

THE FEMINIST CASE FOR THE NCAA'S RECOGNITION OF COMPETITIVE CHEER AS AN EMERGING SPORT FOR WOMEN

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Abstract: This Article examines whether a university can count opportunities in competitive cheer to demonstrate compliance with Title IX. A federal court in Connecticut recently considered this question for the first time. Although it held that the sport as it currently exists is not sufficiently similar to other varsity sports to qualify for Title IX compliance, the decision has mobilized two separate governing bodies to propose more organized and competitive versions of competitive cheer as possible NCAA emerging sports. This Article argues that these proposals would satisfy regulators and the courts. It then discusses how competitive cheer has potential to improve Title IX compliance, in a way that would benefit women's sports generally, by expanding the definition of sport to include those that are women-driven and by reclaiming as sport an activity—cheer—that was initially deployed to separate women from athleticism. In light of these reasons, as well as the burgeoning interest in competitive cheer at the college and high school levels, the Article concludes that the NCAA should promote the growth of competitive cheer by endorsing it as an emerging sport for women.

INTRODUCTION

In 2010, in *Biediger v. Quinnipiac University*, the U.S. District Court for the District of Connecticut became the first federal court to consider whether competitive cheer could count as a varsity sport for purposes of gender equity under Title IX.¹ Quinnipiac University's com-

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¹ See *Biediger v. Quinnipiac Univ. (Biediger II)*, 728 F. Supp. 2d 62, 64 (D. Conn. 2010); see also Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2006).

petitive cheer team had evolved from sideline cheerleading, but was a separate and distinct activity, most notably due to its devotion entirely to its own competition and to the fact that it did not cheer on the sidelines in support of other teams. The court, however, determined that Quinnipiac's competitive cheer team was not a sport for purposes of Title IX, citing dissimilarities between cheer and other varsity sports that the university supports.² In particular, the court focused on the fact that competitive cheer is not recognized by the National Collegiate Athletic Association (NCAA) or any comparable governing body.³ If the NCAA had designated cheer an "emerging sport for women," a provisional recognition that results in championship status once a threshold number of teams have been added by member institutions, the court likely would have counted competitive cheer opportunities alongside other athletic opportunities when determining, for purposes of Title IX, whether the opportunities overall are distributed equitably to members of each sex.⁴ This raises the question: should the NCAA recognize competitive cheer—also known as "acrobatics and tumbling" and "stunt"—as an emerging sport?

This Article proposes that the NCAA apply two levels of analysis to this question. First, it must insist that competitive cheer be defined and organized in such a way that it is truly comparable to other varsity sports. This would ensure that collegiate competitive cheer teams provide genuine athletic opportunities within the meaning of Title IX, and ensure that universities could not simply re-label an existing activity in order to create the appearance of a more equitable distribution of athletic opportunities.

Second, the NCAA should consider whether recognizing competitive cheer will enhance women's sports generally. This is a more challenging question, as some fear that adding competitive cheer could stall or cause a decline in opportunities for women in traditional sports, an area where women's participation helps to neutralize negative stereotypes about female athleticism.⁵ Additionally, some may fear that legitimizing competitive cheer will promote or entrench the narrow, ide-

² See *Biediger II*, 728 F. Supp. 2d at 99–101.

³ See *id.* at 94.

⁴ See *id.* at 94, 101. The court stated that it has "little doubt that at some point in the near future—once competitive cheer is better organized and defined, and surely in the event that the NCAA recognizes the activity as an emerging sport—competitive cheer will be acknowledged as a bona fide sporting activity by academic institutions, the public, and the law," but noted that "that time has not yet arrived." *Id.* at 101.

⁵ See, e.g., DEBORAH L. BRAKE, GETTING IN THE GAME: TITLE IX AND THE WOMEN'S SPORT REVOLUTION 102–03 (2010).

alized version of femininity that was originally cultivated in traditional sideline cheerleading—a version of femininity that was more sexual than athletic, and which normalized the expectation that women belonged on the sideline rather than the playing field.⁶ This Article takes the position that there is symbolic power in the transformation of cheerleading from an activity that “ghettoized” women into non-sport activities, to one that displays women’s competitive athletic ability. By promoting and supporting the growth of competitive cheer, the NCAA could contribute to the destabilization of many negative stereotypes that currently serve to limit women’s opportunities in sport, and could help expand the definition of sport to encompass women-driven, competitive athletic opportunities.

Part I of this Article explains the relationship between cheerleading and Title IX and provides background on the *Quinnipiac* litigation.⁷ Part II describes the ongoing efforts to qualify cheer as an emerging sport.⁸ Part III contains an analysis of whether the sport being proposed by two organizations satisfies Title IX concerns, as well as the larger question of whether competitive cheer is good for women’s sports generally.⁹

I. TITLE IX, COMPETITIVE CHEER, AND *BIEDIGER V. QUINNIPIAC UNIVERSITY*

Section A of this Part provides a background of Title IX and its relationship to competitive cheer.¹⁰ Section B discusses the analyses of competitive cheer conducted by various regulators, including the Department of Education’s Office for Civil Rights (OCR).¹¹ Section C presents the judicial response to competitive cheer thus far, focusing on the 2010 opinion by the U.S. District Court for the District of Connecticut in *Biediger v. Quinnipiac University*.¹²

A. *Cheerleading and Title IX*

Title IX is a comprehensive statute that prohibits discrimination on the basis of sex in all aspects of federally funded educational institutions, including extracurricular activities of both athletic and non-athletic va-

⁶ See *id.* at 103.

