


2011

Revisiting Title XI's Feminist Legacy: Moving Beyond the Three-part Test

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Recommended Citation

Brake, Deborah. "Revisiting Title XI's Feminist Legacy: Moving Beyond the Three-part Test." *American University Journal of Gender, Social Policy & the Law*. 12, no. 3 (2004): 453-482.

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REVISITING TITLE IX'S FEMINIST LEGACY: MOVING BEYOND THE THREE-PART TEST*

DEBORAH BRAKE**

Introduction	453
I. Title IX's Legacy: Explosive Growth in Girls' and Women's Sports Participation, but Deep-Seated Resistance to Challenging Male Privilege in the Structure of Sports.....	457
II. Leadership Structures in Sport: More Women Play, but Fewer Women Lead	459
III. Cuts in Men's Sports as a Remedy for Discrimination Against Women	466
IV. Feeding the Sports Machine: The Role of Money in Justifying Sex Discrimination in Sport	469
A. Essentializing Inequality in the Body: The Convergence of the Market Defense and Covert Assessments of a Natural Gender Order	471
B. The Role of the Market in Justifying Sex Discrimination in Sports.....	477
Conclusion	482

INTRODUCTION

At the time of this Symposium in April of 2003, controversy over the recommendations proposed by the Secretary of Education's Blue Ribbon Commission on Opportunity in Athletics to revise Title IX of

* This article was originally solicited and submitted for publication as part of a Symposium sponsored by the *American University Journal of Gender, Social Policy & the Law*, "Title IX: 30 Years Later," which was held at American University, Washington College of Law on April 2, 2003.

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the Education Amendments of 1972¹ took center stage in discussions about the law's application to sports. The Commission's focus from the outset was on Title IX's impact on men's sports, responding to the male sports establishment's claim that Title IX's "unintended consequences" have forced cuts in men's athletic programs.² Not surprisingly, given the Commission's composition and initial premises,³ many of its recommendations were geared toward loosening the three-part test for measuring equality in sport participation opportunities, thereby reducing the pressure on educational institutions to increase women's share of athletic participation opportunities.⁴ The Commission's final

1. See 20 U.S.C. § 1681 (1972); see also "Open To All": Title IX at Thirty, SECRETARY OF EDUCATION'S COMMISSION ON OPPORTUNITY IN ATHLETICS (U.S. Department of Education, Washington, DC), Feb. 28, 2003 [hereinafter *Commission Report*], available at <http://www.ed.gov/about/bdscomm/list/athletics/title9report.pdf>.

2. See Michael Dobie, *EnTITLEment? It has Heard from the Public, Now the Title IX Commission Faces Difficult Task of Agreeing on its Next Step*, NEWSDAY, Nov. 24, 2002, at B16 (quoting U.S. Tennis Association official as saying, "[w]e are . . . concerned about [Title IX's] unintended consequences"); see also *Gender Equity in College Sports: 6 Views*, CHRON. OF HIGHER EDUC., Dec. 6, 2002, at B8 (quoting Charles Neinas, former executive director of the College Football Association, as denouncing Title IX's "unintended consequences of reducing opportunities for men"); Vicki Michaelis, *Anthem Increasingly Her Song Too*, USA TODAY, May 3, 2001, at C6 (quoting U.S. Olympic Committee official as saying, "[t]he unintended consequences of Title IX—the decline of male sports opportunities—is very unfortunate").

3. See DONNA DE VARONA & JULIE FOU DY, MINORITY VIEWS ON THE REPORT OF THE COMMISSION ON OPPORTUNITY IN ATHLETICS, 18-20 (2003) [hereinafter MINORITY REPORT] (detailing flaws in the Commission's process), available at http://www.womensportsfoundation.org/binary-data/WSF.ARTICLE/pdf_file/944.pdf (last visited Sept. 17, 2004).

4. Under the governing standard for measuring equal accommodation of interests and abilities in the selection of sports, compliance is measured by the following three-part test:

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

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

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

See Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 46-59 (2000-2001) (explaining the three-part test in detail); see also Letter from Gerald Reynolds, Assistant Secretary for Civil Rights, United States Department of Education Office of Civil Rights, to the Staff of the Office of Civil Rights (July 11, 2003), available at <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html> (last visited Aug. 17, 2004); see, e.g.,

recommendations threatened to halt or even reverse much of the progress toward sex equality in sports made possible by Title IX.⁵ Given the politics of the Bush Administration and the content of the Commission's recommendations, the prospect of a weakened Title IX appeared imminent.⁶

For the time being, however, Title IX has emerged from the latest controversy unscathed. After first floating the possibility of considering only those recommendations that received a unanimous vote by the Commission—an inadequate concession, given that some of the most controversial recommendations were officially listed as unanimous despite the existence of a minority report highlighting a flawed process that did not allow for full consideration of many of these recommendations⁷—the Department of Education ultimately decided not to make any substantive changes to the official policies implementing and interpreting Title IX.⁸ For now, the administrative push to revise and weaken Title IX and its regulations and policies has receded.

However, it is only a break in the battle, not the end of the culture war over Title IX. Conservative legal and political organizations

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

5. See *Commission Report*, *supra* note 1, at 36-39. Some of the more problematic provisions included recommendations that the Department consider: revisiting the role of private funding of particular sports (Rec. 12); redefining substantial proportionality to allow for "a reasonable variance" in male/female sport participation opportunities relative to enrollment (Rec. 14); counting participation opportunities to include planned available slots, rather than the actual number of participants (Rec. 15); excluding walk-on athletes from counted participants (Rec. 17); permitting the use of interest surveys as a basis for demonstrating compliance (Rec. 18); permitting institutions to demonstrate compliance by mirroring the relative participation rates at other levels of sport, such as high school or youth leagues, or the relative interests from surveys of prospective or enrolled students (Rec. 19); exempting nontraditional students from the athletics participation calculation (Rec. 20); adopting alternative measures of compliance wholly apart from the three-part test (Rec. 23). See also *The Attack on Women's Sports*, N.Y. TIMES, Feb. 17, 2003, at A20 ("The Commission's recommendations would create enough exceptions to significantly undermine the equality that Title IX has always stood for.").

6. See, e.g., Diana Jean Schemo, *Women's Athletics; Female Athletes Attack Plans to Change Title IX*, N.Y. TIMES, Jan. 29, 2003, at D2 (explaining that the Commission's revisions "could cost female athletes nearly a million places a year in sports programs"); Lance Pugmire, *An Uneasy Step for Title IX*, L.A. TIMES, Feb. 24, 2003, at D1 (quoting an aide of a top Democrat as saying that the Bush Administration "is going after everything it perceives to have a quota attached to it They clearly have an agenda, one that could potentially disenfranchise a lot of people.").

7. See MINORITY REPORT, *supra* note 3, at 12-18 (detailing objections to Commission's recommendations).

8. See Letter from Gerald Reynolds, *supra* note 4; see also Mike Terry, *Decision Retains Title IX Status Quo*, L.A. TIMES, July 12, 2003, at D1 (stating that the purpose of the letter was to clarify the three-part test and emphasize that all three tests have equal weight).

continue to place a high priority on weakening Title IX as part of their broader political and legal agenda, and concerns about the law's impact on men's sports opportunities still dominate media coverage of Title IX.⁹ In the latest legal skirmish, the College Sports Council, an organization that opposes the current interpretation of Title IX, filed suit against the General Accounting Office, claiming that it reported flawed data in a 2001 report citing net gains to men's sports in the post-Title IX era,¹⁰ and that this data was used to support the continued application of existing Title IX standards.¹¹ This lawsuit, filed on the heels of the dismissal of a much more threatening lawsuit brought by men's sports associations against the Department of Education challenging the legality of the Title IX regulations and the three-part test, shows both the tenacity and increasing desperation of the anti-Title IX agenda.¹²

Attacks on the three-part test will undoubtedly continue to percolate. In a prior article, I have offered a defense of the three-part test and the theory behind it.¹³ Rather than revisit the controversy over that test, this essay will focus on three respects in which the law's existing conception of discrimination fails to reach far enough to ensure girls and women equality in sports. Greater progress toward sex equality in sports requires not just holding the line on existing legal requirements, but further evolution in the law's approach to discrimination and equality guarantees. This essay will consider Title IX's legacy in connection with three remaining challenges to the transformative potential of Title IX, highlighting existing inadequacies in the prevailing legal approach. Specifically, this essay will examine the continuing decline of women in coaching jobs and its impact on female athleticism; the too-ready acceptance of cuts in men's opportunities as a remedy to discrimination against women; and the role of cost-based justifications in preserving the status quo sports establishment and its resistance to the kinds of restructuring

9. See Welch Suggs, *Colleges Make Slight Progress Toward Gender Equity in Sports*, CHRON. HIGHER EDUC., July 25, 2003, at A30 ("The question of saving men's teams has been the hottest topic in Title IX circles since President Bush took office.").

10. See GENERAL ACCOUNTING OFFICE, INTERCOLLEGIATE ATHLETICS: FOUR-YEAR COLLEGES' EXPERIENCES ADDING AND DISCONTINUING TEAMS (2001) (stating that the number of men participating in intercollegiate sports increased from 220,000 to 232,000 between 1981 and 1991).

