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FOREWORD: “JUST DO IT!”

Title IX as a Threat to University Autonomy

*Richard A. Epstein**

A Nike Moment

For a short time I was stymied to identify a suitable theme for the Foreword to the 2003 Survey of Books in the *Michigan Law Review*. The task is surely a daunting one, because it is never possible to write a Foreword that offers the reader a Cook’s Tour of the many distinguished offerings reviewed in its pages. Therefore I hope to link one broad theme to one narrow topic, knowing that at first it may look as though they have little in common. In taking this approach, I prefer dangerous shoals to well-marked channels. I shall therefore begin with one elusive word and then work my way back to one of the bitterest controversies of the present time, which illustrates the general dangers of which I speak. The single word that I have selected is “just”; the current controversy is the application of Title IX to intercollegiate athletics.

To lawyers and moral philosophers alike, the term “just” conjures up a rich historical heritage draped in deep conceptual ambiguity. Its first connotation evokes images of social justice: What are the indicia of a just set of rules and social institutions? There is doubtless much to be said on that subject, but for the moment I shall content myself with the single observation that however well the appeal to justice writ-large works as a source of collective or social aspiration, often it works less well as a principle for resolving particular disputes. One reason why this translation is so precarious stems from a second common-sense use of the term “just,” fraught with its own perils. I refer here to the sense of “just” as used in the familiar Nike advertisement slogan: “just do it.” Once the task of disinterested explication is completed, I shall turn to one current controversy that ironically comes close to Nike’s line of business, namely, the battle over the proper interpretation of Title IX, prohibiting discrimination on

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grounds of sex in institutions that receive federal funding, which was added with much fanfare to the Civil Rights Act of 1972 (“the Act”).

Just Doing It.

Ends

The general rule in advertisement is: the shorter the slogan, the more powerful the image. By that standard, “just do it,” with or without the swoosh, counts as the real thing. Fully explicated, this terse proposition sets out an instructive program for some of the grander questions of legal and political theory. But the expression surely has more humble origins. Its implication is that individual self-determination not only worked for Horatio Alger, but it can work just — that pesky word again — as well for us. Set some goal, and then “just do it,” where the “it” is left conveniently undefined.

The substantive difficulties buried in this laudable maxim become acute, moreover, when translated to other contexts. Think of how the Nike slogan reads when juxtaposed against the familiar mantra of the drug war — “just say no.” Now individual behavior is treated optimistically as a matter of individual will, even in the face of relentless peer pressure. A similar sense of “just” serves as the word of last resort in so many moral arguments and factual disputes: “I just don’t buy that argument,” or “I just can’t believe that X committed that crime,” for example. Here the implicit subtext is that the speaker has reached bedrock conclusions on disputed matters of fact or principle and thus declares himself beyond persuasion by further evidence or arguments.

It is at this point in the argument that the indefinite reference to “it” starts to bite. To read the Nike slogan in isolation is to miss much of its force. Its subtext is that the goals in question are confined to excellence in competition: running faster, throwing farther, and jumping higher than anyone else with whom one competes. Each of us can seek to reach this particular goal without necessarily impinging on the ability of others to strive for the same objective. Indeed, in a sense, competition allows us to achieve results that are beyond us in isolation. Strong competitors may well deny you the top prize, but by the same token they let you develop untapped strengths that you could not have realized on your own. That is the reason why those PRs, or personal records, count for so much in athletics. People achieve real progress by competing with their own past in the company of others. Large marathons have thousands of entrants but only a handful of prize winners. But before we conclude that the laggards are trapped by some flawed heuristic, remember that the PR makes it possible to run a race, in that (just about) everyone except *homo economicus* wins. So we now see why this theme has served Nike so well: it sells more shoes and shorts when every sports participant comes out a winner.

The Nike expression is elusive for yet another reason. The pictorial representations of its goals exclude this equation: “just do it” = “rob the nearest bank of your choice.” When the chosen ends have negative consequences, then the Nike maxim operates in reverse, as an open invitation for every brigand in the land to inflict palpable harm to others. The pictorial background in the Nike ads precludes this dreadful image of unbridled action but also exposes this latent danger. The phrase packs an emotional wallop that is independent of the particular context of its origin. One thief could spur on his apprentice to acts of wrongdoing by that same exhortation: “don’t worry about the risks to yourself or others; just do it.”

The inference for political theory is that individual liberty is always constrained with an eye to harms to others. The choice of ends determines whether ambition is blind or productive. We can, and should, encourage those actions which allow all to benefit, as in competition. But we must also take steps to see that our celebration of the will does not become the “open sesame” for antisocial actions. At this point, of course, the slogan “just say no” applies only to drugs: not to marriage, voting, or the ordinary businesses of life. Shorthand slogans have their uses, but also their limitations.

Means

The expression “just do it” is instructive on means as well as ends. One persuasive mode of argument urges you to do X because the means to achieve it are presumed to be easy. Move to New York because you can “just sell your house” in Chicago. Here the word “just” is used to connote the idea that once the choice of ends is embraced, the task itself will be executed. But no person steeped in the transaction-cost economics of Ronald Coase could accept that statement at face value. The first question that any experienced manager asks is, “How many steps are needed to do that small job?” Well, it is possible to teach an entire course on the difficulties that may block the routine house sale. Sell the house? But first do I find a broker? Well, if that makes sense, which brokerage firm do I find? And which individual broker gets the listing? Of course, in going through each of these steps, one may miss a host of phone calls and email messages. So it goes with each separate step, which in turn has to be decomposed into major questions of price, terms, insurance, title searches, closings, and the like. This grim view of simple transactions does not hold in all cases, for some fearsome transactions are made to look as though they were wired from start to finish by removing all reference to the countless intermediate steps. Alas, for every blissful transaction we can find some nightmarish tale. The term “just” just has to mislead people into how easily things get done and to ignore the contributions of those countless individuals whose sole job is to

execute the routine tasks of life quietly and efficiently. The word "just" just elides over these difficulties.