⁷ See *infra* notes 13–81 and accompanying text.

⁸ See *infra* notes 83–121 and accompanying text.

⁹ See *infra* notes 122–148 and accompanying text.

¹⁰ See *infra* notes 13–27 and accompanying text.

¹¹ See *infra* notes 26–45 and accompanying text.

¹² See *infra* notes 46–79 and accompanying text.

rieties.¹³ The general rule is that participants may not be limited or excluded on the basis of sex, but Title IX applies differently to athletics than it does to any other aspect of education. As interpreted by the Department of Education, athletic programs under Title IX may exclude women from men's athletics and vice versa so long as there is equity generally between the men's and women's programs.¹⁴ Among other things,¹⁵ the number of athletic opportunities for each sex must be equitable¹⁶ as defined in one of three alternative measures of compliance.¹⁷ The first option, proportionality, asks whether the percentage of athletic opportunities provided to each sex is equal to the percentage of each sex in the student body.¹⁸ The second requires the school to demonstrate a history and continuing practice of expanding athletic opportunities for the underrepresented sex.¹⁹ Lastly, the third asks whether existing athletic opportunities, disparate as they may be, nevertheless satisfy the "interests and abilities" of the underrepresented sex.²⁰ By requiring schools always to meet one of these three tests, the law protects women, the underrepresented sex, from losing existing athletic opportunities. Because cutting a viable women's team necessarily violates the second and third prong, a school can only lawfully take this action when it complies with the proportionality prong. Thus, schools unable to add or preserve women's athletic opportunities²¹ may be tempted to count women's opportunities that are marginally athletic in order to provide the appearance of proportionality.

¹³ See Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2006).

¹⁴ See 34 C.F.R. §§ 106.21, .31 (2010).

¹⁵ See *id.* § 106.41(c)(2)–(10) (2010) (requiring equity in such qualitative factors as access to facilities and equipment, scheduling, coaching, publicity and promotion, and other aspects of athletic participation).

¹⁶ See *id.* § 106.41(c)(1).

¹⁷ See Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) [hereinafter Title IX Policy Interpretation].

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.*

²¹ For simplicity, this Article uses "athletic opportunities" to mean intercollegiate "varsity" athletic opportunities, even though Title IX's athletics regulations apply by their terms to all varieties of athletics, be they intercollegiate (varsity), club, or intramural. See 34 C.F.R. § 106.41(a). Colleges and universities must separately satisfy the equity requirement for their club and intramural programs. See Title IX Policy Interpretation, *supra* note 17, at 71,413, 71,418 (signaling separate consideration of varsity opportunities by providing a policy that by its terms applies particularly to them, while applying the policy as "guidance" to other types of athletic opportunities).

In response, OCR, which enforces Title IX, has warned that schools may only count athletic opportunities that are “real, not illusory,” and that offer the same benefits as would be provided to other athletes.²² Moreover, soon after Title IX’s inception, regulators specifically addressed the temptation to count cheerleading and other predominantly female activities, when they clarified that “drill teams, cheerleaders and the like . . . are not a part of the institution’s ‘athletic program’ within the meaning of the [athletics] regulation.”²³ This interpretation was not controversial because it predated the competitive trend in cheer. As female athleticism became increasingly normalized in the Title IX era, however, cheerleaders incorporated more acrobatic and physically demanding moves like jumps, tosses, and pyramids into sideline routines.²⁴ Private companies such as the National Cheerleaders Association (NCA) and the Universal Cheerleading Association (UCA) have since developed national, state, and regional championships to give squads the opportunity to compete against other squads.²⁵ Private “All-Star” cheerleading teams, not affiliated with educational institutions, have also emerged to provide cheerleading opportunities that are competitive-only and do not include any sideline support or spirit-raising for other teams.²⁶ Eventually, a few college and university athletic departments added women’s competitive-only cheer teams in the All-Star model. The first to do so was the University of Maryland in 2003.²⁷

B. Regulators’ Analyses of Competitive Cheer

Because the University of Maryland’s competitive cheer team was significantly different from the sideline-only squads that OCR contemplated when it had earlier declared cheerleading outside the scope of

²² Letter from Norma V. Cantú, Assistant Sec’y for Civil Rights of the Dep’t of Educ. (Jan. 16, 1996), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

²³ Letter from Peter E. Holmes, OCR, to Chief State School Officers, Superintendents of Local Educational Agencies and College and University Presidents (Nov. 11, 1975), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/holmes.html>.