11. See *In Brief*, ST. PETERSBURG TIMES (Fla.), Sept. 13, 2003, at 10C.

12. See *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, No. 02-0072, slip op. at 55-109, 116-19 (D.O.C. June 11, 2003) (holding that plaintiffs lacked standing to challenge the Title IX regulations and interpretation since they failed to demonstrate that invalidating the regulations would ensure the reinstatement or retention of any men's teams).

13. See Brake, *supra* note 4, at 13.

that would enable further expansion of women's sports to coexist with the retention of men's sports. While far from comprehensive, these brief discussions serve to underscore three respects in which Title IX interpretation does not go far enough toward the elimination of institutional practices that perpetuate sex inequality in sports. Title IX's laudable legacy of transforming girls' and women's participation in sports, rich as it is, must not eclipse the shortcomings of existing legal interpretation and the challenges that remain.

I. TITLE IX'S LEGACY: EXPLOSIVE GROWTH IN GIRLS' AND WOMEN'S SPORTS PARTICIPATION, BUT DEEP-SEATED RESISTANCE TO CHALLENGING MALE PRIVILEGE IN THE STRUCTURE OF SPORTS

Title IX's role in furthering the explosive growth of girls' and women's sports has been widely acknowledged. Compared to the 294,000 girls who participated in interscholastic athletics in 1971, there were over 2.8 million girls who participated in interscholastic athletics in 2002-2003.¹⁴ The number of women participating in intercollegiate sports has gone from just below 32,000 in 1971 to over 160,000 in 2004.¹⁵ Even in recent years, with constricted budgets and repeated claims that some institutions have cut men's sports opportunities, rather than increase sports opportunities for women, the numbers of female athletes have continued to climb.¹⁶

These tremendous increases in girls' and women's sports participation could not have been predicted at the time Title IX was adopted. At congressional hearings on the Title IX regulations, opponents of the Title IX standards charged that the creation of full-blown sports programs for girls and women would be irresponsible given the limited interest to support them.¹⁷ Subsequent experience with three decades of Title IX has exposed this argument as sexist and

14. See Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,419 (Dec. 11, 1979); Women's Sports Foundation, *Women's Sports & Fitness Facts and Statistics*, June 1, 2004, at 14, available at http://www.womenssportsfoundation.org/binary-data/WSF_ARTICLE/pdf_file/28.pdf (last visited Oct. 5, 2004).

15. See Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,419 (Dec. 11, 1979); Women's Sports Foundation, *supra* note 14, at 15.

16. See Suggs, *supra* note 9, at A30-32 (noting that the number of women playing college sports at Division I schools increased from an average of 143 in 1995-96 to 208 in 2001-02).

17. See Brief of Amici Curiae National Women's Law Center at 29, *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996) (No. 95-2205) (quoting the testimony of a representative of the American Football Coaches Association, stating "[t]o have equal women's athletic programs emerge full blown without possibly a demand for them seems a little irresponsible").

short-sighted. The unprecedented growth of women's sports in the post-Title IX years has demonstrated the extent to which interest depends on opportunity structures.¹⁸

The importance of the sheer numbers of girls and women now playing competitive sports should not be understated. With more than one out of three high school girls today competing on a school sports team, school sports for girls have become commonplace.¹⁹ Studies have shown that girls who compete in sports not only receive a physical benefit, but also benefit academically and socially. Girls who play sports have higher self-esteem, less risk of depression, a lower likelihood of engaging in high-risk behaviors, and perform better in school than girls who do not play sports.²⁰ The increased popularity of, and participation in, girls' and women's interscholastic and intercollegiate sports has fueled greater interest and activity in women's sports at all levels.²¹ By playing sports, girls and women gain the opportunity to develop new relationships with their bodies, as a source of strength and learning.²² The benefits to the girls and women who play sports have positive spillover effects in the culture, both within and beyond the world of sports.²³

However, despite these successes, Title IX's legacy is not one of unmitigated success. Like other social institutions, sport has been resilient in preserving male privilege in its deepest structures. Professor Reva Siegel has noted the capacity of social structures to

18. See Brake, *supra* note 4, at 69-122 (discussing the extent to which institutional practices shape male and female interest and experiences in sports).

19. See *id.* at 15-17 (documenting the growth of girls' and women's sports participation in the post-Title IX era).

20. See Hannah Storm, *Title IX Offers Fair Play for All*, CHI. SUN-TIMES, June 22, 2002, at 12 (reporting that girls who participate in sports have higher grade point averages and SAT scores than girls who do not play sports, and that sports increases girls' motivation and optimism, and decreases the chances of teen pregnancy, depression, drug abuse, and an eating disorder); see also Bonnie Erbe, *Men's College Teams: Let's Stop the Whining*, NEWSDAY, July 22, 2003, at A26 (citing the Women's Sports Foundation findings from a 1989 study "showing that girls who participate in sports are less likely to get involved with drugs, less likely to become pregnant and more likely to graduate from high school than those who do not play sports").

21. See Storm, *supra* note 20, at 12 (stating that "[h]igh profile college programs . . . bolstered by Title IX, have led to success as in the Olympics" and have helped create women's professional teams).

22. See CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 121 (1987) (describing the potential for women's participation in sports to transform female bodies from objects into subjects).

23. See, e.g., Cheryl Hanna, *Bad Girls and Good Sports: Some Reflections on Violent Female Juvenile Delinquents, Title IX, & the Promise of Girl Power*, 27 HASTINGS CONST. L. Q. 667, 699-701, 710-13 (2000) (documenting the varied benefits of sports participation for girls and women, and arguing that sports participation has the potential to help girls and women avoid high-risk behaviors by channeling competition into a healthy outlet).

resist challenges to inequality through a phenomenon she calls “preservation through transformation,” in which institutions adapt to shifts in ideology and cultural norms by avoiding overt conflicts with a new legal and social order, while still preserving the underlying structure of inequality.²⁴ Professor Siegel uses as an example the legal invalidation of Jim Crow segregation, and the subsequent development of a discriminatory intent standard that operates to preserve much of the underlying inequality in a manner that comports with the modern ideology of color-blindness.²⁵ In this example and others, she illustrates the capacity of discriminatory practices to change form in response to cultural and ideological shifts while still operating to enforce social stratification.²⁶

Likewise, in the world of sport, despite massive shifts in female sports participation, there has been a good deal of “preservation through transformation,” as the opportunity structures have regrouped to preserve the central features of male privilege in sport. For Title IX to further challenge sex bias in sports, it must extend to a wider range of practices that preserve male privilege in the structures of sport.

II. LEADERSHIP STRUCTURES IN SPORT: MORE WOMEN PLAY, BUT FEWER WOMEN LEAD

The disproportionate attention paid to the alleged loss of some male athletic opportunities in particular sports in recent years²⁷ contrasts sharply with the relative inattention given to the one area in which Title IX has coincided with a devastating loss of opportunity: positions for women coaches and athletic administrators.²⁸ In this

24. For a sampling of articles discussing this phenomenon, see Reva B. Siegel, *1998-99 Brennan Center Symposium Lecture: Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77 (2000) (illustrating “preservation through transformation” in the context of civil rights and domestic violence law); Reva B. Siegel, *The Critical Use of History: Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113-14, 1142 (1997) (using the concept to point out that while a “color blind” antidiscrimination legal standard was appropriate to battle early facial discrimination, it may not be the most appropriate lens through which to view discrimination in today’s world); Reva B. Siegel, *“The Rule of Love”: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2175-87 (1996) (comparing current equal protection doctrine with legal rationales for segregation).

25. See Siegel, *Why Equal Protection No Longer Protects*, *supra* note 24, at 1113-14, 1129-48 (arguing that after Jim Crow was challenged and defeated, it was replaced by new practices and principles such as the intent requirement that preserve much of the prior social stratification).

26. See *id.* at 1142 (noting that “status enforcing state action is mutable in form”).

27. See *supra* note 2 and accompanying text.

28. See Suggs, *supra* note 9, at A30 (noting that over the past thirty years, the

area, the loss of opportunity is both severe and more clearly a by-product of Title IX, in combination with other discrimination laws such as Title VII of the Civil Rights Act of 1964²⁹ and the Equal Pay Act of 1963.³⁰

The percentage of women who hold jobs coaching women college athletes has dropped from ninety percent in 1972, to forty-four percent in 2002, the lowest level on record.³¹ Recent trends suggest that the decline in women's share of coaching jobs in women's sports will not reverse itself any time soon.³² Although 361 new coaching positions were created in women's athletics from 2000 to 2002, more than ninety percent of them were filled by men.³³ The decline in women's access to jobs coaching women athletes is not offset by any increase in women's access to jobs coaching men; during the past thirty years, women's share of jobs coaching male athletes has held steady at just below two percent.³⁴

The gender divide in access to coaching jobs is exacerbated by pay structures that reserve the highest coaching salaries for coaches of men's sports.³⁵ Disparities in pay for the coaches of male and female athletes have continued to increase, so that women are effectively barred from securing the highest paid coaching jobs in college athletics.³⁶

Women's share of jobs in athletics administration also has declined

number of women coaching women's college teams has steadily shrunk and in addition, women have not made many inroads coaching men's teams).