From Singular to Plural

The difficulties with "just do it" do not end with the identification of legitimate ends and of appropriate means. These are choices that each person must make in his or her own life. They are decided, as it were, by a majority vote of one to zero. "Just do it" faces another insuperable obstacle in moving from the singular to the plural. At this point, we have to face the question of how to aggregate these individual preferences in order to make a collective choice. The transition from one to two is often the question of whether the parties can achieve agreement on all the essentials of the project, including a division of the required tasks and of the ultimate spoils. So much of legal analysis is directed toward an analysis of these transactions, be they sales, leases, mortgages, hires, or bailments. But whatever the challenges in finding the ideal solution, it is clear that a contract between two parties must be formed with joint consent and has, after formation, no place for a system of majority rule. There must be unanimous consent in order to secure formation, and then some built-in mechanism has to resolve disputes when and if they arise during the life of the agreement. To tell these parties, however, that they should "just do it," i.e., make a deal, is to gloss over the litigation risks involved. "Just do it" makes sense after all the work has been done to structure the deal. But it should never be treated as a headlong inducement to enter agreements today that might easily be regretted tomorrow.

The situation becomes still more complex when we have three or more parties. Here again the unanimous consent at the outset could unravel over the course of time. The question of whether contractual modifications should be allowed, and if so on what terms, is one of the most difficult for parties to negotiate. In some cases, it may make sense to have a detailed plan of who has to do what when. But in other cases, unanimous consent at the front end could create institutions wherein the chosen governance system — a charitable condominium or corporate board — allows the group to make decisions by less than unanimous vote to avoid the risks of paralysis. But one bad turn invites another, for majority rule presents an invitation for confiscation of minority interests. Figuring out what property-rights protections should be mixed with what voting mechanism thus becomes the question of the hour. These arrangements can often go aground, and when they succeed it is often because sensible people have taken their time to sort them out. They pick their trading partners with great care, and their agreement makes conscious trade-offs that permit flexibility in operation and do not wipe out

minority coalitions. Hence, as the numbers to the transaction increase, the role of “just do it” decreases. Nike commercials are not good guides for the formation of private agreements, nor do they pretend to be.

This need for greater institutional caution in forming complex social organizations is not confined to voluntary organizations. It also should inform the way we set up our public institutions. We may be wedded to the idea of a social contract that removes the individual from some initial position (call it the “state of nature,” if you will) and offers him the security of political governance in exchange for any loss of natural liberty, which in any event he could not protect if forced to operate alone. But again, it is one thing to say that we must have a government to make sense of ordered liberty, and it is quite another to say that we should be happy to entrust that government with any and all powers. “Just do it” is not a good recipe for the organization of political bodies. Indeed, political institutions are harder to form than complex voluntary organizations for two reasons, neither of which will ever be eliminated. First, political governance is over territory and covers all the people who reside within some borders, perhaps even borders that are arbitrarily defined. No one has the luxury of choosing his or her fellow citizens with as much particularity in choosing other members of voluntary organizations. The loss of the power of selection therefore will leave some individuals — it is often difficult to identify in advance who they could be — at the risk of predation by others. As the ability to select one’s trading partners is diminished, the level of formality needed to counteract abuse can be expected to increase.

Second, the exit right is not as effective in political settings as it is for private organizations. To be sure, people can pack up their belongings and migrate to foreign lands. One sure sign that a government has become tyrannical is its imposition of constraints on the exit rights of its own citizens. But even the diligent preservation of the exit right leaves much to be desired, because its exercise comes at a terrible cost: the loss of property, friends, and other associations. I can walk away from a partnership without abandoning my home, friends, and other associations. It is not so easy to escape the grasp of government through voluntary exile because of the collateral sacrifices that have to be made. Hence, when people take that option in droves, it offers powerful evidence that something is deeply wrong with the internal system, for which there are few prospects of immediate reform.

The upshot, of course, is that durable legislative solutions are more difficult to implement than the analogous private solutions needed to run complex organizations. The level of formality that is required in the political process is greater, owing to the necessarily higher level of distrust that pervades these organizations. This higher level of formal-

ity comes at the cost of greater institutional rigidity, which makes the process of self-correction through political deliberation chancier than it is with private associations, where it is difficult enough. This has serious consequences for the formation of general policy. It is common knowledge that the internal processes of legislation are often Byzantine, so much so that it is difficult (for good reason) for a simple majority to have its way. The endless procession of committees and studies creates a number of pressure points, so that individuals who are in the minority often have the option of blocking legislation that would pass if the legislature could "just do it," i.e., decide on a simple up-or-down vote. In effect, legislation is a bit like battle. It is easier to hold onto a defensive position than to take new territory. That simple truth accounts for much of the stability that we see in international relations, even in the absence of a dominant Hobbesian sovereign capable of ruling over us all.

