTITUTIONS?* (2004), available at http://www.wabash.edu/cila/docs/athletic_study_report-6.pdf; Robert L. Simon, *Does “The Game of Life” Really Score?* (Oct. 7, 2002) (unpublished manuscript),

No other western country has elite sport so deeply embedded in institutions of higher learning. There is some sentiment among intercollegiate administrators in support of the idea that collegiate sport, while not harming the educational mission of the college or university, is not educational.¹⁶⁰ In some cases, the connection between sport and education has become downright inconvenient. In 1989, for example, during hearings on the Student Right to Know Act, Congressman Carl Perkins asked Dick Schultz, the executive director of the NCAA at that time, what the NCAA was doing to stem student-athlete attrition.¹⁶¹ Schultz responded by distancing sport from the educational mission of institutions. “[T]he primary function of the NCAA,” he instructed Perkins, “is to govern intercollegiate athletics. I think the NCAA has been drawn into the educational side of it, which really should not be their basic responsibility because of a perceived need.”¹⁶² The primary motivation for Schultz’s comment may have been to discourage government intervention in the affairs of the NCAA by distancing sport from education.¹⁶³

The unintended consequence of well-intentioned reformers and autonomy-minded sport administrators is a weakening of Title IX. Even if collegiate sport remains in the civil sphere and reformers are able to reverse its slide toward the entertainment market, if enough people are convinced by these reformers’ framing of collegiate sport as anti-educational or adopt a more neutral “Schultzian” perspective in which sports are distinct from education, the state is less likely to consider collegiate sport to be a public concern. It would follow, then, that the state will not find justification for continued intervention on behalf of collegiate women athletes.

4. New Structures

The place of collegiate sport within the college or university is rarely clear and often contested. Is it a commercial entity, an educational department, or a separate voluntary association? Recently, collegiate sport has witnessed structural changes at individual athletic departments that distance the athletic department from the college or university (although not necessarily toward the entertainment market). The new structures suggest that collegiate sport is becoming a private association distinct from the college or university.

These changes in structure and practice are fueled by financial challenges facing

available at <http://www.trincoll.edu/depts/educ/GOL/Simon.pdf>.

160. WILSON, *supra* note 9, at 290–91.

161. *Id.*

162. *Id.*

163. Historically, the association of sport with education was the perceived need of collegiate sport. Sport needed some justification other than fun and distraction. Physical education served that need initially. But as sport gained institutional power, the ties between sport and physical education were severed and the ideology that sport is educational remained. *See generally* RONALD A. SMITH, *SPORTS AND FREEDOM: THE RISE OF BIG-TIME COLLEGE ATHLETICS* (1988).

collegiate athletics.¹⁶⁴ For example, a comparison between the percentage of revenues for athletics at the University of Colorado Boulder between financial years 1990–91 and 2004–05 reveals a large decrease in university funding and student fees.¹⁶⁵ This decrease is offset by an equally dramatic increase in conference distributions (television revenues) and contributions.¹⁶⁶

Donations to athletic departments have increased significantly. A survey conducted by the *Chronicle of Higher Education* found that booster clubs representing the six major conferences raised more than \$1.2 billion in 2006–07.¹⁶⁷ Some schools tripled their annual gifts received by athletic departments within the last decade.¹⁶⁸ Research by Stinson and Howard in 2007 revealed that alumni athletic giving as a percent of the total giving to Division I-A football institutions increased from 14.7% in 1998 to 26% in 2003,¹⁶⁹ while giving to the institutions' general fund remained flat,¹⁷⁰ suggesting that this drive to woo sport donors is cutting into giving for academic programs.

As donations become an increasingly important source of revenue for athletic departments, college and university-affiliated foundations have also played a more critical financial role in athletics. At least three schools—the University of Florida, the Georgia Institute of Technology (Georgia Tech), and the University of Georgia—have opted to structure their athletic departments as foundations.¹⁷¹ That is, rather than housing athletics within a department within the institution structure, these schools have formed a non-profit corporation to administer athletics for the institution.¹⁷² While these foundations are school-affiliated and enjoy interlocking directorates, they are separate legal entities.