²⁴ NATALIE GUICE ADAMS & PAMELA J. BETTIS, CHEERLEADER! CHEERLEADER! AN AMERICAN ICON 48, 78 (2003).

²⁵ *Id.* at 49, 77; MARY ELLEN HANSON, GO! FIGHT! WIN!; CHEERLEADING IN AMERICAN CULTURE 46, 91 (1995).

²⁶ ADAMS & BETTIS, *supra* note 24, at 39–40; Laura Grindstaff & Emily West, *Cheerleading and the Gendered Politics of Sport*, 53 SOC. PROBS. 500, 501 (2006); Rebecca Boyce, *Cheerleading in the Context of Title IX and Gendering Sport*, SPORT J., Summer 2008, <http://www.thesportjournal.org/article/cheerleading-context-title-ix-and-gendering-sport>.

²⁷ Sarah Elizabeth Olson, *From Sidelines to Center Stage, The Development of Collegiate Competitive Cheer 18* (May 5, 2008) (unpublished Master’s thesis, University of Maryland) (on file with author).

Title IX's athletic regulations, the school asked OCR to consider whether its new varsity sport could provide athletic opportunities for women for purposes of Title IX.²⁸ OCR's response did not definitively sanction or preclude the school's inclusion of competitive cheer opportunities in its Title IX compliance calculus, but rather reflected the agency's concern that the team provide opportunities comparable to other varsity opportunities.²⁹ In some ways, competitive cheer met this Title IX test: its selection was based on athletic ability, it was administered by the athletic department, and it existed primarily for a competitive purpose.³⁰ But on other factors, the similarity was less clear. The lack of a governing body coordinating the scheduling of a competitive season and joint practices between competitive cheer and the spirit squad prevented OCR from concluding that the team was truly comparable to Maryland's other varsity teams.³¹ The University of Maryland has since separated its competitive cheer team entirely from its sideline spirit squad, both with respect to the participants and coaching staff.³² And although the school describes its competitive cheer as part of its varsity program, it does not rely on opportunities in cheer to demonstrate compliance with the proportionality prong.³³ As a result, the University of Maryland's competitive cheer team has not served as a test case to generate definitive judicial or administrative opinions about the status of competitive cheer under Title IX.

Since the University of Maryland, five universities—Baylor University, the University of Oregon, Fairmont State University, Quinnipiac University, and Azusa Pacific University—have added varsity competi-

²⁸ See *id.* at 17.

²⁹ See Letter from Linda Barrett, OCR, to Deborah Yow, Univ. of Md. Athletic Dir. (May 8, 2003) [hereinafter Barrett Letter].

³⁰ See *id.*

³¹ See *id.*

³² See *Maryland Competitive Cheer*, MD. ATHLETICS, http://www.umterps.com/auto_pdf/p_hotos/s_schools/md/sports/comp-cheer/auto_pdf/RecruitmentPacket2009 (last visited Feb. 1, 2011) ("The University of Maryland Competitive Cheer Team is recognized by the University as an official varsity sport. Unlike traditional college cheerleading programs, the competitive cheer team does not cheer games; their primary purpose is to compete.")

³³ See *The Equity in Athletics Data Analysis Cutting Tool*, U.S. DEP'T OF EDUC., <http://www.ope.ed.gov/athletics> (follow "Get data for one institution" hyperlink; then search "University of Maryland" in "Name of Institution" text box; then follow "University of Maryland-College Park" hyperlink) (last visited Feb. 1, 2011). Data submitted by the University of Maryland pursuant to requirements of the Equity in Athletics Disclosure Act (EADA) indicates that the university's student body is 48% female and that 48% of athletic opportunities not counting competitive cheer are allocated to women. *Id.*

itive cheer teams.³⁴ A few high schools provide opportunities in competitive-only cheer teams, while many more support their sideline cheerleading squad's competition in the statewide championship sponsored by the state's interscholastic athletic/activity associations.³⁵ The National Federation of State High School Associations has established a standard competitive format for competitive meets.³⁶ Although the Association does not distinguish between competition-only teams and sideline squads that only compete in a state tournament, it nonetheless reports that competitive cheer is one of ten most popular sports for girls, and among the fastest growing sports in the country.³⁷

³⁴ See *Member Schools*, NAT'L COLLEGIATE ACROBATICS & TUMBLING ASS'N, www.the.ncata.org/index-1.html (last visited Feb. 1, 2011) (listing these six schools as members of the NCATA); see also *Biediger v. Quinnipiac Univ.* (*Biediger II*), 728 F. Supp. 2d 62, 82 (D. Conn. 2010).

³⁵ See *State Association Listing*, NAT'L FED'N STATE HIGH SCH. ASS'NS, <http://www.nfhs.org/stateoff.aspx> (last visited Feb. 1, 2011). Twenty-eight state athletic/activities associations sponsor a state championship in cheerleading (or "spirit") according to their websites. See *List of State Athletic/Activities Associations (2010)* (unpublished research results) (on file with author). Some states require teams to qualify for the championship based on the results of their competitive regular season, which may include invitational meets and/or progression through sectional/regional qualifiers. See *id.*

³⁶ See generally NAT'L FED'N OF STATE HIGH SCH. ASS'NS, 2010–2011 SPIRIT RULES BOOK (2010).

