

Forced to Punt: How the Bowl Championship Series and the Intercollegiate Arms Race Negatively Impact the Policy Objectives of Title IX

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INTRODUCTION

In a time when most Division I-A women's sports fail to breakeven financially,¹ the locker room of the Lady Razorbacks women's basketball team at the University of Arkansas at Fayetteville reflects anything but a struggling program.² The oversized, black leather sofas and bubbling hot tub³ represent an athletics program that exemplifies the intent of Title IX to provide equal athletic opportunities—including the provision of equipment, supplies, and competitive facilities—to members of both sexes.⁴ Down the road, however, Arkansas State University in Jonesboro has been unable to adequately support women's sports and was forced to add a women's soccer team in 2000 after being cited by the National College Athletics Association ("NCAA") for failing to provide equality of athletic opportunity as required by Title IX: the proportion of female athletes at the university (33%) was substantially smaller than the proportion of female undergraduates (56%).⁵ The difference between these two Division I institutions: as a member of the Southeastern Conference ("SEC"), Arkansas benefits from an arrangement that ensures that every year the SEC football champion is guaranteed one of the eight slots in the lucrative Bowl Championship Series ("BCS"). Meanwhile, Arkansas State's football team, a member of the Sun Belt Conference—which is not guaranteed a berth in the BCS—loses millions of dollars annually.⁶

For the University of Arkansas at Fayetteville, supporting women's athletics is not a problem.⁷ The SEC's guaranteed spot in the BCS ensures that Arkansas will benefit

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1. See generally Daniel L. Fulks, *Revenues and Expenses, Profits and Losses of Division I-A Intercollegiate Athletic Programs Aggregated by Conference—2003 Fiscal Year*, at 29 tbl.3.1, at http://www.ncaa.org/library/research/i_ii_rev_exp/2003/2003D1aConfReport.pdf (highlighting net losses for women's athletic programs in every Division I-A conference) (last visited Feb. 4, 2005).

2. Welch Suggs, *Uneven Progress for Women's Sports*, CHRON. OF HIGHER EDUC., April 7, 2000, at A52.

3. *Id.*

4. See MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 586 (4th ed. 2002).

5. Suggs, *supra* note 2, at A52.

6. See *id.*

7. *Id.*

from the nearly \$18 million yearly payout⁸ to the dozen SEC schools. Meanwhile, the Sun Belt is guaranteed a payout of only \$720,000⁹ to be spread among its nine member schools. All told, this lucrative BCS is scheduled to pay out over \$93 million to the member schools in 2004–05, with the overwhelming share going to conferences that are guaranteed to participate in one of the four BCS Bowl Games (“BCS Bowl guaranteed”).¹⁰

Since women’s intercollegiate athletic programs “depend to a large extent on football revenues for their support,”¹¹ any discrepancy in amount of revenues collected carries over to women’s sports. Evidence shows that Division I-A football programs that are members of BCS Bowl guaranteed conferences have money to distribute to women’s athletic programs.¹² Furthermore, schools that are part of a BCS Bowl guaranteed conference have substantial means to build athletic facilities, hire coaches, and recruit athletes for both their men’s and women’s programs. However, institutions without the increased BCS funds have a much more difficult time meeting their Title IX obligations. In most cases, schools in conferences that are not guaranteed a position in one of the BCS bowl games (“BCS non-guaranteed”) lose an average of \$1 million on their football programs on a yearly basis.¹³ The end result is that schools without these advantages are much more likely to fail the “effective accommodation test” of Title IX set forth in Title IX’s 1979 Policy Interpretation.¹⁴

Unfortunately, this problem does not lend itself easily to a legal solution. For one, the BCS does not currently violate any provision of Title IX or its subsequent interpretations. As previously mentioned, the only policy implication is that the distinction between BCS Bowl guaranteed and non-guaranteed conferences makes it harder for BCS non-guaranteed conferences to meet their Title IX obligations. This Note concedes that ensuring athletic opportunity for female athletes between BCS bowl guaranteed and non-guaranteed conferences is beyond the rule of law.

However, that does not mean that this argument is without its merits. Currently, there is an ongoing and active debate about the escalating “arms race” in intercollegiate athletics and the increasing difficulty of maintaining a top-notch athletics program in the face of spiraling athletics costs. The BCS series, for one, has been greatly scrutinized.¹⁵ However, curiously absent from this debate is the effect that such an arms

8. Bowl Championship Series, *2005 BCS Revenue Distribution*, at <http://www.bcsfootball.org/index.cfm?page=revenue> (last visited Jan. 10, 2005).

9. *Id.*

10. *Id.*

11. *On the Issue of Fundamental Fairness and the Bowl Championship Series (BCS): Hearing before the House Judiciary Committee*, 108th Cong. 29 (2003) (statement of Steve Young, former college and professional football player) [hereinafter Young].

12. *See infra* Part II.B.

13. *See* Young, *supra* note 11.

14. Title IX of the Education Amendments of 1972: A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,413, 71,415 (Dec. 11, 1979) (codified at 34 C.F.R. § 106.37(c) (1993)).

15. *See, e.g.*, John Sandbrook, *Division I-A Postseason Football History and Status: Executive Summary*, The Knight Foundation (June 2004), available at http://www.knightfdn.org/default.asp?story=athletics/reports/2004_sandbrook/execsummary.html (last visited Jan. 17, 2005).

race has on the implicit policy goals of Title IX. Therefore, this Note seeks to encourage further debate on this topic. Specifically, this Note argues that the current BCS, as an inseparable part of the arms race, is directly at odds with the spirit of Title IX of the Education Amendments of 1972 to provide equal athletic opportunities in educational programs receiving federal funding.¹⁶ Due to the lucrative payouts it guarantees to certain conferences, the BCS creates discrepancies in football revenue that cause Title IX compliance issues for many non-guaranteed institutions. While there have been efforts in the past to remedy the vast discrepancies in funding between college football “have” and “have-nots,” none have considered the negative impact that such funding has on female athletes. This Note proposes solutions to this problem within the larger context of college athletics spending reform.

In order to understand the context of this argument, an overview of Title IX legislation, BCS history, and the debate over the college arms race is necessary. Part I describes relevant Title IX legislation, from its genesis in Congress to subsequent revisions and updates put forth in the 1979 Policy Interpretation, and briefly interprets Title IX’s policy objective. Part II provides helpful background information on the BCS, detailing its evolution from bowl reform efforts in the 1990s to its current structure and revenue discrepancies, and gives a description of the current intercollegiate arms race. Part III details how the BCS and its prominence in the intercollegiate arms race is directly at odds with the “spirit” of Title IX. Finally, Part IV recommends measures for how to better distribute college football revenue and shows how such goals are consistent with the policy objectives of Title IX.

I. HISTORY OF RELEVANT TITLE IX LEGISLATION

At Division I-A schools, football is without a doubt the “engine that drives all intercollegiate sports,” including women’s sports.¹⁷ As such, it is easy to see how gross discrepancies in football revenue among schools could lead to the failure of the lower revenue-producing schools to meet their Title IX obligations by having less to distribute to their women’s athletics program. However, before putting forth such an argument, a brief background of relevant Title IX legislative history and interpretation is necessary. This section details the two major phases of Title IX development: its legislative history and enactment in 1972, and the 1979 Policy Interpretation.

A. History and Enactment of Title IX

Title IX of the Education Amendments of 1972 was signed into law on June 23, 1972.¹⁸ Title IX provides that: “[n]o person . . . 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.”¹⁹ Although there is little legislative history surrounding the enactment of Title IX,²⁰ Title IX’s

16. 20 U.S.C. § 1681 (2000).