As non-profit entities, these foundations have mission statements separate from their institutions.¹⁷³ For example, the University Athletic Association, Inc., which is responsible for intercollegiate athletics at the University of Florida, states:¹⁷⁴

[T]he UAA is governed by a Board of Directors who provide guidance and direction through approval of policies, procedures and the budget. The UAA has developed a mission statement that was adopted by the Board of Directors to provide goals and objectives in the development

164. See DANIEL L. FULKS, 2002–03 NCAA REVENUES AND EXPENSES OF DIVISIONS I AND II INTERCOLLEGIATE ATHLETIC PROGRAMS REPORT (2005), available at http://www.ncaa.org/library/research/i_ii_rev_exp/2003/2002-03_d1_d2_rev_exp.pdf.

165. See UNIVERSITY OF COLORADO BOULDER, DEPARTMENT OF INTERCOLLEGIATE ATHLETICS FINANCIAL UPDATE (2005), http://www.cu.edu/regents/BoardMeetings/powerpoint/JanuaryPresentations/Regents_%20athletics%20finances%202005%20-%20A.pps.

166. *Id.*

167. Brad Wolverton, *Growth in Sports Gifts May Mean Fewer Academic Donations*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 5, 2007, at A1.

168. *Id.*

169. Jefferey L. Stinson & Dennis R. Howard, *Athletic Success and Private Giving to Athletic and Academic Programs at NCAA Institutions*, 21 J. SPORT MGMT. 235, 249 (2007).

170. *Id.* at 259.

171. University Athletic Association, <http://www.uaa.ufl.edu> (last visited Apr. 2, 2008).

172. *See id.*

173. *Id.*

174. *Id.*

and delivery of the athletics program at the University of Florida. This “vision” provides the road map for the University’s commitment to be second to none in the area of intercollegiate athletics.¹⁷⁵

The focus for these schools incorporates education and development of athletes, but at the same time embraces the new reality of a commercialized, professional sport model. For instance, boosters at Florida claim 13,000 members and raised \$11.9 million in donations to the athletic association in 2007.¹⁷⁶ The University of Georgia and Georgia Tech have adopted similar models.¹⁷⁷ If more schools and athletic departments take advantage of this structure, questions about the place of collegiate sport within the college or university are likely to increase. In sum, a separate-yet-affiliated non-profit structure may contribute to the controversy regarding the educational value of sport and the position of sport within higher education. As athletic associations distinguish themselves from the college and university missions and oversight, and while awareness grows that donations to athletic teams undermines and competes with donations to academic programs, the state is likely to reevaluate the non-profit charity status of gifts earmarked for athletic programs. The House of Representatives’ Ways and Means Committee has been investigating tax-exempt organizations since 2004.¹⁷⁸ In October 2006, the NCAA’s tax-exempt status became a critical issue for the committee.¹⁷⁹ In a letter to NCAA President Myles Brand from Rep. Thomas, the NCAA was asked to justify its status as a non-profit charity organization.¹⁸⁰ The status was questioned because of the revenue from Division I men’s basketball and football, the “professional” nature of these programs, and the NCAA’s \$6 billion TV contract with CBS for men’s basketball.¹⁸¹ Rep. Thomas sought to determine how these high-profile programs supplemented the educational mission of the member institutions and, on a broader scale, how the NCAA retaining its tax-exempt status benefits federal taxpayers.¹⁸² Rep. Thomas inquired specifically about revenues and expenses for Division I men’s basketball and football, coaches’ salaries, NCAA revenue distribution, charitable donations in exchange for tickets, athletic department budgets, and budget growth rates.¹⁸³ More recently, in response to the

175. *Id.*

176. See UAA, FINANCIAL STATEMENTS JUNE 30, 2007 AND 2006 (2007), available at, <http://www.uaa.ufl.edu/uaa/UAA%20Financial%20Statements%20-%20June%2030,%202007%20and%202006.pdf>.

177. See Georgia Tech Official Athletic Site, <http://ramblinwreck.cstv.com/genrel/111501aab.html> (last visited Apr. 2, 2008); UGA Athletic Association Homepage, <http://www.sports.uga.edu/> (last visited Apr. 2, 2008).

178. *Congress Questions NCAA’s Tax-Exempt Status*, MSNBC, Oct. 4, 2006, available at <http://nbcsports.msnbc.com/id/15133560/>.

179. *Id.*

180. *Id.*

181. Letter from Bill Thomas, Chairman, House Ways and Means Committee, to Dr. Myles Brand, President, National Collegiate Athletic Association (Oct. 2, 2006), available at http://www.usatoday.com/sports/college/2006-10-05-congress-ncaa-tax-letter_x.htm.