This bias in favor of the status quo is, however, far from a fool-proof strategy, because it does not take into account the sharp variations in public sentiment that can be driven by external events. For a variety of reasons, the political system tends to respond sharply to instances of disaster or scandal. Independent commissions are set up, political debates progress rapidly because of the short-term consensus, and complex administrative regimes are enacted into law in order to respond to the problem. The recent Sarbanes-Oxley legislation is a prime instance of the problem. Oftentimes, the new concern turns out to be a spike in public opinion that moves back to more conventional grounds once the initial disaster or scandal has ebbed. But at this point, new entrenched interests grow up around the new statute, so that it is hard to repeal legislation hastily passed in response to a sharp crest in public opinion. At that point, the implementation of the scheme depends critically on its delegation to administrative agencies. That delegation represents the quintessential political choice, and often it will take place in such a fashion that the champions of the initial legislation staff the critical committees, where they can operate with less interference from its opponents. The new agents are in a position to "just do it," where the "it" refers to the aggressive enforcement of a statute in ways that might not be consistent with its original political design. We then face a political crisis that could easily divide the very people who were four-square behind the initial legislation. The one-way ratchet supplies a good description of much political legislation: "just undo it!" is, it turns out, not so easily done.

Title IX, Forever?

There are, I think, many situations that illustrate this last proposition, but in the space of a short Foreword I shall discuss only one issue which is presently the source of much public divisiveness. The ques-

tion quite simply is the appropriate set of rules that should be used to determine whether colleges and universities are in compliance with Title IX of the Civil Rights Act of 1972. Title IX was greeted with unanimous support at the time of its passage, when the dominant attitude was that we as a nation should “just do it” because the moral case in its favor was strong enough to overwhelm all opposition. Yet the course of the legislation in the thirty or so years since its inception did not take the smooth course that seemed to be its birthright. So deep are the current divisions on the issue that Title IX makes headlines on nearly a daily basis. Its proper interpretation was the subject of a contentious Bush administration committee that reports to Secretary of Education Rod Paige.¹ This committee was asked to re-examine the administrative implementation of the program. As a first cut, the public controversy concerns whether the Office of Civil Rights in the Department of Education has gone too far in proposing a proportionality requirement on intercollegiate athletics, such that schools will have a safe harbor (so to speak) under Title IX only if the number of women on intercollegiate teams is proportionate to the number of women enrolled in undergraduate programs. The proportion of women enrolled in undergraduate programs across the nation today stands at around 76 percent, which hardly counts as evidence of male domination in institutions of higher education. The number of schools that meet the proportionality requirement is, at a guess, close to zero, where only institutions like the service academies, with heavily male populations are in, or close to, compliance.

The dispute has been marked by uncommon bitterness on both sides, and the tepid recommendations of the Paige Committee to slightly relax the guidelines have been met with ferocious opposition from women’s groups. The Commission study reads as though the position of women in higher education still remains tenuous, for the short cover letter from its two chairs stresses “the need to ensure continued progress in eliminating discrimination against women.”² But that conclusion sounds odd in light of the situation on the ground. “In 1972, when Title IX was enacted, 44 percent of all bachelor’s degrees were earned by women, as compared to 57 percent in 2000.”³ The real social challenge is to explain the decrease in the total number of men who are enrolled in programs of higher education.

The situation looks no different with respect to athletics, where there has been a dramatic increase in the percentage of females who

1. U.S. DEP’T OF EDUC., SECRETARY OF EDUCATION’S COMMISSION ON OPPORTUNITY IN ATHLETICS, OPEN TO ALL: TITLE IX AT THIRTY (Feb. 28, 2003), available at <http://www.ed.gov/pubs/titleixat30/index.htm/> (last visited May 3, 2003).

2. *Id.* at 1 (letter of transmittal of Ted Leland & Cythia Cooper-Dyke, co-chairs).

3. *Id.* at 2 (citing NAT’L COALITION FOR WOMEN AND GIRLS IN EDUC., TITLE IX AT THIRTY: REPORT CARD ON GENDER EQUITY (2002)).

participate in intercollegiate sports.⁴ Today's ratios are such that men constitute roughly 56-57 percent of the athletes but only 43 percent of the students, which essentially means that the interscholastic participation rates have to be reversed to be in compliance with a proportionality standard. The current roster of male college athletes stands at about 209,000, while the number of female athletes is around 151,000. The clear implication is that 68,000 male athletes have to be eliminated and a like number of female athletes added to achieve Title IX's required proportionality. It cannot be done without wrecking men's programs. It is easy to find sports, such as football and wrestling, in which men have a strong interest and women virtually none. No one can point to a women's sport, not practiced by men, of equal importance. In this critical matter, the action takes place at the margin. In a world without discrimination the cost of adding a new female athlete should equal that of adding a new male athlete. But the Report makes no effort to measure costs at the margin. We know that at the current time, however, those marginal differences are likely to be huge, as additional women will need large scholarships to be coaxed into participation while male athletes are quite literally willing to pay for participation.

These stark considerations count for naught in a Report that reaffirms the importance of the status quo in its recommendations when it writes in Recommendation 4: "*The Office for Civil Rights should not, directly or indirectly, change current policies in ways that would undermine Title IX enforcement regarding nondiscriminatory treatment in participation, support services and scholarships.*" (Recommendation 4). Recommendation 6 then endorses "aggressively enforcing" Title IX.⁵ Thereafter a whole raft of small-bore recommendations urge the Office of Civil Rights to find better ways to measure compliance with Title IX's objectives.⁶ The composition of the committee makes it clear that each important interest group has veto power over change, so that it is no surprise that the overall tenor of the Report shows an unwavering if unthinking commitment to Title IX.