³⁷ See Press Release, Nat'l Fed'n of State High Sch. Ass'ns, High School Sports Participation Increases for 20th Consecutive Year (Sept. 15, 2009), *available at* <http://www.nfhs.org/content.aspx?id=3505>. In 2008–2009, approximately 4700 schools fielded "competitive spirit squads," which provided opportunities to 2251 boys and 117,793 girls. *Id.* There is no standard definition of "competitive spirit squad," however, and given the fact that these numbers include participants from some states in which competitive cheer is considered an activity, it seems likely that many schools are reporting primarily sideline cheerleading squads as competitive spirit squads due to their occasional competition, such as in a state tournament. *Cf.* Expert Report of Jeff Webb at 2, *Biediger II*, 728 F. Supp. 2d 62 (No. 3:09cv621).

In particular, the NFHS reports the participation of all cheerleaders in its annual participation survey. These are overwhelmingly sideline cheerleaders who support other varsity sports teams. They may occasionally compete, but they are not separate programs. In fact, the only state high school athletic association that has tried to create a separate, competitive cheer program is Michigan. All other states essentially offer a year-end competition for sideline cheerleaders.

Id.

Defined broadly, competitive spirit was nevertheless the ninth most popular girls' sport in 2008–2009, as measured by number of participants, and the tenth most popular girls' sport, as measured by number of schools fielding a team. See NAT'L FED'N OF STATE HIGH SCH. ASS'NS, 2008–2009 PARTICIPATION DATA (2008–2009), *available at* <http://www.nfhs.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=3506>. These figures reflect a 40% increase over the total number of competitive cheer participants and a 35% increase

In apparent response to the rising popularity of competitive cheer, OCR issued in 2008 a general “Dear Colleague” guidance letter that clarified the line between intercollegiate or interscholastic athletic opportunities and other extracurricular activities for Title IX purposes.³⁸ Expounding on its 2003 letter to the University of Maryland, OCR explained that in order to be regulated and counted as an athletic opportunity, the activity has to be comparable to existing athletic opportunities in such essential attributes as administration by the athletic department, existence for a competitive purpose; the activity must also be similar to other athletic activities in such aspects as coaching, budget, tryouts eligibility, practices, and regular- and post-season competitions.³⁹ In particular, the agency stated that it considers the following factors when determining whether the team enjoys varsity competitive opportunities:

- Whether the number of competitions and length of play are predetermined by a governing athletics organization, an athletic conference, or a consortium of institutions;
- Whether the competitive schedule reflects the abilities of the team; and
- Whether the activity has a defined season and whether the season is determined by a governing athletics organization, an athletic conference, or a consortium.⁴⁰

OCR also explained that sports recognized under relevant athletic associations, such as the NCAA or state interscholastic athletic associations, enjoy a “rebuttable presumption” that they should be included as athletic opportunities under Title IX.⁴¹ Since issuing the letter, however, OCR has demonstrated that recognition is not dispositive of the Title IX question.⁴² After investigating complaints of gender inequity at Foster High School in Tukwila, Washington, OCR concluded that the school violated Title IX because its athletic opportunities did not satisfy

in the number of teams reported only four years earlier. *See id.* (reporting that in 2008–2009, 2115 boys and 84,416 girls competed on approximately 3500 teams).

³⁸ *See* “Dear Colleague” Letter from Stephanie Monroe, Assistant Sec’y of Educ. for Civil Rights (Sept. 17, 2008) [hereinafter Dear Colleague Letter], *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html>.

³⁹ *See id.*; *see also* Letter from Dr. Mary Frances O’Shea, OCR, U.S. Dep’t of Educ., to David V. Stead, Exec. Dir., Minn. State High Sch. League (April 11, 2000) (on file with the *Boston College Law Review*) (setting forth an identical set of criteria).

⁴⁰ Dear Colleague Letter, *supra* note 38.

⁴¹ *Id.*

⁴² *Id.*

any of the three compliance prongs.⁴³ In reaching this conclusion, OCR determined that Foster High School's competitive cheer team could not count as a source of athletic opportunities because it was funded differently from the school's interscholastic athletics program and provided only a limited number of competitions during the regular season.⁴⁴ In the face of these discrepancies, the agency concluded it was not enough that the sport was sanctioned by the Washington Interscholastic Athletic Association.⁴⁵

C. Judicial Analysis of Competitive Cheer

Because Title IX provides for enforcement by private lawsuits in addition to OCR's public enforcement, courts have also had the opportunity to draw distinctions between opportunities that are considered athletic opportunities under Title IX and those that are not. For example, in 2006 in *Choike v. Slippery Rock*, the U.S. District Court for the Western District of Pennsylvania criticized Slippery Rock University for creating "artificial" athletic opportunities by expanding the roster of women's sports teams beyond their normal capacity for the purpose of providing the appearance of proportionality, as evidenced by the fact that some of these participation opportunities were unfilled.⁴⁶ Providing further evidence of judicial scrutiny to the question of what "counts" as an athletic opportunity under Title IX, several courts have determined that, under some circumstances, women's indoor track does not provide additional athletic opportunities that should count in addition to the opportunities provided by existing outdoor track.⁴⁷ Even though the

⁴³ See Letter from Gary D. Jackson, OCR Seattle Office, to Herb Dempsey 5 (Dec. 16, 2009) (on file with the *Boston College Law Review*). OCR dropped its enforcement proceeding after producing a settlement agreement that provided the school district a deadline for demonstrating compliance with one of the three prongs. Settlement Agreement OCR No. 10091257 (Dec. 16, 2009).