29. 42 U.S.C. § 2000(e) (2004).

30. 29 U.S.C. § 206(d) (2004).

31. See R. VIVIAN ACOSTA & LINDA JEAN CARPENTER, *WOMEN IN INTERCOLLEGIATE SPORT: A LONGITUDINAL STUDY—TWENTY FIVE YEAR UPDATE 1977-2002* (2002) [hereinafter *WOMEN IN INTERCOLLEGIATE SPORT*], available at http://www.ncaa.org/gender_equity/resource_materials/Historical/women_in_intercollegiate_sport.pdf (last visited Sept. 17, 2004).

32. See *id.* (reporting that the decrease in number of females coaching women has been steady in recent years: 47.4% in 1998 and 45.6% in 2000).

33. See *WOMEN IN INTERCOLLEGIATE SPORT*, *supra* note 31, at 8.

34. See *id.* In February 2003, Tennessee State University Athletic Director Teresa Phillips made history as the first woman to coach a men's Division I basketball team when she filled in for the regular men's coach who was serving a one-game suspension. The specter of a woman coaching a men's basketball team made national news. See Jere Longman, *Female Coach Wins Acceptance, if Not the Game*, N.Y. TIMES, Feb. 14, 2003, at D1.

35. See Suggs, *supra* note 9, at A30 (reporting that the average salary for coaching men's sports was \$81,643, while the average salary for coaches of women's teams was \$46,382).

36. See *id.* (citing data showing that coaches of women's teams made about \$3,500 more in 2001-2002 than they did in 2000-2001, but that the pay for coaches of men's teams increased by about \$9,300).

significantly in the post-Title IX era.³⁷ With the merger of formerly discrete women's athletics programs into a unified structure combining men's and women's programs, fewer leadership positions in sports are held by women.³⁸ Before Title IX, when women's athletics departments were managed separately from men's athletics, women held virtually all of the administrative positions for women's sports.³⁹ Today, women remain tokens in leadership positions in intercollegiate athletics.⁴⁰

Existing interpretations of discrimination law effectively encourage the dearth of women's leadership roles in competitive sport. The law does not recognize the underrepresentation of women in athletic leadership roles and women's declining share of coaching jobs as an equality problem for female athletes. The law's blindness, however, does not erase the very real implications of male athletic leadership for female athletic experience and for sex equality in sport more broadly. By linking leadership and competence in sports with maleness, sport's leadership structure reinforces women's marginal place in sports and reinserts a risk that the empowering potential of sports will be thwarted by gender dynamics that reinforce male dominance.⁴¹ Inequality in sport leadership shapes the aspirations and experiences of female athletes, reinforcing cultural and institutional norms that devalue female athleticism.⁴² Sadly, many women athletes internalize the norms linking athletic competence with masculinity, and express preferences for male coaches.⁴³ The

37. See WOMEN IN INTERCOLLEGIATE SPORT, *supra* note 31, at 2 (reporting that in 2002, "17.9% of women's sports programs [were] directed by a female . . ." compared to more than 90% in 1972).

38. See Patricia A. Cain, *Women, Race, and Sports: Life Before Title IX*, 4 J. GENDER RACE & JUST. 338, 350 (2001) (documenting the history of the NCAA takeover of women's intercollegiate sports and pointing to decreased levels of women's leadership for women's sports).

39. See WOMEN IN INTERCOLLEGIATE SPORT, *supra* note 31, at 2 (highlighting that "in 1972 more than 90% of women's programs were directed by a female head administrator").

40. See *id.* (reporting that women hold 31.2% of the administrative job in intercollegiate athletics, and even that number overstates women's real power in the athletics leadership structure, since women are more likely to be in support staff positions rather than in policy-making positions).

41. See Rhonda Reaves, *"There's No Crying in Baseball": Sports and the Legal and Social Construction of Gender*, 4 J. GENDER RACE & JUST. 283, 289-303, 312-14 (2001) (discussing the problem of male coaches' sexual harassment of female athletes and the inadequacy of existing interpretations of sexual harassment law to reach this conduct).

42. See Brake, *supra* note 4, at 88-90 (discussing the importance of gender inequality in sport leadership structures in influencing the sports participation and interest of women athletes).

43. See *id.* at 88.

internalized devaluation of feminine athleticism by women athletes influences their own relationship to sport.⁴⁴ Equally problematic is the presumption implicit in the absence of female coaches coaching male athletes: that women would not be respected or competent in coaching male athletes.⁴⁵ Title IX's failure to recognize the gender hierarchy in sport leadership as gender discrimination that affects athletes is deeply unsatisfying.

Nor does Title IX provide a meaningful remedy for the undervaluation of women's coaches as reflected in the enormous disparities in coaching salaries for men's and women's teams.⁴⁶ As more women's sports, and hence coaching jobs, were created in the post-Title IX years, and more money was spent on women's programs, men were increasingly drawn to jobs coaching female athletes, without any compensating increase in access for women to the jobs coaching male athletes.⁴⁷ Although Title IX forced institutions to spend more money than they had been spending on women's sports, it did not begin to challenge the massive divide in salaries for coaches of men's sports and coaches of women's sports. The disparities in coaches' pay for men's sports and women's sports remain striking. The undercompensation of the coaches of women's teams also shapes female athletic experience by reinforcing the disparate valuation of men's and women's athletics. Yet Title IX does next to nothing about the disparities in coaches' pay. Although coaches' compensation is one factor listed in the "equal treatment" factors for measuring equal athletic opportunity in the Title IX regulations, female athletes may not challenge pay disparities in coaches' compensation unless they prove that the lesser amount of money spent on coaches for female athletes purchases a lower quality of coaching.⁴⁸ So interpreted, the law effectively requires female athletes to indict their coaches in order to address pay discrimination in coaches' salaries. Not surprisingly, Title IX has made no headway in minimizing disparities in valuing men's and women's coaches.

Not only does Title IX fail to provide a remedy for the gender hierarchies in sport leadership, but in many respects, discrimination law encourages the marginalization and devaluation of women in

44. *See id.* at 88-90.

45. *See id.* at 88-89.

46. *See Suggs, supra* note 9, at A30.

47. *Cf. Reaves, supra* note 41, at 312-14 (arguing that female sports adopted the "win-at-all-costs" model of men's sports, which retains a style of coaching that "favors male coaches over female coaches" to the detriment of female athletes).

48. *See Brake, supra* note 4, at 128-29 (detailing the inadequacies in Title IX's application to disparities in coaches' pay for men's and women's sports).

these roles. The only law that has been even marginally successful in addressing the pay discrimination against the coaches of women's teams is the Equal Pay Act, which requires institutions to pay equal salaries to persons of the opposite sex who perform substantially similar work. The Equal Employment Opportunity Commission's ("EEOC") current policy guidance on coaches' pay makes it possible in certain circumstances to successfully bring Equal Pay Act claims where a man and a woman are paid different salaries to coach men's and women's teams in the same sport.⁴⁹ However, because the law is only triggered when a man and a woman hold substantially similar jobs at different levels of pay, it has the perverse incentive of encouraging institutions to solve their Equal Pay Act problems by hiring male coaches to coach female athletes.⁵⁰ The Equal Pay Act has no application to an institution that pays male coaches of women's teams less than the male coaches of men's teams. Although Title VII, in theory, prevents outright hiring discrimination against women in coaching jobs, for male or female athletes, the difficulty of proving intentional discrimination renders this prohibition easily evaded.⁵¹

A final example of how the law preserves existing hierarchies in sport leadership to the detriment of female athletes is in its failure to adequately protect employees from retaliation for raising equality issues on behalf of female athletes. In a decision remarkable for its blindness to the equality implications for female athletes, the Eleventh Circuit recently held in *Jackson v. Birmingham Board of Education* that a coach who complains of Title IX violations against a women's team has no right to bring a private action under Title IX's anti-retaliation provision after being fired in retaliation for raising such issues.⁵² The Eleventh Circuit held that because the anti-retaliation regulatory provision exceeded the statute's nondiscrimination mandate, the regulations could not support a retaliation claim by coaches or other employees.⁵³ In failing to recognize anti-retaliation

49. See generally EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, NO. 915.002, ENFORCEMENT GUIDANCE ON SEX DISCRIMINATION IN THE COMPENSATION OF SPORTS COACHES IN EDUCATIONAL INSTITUTIONS (1997).

50. See 29 U.S.C. § 206(d)(1) (2004) (prohibiting discrimination on the basis of sex between wages to any employees "at a rate less than the rate at which he pays wages to employees of the opposite sex for equal work").

51. See, e.g., *EEOC v. Madison County United Sch. Dist. No. 12*, 818 F.2d 577, 586 (7th Cir. 1987) (holding that school district's hiring of more males to coach girls' teams after the EEOC Equal Pay Act investigation began was not hiring discrimination, since "efforts to bring one's conduct into conformity with one's litigating posture are not evidence of willful noncompliance with the law").

52. See *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333 (11th Cir. 2002).

53. See *id.* at 1347-48.

as implicit in the anti-discrimination norm, the court undercut the rights of female athletes by denying protection to the persons who may be best-situated (as adults and knowledgeable actors within the athletics inner circle) to raise issues of inequality affecting female athletes.