17. Young, *supra* note 11.

18. 20 U.S.C. § 1681(a).

19. *Id.*

20. See generally Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 9 n.30 (1992) (detailing the sparse legislative

general prohibition against gender-based discrimination in education is based on Title VI of the Civil Rights Act of 1964, which prevented racial discrimination in federally funded programs.²¹

Intercollegiate athletics were never mentioned in the original statutory language of Title IX, leaving its “specific application to intercollegiate athletics ambiguous.”²² However, Congress made it clear that Title IX did apply to intercollegiate athletics with the passage of the “Javits Amendment” in 1974.²³ This amendment required the then existing Department of Health, Education and Welfare (“HEW”) to develop regulations for Title IX implementation including, “with respect to intercollegiate athletic activities[,] reasonable provisions considering the nature of particular sports.”²⁴ These regulations, after being authorized by President Ford and reviewed by Congress, became effective on July 21, 1975.²⁵ The new regulations listed ten factors to be considered when determining whether equal opportunities are available for members of both genders, including the effective accommodation of both genders’ interests and abilities and the equal provision of equipment, supplies, as well as practice and competitive facilities.²⁶

Included in the regulations was a three-year transition period for schools of higher education to comply with the regulations.²⁷ When this period ended in 1978 and the HEW’s Office for Civil Rights (“OCR”) began to investigate Title IX complaints, it determined that further clarification of how Title IX applied to intercollegiate athletics was needed.²⁸ To accomplish this, the OCR “consulted with interested parties from around the country, visited eight universities, and entertained 700 public comments.”²⁹

history of Title IX). What little relative legislative history that does exist is discussed in greater detail at Part I.C, *infra*.

21. 42 U.S.C. § 2000(d) (2000). As it relates to Title IX: “The early version of [Title IX] legislation proposed the addition of the word ‘sex’ to Title VI of the Civil Rights Act of 1964 . . .” Heckman, *supra* note 20, at 9 n.30 (citing H.R. 16098, 91st Cong., 2d Sess. § 805 (1970); H.R. 916, 92d Cong., 1st Sess., (1971)). *See also* Cannon v. Univ. of Chi., 441 U.S. 677, 696 (1979) (“The drafters of Title IX explicitly assumed it would be interpreted and applied as Title VI had been during the preceding eight years.”)

22. Walter B. Connolly, Jr. & Jeffrey D. Adelman, *A University’s Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios*, 71 U. DET. MERCY L. REV. 845, 850 (1994). However, intercollegiate athletics were touched upon briefly by Sen. Birch Bayh during congressional hearings. *Id.* at 850 n.18.

23. Heckman, *supra* note 20, at 12.

24. Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974).

25. 40 Fed. Reg. 24,128 (June 4, 1975) (codified at 34 C.F.R. § 106.41 (July 21, 1975)); *see also* Heckman, *supra* note 20, at 12-13.

26. 34 C.F.R. § 106.41.

27. 45 C.F.R. § 86.41(d) (codified at 34 C.F.R. § 106.41(d) (1991)).

28. Julia Lamber, *Gender and Intercollegiate Athletics: Data and Myths*, 34 U. MICH. J.L. REFORM, 151, 155 (2000–2001). This policy clarification was made in part to ease schools’ fears of losing their federal funding due to Title IX violations. *See* Heckman, *supra* note 20, at 13.

29. Ellen J. Staurowsky, *Title IX and College Sport: The Long Painful Path to Compliance and Reform*, 14 MARQ. SPORTS L.J. 95, 102 (2003).

This resulted in HEW's publication of a Policy Interpretation in December 1979.³⁰ The Policy Interpretation is not a "regulation" within the meaning of the Title IX statute and "does not have the force of law, but it is entitled to substantial deference" by the courts.³¹

B. The 1979 Policy Interpretation

The Policy Interpretation is divided into three sections: athletic financial assistance (scholarships),³² equivalence in other athletic benefits and opportunities,³³ and effective accommodation of student interests and abilities.³⁴ Part one of the code dictates that athletic scholarships "should be given to men and women in proportion to the number of men and women participants in the institution's athletic program."³⁵ It requires universities to award scholarships to "members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics."³⁶ Thus, if women make up 60% of the intercollegiate athletes at a school, they should be entitled to 60% of athletic scholarships.

Part two of the test is used to determine "compliance in program components, such as recruitment, equipment, travel or practice times" by comparing the "availability, quality, and types of benefits, opportunities, and treatment afforded male and female athletes."³⁷ The Policy Interpretation does not require identical program components for each sex, but rather that any differences result from "nondiscriminatory factors, such as rules of play, rate of injury resulting from participation, or the nature of the facilities required for competition."³⁸ Therefore, while there might be differences in funding for football due to high injury rates or equipment needs that favor men, "[p]rovided the institution meets the sports specific needs of both men and women, 'differences in particular program components will be found to be justifiable.'"³⁹

30. Lamber, *supra* note 28, at 155 (citing Title IX of the Educational Amendments of 1972; A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979)).

31. *Id.* at 155 n.17. Generally speaking, courts have given deference to the 1979 Policy Interpretation consistent with the Supreme Court's decision in *Chevron, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, regulations promulgated by a government agency should be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. Several circuit courts have concluded that the policy interpretation is consistent with Title IX. See *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1045-47 (8th Cir. 2002); *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 637-38 (7th Cir. 1999); *Neal v. Bd. of Trs. of the Cal. State Univs.*, 198 F.3d 763, 769-72 (9th Cir. 1999); *Cohen v. Brown Univ.*, 101 F.3d 155, 172-73 (1st Cir. 1996); *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 272-75 (6th Cir. 1994).

32. 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979) (codified at 34 C.F.R. § 106.37(c) (1993)).

33. *Id.* at 74,415-17 (codified at 34 C.F.R. § 106.41(c)(2)-(10) (1993)).

34. *Id.* at 74,417-18 (codified at 34 C.F.R. § 106.41(c)(1) (1993)).

35. Lamber, *supra* note 28, at 156.

36. 34 C.F.R. § 106.37(c).

37. Lamber, *supra* note 28, at 156.

38. *Id.* at 157 (citing 44 Fed. Reg. at 71,415-16).

39. *Id.* (quoting 44 Fed. Reg. at 71,416).

Part three, the most controversial aspect of the Policy Interpretation, has been called “the effective accommodation test”⁴⁰ by some commentators. It consists of a three-part test which is “used to determine whether an institution has effectively accommodated student interest and ability.”⁴¹ A school is considered to be in compliance with Title IX if it satisfies any part of the three-part test: “(1) achieving substantial proportionality between the male-female student ratio and the male-female student-athlete ratio; (2) demonstrating a history of continuing program expansion; or (3) satisfying the interests and abilities of the under-represented gender.”⁴² In 1996, under pressure from academic institutions, coaches of minor men’s sports, and Congress, the OCR issued a Policy Clarification, which reiterated its position that an institution must meet only one part of the test.⁴³

This test was also clarified with the issuance of an investigator’s manual. This manual “provides detailed tests and procedures for OCR’s investigators to determine compliance with Title IX’s intercollegiate athletic provisions.”⁴⁴ Generally, the manual encourages investigators to use an “overall approach” that incorporates all three of the major areas of the 1979 Policy Interpretation, but this investigation may be narrowed to fewer than the three areas “where unique circumstances justify limiting a particular investigation to one or two of these major areas.”⁴⁵

C. The “Spirit” of Title IX: Policy Interpretation

On its face, the relevant portion of Title IX simply reads: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁴⁶ In other words, the explicit policy goal of Title IX can be interpreted as “eliminat[ing] discrimination on the basis of gender in

40. Connolly, Jr. & Adelman, *supra* note 22, at 861.

41. Lamber, *supra* note 28, at 158. Under the Policy Interpretation, an educational institution must “accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes.” 44 Fed. Reg. at 71,417.