⁴⁴ Dear Colleague Letter, *supra* note 38.

⁴⁵ *Id.*

⁴⁶ Civil Action No. 06-622, 2006 WL 2060576, at *7 (W.D. Pa. July 21, 2006); *see also* Biediger v. Quinnipiac Univ. (*Biediger I*), 616 F. Supp. 2d 277, 297 (D. Conn. 2009) (ruling on preliminary injunction).

⁴⁷ See *Mansourian v. Regents of the Univ. of Cal.*, 594 F.3d 1095, 1107 (9th Cir.), *opinion amended and superseded on denial of reh'g*, 602 F.3d 957 (9th Cir. 2010) ("The addition of indoor track, however, cannot be considered evidence of program expansion [under the second prong]. It did nothing to expand the number of female athletes, as all the women participating in indoor track also participated in an existing varsity sport."); *Cohen v. Brown Univ.*, 809 F. Supp. 978, 991 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993) (reaching the similar conclusion that winter track is "a sport that merely involved providing indoor space to the existing women's track team").

NCAA recognizes winter track as its own sport, separate from either cross-country or outdoor track, courts have discounted it for Title IX purposes if it appears that indoor track operates merely as an off-season extension of another running sport.⁴⁸ In sum, courts' concerns about inflated women's rosters, unfilled roster slots on women's teams, and the addition of women's teams for the apparent purpose of double- or triple-counting existing athletes suggests that courts in Title IX cases are isolating and applying appropriate rigor to the preliminary step of identifying the genuine athletic opportunities before moving on to apply the three-prong test.⁴⁹

The recent Quinnipiac litigation presented several issues related to this preliminary step. In 2009, Quinnipiac University was sued by members of its volleyball team after it announced plans to terminate the program.⁵⁰ Quinnipiac maintained that the decision was lawful because the remaining athletic opportunities were substantially proportionate to the percentage of each sex in the undergraduate population.⁵¹ In turn, the plaintiffs challenged the proportionality calculation on several grounds: the inflated rosters of some women's sports at the university,⁵² the university's triple-counting of cross-country athletes who also competed in winter and spring track,⁵³ and, relevantly for purposes of this Article, its inclusion of opportunities in competitive cheer, which Quinnipiac had recently announced as a new varsity sport.⁵⁴ In Quinnipiac's view, this new sport provided thirty athletic opportunities to women, and demon-

⁴⁸ See *Biediger II*, 728 F. Supp. 2d at 64.

⁴⁹ See *id.* at 94 ("Once all of the genuine athletic participation opportunities are counted, the second step of the test is to compare the percentage of athletic participation opportunities provided to women to the percentage of women enrolled as undergraduates.").

⁵⁰ See *Biediger I*, 616 F. Supp. 2d at 277.

⁵¹ See *Biediger II*, 728 F. Supp. 2d at 65.

⁵² See *Biediger I*, 616 F. Supp. 2d at 294–95. Although Quinnipiac's head count was not discounted on these grounds, the court did express concern that Quinnipiac's women's squads were larger than the NCAA Division I average and substantially larger than the conference average, and noted that this only corroborated the plaintiffs' theory that Quinnipiac was inflating its female headcount by triple-counting cross-country athletes. See *Biediger II*, 728 F. Supp. 2d at 73. At the same time, the court foreclosed the university from arguing that any overall gender disparity in athletic opportunities was due to admissions rather than decisions of the athletic department. See *id.* at 111.

⁵³ See *Biediger II*, 728 F. Supp. 2d at 105. The court agreed that the track teams and the cross country teams were uniquely "intertwined" in a way that suggested the former were "mere adjuncts" of the latter. *Id.*

⁵⁴ See *id.* at 78.

strated compliance with the proportionality prong.⁵⁵ Prior to 2009, Quinnipiac had only a sideline cheerleading squad, which existed primarily for crowd entertainment and spirit-raising at men's basketball games, and competed only "once or twice a year."⁵⁶ In contrast, the new competitive cheer team would exist only for the purpose of competition. Quinnipiac also signified the new team's varsity status by allocating six full scholarships and a budget of \$50,000 administered through the athletic department (though Quinnipiac ultimately spent \$130,000 on the team's first season).⁵⁷ Moreover, the team adhered to all NCAA regulations related to eligibility and practice time restrictions.⁵⁸ Save for a designated locker room, cheer athletes had access to the same medical training, academic support, facilities, and equipment as other Quinnipiac athletes.⁵⁹ In addition, cheer athletes received uniforms comparable to other athletes—consisting of shorts and numbered jerseys—instead of skirts, cropped tops, and pom-poms, which are associated with traditional sideline cheerleaders.⁶⁰