The Supreme Court recently granted *certiorari* in *Jackson* and is poised to decide whether Title IX implicitly includes a private right of action to sue for retaliation.⁵⁴ In a Brief filed by the Solicitor General, the United States has weighed in on behalf of recognizing an implied right of action for retaliation, as have numerous other *amici*.⁵⁵ In light of the high stakes for Title IX enforcement, it is likely that the Court will reject the Eleventh Circuit's extreme ruling denying persons protection from retaliation for asserting Title IX violations. However, even if the Court reverses the ruling in *Jackson*, important issues remain about the scope of law's protection from retaliation. In recent years, a number of doctrines have emerged that limit legal protection from retaliation, and these doctrines are likely to be imported into Title IX retaliation claims as well.⁵⁶ Regardless of how the Court decides *Jackson*, it is likely that coaches and other employees will receive less than full protection from retaliation when they raise issues about their institution's Title IX compliance.

In addition to decreasing the chances that institutions will address program inequalities that affect female athletes, the law's failure to adequately protect coaches and administrators from retaliation for raising Title IX issues on behalf of their athletes may undercut gender equality in sport in another respect as well. If the sociological literature on tokenism is correct, we might expect that the women coaches and administrators who raise Title IX concerns on behalf of

54. See 124 S.Ct. 2834 (2004).

55. See Brief for the United States as Amicus Curiae Supporting Petitioner, *Jackson v. Birmingham Bd. of Educ.*, 124 S. Ct. 2834 (2004) (No. 02-1672); Brief of the American Bar Association as Amicus Curiae in Support of Petitioner, *Jackson* (No. 02-1672); Brief Amicus Curiae of the National Education Association in Support of Petitioner, *Jackson* (No. 02-1672); Brief of Amicus Curiae Leadership Conference on Civil Rights in Support of Petitioner, *Jackson* (No. 02-1672); Amici Curiae Brief of Women's Sports Foundation in Support of the Petitioner, *Jackson* (No. 02-1672); Amicus Curiae Brief of the National Partnership for Women & Families and 31 Other Organizations and Individuals in Support of Petitioner, *Jackson* (No. 02-1672).

56. See, e.g., *Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003) (recognizing an implied right of action for retaliation under Title VI, but limiting such claims to retaliation for asserting intentional discrimination, as opposed to disparate impact, since conduct amounting to mere disparate impact could not be "reasonably believed" to violate the statute). For a thorough discussion and critique of doctrinal limitations on retaliation claims, see Deborah L. Brake, *Theorizing Retaliation: The Under-Protection of Discrimination Claimants and the Preservation of the Social Order* (forthcoming) (on file with author).

female athletes would be particularly subject to penalties, as their female status within a male-dominated structure already marks them as “outsiders” and trouble-makers.⁵⁷ If this is true, the law’s refusal to protect against retaliation may be particularly damaging to women in athletic leadership, effectively encouraging institutions to punish those women coaches and administrators who raise Title IX concerns with impunity. The cyclical effect may be to drive more women out of athletics leadership roles and further reinforce a culture of tokenism.

As a whole, discrimination law works to preserve a culture of male leadership in sports that both devalues the coaches of women’s sports and enforces a strict gender divide in coaching positions over men’s and women’s sports. At the same time, it facilitates the marginalization of women as leaders in sport by creating incentives to hire men as the coaches and administrators for female athletes. And finally, not only does the law accept the severe under-representation of women in athletic leadership roles, it provides little protection to the few women who are brave enough to assert the equality interests of their female students. Despite the inadequacy, and even perverse incentives of, discrimination law as applied to women in coaching and athletic administration positions, no national commission has been established to investigate the law’s “unintended consequences” for these women, and the issue has received relatively scant media attention, particularly in comparison to the media frenzy about Title IX’s consequences for male athletes.⁵⁸

Most problematically, none of this is recognized as an equality problem for female athletes. By divorcing the issues facing women in coaching and athletics administration from the experience of female athletes and taking a piecemeal approach to discrimination, the law fails to recognize the extent to which inequality in sport leadership

57. See Annelies Knoppers, *Gender and the Coaching Profession*, in *WOMEN, SPORT, AND CULTURE* 119, 128-30 (Susan Birrell & Cheryl L. Cole, eds., 1990) (discussing the implications of tokenism as it applies to women coaches and athletics administrators).

58. For some of the more prominent recent critiques of Title IX from this perspective, see JESSICA GAVORA, *TILTING THE PLAYING FIELD: SCHOOLS, SPORTS, SEX, AND TITLE IX* (2002); John Irving, *Wrestling with Title IX*, *N.Y. TIMES*, Jan. 28, 2003, at A21; George F. Will, *A Train Wreck Called Title IX*, *NEWSWEEK*, May 27, 2002, at 82. For surveys of arguments on both sides in the debate, see Michele Orecklin, *Now She’s Got Game: Title IX Helped More Women Get Into Sports, But Opponents Complain Its Pushing Men Out*, *TIME*, Mar. 3, 2003, at 53; *Gender Equity in College Sports: 6 Views*, *CHRONICLE OF HIGHER EDUC.*, Dec. 6, 2002, at B7-B10. See also Ellen J. Staurowsky, *Title IX and College Sport: The Long Painful Path to Compliance and Reform*, 14 *MARQ. SPORTS L. REV.* 95, 97 (2003) (describing the Commission as “a \$700,000, taxpayer-funded, government inquiry, which fueled Title IX passions around the country, politicized the education of children, and slowed enforcement [and which] resulted only in a restatement of policy well-established for over twenty-five years and upheld in eight federal appellate courts”).

affects the female athletes who play sports. Insofar as the law preserves male privilege in sport leadership, it further marginalizes the women who play sports. A more holistic approach would recognize the linkage between fully valuing female athletes and fully accepting women as leaders in sport.

III. CUTS IN MEN'S SPORTS AS A REMEDY FOR DISCRIMINATION AGAINST WOMEN

A second obstacle in securing further progress under Title IX is the current acceptance of cutting men's sports as an adequate remedy for discrimination against women.⁵⁹ Although the claims made by Title IX opponents of lost male athletic opportunities are grossly overstated, it is true that some institutions have chosen to cut or cap men's opportunities in the so-called non-revenue sports as part of a plan to comply with Title IX, rather than choosing the path to compliance that adds new athletic opportunities for women.⁶⁰ They have made this choice not because Title IX requires it, but to avoid having to squeeze the excess resources out of the most-favored men's sports programs (the so-called revenue producers) needed to fund additional opportunities for women.⁶¹

Such a strategy retains the privileges for the most-favored men's sports while re-valuing remaining segments of the men's sports program as expendable. In the institutional calculation, the newly lost male opportunities were valuable enough to warrant funding under the old (non-equitable) gender system, but the combined value of retaining the least-valued sport opportunities for men and adding new ones for women does not match the greater value of preserving the resources for the most-privileged men's sports. Thus, new

59. See, e.g., *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996) (finding that Brown University was in violation of Title IX's three-part test, but rejecting district court's remedy requiring it to add teams for women on the ground that Brown could comply by cutting men's opportunities as well as by adding opportunities for women).

60. See Steven H. Biondolillo, *Comply Without Cutting*, CHI. TRIB., July 20, 2003, at C9 (arguing that cutting men's sports "has been the unimaginative and expedient solution for scores of male athletic directors... whose myopic interest is in 'protecting' the major male (read: revenue) sports").

61. See WOMEN IN INTERCOLLEGIATE SPORT, *supra* note 31, at 9 (criticizing the practice of cutting men's teams as a method of moving toward gender equity and emphasizing that such a practice is not required by Title IX); see also Liz Clarke, *At Fiesta Bowl, Women Score the First Points*, WASH. POST, Jan. 3, 2003, at A1 (quoting Ohio State President as saying, "We shouldn't pretend that we're cutting back on men's sports because of Title IX. We're not. We're cutting back on men's sports because we have some very expensive men's athletic programs."); Marianne Mears, *Only Sporting to Keep Title IX Strong*, HOUST. CHRON., July 21, 2003, at A18 (noting that colleges have ways to preserve men's wrestling and gymnastic teams by cutting costs of football stadiums, recruiting and coaches' salaries).

women's sports opportunities are not valued enough to warrant the restructuring of athletic programs to make room for them.

This strategy effectively punishes the women who bring equality claims by depriving them of any benefit and making them the scapegoats for the losses of men's teams.⁶² It also jeopardizes the popularity (and survivability) of Title IX itself, as the recent controversy over whether to abandon or substantially weaken the three-part test demonstrates.⁶³ By accepting cuts in men's programs as an adequate remedy for inequality in women's opportunities, the structure that privileges men's sports opportunities is preserved, while Title IX and the women who bring sex equality claims are framed as the villains responsible for victimizing the male athletes who lost their sports.⁶⁴ Although such a strategy hurts the most expendable men's programs in the process, the decision ultimately reinforces the lower valuation of women's sports generally, as not worth the restructuring it would take to add them.