42. Catherine Pieronek, *Title IX and Intercollegiate Athletics in the Federal Appellate Courts: Myth vs. Reality*, 27 J.C. & U.L. 447, 455 (2000) (summarizing the actual, more detailed description of the three-part test of the 1979 Policy Interpretation, 44 Fed. Reg. at 71,418).

43. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE PART TEST 2 (1996). The Policy Clarification came after football coaches, men’s minor sports groups, and two universities in violation of Title IX testified before Congress about Title IX and the way it was enforced by the courts. *See* Lamber, *supra* note 28, at 168 n.98 (citing *Hearings on Title IX of the Educational Amendments of 1972: Hearings Before the Subcomm. on Postsecondary Educ., Training and Life-Long Learning of the H.R. Comm. on Econ. and Educ. Opportunities*, 104th Cong., at 78, 101 (1995)). While the hearings did not result in any amendments to Title IX, “some congressmen wrote to OCR to ask that it clarify its three-part test.” *Id.*

44. Connolly, Jr. & Adelman, *supra* note 22, at 852.

45. Pieronek, *supra* note 42, at 456 (quoting VALERIE BONNETTE & LAMAR DANIEL, U.S. DEP’T OF EDUC., TITLE IX ATHLETICS INVESTIGATOR’S MANUAL 7 (1990)).

46. 20 U.S.C. § 1681(a) (2000).

educational institutions.”⁴⁷ When applied to athletics, “[t]he plain meaning of Title IX is that no person . . . can be denied the opportunity to participate in collegiate athletics” due to his or her gender.⁴⁸

However, a broader approach that looks to the 1964 Civil Rights Act, Supreme Court precedent, and the legislative history of Title IX leads to the conclusion that it is meant not only to directly prevent the denial of opportunity to participate in athletics based on gender, but also that it is intended to eliminate all types of discriminatory practices in athletics and to provide equal athletic opportunity for both sexes.⁴⁹

In order to determine the intent of Title IX, an examination of its legislative history must begin with Title IX’s connection to Title VI of the 1964 Civil Rights Act.⁵⁰ Indeed, the Supreme Court itself, noting this connection between Title VI and Title IX, has interpreted the meaning of Title IX well beyond the plain language of the statute. In *Cannon v. University of Chicago*, the Supreme Court concluded “Title IX, like its model Title VI, sought to accomplish two related . . . objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices.”⁵¹ The Court reached this conclusion by examining the legislative history surrounding the passage of Title IX by Congress, directly citing the testimony of Representative Patsy Mink:

“Any college or university which has [a] . . . policy which discriminates against women applicants . . . is free to do so under [Title IX] but such institutions should not be asking the taxpayers of this country to pay for this type of discrimination. Millions of women pay taxes into the Federal Treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access”⁵²

A further assertion of Title IX’s intention is the unequivocal statement by one of Title IX’s framers, former Senator Birch Bayh, that the goal of Title IX when it was drafted was “equal opportunity for young women and for girls in the educational

47. Amy Bauer, *If You Build It, They Will Come: Establishing Title IX Compliance in Interscholastic Sports as a Foundation for Achieving Gender Equity*, 7 WM. & MARY J. WOMEN & L. 983, 990 (2001).

48. Michael Straubel, *Gender Equity, College Sports, Title IX and Group Rights: A Coach’s View*, 62 BROOK. L. REV. 1039, 1060 (1996).

49. 34 C.F.R. § 106.41 (1993).

50. See generally 118 Cong. Rec. 5807 (daily ed. Feb. 28, 1972) (statement of Sen. Birch Bayh) (“Central to my amendment [Title IX] are sections 1001–1005, which would prohibit discrimination on the basis of sex in federally funded education programs. Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by Title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of Title VI.”).

51. 441 U.S. 677, 704 n.36 (1979).

52. *Id.* (citing 117 Cong. Rec. 39252 (daily ed. Nov. 4, 1971)).

system of the United States of America. Equality of opportunity. Equality.”⁵³ This implicit “spirit” of Title IX is continually upheld, most recently during President George W. Bush’s second year in office. Responding to both a campaign promise to develop a “reasonable approach to Title IX”⁵⁴ and a lawsuit by the National Wrestling Coaches Association,⁵⁵ the White House formed the Commission on Opportunity in Athletics to study Title IX and its enforcement. Similar to the process used when the Policy Clarification was issued in the late 1970s, the Commission “listened to the testimony of over fifty witnesses, received public comment from hundreds of individuals, and accessed thousands of pages of material.”⁵⁶ Despite a highly controversial set of recommendations, in the end the OCR, which had overseen the Commission, affirmed the existing Title IX regulations and policy.⁵⁷ Thus, the incorporation of such dynamic legislative history into Title IX policy clearly demonstrates that the federal government intended and still intends for Title IX to provide gender equality in intercollegiate athletics.

II. THE BCS SYSTEM

While college football bowl games have been a part of the American sports scene for over a hundred years,⁵⁸ they have rarely pitted the two top-ranked teams in the nation against each other,⁵⁹ a situation unique to Division I-A football as the only NCAA championship that is not decided exclusively on the playing field.⁶⁰ Attempts to

53. Senator Birch Bayh, Address at the Secretary’s Commission on Opportunity in Athletics 24 (Aug. 27, 2002), at <http://www.ed.gov/about/bdscomm/list/athletics/transcript-082702.pdf>.

54. Straurowsky, *supra* note 29, at 106. The response was made by President Bush to support his view that the three-part effective accommodation test was “a system of quotas or strict proportionality that pits one group against another.” See *id.* (quoting Press Release, Jacqueline Woods, AAUW, Bush Administration Fumbles on Title IX Support (May 30, 2002), at www.aahperd.org/nagws/title9/pdf/aauwtitleIXrelease.pdf).

55. See generally *Nat’l Wrestling Coaches Ass’n v. United States Dep’t of Educ.*, 263 F. Supp. 2d 82 (D.D.C. 2003) (arguing that the three-part effective accommodation test was the product of a flawed process of promulgation).

56. Straurowsky, *supra* note 29, at 107–08.

57. *Id.* at 109.

58. See generally ROBIN OURS, COLLEGE FOOTBALL ENCYCLOPEDIA: THE AUTHORITATIVE GUIDE TO 124 YEARS OF COLLEGE FOOTBALL (1994) (providing a comprehensive history of college football in the United States).

59. *Antitrust Implications of the College Bowl Alliance: Hearing before Subcomm. on Antitrust, Bus. Rights, and Competition of the S. Comm. on the Judiciary*, 105th Cong. 32 (1997) (statement of Roy F. Kramer, Commissioner, Southeastern Conference) [hereinafter *Antitrust Implications*]. In the history of the traditional bowl system, before the birth of bowl reform efforts, the two top teams played against each other only nine times. *Id.* at 32.

60. “The NCAA has conducted championships in various sports since 1921. Currently, the NCAA conducts national championships in over seventy men’s and women’s sports” in divisions I, II, and III, and also in division I-AA for football. K. Todd Wallace, *Elite Domination of College Football: An Analysis of the Antitrust Implications of the Bowl Alliance*, 6 SPORTS LAW. J. 57, 59 (1999).

create a Division I-A football playoff have failed,⁶¹ but there have been a number of efforts by the conferences and bowl game organizers to produce a better system for matching the top two teams in a true National Championship, culminating with the formation of the BCS in 1998. This Part of the Note details bowl reform agreements that gave rise to the BCS, the determination of participation in BCS bowl games, and some of the recent critiques of the BCS.