To my mind, the most important lesson to take from this Report is that government commissions offer a sure-fire forum in which to exalt

4. *Id.* at 13. The table in the Report reads as follows:

	<u>Men</u>	<u>Women</u>
1966-1967	151,918	15,182
1971-1972	170,384	29,977

5. *Id.* at 34 ("*The Office for Civil Rights should aggressively enforce Title IX standards, including implementing sanctions for institutions that do not comply. The Department of Education should also explore ways to encourage compliance with Title IX, rather than merely threatening sanctions.*").

6. *Id.* at 37-40 (Recommendations 14, 15, 17, 19, 20, 21, 23).

without analysis the virtues of the status-quo ante. Ironically, the fierce struggle between the different groups over the administration of Title IX arises because no one is prepared, on pain of political exile from the mainstream, to think outside the box. The resulting intra-mural struggle is, therefore, to my mind, wholly misguided from one end to the other precisely because of the failure across the board to see that “just do it” does not apply to legislation in the same way that it does to individual athletic achievement, or indeed to any form of private choice. Explaining why this is the case requires at least a brief review of the history of Title IX, which may prove familiar to many readers.

Title IX was adopted into law with great fanfare and no opposition in 1972. The date is of some note in light of the massive civil-rights unrest of the 1960s. The mood of the nation had shifted such that the principle of nondiscrimination became strongly entrenched as a bedrock conviction of American culture. Doubts over preferential treatment on the grounds of sex persisted, but a rapid change in attitudes and practices had already begun, and the entry of women into the professions was transforming colleges, graduate departments, and professional schools in business, law, and medicine. Many all-male institutions (e.g., my alma mater, Columbia College) decided to admit women in this period even though they were under no legal compulsion to do so. These social pressures led to the passage of Title IX just about the time that these changes were already underway. Most people agreed with the social objectives of Title IX. They therefore saw no reason to oppose a statute because they did not anticipate the enormous donnybrook that would arise over its implementation. The dominant moral case for Title IX explains why the legislation had such an easy time getting through Congress. When it came up for debate in Congress, senators and congressmen fell over each other to denounce the pervasive discrimination in higher education.⁷ Such a chorus of unanimity on ends should be regarded as raising a red flag because it tends to blind everyone to the difficulties of transition and implementation. It is ever so easy to agree mightily that we should “just do it,” only to worry about the nettlesome technical details afterwards. The result of this attitude was the following statutory provision: “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”⁸

At this time there was much concern about quotas and preferential treatment under the antidiscrimination laws. Accordingly, Title IX

7. See, e.g., 118 CONG. REC. 5804 (1972) (statement of Sen. Bayh).

8. 20 U.S.C. § 1681(a) (2000).

contained language, parallel to that found in Title VI, which held that the prohibition against sex discrimination shall not “be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist” between the total number or percentage of persons of that sex participating in any federally supported program or activity, and “the total number or percentage of persons of that sex in any community, State, section, or other area.”⁹ But that provision is then followed by still another providing that the statute “shall not be construed to prevent the consideration in any . . . proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.”¹⁰

Just from reading the statute, some of its results seem clear. It is no longer possible for the chemistry professor to announce that he will not take on female graduate students. The statute thus has unproblematic application with respect to some of the core historical cases of discrimination based on arbitrary refusals to deal. Yet by 1972 the internal policies of just about every university had evolved in this direction anyway. There was no need to have separate facilities in order to allow women into all academic programs; nor was any cost difference likely to be associated with their inclusion. The transition was easy enough to make because nothing in the Act disrupted the existing internal practices of universities. When compliance is automatic, no one has to decide what remedial measures count as a form of forbidden preferential treatment, and which do not. The tangle of unexplored complications could remain buried in the fine print.

To the uninitiated, what harm is there in using a law to solidify the dominant social consensus? But the perils of “just do it” in the legislative area apply most forcefully to easy cases. If the consensus is solid, then by all means let it operate, for it is far easier to make corrections to social practices at the institutional level than it is to legislate them at the national. Once the statute is on the books, it is capable of extension to areas in which state force is likely to prove highly disruptive. In this case, it has been with the operation of athletic programs. The difficulty here starts with the definition of “equal opportunity.”

There might be no question that women and men should be allowed to enroll in the same courses, but should they be forced to participate in the same athletic programs? Here there has been a long tradition of sex-segregated athletics because of the unequal physical skills of men and women. It would simply not do for Title IX to require the abolition of all separate men’s and women’s teams so that

9. 20 U.S.C. § 1681(b) (2000).

10. *Id.*

one team in all sports could be open to all on the basis of some sex-blind criterion. Nor could adopting some “neutral” criterion to create some protected niche for women solve this problem of imbalance. Does anyone really think that we can fix the problem of male domination by organizing one basketball team for all people who are taller than 5 feet 8 inches and one for all people shorter than that height? No way: men would dominate both teams to the exclusion of women. The potential gains from female participation in athletics would be destroyed under a sex-blind standard.