The political and media emphasis on lost male opportunities further reinforces the privileging of male sports and the devaluation of women's sports. The actual losses of particular men's sports opportunities are disproportionate to the amount of attention devoted to this issue, thus reinforcing the differential valuation of male and female athletes.⁶⁵ Far more female athletes have been added to college athletic programs than male athletes have been cut in recent years.⁶⁶ Even focusing exclusively on the men's side of the

62. See, e.g., John Romano, *Title IX: Evil or Equalizer?*, ST. PETERSBURG TIMES (Fla.), May 31, 2002, at 1C (quoting University of Florida associate athletic director as saying that some universities "have chosen to cut some of their men's sports. But it's been disturbing to women that they continually blame Title IX for these cuts, when often times they haven't managed their money very well.").

63. For examples of how Title IX opponents attempt to use claims of lost opportunities for male athletes to undermine Title IX, see JESSICA GAVORA, *TILTING THE PLAYING FIELD: SCHOOLS, SPORTS, SEX, AND TITLE IX* (2003); George F. Will, *A Train Wreck Called Title IX*, NEWSWEEK, May 27, 2002, at 82.

64. As I have argued elsewhere, such a "thin" interpretation of equality that uncritically accepts leveling down as a remedy to discrimination is not a necessary feature in discrimination law. My proposal would carefully scrutinize leveling down responses to make sure that they fully remedy the expressive and relational injuries of discrimination. See Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Leveling Down Problem in Equality Law*, 46 WM. & MARY L. REV. (forthcoming 2004) (on file with author).

65. See Michael Dobie, *Title IX Comes of Age; Or Does It?*, NEWSDAY, June 23, 2002, at C13 ("Despite the astronomical increase in women's participation, there are more men's teams and men's athletes in college overall than there were in 1972 . . .").

66. See *Title IX*, ST. PETERSBURG TIMES (Fla.), July 22, 2003, at 1C (citing CHRON. OF HIGHER EDUC. survey data showing that in 2001-2002, an average of 267 male and 208 female athletes participated in athletics at a Division-I school, compared to an average of 244 male and 143 female athletes in 1995-1996).

equation, more male sports opportunities have been created in NCAA athletic programs in recent years than have been cut.⁶⁷ Yet, by making lost male athletes the focal point, Title IX's opponents force the advocates of women's sports into the defensive posture of having to prove that Title IX has not hurt men's opportunities.⁶⁸ The debate's focus on how Title IX impacts male athletes contributes to a construction of sport that values men's athletic opportunities as more important than women's athletic opportunities, further marginalizing women as athletes.⁶⁹

In the controversy over Title IX's fairness to male athletes, the typical response by Title IX advocates has been to claim that any loss of men's sports opportunities has nothing to do with Title IX, and that it is the product of budgetary and other considerations. This is an accurate statement insofar as it recognizes the reality that Title IX never forces an institution to cut men's sports because it may always choose to comply by adding sports for women.⁷⁰ Yet, there is a sense in which the choice to cut spaces for some male athletes, rather than to add more sports for women, is very much about Title IX and the grudging attitude toward sex equality that it represents.⁷¹ It reflects the determination that opportunities that had been worth providing

67. See Suggs, *supra* note 9 (reporting that since 1996-1997, only thirty-eight colleges reported dropping more than ten percent of their male athletes, while 165 reported adding more than ten percent).

68. See Maryann Hudson Harvey, *Title IX Returns to Courthouse*, L.A. TIMES, Sept. 19, 2002, at D3 (stating that "women's groups that oppose reform, such as the Women's Sports Foundation and the National Women's Law Center . . . contend it is the schools' choice to comply by dropping teams"); see also Dobie, *supra* note 65, at C13 (describing Title IX supporters as claiming that "if Title IX did produce some unintended consequences for men, that was the result of choices made by college athletic directors, and not [Title IX] itself").

69. See Welch Suggs, *Federal Commission Discusses Possible Changes in Title IX Enforcement*, CHRON. OF HIGHER EDUC., Aug. 29, 2002, at <http://chronicle.com/prm/daily/2002/08/2002082801n.htm>.

70. The Department of Education reaffirmed this most recently in a letter from the Assistant Secretary of Education explaining the Department's decision not to revise Title IX in light of the recommendations from the Secretary's Commission on Opportunities in Athletics. See Letter from Gerald Reynolds, *supra* note 4 ("[N]othing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX . . .").

71. The Minority Report filed in response to the report of the Secretary's Commission on Opportunity in Athletics recognizes as much, stating:

Numerous civil rights laws apply the principle of "equalizing up" in authorizing remedies for discrimination—that is, raising opportunities for the disadvantaged group, rather than diminishing them for the previously benefited group, as a means of achieving civil rights compliance. In providing technical assistance, the Department should advise schools of this principle, as well as providing information on techniques other schools have used to achieve this goal.

MINORITY REPORT, *supra* note 3, at 11.

to men are not worth the added resources, or the restructuring of existing ones, that would be necessary to provide them to women. This determination, when made in response to claims for gender equality or concerns about Title IX compliance, goes to the heart of Title IX.⁷² A richer and more substantive understanding of equality would set limits on when lowering the treatment of the most-favored class, instead of improving the treatment of those hurt by inequality, suffices to cure the inequality at issue. Title IX, and discrimination law more generally, should take a critical stance toward leveling down remedies to ensure that they do not exacerbate the expressive harms and social status injuries from the very discrimination challenged.⁷³ The law's too-ready acceptance of such "leveling down" responses to discrimination perpetuates a formalistic conception of equality that risks undercutting the very values that discrimination law should protect.

IV. FEEDING THE SPORTS MACHINE: THE ROLE OF MONEY IN JUSTIFYING SEX DISCRIMINATION IN SPORTS

Despite Title IX's success in opening up new opportunities for female athletes, the extreme privileging of the most-valued men's sports has been entirely resistant to demands for gender equality. Title IX has failed to make inroads in restructuring sport to provide opportunities on an equal and sustainable basis for men and women, and that failure jeopardizes the prospects for further progress. Institutional strategies of cutting back men's "minor" sports rather than adding new sports for women are fueled by a determination to preserve the privileged status of the most sacred men's sports, which continue to receive ever-increasing influxes of cash.⁷⁴ The resulting cash-crunch for women's sports and the remaining men's sports are dismissed as necessary capitulations to the market and the money-

72. The Department itself came close to acknowledging this tension with Title IX, stating: "Because the elimination of teams diminishes opportunities for students who are interested in participating in athletics instead of enhancing opportunities for students who have suffered from discrimination, it is contrary to the spirit of Title IX for the government to require or encourage an institution to eliminate athletic teams." Letter from Gerald Reynolds, *supra* note 4. Yet, the Department has not gone so far as to impose Title IX-based legal limits on the practice of leveling down men's opportunities in order to achieve gender balance in athletic programs, stating merely "that the elimination of teams is a disfavored practice." *Id.*

73. I develop this theory, and an argument for setting greater limits on leveling down remedies under equality law, more fully elsewhere. See Brake, *supra* note 64.

74. See Suggs, *supra* note 9, at A31 (reporting that the average athletics budget for institutions in the six elite bowl championship series leagues increased from fourteen million to thirty-four million from 1996-97 to 2001-02).

making potential of football and men's basketball.⁷⁵ Insofar as Title IX threatens this status quo by pressuring institutions to find the resources necessary to add women's sports, proponents of the status quo respond that they cannot afford to shift expenditures away from men's "revenue sports." This claim amounts to an assertion that the costs of gender equality justify abandoning, or at least cutting back on, Title IX's project of securing equality for girls and women in sports. This is the central issue today in debates about Title IX's application to sports, and it is an issue that deserves further consideration.

The standard response from Title IX supporters has been to contest the revenue-generation argument on its facts, questioning whether the economies of athletic programs really justify excess expenditures on men's most-privileged sports. Title IX advocates contend that the profitability of these programs is vastly overstated,⁷⁶ and that net profits, such as they are, would not suffer from cutbacks on extravagantly excess expenditures.⁷⁷ These arguments have a good deal of merit. The profit margins of the big-time sports programs are notoriously inflated by creative accounting procedures,⁷⁸ and even though some of these programs do bring in significant amounts of revenue,⁷⁹ the profits do not necessarily require the profligate expenditures lavished on these programs.⁸⁰ Many of these expenditures could be reduced without jeopardizing the potential for

75. See *id.* at A30 (citing most recent data showing that "rising costs threaten both the progress of women's sports and the future of men's sports that don't make any money"); see also Dobie, *supra* note 65, at C13 ("Generally, colleges are loath to make any cutbacks in football because of the long-held belief that football revenues fund the rest of the athletic program, including all those non-revenue producing women's and men's minor sports.").

76. Dobie, *supra* note 65, at C14, C16 (stating that in the NCAA, "58% of Division I-A and I-AA football programs lose money, with average annual deficits of \$1 million in I-A and \$630,000 in I-AA" and noting that while some Title IX advocates want to reduce the number of football scholarships from eighty-five to seventy, college football coaches argue, as they did when football was forced to cut back from more than 100 scholarships, that such cutbacks would ruin the game).

77. See *id.* at C14, C16 (stating that Nebraska sacrificed expenditures on swimming and gymnastics, while putting in heating coils under the grass in the football stadium, and other institutions are known for housing players in hotels during nights before home games).