A. College Football: Who's Number One?

The first proposal to match the top teams in the country was the formation of the Bowl Coalition in 1992. Four of the major New Year's Day bowl games—the Orange, Sugar, Cotton, and Fiesta Bowls—came together to form the Coalition with several conferences including the Atlantic Coast (“ACC”), Big East, Big Eight, Southeastern (“SEC”) and Southwest as well as independent Notre Dame.⁶² The goal of the coalition was to match the highest-rated teams available—including a number one versus number two match-up whenever possible—“while keeping traditional regional and conference bowl ties in place.”⁶³

After this first attempt failed, a second attempt resulted in the formation of the Bowl Alliance after the 1995 season.⁶⁴ The Bowl Alliance consisted of the Orange, Fiesta, and Sugar Bowls joined by the ACC, Big East, Big Eight, Big Ten, Pacific-10 (“Pac-

61. In hopes of putting the top Division I-A football teams in direct competition with each other, various efforts at establishing a championship playoff system similar to other NCAA sports have been proposed over the years. Most of these efforts have had little or no success. At the 1976 NCAA Convention, a Special Committee proposal to establish a Division I-A football championship was withdrawn with no discussion. *Antitrust Implications*, *supra* note 59, at 44 (prepared statement of Cedric Dempsey, Executive Director, NCAA). A 1988 convention resolution that “would have attempted to measure the interest of Division I-A members in a national football championship” was defeated by a vote of ninety-eight to thirteen with one abstention. *Id.* A 1994 NCAA Special Committee formed to study a Division I-A football championship concluded that “while there was merit to the concept of a playoff, it could not at that time recommend specific legislation to the NCAA President’s Commission.” *Id.* Most recently, a 1997 study undertaken by the Division I Board of Directors found a large majority of schools opposed to any type of movement towards a football championship. *Id.* at 46.

62. *See id.* at 34 (statement of Roy F. Kramer, Commissioner, SEC).

63. *See* Richard Billingsley, *The road to the BCS has been a long one* (Oct. 21, 2001), at <http://espn.go.com/ncf/s/historybcs.html> (on file with author). Over time, certain conferences had developed contractual relationships with certain bowl games. *See Antitrust Implications*, *supra* note 59, at 33–34 (statement of Roy F. Kramer, Commissioner, SEC). For instance, the Big Eight conference was affiliated with the Orange Bowl and the SEC with the Sugar Bowl. *Id.* at 34. However, the coalition could not guarantee a national championship game every year. For instance, if a team from the Big Eight finished the season ranked number one and a team from the SEC finished ranked number two, their respective conference affiliations with the Orange and Sugar bowls would prevent them from playing one another. *Id.* Therefore, a match up between any top ranked teams from these conferences with another Bowl Coalition member school was impossible.

64. *Antitrust Implications*, *supra* note 59, at 35 (statement of Roy F. Kramer, Commissioner, SEC).

10”), and SEC conferences and independent Notre Dame.⁶⁵ The bowls agreed to rotate a national championship game among themselves so that each bowl was guaranteed the championship once every three years.⁶⁶ This game would match the number one and number two ranked teams, unless either of those teams were the champions of the Pac-10 or Big Ten who were still contractually obligated to the Rose Bowl, which was not a part of to the Bowl Alliance.⁶⁷ Thus, a match-up between any top-ranked team from these conferences with another Bowl Coalition member school was impossible.

Finally, in 1996 the American Broadcasting Company (“ABC”), which owned the television rights to the Rose Bowl, entered into discussions to integrate the Rose Bowl into a new “super alliance,” a plan which became a reality following the 1998 season.⁶⁸ Under this new alliance, which became the present-day BCS, the champions of the ACC, Big East, Big Ten, Big XII,⁶⁹ Pac-10 and the SEC are guaranteed participation in a BCS bowl game, with the championship game rotating among the Rose, Orange, Fiesta, and Sugar Bowls, allowing each bowl to host the national championship game once every four years.⁷⁰

To best determine the top two teams that would play in this national championship game the BCS ranking system was created. For the 2004–05 football season, the formula consisted of three components: The Associated Press (“AP”) media poll, the USA Today/ESPN coaches poll, and a computer poll average.⁷¹ Each component counts as one-third of a team’s overall BCS score in the BCS standings.⁷² The two

65. *See id.* The Big Ten and Pac-10 champions were still prevented from playing in a Bowl Alliance game due to their Rose Bowl contract. However, their membership in the Alliance allowed other bowl eligible teams from either conference to be selected by one of the Alliance bowls. *Id.* at 36.

66. *See id.*

67. *Id.*

68. *Id.*

69. In 1996, the Big Eight merged with four members of the now-defunct Southwest Conference to become the Big XII. *See* big12sports.com, *About The Big 12*, at <http://big12sports.collegesports.com/aboutbig12/big12-aboutbig12.html> (last visited Feb. 5, 2005).

70. *See Antitrust Implications, supra* note 59, at 106–07 (statement of James Delany, Chairman, Big Ten Conference). Under the new arrangement, the Rose Bowl would still host the Big Ten and Pac-10 champions, unless either of those teams was ranked among the top two teams in the nation, in which case that team would be permitted to play in the national championship game regardless of venue. *Id.* at 36–37.

71. BCSFootball.org, *BCS Standings*, at <http://www.bcsfootball.org/index.cfm?page=standings> (last visited Jan. 13, 2005) [hereinafter *BCS Standings*]. However, as of December 21, 2004, the AP has insisted that the BCS no longer use its poll in compiling the BCS standings, citing harm to the reputation of the AP brand name and violations with AP poll voters. *College Football Notebook: BCS not going away*, SEATTLE POST-INTELLIGENCER, Dec. 23, 2004, http://seattlepi.nwsource.com/cfootball/204997_fbc23.html (last visited Feb. 5, 2005). Nevertheless, the BCS appears to be ready to proceed without the AP poll, hoping to unveil a new formula by April 2005. *Id.*

72. *BCS Standings, supra* note 71.

teams with the top overall BCS score will then meet in the BCS championship game.⁷³ The remaining six teams are then selected from the conference champions of the Big East, ACC, Big XII, Big Ten, SEC, and Pac-10 that are not playing in the BCS championship game.⁷⁴ The bowls may then select from any other team that has won at least nine games and is ranked in the top twelve of the final BCS standings; however should any team from a BCS non-guaranteed conference—which includes the Sun Belt Conference, Mid-American Conference, Mountain West Conference, Conference USA, and the Western Athletic Conference (“WAC”)—finish sixth or higher in the final BCS standings, the team shall be awarded a BCS game.⁷⁵ Since the formation of the BCS in 1998, the University of Utah is the only team from a BCS non-guaranteed conference to qualify for a BCS bowl, and that was not until after the new BCS qualifications were implemented in March of 2004.⁷⁶

Prior to 2004, however, Utah and other schools from the aforementioned BCS non-guaranteed conferences were not even members of the BCS and therefore had never been invited to play in a BCS game. In order to address the fact that no BCS non-guaranteed conference teams were being admitted into the BCS games, a group of presidents from the BCS non-guaranteed conferences formed the Presidential Commission for Athletic Reform.⁷⁷ Led by Scott Cowan, president of Tulane University, the commission sought four changes: greater access to major bowls, an end to “the stigma of being labeled ‘non-BCS’ schools,” a reduction in the financial disparity of football’s “haves” and “have-nots,” and a voice in the governance of post-season play.⁷⁸ In airing its concerns, the commission considered filing an antitrust suit and succeeded in getting Congress to hear its grievances.⁷⁹ In the fall of 2003, both the House and the Senate held hearings to discuss the ramifications of the BCS on intercollegiate athletics.⁸⁰ Among the issues put before Congress were allegations that the BCS hinders funding, athletics facility construction, and recruiting at non-BCS schools, leading to a negative effect on women’s intercollegiate athletic programs.⁸¹ After several months of standoffs with little progress and facing the very real possibility of congressional interference and a multimillion dollar lawsuit, the BCS

73. See BCSFootball.org, *BCS Bowl Eligibility*, at <http://www.bcsfootball.org/index.cfm?page=eligibility> (last visited Jan. 13, 2005) [hereinafter *BCS Eligibility*].