It is painfully evident that some other form of accommodation is needed to carry over Title IX to athletics. But what? At this point the text of Title IX offers no real guidance. By the same token, the moral consensus that fueled Title IX’s passage had run out of steam. It is no longer possible to “just do it,” if we have no idea what it is that should be done. This conceptual and practical void was filled by the Office of Civil Rights (“OCR”) in the Department of Education (“DOE”). The OCR was charged with translating the principle of equal opportunity in a context in which it was not possible to appeal to any sense of natural equality. At this point, the rules start to look less like a universal declaration of the rights of man and more like a complex bureaucratic web. It is important to set out the basic regulation in full.¹¹

11. 34 C.F.R. § 106.41 (1995) provides:

- a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.
- b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.
- c) Equal Opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:
 - 1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
 - 2) The provision of equipment and supplies;
 - 3) Scheduling of games and practice time;
 - 4) Travel and per diem allowance;

This regulation prompts several observations even before we reach the burning dispute over proportionality. The first is that no one quite knows what it means to talk about equal opportunity in an environment where the programs in question are subject to some degree of necessary separation. There are good theoretical reasons why no wave of a magic wand can make this problem disappear. When an integrated program is possible, as with education generally, there is no reason to worry about differences either in cost or demand. The former are roughly equal and students may just enroll in the academic programs of their choice. If it turns out that more women choose to enroll in the hard sciences, the colleges can respond by hiring more faculty and building more laboratory space. Once the programs are separate, however, the civil rights statute looks more like an exercise of rate regulation than the enforcement of some fundamental moral principle.

Nor is it possible to resolve this question by an appeal to rules. Rather, we are told that the Director "will consider" a number of factors in making the official determination of whether opportunities are equal or not. The common view often attributes wisdom to the refusal to lay down fixed rules. But it is far better to regard these inconclusive declarations as a confession of intellectual weakness in the underlying substantive scheme. As is always the case with such multifactor tests, no administrator dares assign weights to the various relevant factors, nor will anyone commit to an exclusive list of such factors.

It is here that the difficulties begin. At the first level, each of these internal elements raises as many questions as it answers. Initially, it is necessary to make critical global judgments, which always turn out to be elusive when all the relevant factors do not line up in the same way. How does one attach weights to the various elements so as to allow for their combined rating? There is no formal metric that will do this job, so the process itself will necessarily favor discretion over rules, which means that figuring out who decides becomes ever more important. The new density in this legal framework is evident to anyone who contrasts the universalist style of the statutory command with the turgid ad hoc quality of its key regulation. Yet this is not in and of itself a criticism of the regulation, given the statute has to be interpreted somehow, and cannot be simply ignored. Once the question becomes

5) Opportunity to receive coaching and academic tutoring;

6) Assignment and compensation for coaches and tutors;

7) Provision of locker rooms, practice and competitive facilities;

8) Provision of medical and training facilities and services;

9) Provision of housing and dining facilities and services;

10) Publicity.

how to treat different cases alike, then any administrator will have to scramble. The inherent burden of choreographing new dance steps cannot be avoided. What can be changed is their content. Other regulations could have been drafted that took into account revenue differences or differences in levels of interest. Those alternatives could be attacked on the ground that they too give excessive discretion to administrators, who may give a free pass to colleges and universities. That is just the problem. There is no neutral translation metric, and this is a point that counts in favor of repealing the Act, rather than in favor of its universal enforcement.

In one important sense, the difficulties go deeper. Any system of social regulation presents the following question. When individuals are subjected to a single collective regime, what is the objective of the regulator: To improve the position of all equally against some prior baseline, or to redress some fundamental inequity (or inequality) within the basic system? The issue comes up all the time: Is social health care insurance intended to charge people premiums that match risks, or is it intended (as the word “social” can be read to suggest) to redistribute wealth to poorer individuals under the umbrella of the collective program? It’s anyone’s guess, and if the latter is chosen, as is often the case, the question of “how much” cannot be answered with any confidence at the outset.

Just this problem plagues the general regulations under Title IX. Consider just one factor — assignment and compensation for coaches and tutors. Let us assume that the men’s basketball team draws twice as many spectators as the women’s. Is it now appropriate to pay the male coach more because he is in charge of a larger budget? To offer him a lucrative media contract on the side? Or do we argue that these differences simply perpetuate the form of discrimination that Title IX is supposed to end? And if so, then just what pay differential is appropriate and why? No one can commit to an answer in advance, and no one can sort out the relevant factors with enough confidence to override the judgment of those who have programmatic responsibility in the first instance. Yet Title IX takes the locus of decisionmaking from the university or college and places it in the lap of the federal administrator. It is easy to see why the creation of this administrative morass should be a source of profound uneasiness to those who believe, naïvely perhaps, in the rule of law.

The problems with the regulation’s list of relevant factors run still deeper. For amidst the confusion about individual cases, one point becomes clear: conspicuous by their absence are the revenue and/or profit generated by the various interscholastic activities in the first place. At this point, the entire agenda under Title IX begins to lapse into incoherence, even before we get to the issue of proportionate participation levels. The culprit to some extent is football, which consumes huge resources and generates huge revenues for schools. In

many cases, it is hard to determine whether the program runs at a gain or a loss. In calculating revenue, do we include sales of memorabilia? Do we include increased alumni giving to the school, including its academic programs? Do we assign a dollar value to the favorable publicity that prominence in athletics brings to the program at large? Do we debit this for the decline of teaching effectiveness within the school? Within any voluntary organization, all these indirect costs and benefits are absorbed in the first instance by the college or university, and its administrators will normally invest in any activity until its marginal cost equals its marginal benefit, notwithstanding the heroic efforts that it takes to figure out where these multiple margins lie.

To make matters more difficult, most universities engage in a wide variety of internal cross-subsidies that are not practiced by ordinary commercial firms. No one expects the English department to break even financially, but no one thinks that a sensible university should shut it down for that reason. The art of administration demands that someone determine the nature and extent of the transfer payments needed between the financially strong and weak departments and schools.