78. See Suggs, *supra* note 9, at A31 (noting that some athletics departments "count scholarships as revenue if the college itself allocates money to cover the expense").

79. See *id.* (finding that Division I-A members outside the BCS reported spending deficits on sports while those inside the BCS reported an average profit of three million dollars, while Divisions I-AA and I-AAA reported losing, on average, over half a million dollars).

80. See Mark Pitsch, *Todd Says He's Shifting Course of UK Athletics*, COURIER-J. (Louisville, Ky), Jan. 26, 2003, at C1 (stating that at the University of Kentucky, athletic department employees were provided with cars for their jobs and the athletic director earned more than the President of the University).

these programs to produce revenue, especially if universities worked together to collectively reduce costs so as to avoid risking competitive or recruiting disadvantages relative to other schools.⁸¹

But wholly apart from its factual shortcomings, the revenue-defense taps into deep-seated cultural understandings about sport and gender that should be engaged in their own right. In the debate over Title IX, claims about lost male athletes converge with cost-based justifications for maintaining a status quo structure that leaves little room for further expansion of women's sports. The claim boils down to the contention that, because men's sports are more profitable, Title IX should not be interpreted in a way that hinders the marketability and profit-making potential of these sports. To the extent that the market-based defense is accepted in this context, it raises questions about what kinds of markets justify discrimination and what costs institutions should have to bear in remedying discrimination. A more general look at the role of cost in justifying discrimination will help illuminate the relevance of cost-based arguments under Title IX.

A. Essentializing Inequality in the Body: The Convergence of the Market Defense and Covert Assessments of a Natural Gender Order

Judicial rhetoric broadly repudiates cost-based considerations as a legitimate defense to sex discrimination.⁸² Early questions about the role of cost in discrimination law arose most prominently in a series of cases brought under Title VII in which employers admitted discrimination, but defended it as a necessary accommodation of discriminatory customer preferences. The customer-preference defense is essentially a cost-based justification, premised on the employer's fear of losing market-share if it disappoints customer expectations. In a critical test of the law's transformative potential, courts resoundingly rejected the customer-preference defense in challenges to airline practices hiring female-only flight attendants.⁸³

81. See *id.* (stating that only forty-eight of the 997 NCAA programs generate a profit, and quoting a men's gymnastics coach whose program was cut as saying that there is an "athletic arms race" where each school tries to be the best nationally).

82. See, e.g., *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 210 (1991) ("The extra cost of employing members of one sex . . . does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender."); *City of Los Angeles v. Manhart*, 435 U.S. 702, 716-18 (1978) (rejecting cost as a defense to discrimination under Title VII); *Guardian Capital Corp. v. New York State Div. of Human Rights*, 360 N.Y.S.2d 937, 938-39 (N.Y. App. Div. 1974), *appeal dismissed*, 396 N.Y.S.2d 1027 (N.Y. 1975) (holding that a restaurant could not replace male waiters with scantily clad female waitresses, even if doing so increased its profit margins).

83. See, e.g., *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981) (rejecting oil company's defense to a Title VII sex discrimination claim that Latin American clients would refuse to deal with female executives); see also *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (holding that customer

These cases produced broad pronouncements that the cost of compliance is not a defense to a discrimination claim,⁸⁴ and noted the circularity of relying on customer preference to justify discrimination when the very discrimination challenged had contributed to the construction of customers' discriminatory preferences.⁸⁵

Yet, judicial rhetoric notwithstanding, discrimination law allows for greater deference to cost-based considerations than such pronouncements suggest. The determination of whether to place the costs of nondiscrimination on employers depends not so much on the extent of the costs themselves, but on situational factors affecting the type of discrimination at issue and covert judicial attitudes about the legitimacy of a market preference for discrimination. The determination of whether to impose the costs of nondiscrimination on employers turns largely on the extent to which courts believe that the discrimination at issue corresponds to differences in male and female bodies. When courts believe that the gendered body is the source of the inequality at issue, they do not place the full burdens of nondiscrimination on employers, implicitly viewing the discrimination as "natural" and legitimate as opposed to socially constructed and suspect.

For example, courts tend to defer to employer accommodation of privacy-based preferences for employees of one sex in jobs that involve intimate bodily touching or exposure. Although the Supreme Court has never ruled on the legitimacy of privacy-based justifications for sex discrimination under Title VII, lower courts typically permit employers to discriminate on the basis of sex in jobs which involve the touching or viewing of intimate body parts.⁸⁶ For example, courts are more likely to accommodate discriminatory preferences for employees of the same sex in jobs such as caretakers for nursing home patients or restroom attendants than in jobs that do not involve such

preference does not validate sex discrimination because the flight attendants' services are not the primary function of the airline services as a whole); *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 295, 302 (N.D. Tex. 1981) (rejecting airline's claim that its sex based hiring policy was necessary to run a successful business).

84. See *Wilson*, 517 F. Supp. at 302 ("If an employer could justify employment discrimination merely on the grounds that it is necessary to make a profit, Title VII would be nullified in short order.").

85. See *id.* at 303 ("Southwest exploited, indeed nurtured, the very customer preference for females it now cites to justify discrimination against males . . .").

86. See *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 206 n.4 (1991) (acknowledging that it has never addressed privacy-based justifications in sex discrimination claims, and noting that nothing in its present opinion calls into question lower court decisions accepting sex-based privacy concerns as a bona fide occupational qualification for jobs that implicate privacy interests).

bodily exposure or intimacy.⁸⁷ In the former set of cases, courts make the implicit judgment that discriminatory preferences for workers of one sex are appropriate and worthy of deference.⁸⁸

In articulating what I believe to be implicit judgments about the naturalness of discriminatory market preferences, I do not mean to lend legitimacy to the idea that such preferences are natural and unconstructed. Although courts may accept as natural a preference for workers of the same sex in jobs requiring intimate bodily exposure, such a preference is in fact socially constructed and culturally contingent. It is predicated on a heterosexual presumption and a sexual norm favoring modesty, which together dictate that the body should not be exposed to persons of the other sex. Intimate bodily contact and exposure among persons of the same sex, on the other hand, is presumed to be nonsexual and unlikely to induce attraction. Even if the market preference for employees of one sex responds to feelings of shame and vulnerability, rather than the potential for attraction, it still rests on a heterosexual norm, reflecting the assumption that feelings of vulnerability or inadequacy in one's body matter less when the body is exposed to persons of the same sex. By treating discriminatory preferences in such cases as natural and worthy of deference, courts relieve employers of the burden of defying cultural norms, as if expecting employers to bear the costs of transforming such preferences would be tantamount to expecting them to transform male and female bodies themselves.

Judicial accommodation of discriminatory market preferences is not confined to cases raising privacy-based objections. In other cases, where courts attribute sex discrimination to differences in male and female bodies, they are also more receptive to cost-based justifications. For example, the Supreme Court's notorious first attempt to grapple with the bona fide occupational qualification defense in a sex discrimination case, *Dothard v. Rawlinson*, upheld Alabama's

87. See, e.g., *id.* at 219 n.8 (White, J., concurring in part and concurring in the judgment) (citing lower court cases accepting privacy-based customer preferences as a bona fide occupational qualification in job settings such as a nurse's aid and a washroom attendant); *Local 567 Am. Fed'n of State, County, & Mun. Employees v. Mich. Council 25*, 635 F. Supp. 1010, 1012 (E.D. Mich. 1986) (stating that "it is clear that in certain situations privacy rights of individuals will justify sex-based classifications. These cases seem to involve occupations in which an employee must work with or around individuals whose bodies are exposed in varying degrees," and citing cases).

88. See, e.g., *Local 567*, 635 F. Supp. at 1013-14 ("Obviously most people would find it a greater intrusion of their dignity and privacy to have their naked bodies viewed (or any number of personal services performed) by a member of the opposite sex."); *Spragg v. Shore Care*, 679 A.2d 685, 694 (N.J. Super. Ct. App. Div. 1996) (justifying sex-based discrimination for employees working in an environment involving the bodily exposure of their clientele).

exclusion of women from a maximum-security men's prison even though greater expenditures would have enabled the prison system to operate safely with women as guards.⁸⁹ The Court accepted Alabama's argument that the exclusion of women from all contact positions working with maximum security male inmates was justified by the risk of sexual assault to women guards, asserting that the female plaintiff's "very womanhood" prevented her from adequately performing the job of securing prison safety.⁹⁰ The Court thus viewed the discrimination as biologically, rather than socially determined. The Court relied on the unique conditions of the Alabama maximum security facility, which failed to seclude or classify inmates on the basis of dangerousness and type of offense, and operated under conditions of severe overcrowding in violation of the Eighth Amendment.⁹¹ Uncontradicted evidence showed that other state prison systems that followed general safety standards were able to effectively use women as guards in maximum security facilities.⁹² However, by locating the inequality in the female body and the rape-ability of women, the Court was able to obscure the institutional and cultural forces that placed women – and men – at risk of danger, and thereby naturalize the job discrimination in question.⁹³ Although the state could have taken professionally accepted (and constitutionally required) measures to lower the level of dangerousness in its facility, the Court did not require the state to bear the cost of such measures.⁹⁴

The *Dothard* decision has been justly and resoundingly criticized for ignoring the obvious fact that men are also susceptible to rape in prison and that other prison systems have managed to successfully use women as guards in maximum-security male prisons.⁹⁵ I share these criticisms, and view the Court's central error as locating the inequality in women's bodies, which enabled it to ignore the extent to which the danger to women (and men) was socially and institutionally created. Having focused on the body as central to the job, and the difference in male and female bodies as central to the inequality, the Court was

89. 433 U.S. 321, 336-37 (1977).