182. *Id.*

183. *Id.*

evidence that sports donations represent over twenty-five percent of all donations to colleges and universities, Senator Chuck Grassley, a Republican from Iowa, questioned the logic of continuing to characterize donations to Division I athletic departments as charity.¹⁸⁴

In his response to Rep. Thomas's letter, Brand defended the mission of the NCAA by arguing that the "uniquely American" system binding athletics and education broadens the education of student-athletes outside the classroom.¹⁸⁵ Brand argued that Division I athletics is different than professional sports in that its purpose is not entertainment-centered,¹⁸⁶ a seeming contradiction with the NCAA's own rules.¹⁸⁷ Brand's comment also contradicts comments made by past NCAA executive director Dick Schultz before Congress that all but denied the educational mission of the NCAA. This contradiction is a clear reflection of the place of the NCAA and collegiate athletics in our society, between education and commerce. In an effort to maintain the status quo, collegiate sport administrators can and will pull from either side of this position.

CONCLUSION

The argument in this article began with the observation that we operate in a differentiated society composed of distinct spheres of action. "Good fences" between the spheres maintain social harmony.¹⁸⁸ As such, legislators and courts are reluctant to interfere with the affairs of voluntary associations operating within the civil sphere.

Yet boundaries between spheres are flexible and permeable. The state will intervene in the civil sphere if certain conditions are met: 1) members do not enjoy easy exit from the group and/or do not have other options available to them; 2) members seek state intervention to solve disputes; 3) the settlement of disputes requires only general knowledge to resolve; and 4) the organization provides important public services.

Athletic departments met those conditions nearly four decades ago when Title IX was enacted. Women ages eighteen to twenty-five had few options to participate in high level sport other than collegiate sport. Sport was understood to be educational and, as such, a concern of the state. Additionally, sex discrimination requires only general knowledge (not sport specific or technical knowledge) to resolve a dispute. It is relatively easy to determine whether a school offers women an equal number of opportunities as it offers men, for example. Finally, women athletes sought relief from the state when they felt slighted by sport administrators.

184. Wolverton, *supra* note 167.

185. Letter from Dr. Myles Brand, President, National Collegiate Athletic Association, to Bill Thomas, Chairman, House Ways and Means Committee (Nov. 13, 2006), *available at* http://www2.ncaa.org/portal/media_and_events/press_room/2006/november/20061115_response_to_housecommitteeonwaysandmeans.pdf.

186. *Id.*

187. See 2007-08 MANUAL, *supra* note 140, § 20.9.

188. WALZER, *supra* note 16, at 319.

Much has changed since 1972. The developments discussed in this article indicate a possible change in the definition of collegiate sport and, thus, in the applicability of Title IX. Since the passage of Title IX, opportunities for women athletes outside of varsity athletics has increased. The assumption that collegiate sport is part of the educational mission of colleges and universities is no longer taken for granted. The sport reform industry has raised serious questions about the educational value of sport at the collegiate level. Structural arrangements at the league and school level further remove athletic departments from the educational mission of the institution. Combined with the increasingly commercial activities of collegiate sport, the state is more likely to view Division I collegiate sport as something other than an educational activity.

If the trajectory of collegiate sport and the post-1987 structural, political and ideological changes continue, collegiate sport will be viewed either as part of the entertainment market or as a non-educational voluntary association. Future debate concerning the application of Title IX to sport may be less about contemporary issues, such as gender equity, and more about the position of collegiate sport in society and the appropriate place and form of government interference in the affairs of sport.

No single factor will change the state's view of collegiate sport. However, when combined with the state's inherent reluctance to intervene in the affairs of a private entity, the concurrent changes may erode the state's willingness to uphold Title IX as it applies to collegiate sport. Our contention is that the place of women's collegiate sport, currently a concern of the state, is on the brink of change. Boundaries between spheres are "vulnerable to shifts in social meaning," Walzer writes, "and we have no choice but to live with the continual probes and incursions through which these shifts are worked out. Commonly the shifts are like sea changes, very slow But the actual boundary revision, when it comes, is likely to come suddenly."¹⁸⁹

Advocates for women's collegiate athletics need to be prepared for such a shift.

189. *Id.*