Over the course of its first season, Quinnipiac's competitive cheer team competed in a total of nine competitive events.⁶¹ Two of these events pitted Quinnipiac against other collegiate competitive cheer teams and employed a new scoring format that was created in 2009 by the National Competitive Tumble and Stunt Association (NCTSA) (now called the National Collegiate Acrobatics and Tumbling Association (NCAT)), a consortium of colleges and universities that sponsor varsity competitive cheer.⁶² Under this format, a team's score is a composite of six discrete events: the stunt, tumble, pyramid, basket toss, partner stunt, and team events.⁶³ The other competitions on Quinnipiac's schedule

⁵⁵ *Id.* at 80. The university was, of course, precluded from relying on either alternative to proportionality because it terminated a viable women's team for which interest remained. *See supra* text accompanying note 21.

⁵⁶ *Biediger II*, 728 F. Supp. 2d at 80.

⁵⁷ *Id.* at 81.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 78.

⁶¹ *Id.* at 84.

⁶² *Biediger II*, 728 F. Supp. 2d at 84. At the time of the opinion, NCSTA's members included the University of Maryland; the University of Oregon; Fairmont State University; Azusa Pacific University, which sponsored varsity cheer in 2009; Baylor University, which elevated competitive cheer to varsity status in 2010; and The Ohio State University and Fort Valley State University, both of which have competitive club cheer teams. *See id.* at 82. Quinnipiac's competitive cheer team competed under this format on February 5, 2010, in a meet against varsity teams from Fairmont State, Maryland, Oregon and the University of Georgia club team. *Id.* at 83.

⁶³ *See id.*

were organized and scored by a variety of private cheerleading companies including Spirit Unlimited, CheerSport and the National Cheer Association (NCA). These events pitted Quinnipiac against college sideline squads and college varsity and club competitive cheer teams, and at some of these events, high school and private All-Star teams also competed, though Quinnipiac did not consider itself competing against these teams.⁶⁴ Many of these competitions were designed to showcase the strengths of sideline cheerleading.⁶⁵ For example, at the NCA Nationals, competitive cheer squads including Quinnipiac were evaluated on one two-and-a-half minute group routine and a forty-five second “crowd-response” segment—a concept that would be entirely unfamiliar to a team who had not been training or competing in entertainment and spirit-raising.

During the Title IX litigation against Quinnipiac, U.S. district court judge Stefan Underhill granted the plaintiff’s motion for a preliminary injunction that enjoined Quinnipiac from cutting the volleyball team for the 2009–2010 season.⁶⁶ The court determined that the volleyball players were sufficiently likely to succeed on the merits of their claim that Quinnipiac violated Title IX.⁶⁷ But this conclusion was derived primarily from evidence that the Quinnipiac Athletic Department had in the past manipulated its rosters to maintain the appearance of proportionality, including undercounting the true number of male athletes by adding players to certain men’s teams after the first day of competition, which serves as the deadline for reporting participation data to the Department of Education.⁶⁸ Without formally decid-

⁶⁴ See Press Release, Quinnipiac University, Competitive Cheer Records Highest Team Score at USA Wildcat Cheer and Dance Challenge (Mar. 20, 2010), available at http://www.quinnipiacbobcats.com/ViewArticle.dbml?DB_OEM_ID=17500&ATCLID=204912703 (“Quinnipiac competed against the University of Connecticut in the *collegiate* division of the event. . . . The Bobcats also recorded higher scores than many Level 5 All-Star squads, who were also competing on the day.” (emphasis added)).

⁶⁵ *Id.*

In addition to recording 9’s and 9.5’s in the standing and running tumbling segment, the Bobcats earned 9 out of 10 points in the jumps segment. The team normally dominates the pyramid section, but one side of the formation fell early in the sequence. Quinnipiac was able to recover in the pyramid and finished the segment with an 8 out of 10. The team also earned 8 out of 10 points in the basket toss segment.

Id.

⁶⁶ See *Biediger I*, 616 F. Supp. 2d at 298.

⁶⁷ See *id.* at 279.