90. *Id.* at 335.

91. *Id.* at 334-35.

92. *See id.* at 336 n.23 (recognizing that the conditions in Alabama's penitentiaries are not common and cannot be compared to those prisons safe enough for female guards).

93. *See id.* at 336 (finding that the gender of the prison guard has a direct impact on the safety of a penitentiary with existing poor conditions).

94. *Id.* at 334-35.

95. *See, e.g.,* Christine A. Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043, 1048-51 (1987) (discussing feminist criticisms of *Dothard*).

primed to accept the employer's decision to exclude women as natural, and did not require the defendant to bear the costs of integrating women into its workforce.

Another example of a case where judicial acceptance of sex discrimination is driven by perceptions of the female body is *Chambers v. Omaha Girls' Club, Inc.*⁹⁶ In *Chambers*, the employer was an organization dedicated to providing role models for young, adolescent women.⁹⁷ When an unmarried female employee became pregnant, the employer determined that she could no longer serve as an adequate role model for young women. Although the Pregnancy Discrimination Act defines discrimination on the basis of sex to include pregnancy, the court accepted the employer's defense, finding that the unmarried pregnant employee could not perform her job because her pregnancy undermined her ability to serve as a role model.⁹⁸ As in *Dothard*, the source of the inequality was grounded in the female body, this time, the pregnant female body. The discrimination was viewed as corresponding to the natural meaning of the pregnant body, a meaning indicative of licentiousness and promiscuity, and incompatible with positive values. The court treated the meaning of the pregnant body and its capacity to mentor young women as fixed, without questioning the cultural and institutional practices that assigned it that meaning. Having grounded job performance in the body, the court was not inclined to require the defendant to undertake efforts toward cultural transformation that might challenge the social meaning of pregnancy and enable an unmarried pregnant woman to serve as a positive role model.

Sometimes covert assessments of the naturalness of discrimination occur at the level of denying that discrimination exists, rather than evaluating customer- or client-based defenses to the discrimination. For example, judicial acceptance of employer sex-based dress codes and appearance standards stands out as an exception to the general rule that sex-based different treatment is invalid unless justified by a bona fide occupational qualification.⁹⁹ Title VII challenges to sex-based dress codes and standards of appearance rarely succeed, as long as the dress and grooming standards conform to community norms

96. 834 F.2d 697, 703-04 (8th Cir. 1987).

97. See *id.* at 699 (maintaining that the purpose of the role model approach was for the girls to emulate the role models' behavior and actions).

98. *Id.* at 702-03.

99. See, e.g., *Kelley v. Johnson*, 425 U.S. 238, 248-49 (1976) (upholding hair-grooming standards as applicable to male members of the police force).

and professional expectations, however gendered.¹⁰⁰ Generally, discrimination against individuals on the basis of sex is cognizable as discrimination, even if symmetrical constraints may be placed on persons of the other sex.¹⁰¹ However, in the dress code cases, courts typically refuse to see the “discrimination” at all, as long as both men and women are prohibited from “crossing over” to the gender presentation deemed suitable for the other sex. These cases reflect an implicit judgment that employers should not be forced to bear the costs of challenging certain cultural expectations about gender.

The dress code cases, much like *Dothard*, *Chambers*, and the privacy cases, reflect an underlying, unarticulated judgment that the body is central to the employment practice in question, and that the different treatment corresponds to differences in male and female bodies. Together, when read in context with the courts’ general rejection of customer preference as a defense to discrimination, these cases reflect an implicit determination about when employers should have to bear the costs of nondiscrimination and when they should not. The dividing line turns on implicit judgments about the “naturalness” of the gendered order confronted by discrimination law. The willingness of courts to place such costs on airlines that capitulate to cultural preferences for sexy and nurturing female flight attendants is juxtaposed with a reluctance to place such costs on employers who conform to gendered expectations for appearance. The difference in the two contexts reflects an implicit judgment that the preference in the former type of case is constructed, undeserving of accommodation, while the preference in the latter situation is natural and grounded in the body.

It is not that the body does not exist in cases like the airline litigation rejecting the market-based justification, but that courts see the interjection of sex difference stemming from the body as extrinsic to the flight attendant’s job.¹⁰² Having inserted the sexualized female body in a setting where it does not belong, the employer must bear the costs of cultural transformation in defying the customer

100. See, e.g., *Wislocki-Goin v. Mears*, 831 F.2d 1374, 1380 (7th Cir. 1987); *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175 (3d Cir. 1985); *Willingham v. Macon Pub’g Co.*, 507 F.2d 1084 (5th Cir. 1975).

101. See, e.g., *Manhart*, 435 U.S. at 708 (judging discrimination at the level of the individual, without regard to absence of disparate burden on women as a group); *Connecticut v. Teal*, 457 U.S. 440, 451 (1982) (rejecting employer’s argument that the bottomline treatment of African Americans as a group effectively countered any discriminatory impact of the employer’s test on African American individuals).

102. See *Wilson*, 517 F. Supp. at 302 (explaining that “being female is not a qualification required to perform successfully the jobs of flight attendant and ticket agent”).

preference for a female-gendered body. The customer preference in that case strikes courts as prejudicial, not natural. In part, this reflects a covert determination to keep the gendered or sexualized body out of work settings where it does not belong.¹⁰³ In workplaces that are already highly sexualized, in which sex is the commodity sold, the body's presence is undeniable and customer preferences for the sexualized female body is a legitimate discrimination against male employees.¹⁰⁴

While courts do not explain their decisions in terms of the perceived naturalness of the existing gender order (although *Dothard* comes close), judicial determinations about when to saddle defendants with the costs of nondiscrimination often correspond to conventional and deeply held notions of "real differences" grounded in male and female bodies. Broad judicial statements dismissing cost-based justifications must be read in light of those cases in which courts shy away from placing the costs of nondiscrimination on defendant institutions. Courts typically accede to market preferences for discrimination in cases where the body is perceived as central to the job and the source of the inequality.¹⁰⁵ In such settings, the acquiescence in discriminatory market preferences reflects the judgment that, although discrimination law generally requires defendants to bear the costs of nondiscrimination, it does not require them to defy fundamental differences in male and female bodies and how people respond to them.

B. The Role of the Market in Justifying Sex Discrimination in Sports

Returning to the use of market justifications for the status quo in sports, I believe that a similar kind of covert assessment about the naturalness of sex inequality in sports is at work in this setting. In the late nineteenth and even early- to mid-twentieth centuries, justifications for the exclusion of women from sports were expressly

103. See Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147, 196 (2004) (discussing and defending the distinction in Title VII case law between employers who operate a highly sexualized workplace where sex is the commodity sold and are permitted to use sex as a bona fide occupational qualification ("BFOQ"), from employers seeking to insert sex appeal into the non-sexual product or service sold, who typically are prohibited from using sex as a BFOQ).

104. See, e.g., *Guardian Capital Corp. v. New York State Div. of Human Rights*, 360 N.Y.S.2d 937, 939-40 (N.Y. App. Div. 1974) (Reynolds, J., concurring), *appeal dismissed*, 369 N.Y.S.2d 1027 (N.Y. 1975) (citing and discussing a case upholding sex as a BFOQ in the highly sexualized job of a Playboy Bunny).

105. *But see Wilson*, 517 F. Supp. at 301 (stating that sex-linked aspects of a job must predominate over sex-neutral aspects in order for an employer to discriminate based on gender as a BFOQ).

grounded in the female body and fears that participation in sports would interfere with female reproductive functions.¹⁰⁶ Today, explicit reference to the distinctiveness of female bodies as a rationale for inequalities in providing sport opportunities to women is no longer generally accepted. As more and more girls and women have participated in sports, it has become implausible to perceive women's bodies as incompatible with sports. However, implicit judgments about differences in male and female athletic bodies continue to shape arguments and justifications for continued inequality in sports opportunities.

Title IX takes an ambivalent stance with respect to the role of cost in a discrimination analysis. On the one hand, cost has not succeeded as a defense to discrimination claims under the three-part test for measuring participation opportunities.¹⁰⁷ However, in applying that test, courts have permitted institutions to cut minor men's sports as a means of compliance, rather than requiring the reshaping of athletic programs to retain existing programs at a sustainable level of funding while adding new opportunities for women.¹⁰⁸ The typical justification proffered by an institution for refusing to expand opportunities for women as the chosen method for Title IX compliance is cost—that the institution can not afford to reallocate resources away from its richest men's teams.