74. *Id.*

75. *Id.*

76. See Liz Clarke, *Finally, A Mid-Major Breakthrough: Utah Overcame Odds, Favoritism to Claim a Spot in the BCS*, WASH. POST, Jan. 1, 2005, at D01.

77. See generally Tulane University, *Presidential Coalition for Athletics Reform*, at <http://coalition.tulane.edu> (containing general background information and press releases about the coalition) (last visited Jan. 13, 2005).

78. Liz Clarke, *Future of BCS Still Faces Major, Mid-Major Issues*, WASH. POST, Feb. 28, 2004, at D4.

79. *Id.*

80. See generally *BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field: Hearings before the Senate Comm. on the Judiciary*, 108th Cong. (2003), http://judiciary.senate.gov/print_member_statement.cfm?id&wit_id=2628 (detailing the hearings in the senate) [hereinafter *BCS or Bust*]; Young, *supra* note 11 (detailing the house hearings).

81. See *BCS or Bust*, *supra* note 80 (statement of Sen. Orrin Hatch).

Presidential Oversight Committee was close to dissolving the current BCS system and heading back to the old bowl setup where neither the courts nor Congress would be able to touch the major conferences.⁸²

However, on March 1, 2004, NCAA president Myles Brand stepped in and created a compromise position: the creation of a fifth BCS bowl game beginning in the 2006 season.⁸³ Under the new plan, the BCS non-guaranteed conferences will increase their BCS revenues by 50%—from 5% percent of the BCS payout to 7.5%.⁸⁴ In addition, the BCS non-guaranteed schools possibly stand to receive an additional 7.5% of the BCS payout if one of the schools qualifies to play in a BCS game.⁸⁵ While this is obviously a positive step toward equity of football revenue distribution among BCS and former non-BCS schools, a large gap still remains. The BCS bowl guaranteed schools will receive far greater payouts, which can then be converted into much-needed funds for their women's programs.

B. The "Have and Have-Nots": Discrepancies in BCS Revenue Distribution

The primary argument against the current BCS system is that it creates a series of "haves" and "have-nots" in Division I-A college football. As previously stated, BCS non-guaranteed conference schools will likely only qualify for a slot in a BCS game if they win their conference and finish ranked in the top six of the final BCS standings.⁸⁶ The likely exclusion of these conferences from the BCS games creates a problem because of the drastic discrepancy in payouts between these games—and their associated lucrative television contracts—and other bowl games.

Funding for the BCS comes from two sources: ABC Sports and the host bowls.⁸⁷ According to the BCS website, total revenue from the 2004–05 season is expected to be slightly more than \$93 million.⁸⁸ Of this figure, nearly \$86.5 million was initially to be divided among the six BCS Bowl guaranteed conferences, with the remaining five Division I-A conferences splitting about \$5 million, and \$1.5 million going to Division I-AA football conferences that have averaged sixty full scholarship grants over the last four years.⁸⁹ Furthermore, between the 1998–99 and 2002–03 seasons these payouts have totaled nearly \$450 million, with the sixty-three schools in BCS Bowl guaranteed conferences splitting the lion's share—\$433 million—of that total, while the remaining

82. Dennis Dodd, *Middleman Brand proves to be savior* (Mar. 11, 2004), at <http://cbs.sportsline.com/collegefootball/story/7164165> (last visited Jan. 13, 2005).

83. *See id.*; *see also* Tim Layden, *Pleading the fifth: BCS powers don't go far enough in latest reform* (Mar. 5, 2004), at http://sportsillustrated.cnn.com/2004/writers/tim_layden/03/05/bcs.fifthbowl/index.html (last visited Jan. 13, 2005).

84. Stefan Fatsis, *College-Football Deal to Give Nonelite Schools More Money*, WALL ST. J., Mar. 2, 2004, at B11.

85. *Id.*

86. *See BCS Standings*, *supra* note 71.

87. BCSFootball.org, *Revenue Distribution*, at <http://BCSFootball.org/revenue/shtml> (last visited Jan. 13, 2005) [hereinafter *Revenue Distribution*].

88. *Id.*

89. *See id.* The figures are rounded to the nearest half million. While these figures represent the projected BCS payout for the 2004–05 football season, the final payouts had not yet been released at the time this Note was written.

fifty-four schools shared just \$17 million.⁹⁰ To further illustrate this point, consider that if the approximately \$4.5 million projected payout to BCS non-guaranteed conferences for the 2003–04 season is added to the \$17 million total BCS non-guaranteed conference payout from the previous years, for a combined total of slightly more than \$21.5 million, this figure roughly equals the 2003–04 payout to the Big XII conference *alone*—the Big XII had two teams selected to play in BCS bowl games.⁹¹

Indeed, even the inclusion of the former non-BCS schools into the BCS and the addition of a fifth bowl game do little to help the BCS non-guaranteed conferences. For instance, under the five-game plan, the six BCS Bowl guaranteed conferences keep their automatic bids and the payouts for their conference champions. The BCS non-guaranteed schools are still not granted an automatic bid, and the exact financial arrangements are under discussion.⁹² The *Wall Street Journal* reported that had this new plan been in place in 2003–04, the five BCS non-guaranteed conferences would have split about \$8.85 million.⁹³ While this is a greater payout than the \$4.5 million these conferences received in years past under the old plan,⁹⁴ divided among five conferences this results in a total of around \$900,000 per BCS non-guaranteed conference, still vastly inferior to what each BCS Bowl guaranteed conference currently receives. Thus, while the deal is an improvement for the fifty-four BCS non-guaranteed schools, it still offers nothing close to an equal share of the payouts and therefore does little to remedy the financial disparities that cause Title IX discrepancies between schools in BCS Bowl guaranteed and BCS non-guaranteed conferences.

C. The Intercollegiate Arms Race

In the modern world of college athletics, there exists an unwritten mantra of spend or be left behind. As one scholar put it:

[T]he school that spends the most wins the most, and the school that wins the most has the most to spend. If a competitor builds a lavish state-of-the-art weight room and hires an array of strength coaches, the home team is instantaneously at a disadvantage. It has lost an edge in its ability to recruit the most exquisite talent, the talent that will ensure lucrative television contracts and ample post-season receipts.⁹⁵

90. *BCS or Bust*, *supra* note 80 (statement of Dr. Scott Cowen, President, Tulane University).

91. See NCAA, *2003-04 Distribution of BCS Revenue*, at http://www.ncaa.org/financial/postseason_football/2003-04/2003BcsRevenue.html (last visited Feb. 5, 2005) [hereinafter NCAA Figures].

92. See Carol Slezak, *Bigger BCS, Smaller Chance for Reform*, CHI. SUN TIMES, Mar. 2, 2004, available at <http://www.suntimes.com/output/slezak/cst-spt-carol02.html> (quoting Fiesta Bowl executive director John Junker on payments: “So much is unknown. I just don’t know enough yet. It sounds like it’s going to be a very broad set of discussion terms.”).