⁶⁸ See *id.* at 296. The court also thought that the plaintiffs were likely to lose on their argument that Quinnipiac had inappropriately triple-counted cross country runners who

ing the question, the court wrote that the plaintiffs were “likely to lose” on the issue of whether competitive cheer provides athletic opportunities for purposes of Title IX.⁶⁹

The court disproved its own prediction, however, after Judge Underhill conducted a three-day bench trial and heard testimony of Quinnipiac Athletic Department officials, outside experts on women’s sports, and cheerleading entrepreneur Jeff Webb, who owns NCA and several other cheer competitions. Measuring Quinnipiac’s competitive cheer team’s 2009–2010 season against the factors OCR published in its 2008 “Dear Colleague” letter, to which the court deferred, the court determined that competitive cheer was not sufficiently similar to other varsity sports to balance out male athletic opportunities in the proportionality analysis.⁷⁰ In particular, Quinnipiac failed to provide its competitive cheer team with a “competitive schedule that reflects the team’s abilities,” and only partially satisfied OCR’s suggestions that a varsity sport have a governing organization, conference, or consortium that defines its season and predetermines “the number of competitions and length of play.”⁷¹

The court determined that Quinnipiac’s schedule for the 2009–2010 season lacked “two basic features of any other collegiate varsity program,” namely, “the application of a uniform set of rules for competition and the restriction of competition to contests against other varsity opponents.”⁷² Although the nascent NCTSA provided a competitive structure for two of Quinnipiac’s meets, the team’s other six competitions were conducted under a variety of other rules. And it seemed to the court that some of these competitions were not genuine competitive

participated in outdoor and indoor track. *Id.* As with the cheer issue, the judge changed his mind about this after hearing the evidence presented at trial. *Id.*

⁶⁹ *See id.* at 295.

Notwithstanding the facts that competitive cheer does not presently have a non-profit governing body and that its schedule lacks the hallmarks of progressive-style competition where a team’s season record determines its eligibility to compete in culminating conference and national championships, the gymnastic nature of competitive cheer, its broad popularity, and the high level of national competition, provide a legitimate basis from which competitive leagues can be built.

Id.

⁷⁰ *See Biediger II*, 728 F. Supp. 2d at 99. The judge was also concerned that Coach Mary Ann Powers’ inability to recruit athletes from outside the existing student population for the 2009–2010 season was a significant distinction between competitive cheer and Quinnipiac’s other varsity sports. *See id.* at 96.

⁷¹ *See id.* at 97.

⁷² *See id.* at 99–100.

cheer meets, but rather an effort to shoehorn Quinnipiac (and a handful of other competitive cheer teams) into events designed to promote and feature sideline cheerleading.⁷³ The spirit competition at NCA nationals—at which Quinnipiac was judged, for the first time all season, on “crowd response” and incorporation of spirit props—provided some evidence of this.⁷⁴ Additional evidence included its “open invitational” format that did not separate teams based on their quality or “rank, seed, or exclude teams on the basis of their performances during the regular season” as varsity athletic championships invariably do.⁷⁵ Jeff Webb’s testimony that he does not consider NCA or any of the other cheer companies that he owns to be running or promoting cheerleading as a sport also helped the court conclude that competitive events outside the aegis of the NCSTA were not tantamount to varsity competition.⁷⁶

The court observed that competitive cheer needed to be “better organized and defined” in order to resemble other varsity sports.⁷⁷ At the time of this evaluation, the NCSTA was a loose consortium of representatives from a handful of universities that had not incorporated or otherwise formally organized itself. It had organized only one major meeting to define the sport’s rules and structures, and had not reached consensus on several key issues about the structure of the sport.⁷⁸ It had not applied to the NCAA for “emerging sport” status, nor sought an endorsement from OCR that competitive cheer would count for Title IX purposes, in response to NCAA’s suggestion that such an endorsement would influence its decision. The court’s decision seemed to suggest that the NCSTA was headed in the right direction, but had not yet developed competitive cheer into a varsity sport.⁷⁹ The court also acknowledged that that NCAA’s endorsement would almost certainly solidify competitive cheer’s varsity status.⁸⁰

As a Title IX analysis, Judge Underhill’s decision was appropriate and correct. If the court had endorsed the meager level of competition that Quinnipiac’s cheer team experienced in 2009–2010, it would have

⁷³ See *id.* at 100.

⁷⁴ See *id.* at 83–84, 98–99.

⁷⁵ See *id.* at 100.

⁷⁶ See *Biediger II*, 728 F. Supp. 2d at 80.

⁷⁷ See *id.* at 101.

⁷⁸ See *id.* at 82.

⁷⁹ See *id.* at 82–83.

⁸⁰ See *id.* at 101 (“I have little doubt that at some point in the near future—once competitive cheer is better organized and defined, and surely in the event that the NCAA recognizes the activity as an emerging sport—competitive cheer will be acknowledged as a bona fide sporting activity by academic institutions, the public, and the law.”).

rendered the definition of varsity sport dangerously broad. Women's sports, competitive cheer included, would have nothing to gain and everything to lose from such flexibility. If college and university athletic departments could by law offer women's sports that have minimal competitive structures and call them the equivalent of highly organized men's sports, such backsliding would be inevitable. College and university athletic departments do not have a history of voluntarily striving for gender equity, partly because it is politically and financially difficult to achieve. Consequently, it is the appropriate role of the courts and regulators enforcing Title IX to insist, as Judge Underhill did, that all varsity athletic opportunities share comparable, essential features like an organized, competitive structure.⁸¹

II. POST-*QUINNIPIAC* PROPOSALS FOR NCAA RECOGNITION OF COMPETITIVE CHEER

The Quinnipiac decision generated much media attention and public criticism from the cheer community.⁸² Many of cheerleading's defenders erroneously⁸³ accused the court of ignoring the athletic nature of the competitive cheer and the existence of competitive events in favor of traditional stereotypes about "pom-poms and looking pretty."⁸⁴

⁸¹ See *id.* at 113.