There is no question that these issues will, and should, generate major disagreements within the regulated schools. There is, however, no question that the guidelines of equal opportunity as set out by the Department of Education do not track faithfully the considerations that any responsible administrator would regard as relevant to the overall analysis. The upshot is that when both revenues and levels of interest are taken into account, the one result that seems clearly not to hold is that of strict proportionality. The well-run athletics program, state or private, will devote more resources to male activities because the rate of return from those investments is higher than it is for women. Men will participate in a greater range of sports, and within any sport will participate at higher levels. The extra resources that they receive, moreover, are not a naked transfer from women students. Quite the opposite, women will participate in larger numbers in other activities underwritten by these sports revenues. The regulatory frame of mind blinds us to the subtle offsets that take place between programs, within and across budgetary periods. Trying to balance the accounts within any single program shows a total lack of appreciation for the nuances of the internal economy of any complex nonprofit organization.

The deviation between the state command and the voluntary solution looks small with academic programs. But the misfit between what is needed and what is required is just huge for intercollegiate athletic programs under the statutory mandate of equal opportunity. Title IX of course says not a word about how we should balance the dangers to women from contact sports with men, on the one hand, with the equal opportunity mandate, on the other. Oddly enough the regulations

represent a retreat from the sex-blind position insofar as they do not require schools to allow women to try out for men's basketball or football teams. Nor is it an answer to say that it might prove too dangerous to women, because that is something which they should be able to decide for themselves. But from the regulator's point of view, any regime that embraces choice has one irremediable vice: it allows too much freedom to the regulated parties. Hence the noose is tightened not by congressional legislation and not by the issuance of regulations after notice and comment. Rather, the next turn of the screw takes place through pure administrative action in the form of a Policy Interpretation, which purports to interpret the first of the nonexclusive factors listed above, namely, whether effective opportunities for participation have been afforded to both men and women. Here is the outgrowth of that deliberation:

- 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.¹²

At this point, all the weaknesses of the basic structure have been incorporated into law. The deviation between what sensible voluntary organizations would do and what the OCR requires is now beyond the power of half-measures to gloss over or to correct. The simplest evidence for this proposition is that (service academies, perhaps to one side) not a single college or university meets the first prong of this three-part test, while not a single university falters in its obligation to open up its academic programs to all. The only hope for salvation lies in the second and third prongs. In this case the second prong contains a real trap. Any university that decided to revamp its athletic programs promptly in light of new demands puts itself at risk, because

12. Title IX of the Education Amendments of 1972, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

it cannot continue to expand opportunities for women once it has reached its internal equilibrium point, which appears to be around a sixty-five to thirty-five percent split, depending on how football is counted. Just this fate befell Brown University when it expanded its women's opportunities substantially after its merger with Pembroke College.¹³ That expansion is best interpreted as a response to internal demand, and shows in its own way that private institutions are responsive to the needs of all their students. The college that wants to hold off the regulators under Title IX would do better to delay the introduction of new teams so that it could continue to show progress toward some predetermined goal, even if it meant doing a disservice to their own women's athletic programs. But any school that responded to sensible economic pressures would stop the expansion of a women's program when it judged that the cost of developing new positions exceeded the benefits.

There are, however, clues in the wind which suggest that those sensible margins have long been crossed. In the Brown University case, the narrow issue was whether it was permissible to cut back an equal number of women's and men's teams when the overall balance showed a proportionately greater percentage of men's athletic teams. The First Circuit in *Cohen v. Brown University* held that it was not. The telltale sign that Brown was engaged in rational behavior — that is, to equate costs between men's and women's program at the margins — was that the savings generated by cutting the men's teams were one-fourth the savings generated by cutting the women's teams, about \$16,000 to \$64,000 per year.¹⁴ Nonetheless, the court held that cutting back on men's teams did not advance the interest of women's teams so long as there was a lack of parity between the two.¹⁵

The decision in *Cohen* represented something of a watershed with respect to Title IX. Brown could (or can) hardly be described as a conservative bastion dominated by men imbued with old-guard values. Yet the judicial decision depended little on who or what Brown was. It ultimately depended on what OCR had decided. In this case, there is an evident creep outward in the reach of administrative power, which

13. *Cohen v. Brown University*, 101 F.3d 155, 163 (1st Cir. 1996).

The district court also summarized the history of athletics at Brown, finding, inter alia, that, while nearly all of the men's varsity teams were established before 1927, virtually all of the women's varsity teams were created between 1971 and 1977, after Brown's merger with Pembroke College. The only women's varsity team created after this period was winter track, in 1982.

Id. at 163 (internal citations omitted).

14. *Id.* at 163.

15. The court noted further that, because merely reducing program offerings to the overrepresented gender does not constitute program expansion for the underrepresented gender, the fact that Brown eliminated or demoted several men's teams did not amount to a continuing practice of program expansion for women. *Id.* at 175-76.

confirms the oft-stated proposition that effective bureaucracies work overtime to increase their budgets by expanding their power. No matter. There is no clear point in the four-stage movement from statute to regulations to policy interpretations to field implementation that marks a discontinuous jump from the previous position. Nor is there anything in the language of equal opportunity that flatly rules out the proportionality test that the policy ruling imposed, even if more modest interpretations seem far more in keeping with the original tenor of the Act.