93. See Fastis, *supra* note 84, at B11.

94. See NCAA Figures, *supra* note 91.

95. John Weistart, *Title IX and Intercollegiate Sports: Equal Opportunity*, 16 BROOKINGS REV. 39, 41 (1998)).

Such competition to be the best is openly referred to by both the media and college football commentators as the athletics “arms race.” Nowhere is this more evident than in Division I-A college football, where schools and conferences engage in a constant game of one-upmanship to guarantee themselves lucrative television contracts and a chance at BCS Bowl money. If left unchecked, the result is bound to be the same as the version of an arms race played out during the Cold War: only the most financially fit will be left standing. An unnamed university president noted in a survey conducted by the Football Study Oversight Committee in 2001⁹⁶ that “[i]f there is a threat hanging over football, it is the multi-million dollar stadium, locker rooms and the \$2 million paid for a football coach. Only a handful of schools in this country can afford this madness.”⁹⁷

Despite the fact that everyone involved seems to recognize the danger, no one seems willing to opt out for fear of losing a competitive advantage on the playing field, so the race continues unabated. For instance, in 2003 the ACC invited the University of Miami (Fla.), Virginia Tech, and Boston College of the Big East Conference to join the ACC.⁹⁸ It was clear that this move was an effort to become the dominant conference on the East Coast and to increase its member schools’ revenues by adding these three traditionally powerful football programs that would presumably give the ACC a greater chance of qualifying more teams to the BCS. In fact, U.S. Senator George Allen of Virginia has openly admitted that the primary reason for the ACC expansion was monetary gain.⁹⁹

Such a ripple effect was not limited merely to the Big East and ACC. Indeed, even as the Big East presidents filed a lawsuit against the ACC to keep Miami, Virginia Tech, and Boston College in the Big East, they in fact were in the process of snatching five schools from Conference USA.¹⁰⁰ All told, conference realignments affected seventeen schools and half of the conferences, or 15% of all Division I-A conference memberships.¹⁰¹ While not all these realignments will result in BCS bowl game berths, some undoubtedly will, and with them the huge payouts. For everyone else, the realigning process is merely an attempt to get into a better conference, and thereby increase the chance for a bid to any bowl game, since 74% of the forty-six non-BCS bowl game slots are reserved for members of the original BCS alliance.¹⁰²

As one commentator has indicated, “these realignments have a direct impact on all aspects of NCAA governance.”¹⁰³ It is evident that such practices cannot continue

96. NCAA News, *The Will to Act Project: College Football and Ma Bell* (Sept. 16, 2002), at <http://www.ncaa.org/news/2002/20020916/active/3919n12.html>.

97. *Id.*

98. Welch Suggs, *Conference Soap Opera is Driven by Cash, but Cachet Matters, Too*, CHRON. HIGHER EDUC., May 30, 2003, at A37.

99. Mike Fish, *Option play: QB-turned-senator Allen playing tough with ACC* (June 19, 2003), at http://sportsillustrated.cnn.com/inside_game/mike_fish/news/2003/06/19/fish_va_tech/.

100. Douglas Lederman, *College presidents learn it's hard to keep sports pure*, USA TODAY, Jan. 15, 2004, available at http://www.usatoday.com/sports/college/other/2004-01-14-ceos_x.htm.

101. See Sandbrook, *supra* note 15.

102. *Id.*

103. *Id.*

unmonitored or the gap between the “haves” and the “have-nots” will widen and equality of opportunity for both genders in intercollegiate athletics will be further threatened.

III. HOW THE BCS AND THE ARMS RACE INTERFERE WITH THE POLICY OBJECTIVES OF TITLE IX

Because the BCS is not a federally-funded educational program and because there is not a per se violation of one of the three major areas set forth in the 1979 Policy Interpretation, typical Title IX enforcement mechanisms cannot be used.¹⁰⁴ Therefore, rather than attack the BCS on legal grounds, this Part of the Note argues that the BCS has a significant negative effect on the policy objectives of Title IX as interpreted from its legislative history and the statute itself, specifically: to promote gender equality in activities—including intercollegiate athletics—supported by federally funded institutions.

Under a plain meaning interpretation of the language of the statute, Title IX seeks to prevent individuals from being denied participation in athletics on the basis of their gender. From this standpoint, the BCS is not in direct violation of the aforementioned policy objective, because the BCS does nothing to prohibit males or females from participating in intercollegiate athletics and as such does not discriminate against women athletes. However, when one accounts for the intentions of Title IX as determined from its legislative history, the BCS does contradict the implicit goal of providing gender equality in athletics. The following Part of this Note further substantiates this argument by showing that the BCS creates a large discrepancy in the availability of funds, making it much more difficult for women in BCS non-guaranteed conferences to be protected from the discriminatory practice of not receiving the same athletic opportunities as women in BCS conferences.

A. Empirical Evidence against the BCS

Membership in a BCS Bowl guaranteed conference, with its large bowl payouts, ensures that most member schools have a much larger pool of funds from football to spread to non-revenue sports. Since women’s sports depend largely on football revenues for their support,¹⁰⁵ schools that are part of a BCS conference are given “a substantial competitive advantage in building facilities, hiring coaches and recruiting athletes to bolster all other sports . . . including those for female athletes” compared with their BCS non-guaranteed conference competitors.¹⁰⁶ Specifically, these BCS non-guaranteed schools have a much more difficult time providing the resources necessary to satisfy the requirements of the substantial proportionality prong of the effective accommodation test detailed in the 1979 Policy Interpretation.

A study in *The Chronicle of Higher Education* found that schools in the BCS Bowl guaranteed conferences had on average a “gap of only 8.6 percentage points between

104. Title IX of the Education Amendments of 1972; A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,413, 71,415 (Dec. 11, 1979) (codified at 34 C.F.R. § 106.37(c) (1993)).

105. See Young, *supra* note 11.

106. *Id.*

the proportions of women in their sports programs (42 percent) and in their student bodies (slightly over 50 percent)” while schools outside these conferences “had far fewer female athletes—39 percent—than those in the [BCS Bowl guaranteed] conferences, and the disparity between female athletes and female undergraduates was 12 percentage points.”¹⁰⁷

Another analysis, conducted by faculty at the University of Arizona and Cornell University, reached similar results. Using a regression analysis, the study showed a 6.5% proportionality gap at BCS Bowl guaranteed schools, versus a gap of 10.4% at other Division I-A institutions in 2001–02.¹⁰⁸ BCS Bowl guaranteed schools also showed some of the greatest improvement in compliance rates when compared to a similar study conducted in 1995–96,¹⁰⁹ leading the researchers to opine that “our results may reflect the importance of revenue producing men’s sports as a subsidy for women’s sports in Division I-A.”¹¹⁰

Finally, a statistical analysis conducted in 2000 and published in the *Journal of Sport Management* revealed that “[f]ootball profits were a significant influence on achieving gender equity in financial aid” and that “[c]ompliance in meeting gender equity . . . increased by 0.4 percentage points for each million dollars of football profit.”¹¹¹ All told, an average Division I-A football program “earn[ed] 43% of all total sports revenues and incur[ed] 26% of total sports costs.”¹¹² Similarly, a study by Professor Julia Lamber found that “on average, football revenues have the potential to cover 70% of the women’s sports expenses.”¹¹³ The same study also found that “25 out of 80 schools could cover their women’s sports expenses from their net football revenue alone.”¹¹⁴

These numbers imply that a majority of Division I-A football teams are able to provide funding for women’s athletic programs. Upon closer examination, however, almost all schools with available revenues for women’s sports are in BCS Bowl guaranteed conferences, with BCS non-guaranteed schools “los[ing] an average of \$1 Million [sic] dollars in their football programs.”¹¹⁵ For instance, the aforementioned *Journal of Sport Management* study found that, with the exception of the Big West Conference, all of the conference leaders in Title IX compliance were members of the “football bowl coalition or the Rose Bowl agreement.”¹¹⁶ The study implies that

107. Suggs, *supra* note 2, at A52.

108. Deborah J. Anderson et al., *Gender Equity in Intercollegiate Athletics: Determinants of Title IX Compliance* 29 (Feb. 9, 2004) (unpublished manuscript, on file with author).