Title IX law intersects with cost-based justifications of inequality at another level as well. Although courts interpreting Title IX have steadfastly proclaimed that cost is not a defense to discrimination, in some respects, the very selection of the three-part test as the measure of discrimination represents a capitulation to cost-based concerns. When the three-part test was established in 1979 as the measure for equal opportunity to participate in sports, it was chosen over other possible measures of equality.¹⁰⁹ One alternative conception of

106. See CHRISTINE LUNARDINI, WHAT EVERY AMERICAN SHOULD KNOW ABOUT WOMEN'S HISTORY: 200 EVENTS THAT SHAPED OUR DESTINY 328 (1997) (describing late-nineteenth and early-twentieth century prohibitions on female athleticism, based on beliefs that women were inherently fragile and that physical activity was detrimental to their health).

107. See, e.g., *Roberts v. Colorado State Univ.*, 814 F. Supp. 1507, 1518 (D. Colo. 1993) (determining that defendants violated Title IX by eliminating the women's softball team to reduce the athletic department's costs), *aff'd*, 998 F.2d 824 (10th Cir. 1993); *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 580, 583 (W.D. Pa. 1993) (concluding that the University could not cut women's athletic teams even during a budget crisis); *Cook v. Colgate Univ.*, 802 F. Supp. 737, 750-58 (N.D.N.Y. 1992) (holding that the University could not reject the women's ice hockey team's application for varsity status on the basis of financial concerns); *Haffer v. Temple Univ.*, 678 F. Supp. 517, 530 (E.D. Pa. 1987).

108. See, e.g., *Cohen v. Brown Univ.*, 991 F.2d 888, 898-99 n.15 (1st Cir. 1993).

109. See, e.g., Title IX of the Education Amendments of 1972; A Policy

equality might have allocated equal amounts of money to men's and women's sports programs and permitted male and female students to use the money to purchase the kinds of sports that best fit their interests. In many respects, such a simple measure of equality would make more sense than the current three-part test, which measures opportunity based on actual participation and assumes, under prong three, that interest and ability to play varsity sports comes from the existing student body, rather than through recruitment. However, equal funding for men's and women's sports was not chosen as a measure of equality, on either a per capita or absolute basis, because of the expectation that certain men's sports would cost more than women's sports.¹¹⁰ Title IX's failure to require equal resources to be spent on men's and women's sports is itself a capitulation to costs based on a customer preference rationale.

Finally, market considerations may shape the ultimate resolution of the ongoing controversy over how Title IX should define discrimination in sports. To a large extent, the attack on the three-part test rests on the premise that universities should not be required to cut back expenses for their most profitable men's sports in order to add sports for women, and that the only option left, cutting back on men's minor sports, is also unpalatable. Thus, market considerations may affect how discrimination itself is conceptualized in this area. As with the dress code cases, beliefs about the naturalness of sex difference are likely to play a role here as well. For example, in a recent essay, Professor Gary Roberts argues for balancing gender equality, economics, and the interests of elite student athletes aspiring to professional sports careers in framing an equitable solution to the Title IX controversy.¹¹¹ He recommends a set of proposals that would, inter alia, set some constraints on expenditures by institutions while at the same time accommodating, to some extent, the financial realities of institutions seeking to maximize football and men's basketball revenues. His willingness to make some accommodation

Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,420 (Dec. 11, 1979) (explaining the agency's decision to reject a previously proposed average per capita expenditures test in response to opposition in the notice and comment period). The agency apparently did not seriously consider proposing an average per capita expenditures test that used enrollment, as opposed to sports participation, as a benchmark for measuring expenditures. *Id.*

110. See *id.* at 71421 (recognizing "characteristics common to most revenue producing sports that could result in legitimate non-discriminatory differences in per capita expenditures," and noting, for example, that "some 'revenue producing' sports require expensive protective equipment and most require high expenditures for the management of events attended by large numbers of people").

111. See Gary R. Roberts, *Evaluating Gender Equity Within the Framework of Intercollegiate Athletics' Conflicting Value Systems*, 77 TULANE L. REV. 997 (2003).

for the business aspects of sports appears integrally related to his ambivalence about whether disparities in opportunities in this area really amount to “discrimination.” He cites the unique context of sports, and its allowance for sex-separation, as casting doubt on the applicability of traditional concepts of “discrimination.” His view about the limits of “discrimination” is shaped by an understanding of the naturalness of gender difference in sports, and he reads Title IX’s accommodation of sex difference through the separation of sports programs as affirming this understanding.¹¹² By locating male and female bodies as the source of remaining inequality in sports, this account leaves the concept of discrimination itself suspect as applied to women in sports, leaving more room for cost-based considerations to play a role.¹¹³

Although conventional notions of difference in male and female bodies are no longer used to justify the exclusion of women from sports entirely, they still form the subtext for the law’s receptivity to market preferences as a justification for the status quo. The revenue rationale for retaining the status quo in sports draws on deeply ingrained beliefs about differences in men’s and women’s bodies. It assumes that the preference for watching men’s sports is natural, rather than socially or institutionally constructed. Such implicit judgments are apparent, for example, in discussions about whether women’s basketball will ever draw the kinds of crowds that now flock to the men’s games. Those who answer in the negative often cite men’s greater speed and height, which facilitate dunking, thus grounding the difference in spectatorship in the differences in male and female bodies. When Title IX’s critics raise the revenue argument, they remind women that their sports make less money and that while women may play sports, they don’t play them the way men

112. See *id.* at 1016 n.4 (noting a “complication to the concept of equal opportunity” in sports in that “[i]t is only in the context of gender in athletics that modern society accepts the principle of ‘separate but equal,’” and concluding “that there is something very different about men and women when it comes to sports that requires that we not use simple slogans or notions of ‘equality’ in considering the gender-equity issue”).

113. Although Professor Roberts is correct that Title IX’s approach to discrimination in athletics does not fit easily within the law’s typical formal equality or liberal framework, he does not consider other theoretical approaches that better support Title IX’s definition of discrimination. See Brake, *supra* note 4, at 47-50 (using feminist theory to explain and defend the three-part test as a tool for challenging institutional structures and cultures that construct male and female sports interests); see also Kimberly A. Yuracko, *One for You and One for Me: Is Title IX’s Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731 (2003) (defending Title IX’s three-part test under a “tool-giving” distributional model of equality and a model of equality that promotes widely shared perfectionist values).

do or generate the same return for them. The appeal to money in this way taps into lingering beliefs about natural differences between male and female bodies and how those differences define their participation in sports. In such discussions, the extent to which spectatorship has been shaped and constrained by societal expectations and institutional investments is obscured.

In fact, nothing about sports as played in today's educational institutions is "natural"—not even what counts as a "sport." The popularity and revenue-producing potential of a sport is certainly not natural; it is carefully promoted and nurtured by the machinery of college (and professional) athletics. It is a product of countless social and institutional factors, including longstanding and continuing investments in facilities, personnel, programs, recruiting, marketing, and coaching, just to name a few. These investments contribute to a certain image and status of a sport that greatly affect its marketability. The existence of average differences in male and female bodies in height and upper body strength does not "naturally" translate into inequality in markets and spectatorship.¹¹⁴ In a different sports culture, shaped by different institutional practices, for example, women's basketball, with its emphasis on passing, teamwork, and communication might be more highly valued and watched than a dunking match between superstars. To the extent that appeals to market justifications succeed in this context, they do so because they tap into deeply held and little-examined beliefs that locate sex inequality in sports in male and female bodies.

It is not yet clear whether discrimination law will require institutions to participate in the cultural reconstruction of gender norms in sports, in the same way that it has required the airlines to do in refusing to accommodate discriminatory preferences for female flight attendants, or whether it will shirk from placing the full costs of nondiscrimination on these institutions. To the extent that cost-based considerations have succeeded in legitimating the status quo in sports, it is because they still resonate with cultural beliefs about the natural inequality of male and female bodies in sports. Courts tend to equivocate in placing the costs of nondiscrimination on defendants in settings where the body is situated as a prominent site of struggle. Although courts no longer justify discrimination against women in terms of "nature herself" and the "functions of womanhood,"¹¹⁵ there

114. See generally COLETTE DOWLING, *THE FRAILTY MYTH* (2000) (arguing that even average differences in athletic performance are attributed to culture and not biology).

115. See *Bradwell v. Illinois*, 83 U.S. 130 (1872).

is still a tendency to essentialize sex inequality in the body, obscuring its societal and institutional origins.

CONCLUSION

With seemingly endless attacks on Title IX's three-part test in recent years, supporters of Title IX have been consumed by efforts to defend and celebrate the gains in women's sports participation that Title IX has enabled. There has been little attention by legal scholars to the ways in which Title IX's legacy has fallen short of its feminist promise. This article begins to fill this gap. Further developments in Title IX law along the lines discussed here will require changes in the culture and society in which girls and women play sports. Shifting cultural understandings of gender and sports already have played a key role in fending off the recent challenge to Title IX posed by the Secretary's Commission on Athletics.¹¹⁶ But while mainstream culture now accepts girls and women as athletes, it does not yet accept them as equally valuable players and participants. The social constructionist understanding of sex inequality in sports has not yet infiltrated to the level necessary to challenge the deepest structures of bias in sports.

116. See Letter from Gerald Reynolds, *supra* note 4 (stating that "[a]fter eight months of discussion and an extensive and inclusive fact-finding process, the Commission found very broad support throughout the country for the goals and spirit of Title IX").