At this point, the key element in the judicial struggle under administrative law is the extent of deference that is taken toward administrative agencies under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,¹⁶ which was quoted at just the right moment in *Cohen*. "It is well settled that, where, as here, Congress has expressly delegated to an agency the power to 'elucidate a specific provision of a statute by regulation,' the resulting regulations should be accorded 'controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'" ¹⁷ The result follows from the familiar administrative law refrain that expertise matters in deciding on the implementation of complex statutory regimes. Once again, the court in *Cohen* knew just what language to trot out: "As the Supreme Court has explained, 'because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers.'" ¹⁸

As a matter of political economy, this claim, taken normatively, must surely be wrong for two reasons. First, it pays no heed to the risk of bureaucratic expansion I alluded to above. Second, it assumes that some form of expertise can be identified at all when the most difficult problem is to figure out how much to invest in athletics across the board, and how much to invest in each component within the program. In this context, distant administrative expertise (no sign of which appears in the regulations) is a poor substitute for local knowledge. The upshot, therefore, is that aggressive administrative action receives a judicial blessing that is impossible to overcome.

When *Brown* lost its case, the Supreme Court refused to grant certiorari, doubtless because of the want of conflicts between the circuits. If a university could not get to first base with a strong case, then the die was cast: no form of judicial intervention would ever limit

16. 467 U.S. 837 (1984).

17. *Cohen*. 101 F.3d at 173 (quoting *Chevron*, 467 U.S. at 844).

18. *Id.* at 173 (quoting *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991)).

the OCR's expansion of Title IX. At this point, the consequences of Title IX became apparent. The ostensible purpose of the Act was to equalize opportunity. In practice, when judged by any standard of interest or cost, Title IX has done the opposite. Any woman who wants to participate in athletics at the varsity college level has far more opportunities than a similarly situated man. But no amount of evidence that more men are disappointed than women in their pursuit of athletics at the college varsity level could displace the iron presumption erected within the OCR. Clear demonstrations that many more men than women participate in intramural activities, or that huge numbers of male teams have been cut in "minor" men's sports such as wrestling and gymnastics, are likewise of no avail. News articles, published in the *New York Times* no less, under the headline "Forget It" — addressed to men who wish to try out for varsity athletic teams — likewise cut no ice.¹⁹

This phenomenon reflects the fashionable view of human behavior and the doubts about the stoutness of human preferences that loom so large in academic discourse today. It does not matter that the levels of female participation in varsity athletics would have gone up with or without Title IX. What matters is that the (relatively) low levels of female participation in varsity sports are said to be the results of lingering stereotypes and discrimination, which are too insidious to ignore even if impossible to detect in the behavior of college administrators. Management pundits might say that the problems could be solved simply by cutting the size of men's football teams, as if it were somehow possible to compensate for the denial of one set of opportunities by cutting some other activity that a college administration, in its own best judgment, regards as more important on balance. The entire issue is framed to suggest that women are powerless to exercise self-help without assistance from the strong arm of the law, and that false consciousness can only be beaten back by government intervention.

The simple explanation of these problems is that the allocations required by law are different from those that would be made internal to the organization that seeks to make responsible trade-offs at the margin: the last athlete of both sexes should cost the same. No sensible administrator would shut down a men's swim team where the male athletes are prepared to swab the pool decks in order to keep alive a women's hockey team where large scholarships are necessary to lure women to try out for the team. Bodies that have no knowledge of the local situation, and that bear no responsibility for the business and financial management of the athletic programs, remain in charge. The champions of Title IX wish to minimize the differences in participation levels between men and women because they supposedly know

19. Bill Pennington, *Want to Try Out for College Sports? Forget It.*, N.Y. TIMES, Sep. 22, 2002, at A1.

best what the ideal distribution should be. The directors and officers of most universities wish to maximize the benefits to all students, which is quite a different function.

What, then, is the root cause of the difficulty? Here the proponents of changes to the Title IX regulations all find the villain in the proportionality requirement imposed under the 1978 Policy Interpretation, which they think has strayed too far from the original purpose of Title IX. They hope to tinker with the margins through the administrative deliberations now in place. Writing in a recent issue of the *New York Times*, author and former wrestler John Irving takes the typical approach of attacking Title IX for its excesses in intercollegiate sports while extolling its intrinsic virtues.²⁰ He notes somberly the decline in participation in wrestling programs at the college level. In a sport that has rapidly grown at the high school level since 1993, the number of varsity teams has gone down from 363 NCAA wrestling teams to 229, while the total number of wrestlers decreased from 7,900 to somewhat fewer than 6,000 in 2001.²¹ Yet Irving, like so many “prudent” critics of Title IX, goes out of his way to praise Title IX as a “fairness-for-all law” while lamenting that it has been “reinvented” (“hijacked” might be a better term) via interpretation into a tool to marginalize men. In so doing, he leaves himself open to attack by Myles Brand, the newly appointed President of the NCAA, who claims that Title IX has nothing to do with the decline of wrestling teams, which fell in numbers in the early 1980s, a time during which Title IX was not vigorously in force.²²

But it is a mistake to get into endless debates over the particulars of causation. What really matters in this case is the transfer of power from the institutions who organize, finance, and run these programs to a government that bears none of these responsibilities. The current mindset is that private discrimination is so rampant and so pernicious that government intervention should be regarded as the finger stuck into the hole in the dike, even though any university official who announced an intention to discriminate against women would have