109. At BCS schools, the noncompliance rate fell from 11.2% to 6.5%. *Id.*

110. *Id.* at 13.

111. Donald E. Agthe & R. Bruce Billings, *The Role of Football Profits in Meeting Title IX Gender Equity Regulations and Policy*, 14 J. OF SPORT MGMT. 28, 36 (2000).

112. *Id.* at 30. Men’s basketball consistently produces revenues above costs, with 16.1% of average total sports revenues and 7.5% of average total costs. *Id.* at 40 n.1.

113. Lamber, *supra* note 28, at 225.

114. *Id.* The study does not detail whether or not the twenty-five schools were members of BCS conferences.

115. Young, *supra* note 11.

116. Agthe & Billings, *supra* note 111, at 37. As previously discussed, the Bowl Coalition/Bowl Alliance and Rose Bowl participants have since combined to form the BCS. *See supra* Part II.A.

“members of these conferences have better ability to carry out more programs to meet Title IX” than their BCS non-guaranteed conference brethren due to the considerably larger and more certain payouts that the BCS bowls provide.¹¹⁷

In conclusion, a number of studies have shown that schools that are not a part of the BCS guarantee are much more likely to have a greater gap in the percentage of male and female athletes in relationship to their student bodies and do not benefit from the distribution of much-needed funds that could be applied toward providing equal availability of sports programs and facilities for members of both sexes.

B. The Intercollegiate Arms Race, the BCS, and Title IX

While not directly addressed by any reports, the impact of the arms race on the policy objectives of Title IX cannot be overstated. How, for instance, will a school such as Louisiana Tech, a traditional women’s basketball power, be able to compete when its football team is relegated to playing in the WAC, which has never qualified a team for a BCS bowl despite the fact that conference member Boise State has compiled a 24–1 record over the last two seasons—including a perfect 11–0 mark in 2003–04? Moreover, if the arms race is left untouched to reach its logical conclusion, it is impossible to see how anyone, save perhaps titans such as Michigan, Texas, and Ohio State, can survive. In the meantime, it is likely that multiple schools’ athletic programs will collapse under the weight of trying to keep up with the few power programs, resulting in both a narrowing of competition for NCAA championships to schools in the power conferences, and perhaps inevitably, a reduction in the number of athletic programs for women in order to meet budget demands. Such a result is clearly at odds with the policy objectives of Title IX.

However, such a doomsday scenario is not likely to appear. Indeed, many university presidents and faculty senates, awakened not only by the dangers of the college arms race, but also by numerous other problems in college sports ranging from graduation rates to scandals, have increasingly been motivated to address these problems. One group in particular, the Coalition on Intercollegiate Athletics (“COIA”), has tentatively adopted a framework for comprehensive athletics reform that could be beneficial in ensuring that the policy objectives of Title IX are met; this framework is thus analyzed next in the context of the BCS.

IV. SOLUTIONS TO THE TITLE IX PROBLEMS CAUSED BY THE BCS

The above section clearly demonstrates that schools in BCS non-guaranteed conferences have a more difficult time embodying the “spirit” of Title IX, primarily due to their exclusion from the rich BCS bowl game payouts. Evidence indicates that this discrepancy in revenue will only worsen as a result of the intercollegiate arms race.¹¹⁸

Without the threat of legal action, the BCS and the BCS Bowl guaranteed conferences have no compelling reason to change their current practices, which contribute to an uneven playing field for Title IX compliance through unequal

117. Agthe & Billings, *supra* note 111, at 37.

118. *See supra* Part III.A.

distribution of bowl revenues. As previously stated, Title IX applies to educational programs and activities receiving federal funds,¹¹⁹ and since the BCS is neither of these, most of the traditional remedies for Title IX non-compliance are unavailable.¹²⁰ The schools that are members of BCS Bowl guaranteed conferences are not directly violating Title IX, so the authorized remedy for assuring compliance “by the termination of or refusal to grant or to continue assistance . . . to any recipient as to whom there has been an express finding . . . of a failure to comply with such requirement”¹²¹ is not available.

Therefore, it appears that there are no discernible remedies available under current law to reduce the negative effects of the BCS on the policy objectives of Title IX. Nor are measures that would facilitate such reforms likely from Congress anytime soon. Since Steve Young’s testimony in the fall of 2003, there have been no congressional hearings on the subject.¹²²

Indeed, for reform to be truly effective, it must come from all schools and conferences, especially the BCS Bowl guaranteed conferences. While such a remedy at first blush may appear unlikely, the current debate about the role the BCS plays in the escalating “arms race” in intercollegiate athletics has energized many university presidents to assume a more active voice in the debate over the role of intercollegiate athletics in the academic setting.¹²³ Indeed, many proposals that are currently circulating seek to control the arms race before it spirals towards a result where college sports are reduced to a small oligopoly of elite schools that can afford to participate.¹²⁴ While not specifically mentioning Title IX by name, these initiatives would by their very nature embrace the policy goals of Title IX by ensuring that revenues are distributed more fairly across the spectrum of Division I-A schools.

119. 20 U.S.C. § 1681 (2000).

120. Generally, Title IX is enforced in three ways: “(1) through OCR audits; (2) through law suits brought by the federal government; or (3) through law suits brought by private individuals.” Connolly, Jr. & Adelman, *supra* note 22, at 853. The OCR, utilizing the *Title IX Athletics Investigator’s Manual*, looks for violations in three or fewer of “the major areas set out in the 1979 policy interpretation . . .” Pieronek, *supra* note 42, at 456. If a Title IX violation is discovered, the OCR will “work with the institution to reach compliance.” Connolly, Jr. & Adelman, *supra* note 22, at 854. Failure to comply can result in loss of federal funding or judicial proceedings by the Department of Justice. *Id.* (citing OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., *TITLE IX ATHLETICS INVESTIGATOR’S MANUAL* (1990)). Similarly, “[a]n individual can obtain injunctive relief, such as forcing a university to add a team, or money damages and attorney fees . . .” *Id.* (citing *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993)).

121. 20 U.S.C. § 1682.

122. Sandbrook, *supra* note 15.

123. Report of the Knight Foundation Commission on Intercollegiate Athletics, *A Call to Action: Reconnecting College Sports and Higher Education* (June 2001) (providing a letter of transmittal to W. Gerald Austen, M.D.), available at http://www.knightfdn.org/default.asp?story=athletics/reports/2001_report/index.html (last visited Jan. 16, 2004) [hereinafter *Call to Action*].

124. *See id.*; see also The Coalition on Intercollegiate Athletics, *A Framework for Comprehensive Athletics Reform* (bold and underline type omitted), at <http://www.math.umd.edu/%7Ejmc/COIA/Framework-Text.html> (last visited Jan. 17, 2005) [hereinafter *Framework*].

The first is a series of initiatives affecting Division I-A football proposed by the Knight Commission on Intercollegiate Athletics. Founded in 1989 as a response to more than a decade of highly visible college sports scandals, the John S. and James L. Knight Foundation's stated goal is to "recommend a reform agenda that emphasize[s] academic values in an arena where commercialization of college sports often overshadow[s] the underlying goals of higher education."¹²⁵ It is generally comprised of current and former NCAA presidents that are concerned about the influence of college sports in the university setting.¹²⁶ In the past, the Knight Commission has been successful in putting pressure on both the NCAA and colleges and universities. For example, its 2001 report, *A Call to Action: Reconnecting College Sports and Higher Education*, was one of the first reports to mention the dangers of the arms race and to propose solutions.¹²⁷

In 2004, the Knight Commission published a working paper entitled *Division I-A Postseason Football History and Status* in an attempt to understand the current Division I-A postseason football structure and its interplay within the BCS structure. While not explicitly proposing any direct changes to the current structure, the report did note three critical areas of concern: governance, access and revenue distribution.¹²⁸

First, with respect to governance, the report noted an alarming lack of NCAA oversight over Division I-A postseason football.¹²⁹ As a result of this lack of oversight, the BCS organization will continue to link "the more 'successful' football conferences with four major revenue-producing bowls and a single television company."¹³⁰ Such a result, the authors contend, actually weakens the overall economic strength of the bowl system.¹³¹ On the other hand, a single governing authority could "coordinate all television and sponsorship agreements to maximize revenues."¹³²

Second, the report briefly noted that access to the BCS bowls continues to be a major concern for the aforementioned BCS non-guaranteed schools, questioning whether or not increasing the number of BCS bowl games would actually increase participation in BCS games by BCS non-guaranteed schools.¹³³ Finally, the report addressed what the authors considered to be the "foremost concern": revenue distribution.¹³⁴ Here the report discussed how the absence of a governing authority allowed nearly 99% of the revenues from bowl games to flow directly to Division I-A

125. Press Release, *Knight Commission on Intercollegiate Athletics Calls for Clearer Model of Division I-A Football Governance: Notre Dame Football Coach Tyrone Willingham and Former Texas A&M Coach R.C. Slocum Offer their Testimony* (May 24, 2004), available at <http://www.knightfdn.org/default.asp?story=/news%5Fat%5Fknight/releases/2004/2004%5F05%5F24%5Fkcia.html>.

126. *Id.*

127. *See Call to Action*, *supra* note 123. Interestingly enough, this report suggested basing revenue distribution plans "not on winning and losing but on improving academic performance, enhancing athletes' collegiate experience," and, most notably, "achieving gender equity." *See* Press Release, *supra* note 125.

128. Sandbrook, *supra* note 15.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

conferences.¹³⁵ Since these revenues in large part flow to the BCS Bowl guaranteed conferences, such a distribution makes it increasingly difficult for the non-guaranteed conferences to keep pace in athletic expenditures.

As a proposed solution, the authors analogized the current BCS system to the differences in revenue generation between the so-called “big market” and “small market” Major League Baseball and National Football League franchises.¹³⁶ Such leagues, the authors contend, have benefited from greater economic success by implementing a revenue distribution plan.¹³⁷

Such an outcome is not too far-fetched and in fact currently exists within the NCAA structure. Each year the NCAA distributes roughly 58% of the income generated by the Division I-A basketball championships to its Division I-A members.¹³⁸ Such a revenue plan could be adopted for the Division I-A football championships. Using recent BCS payout figures, the distribution would amount to roughly \$750,000 per school,¹³⁹ a significant improvement for BCS non-guaranteed schools over what they have been receiving under the current system.

However, such redistribution would result in BCS Bowl guaranteed conference schools having fewer resources to distribute among themselves, making it unlikely that these schools would choose to voluntarily adopt such a system. Yet it appears that, faced with the mounting costs of maintaining their place in the arms race, many schools—including members of the BCS Bowl guaranteed conferences—are in fact open to any proposal, including revenue sharing that could limit this trend.¹⁴⁰

One such proposal has recently been put forth by the COIA. COIA is a group of Division I-A faculty senates that works with the American Association of University Professors, the Association of Governing Boards (a national organization representing college and university trustees), and the NCAA, among other groups, to promote serious and comprehensive reform of intercollegiate sports.¹⁴¹ As of January 17, 2005, thirty-one of COIA’s forty-five members were schools in BCS Bowl guaranteed conferences.¹⁴²

COIA’s mission is “to preserve and enhance the contributions athletics can make to academic life by addressing longstanding problems in college sports that undermine those contributions.”¹⁴³ In keeping with this goal, COIA’s steering committee released

135. *See id.*

136. *Id.*

137. *See id.*

138. *Id.*

139. *BCS or Bust*, *supra* note 80 (statement of Harvey S. Perlman, Chancellor, University of Nebraska-Lincoln).

140. The Coalition on Intercollegiate Athletics, *A National Coalition of Faculty Governance Leaders*, at <http://www.math.umd.edu/~jmc/COIA/Members.html> (last visited Dec. 17, 2004).

141. The Coalition on Intercollegiate Athletics, *About the Coalition*, at <http://www.math.umd.edu/~jmc/COIA/COIA-Home.html> (last visited Jan. 17, 2005) [hereinafter *About the Coalition*].

142. *See* The Coalition on Intercollegiate Athletics, *Schools whose faculty senates have voted to join the Coalition*, at <http://www.math.umd.edu/~jmc/COIA/Members.html> (last visited Jan 17, 2005).

143. *About the Coalition*, *supra* note 141.

A Framework for Comprehensive Athletics Reform in the fall of 2003, which cited five areas of comprehensive reform in college athletics: “(1) academic integrity, (2) athlete welfare, (3) governance of athletics at the school and conference level, (4) finances, and (5) over-commercialization.”¹⁴⁴

Noting the rising costs of maintaining a top-notch athletics program at a time of budget scarcity, the coalition openly embraced “increased revenue-sharing (beyond the participants in events) to minimize revenue-driven incentives for winning.”¹⁴⁵ Furthermore, the report emphasized that, to the degree allowable under federal anti-trust laws, “conferences should . . . seek to control expenses . . . to create as level a playing field as possible.”¹⁴⁶ Finally, the report concluded by acknowledging that such a plan would disadvantage programs that are currently most successful and by noting the importance of developing a plan that could buffer these effects during the period of reform.¹⁴⁷

While it is currently unclear which, if any, of the proposals offered by either the Knight Commission or the COIA will become a reality, it is nevertheless critical that such a debate, ignited by the arms race, has begun in the first place. As it stands, any type of increased revenue-sharing system would be beneficial to the policy goals of Title IX, which are in no small part hampered by the gross inequities of revenue distribution currently promulgated by the BCS.

CONCLUSION

It is apparent that the BCS in its current form does not sufficiently support the provision of equal opportunity for women athletes under the goals of Title IX. Originally designed to match the two top-ranked teams in a national championship game, the BCS has morphed into what critics have stated is a two-tiered system of college football “haves” and “have-nots.”¹⁴⁸ Partially by repeatedly rejecting proposals that exempt revenue-producing sports from Title IX, Congress has established that the goal of intercollegiate athletics is not to make money but to enhance the overall educational experience for both males and females.¹⁴⁹ Since the scope of Title IX does not extend to organizations such as the BCS, and since Congress is loathe to act, no legal remedies are currently in place to reign in the excesses of the BCS. Therefore, it is apparent that the current proposals by the Knight Commission and the COIA should be implemented to ensure that the policy objectives of Title IX are maintained.

144. *Framework*, *supra* note 124.

145. *Id.*

146. *Id.*

147. *Id.*

148. *See* NCAA News, *supra* note 96.

149. *See* Heckman, *supra* note 20, at 12.