20. John Irving, *Wrestling with Title IX*, N.Y. TIMES, Jan. 28, 2003, at A21.

21. See Joe Lapointe, *New Chief Brings College Presidential Seal to the N.C.A.A.*, N.Y. TIMES, Feb. 9, 2003, at 9.

22. Brand's position is reported as follows: “Title IX gets blamed, for example, in terms of wrestling. Well, it's interesting to observe that in the first half of the 1980's, Title IX was in complete abeyance and it was not enforced. It was put on hold. During that period of time, 53 wrestling programs were closed. So that tells me that individual institutions were making decisions about wrestling.” Lapointe, *supra* note 21 (internal quotation marks omitted). The Commission Report notes that 171 wrestling teams were cut in the 18 years between 1981-1982 and 1998-1999, which suggests that nearly 10 teams were cut on average both during the early 1980s and thereafter. U.S. DEPT OF EDUC., *supra* note 1, at 19 (internal citation omitted). Brand's number does not explain the other 118 cuts, or the relatively constant rate of attrition over the period of “abeyance” and active enforcement. Irving, *supra* note 20.

a tenure measured in days, if not hours. Those responsible for this transfer of power forget the lesson of Friedrich Hayek on the importance of the decentralization of power as a check against ignorance, bias, and greed.²³ The OCR labors under no competitive pressures and no budget constraints. It and every university in the land knows that merely announcing an investigation poses an enormous threat to any private institution, no matter what its outcome. Restore to universities the control over their decisions, and the pressures will cease to be national and become local. The essence of running a university is deciding on an intelligent set of cross-subsidies, which only experimentation and fine-tuning — right for private institutions and wrong for governments — can achieve.

No modest fix of the regulations will make much difference so long as the clear political progression from cautious generalizations to aggressive particulars is allowed to run its administrative course. There is only one way to stop this progression in its tracks, which is to resist the arrogation of government power at its first step. The argument here has nothing to do with whether one likes or dislikes women's athletics. Rather, it has to do with the critical role of voluntary institutions and their autonomy, which cannot be satisfied when state and private universities all operate under a single mandate from Washington, D.C.

The case for autonomy is not unique to Title IX, and it in no way depends on a liberal or conservative slant to its particular applications. In a recent issue of this law review, I wrote an article that urged the United States Supreme Court to allow Michigan's affirmative action program to survive challenges under the color-blind reading of the Equal Protection Clause of the Fourteenth Amendment.²⁴ I did not take this stand out of any peculiar support for affirmative action programs at the university level. My views of what should or should not be done within a university have little to do with this issue, and should be cheerfully disregarded by anyone who thinks that they are ill-advised for his or her home institution. We need to break the eerie consistency whereby those who support affirmative action find it constitutional while those who oppose it do not. It is perfectly consistent to support a move to limit or abolish such programs as a member of the faculty and to invoke the principle of *nonintervention* to prevent the imposition of some uniform regime.

I take this position, moreover, even though I have long argued that higher standards of review should be imposed on state and federal governments alike whenever they engage in programs of taxation or

23. See generally FRIEDRICH A. HAYEK, *THE FATAL CONCEIT* (1988).

24. Richard A. Epstein, *A Rational Basis for Affirmative Action: A Shaky but Classical Liberal Defense*, 100 MICH. L. REV. 2036 (2002).

regulation.²⁵ Here they are running businesses as opposed to acting as a public police force. For private universities, the right solution is to let them do what they please. These are, as the Supreme Court likes to say, expressive institutions which, like the Boy Scouts, should be allowed to decide who comes in and who stays out, and what is done within the walls.²⁶ Indeed it is easy to take the argument one step further and to say that freedom of association should be protected as an outgrowth of human freedom more generally whether or not it is associated with some form of expression. There is little profit in asking whether athletics like drama represent a protected form of constitutional speech. Public universities are a bit more difficult to deal with, but here I believe that the resemblances to private universities are far greater than those to public police forces. That does not mean that they should be wholly free to do as they choose on matters of race, but it does mean that they should be able to imitate the set of practices undertaken by private universities, which have no truck with traditional forms of segregation.

The same considerations that apply to affirmative action apply to Title IX. The question of governance is the question of *who* shall decide what rules control colleges and universities. The question of *what* should be decided may be of much public concern, but public concern does not, without more, translate itself into public power. At a structural level, the vital and enduring concern is how institutions define and organize themselves. Whether we deal with affirmative action or Title IX, the greatest threat to organizational freedom comes from the use of government coercion to support policies that *do* command widespread public support. Those policies will be implemented at the local level, and if not in as monolithic a fashion as the regulations under Title IX, it is because competing considerations come more quickly to the fore in a private setting where the feedback loops are more sensitive. The state does not have to use its power to create some ideal-universal policy. Rather, the social power must be directed against outliers who will use force to disrupt the activities of other institutions. No social consensus should be so strong or so self-complacent that it will drive out by public decree those individuals who operate their own institutions under a different set of principles. Competition is not just an economic value; it is a political check on the aggrandizement of power. Tinkering with Title IX regulations will merely invite yet another round of evasive responses. We should stop thinking of this as one giant public problem instead of many small

25. See generally RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

26. See *Boy Scouts of America v. Dale*, 530 U.S. 640, 649-50 (2000); see also Roderick M. Hills, *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144 (2003).

institutional problems. When it comes to the abolition of Title IX, by all means just do it.

The same point applies to other critical issues of educational policy. Just think of how the world would look if all books of merit had to be published in accordance with guidelines established by some national government agency. One confident prediction is that book review issues, like the current volume of the *Michigan Law Review*, could not thrive in an environment in which individual teachers were denied choice of the books that they could use, for example, in classroom instruction. The success of scholarship depends on its decentralized control, and the evidence of that success is found most concretely in the reviews of the forty-one academic books that are reviewed in this current issue of the *Michigan Law Review*.