⁸² See e.g., Leah Friedman, *Cheerleaders Miffed at Judge's Opinion of Them*, CHARLOTTE OBSERVER, Aug. 2, 2010, <http://www.newsobserver.com/2010/08/02/609877/cheerleaders-miffed-at-judges.html> (containing quotes from sideline cheerleaders suggesting they interpret the decision as relating to them); Deanna Harvey, Analysis, *Federal Judge Who Ruled That Cheerleading Is Not a Sport Should Toss His Decision*, N.Y. DAILY NEWS, July 22, 2010, http://www.nydailynews.com/sports/more_sports/2010/07/22/2010-07-22_federal_judge_who_rules_cheerleading_is_not_a_sport_under_title_ix_should_toss_h.html (criticizing the judge's opinion for missing the point that cheer is a dangerous, physical activity, points that the judge acknowledged but that were not relevant to the decision).

⁸³ See *Biediger v. Quinnipiac Univ. (Biediger II)*, 728 F. Supp. 2d 62, 101 (D. Conn. 2010) ("In reaching my conclusion, I also do not mean to belittle competitive cheer as an athletic endeavor. Competitive cheerleading is a difficult, physical task that requires strength, agility, and grace."); *id.* at 78 ("As I noted in my preliminary injunction ruling, competitive cheer is an athletic endeavor that 'could be easily described as group floor gymnastics.'") (quoting *Biediger v. Quinnipiac Univ. (Biediger I)*, 616 F. Supp. 2d 277, 295 (D. Conn. 2009) (internal quotation marks omitted)).

⁸⁴ Ashley Hill, *Judge Rules Cheerleading Doesn't Qualify Under Title IX*, MARIETTA TIMES (Ga.), Aug. 2, 2010, <http://www.mariettatimes.com/page/content.detail/id/523763/Judge-rules-cheerleading-doesn-t-qualify-under-Title-IX.html?nav=5001>; see also Robert McCoppin, *Is Cheerleading a Sport? Judge Says No but Suburban Teams Disagree*, DAILY HERALD (Arlington Heights, Ill.), July 23, 2010, <http://saxo.dailyherald.com/article/20100724/News/307249801/> ("To think cheerleading merely rallies fans for a football game is an outdated perception," Rolling Meadows High School coach Patti Hein said. "If people had to go through all the things my kids do athletically, they would consider it a sport.").

There were also many misplaced comments coming to the defense of sideline cheerleading, which was, of course, entirely outside the scope of the decision. Moreover, the offense that sideline cheerleaders appeared to take at the (perceived) suggestion that they were not participating in a varsity sport seemed to miss the point that such a designation would require the nature of the activity to change fundamentally to adopt competition as its primary purpose. Competitive cheer's proponents also criticized the decision and seemed to interpret it as a setback for their sport. But this interpretation has also proven to be misplaced. Instead, the decision provided stronger incentive for cheer's organizers to work diligently to organize, standardize, and increase the competitive opportunities for cheer. In fact, responding to the court's suggestion that NCAA recognition would be highly relevant to determining that cheer has a competitive structure similar to other sports, two separate organizations have announced initiatives to qualify competitive cheer for recognition as an emerging sport. This Part first describes the NCAA's emerging sport initiative;⁸⁵ then it describes the two competing proposals to designate some form of competitive cheer as an emerging sport for women.⁸⁶

A. NCAA Emerging Sports

In 1994, the NCAA adopted the Emerging Sports initiative as part of an overall effort to promote the growth of women's sports.⁸⁷ These efforts sharply contrasted with the organization's earlier support for legislative and judicial actions that would have weakened Title IX's effect on college athletics,⁸⁸ and suggested that by the 1990s the NCAA not only considered Title IX's objectives legitimate, but recognized a responsibility to promote compliance among members.⁸⁹ The organization was concerned that the distribution of athletic opportunities,

⁸⁵ See *infra* notes 87–102 and accompanying text.

⁸⁶ See *infra* notes 103–121 and accompanying text.

⁸⁷ See *NCAA Emerging Sports Timeline*, NCAA, http://www.ncaa.org/wps/portal/ncaa/home?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/about+the+ncaa/diversity+and+inclusion/gender+equity+and+title+ix/es+-+history (last visited Feb. 2, 2011) (“When the NCAA adopted the recommendations of its Gender-Equity Task Force in 1994, one of the recommendations was the creation of the list of emerging sports for women.”).

⁸⁸ See *Grove City Coll. v. Bell*, 465 U.S. 555, 573–74 (1984) (interpreting legislation as limited to specific universities' programs that actually received federal funding); see also B. Glenn George, *Title IX and the Scholarship Dilemma*, 9 MARQ. SPORTS L.J. 273, 281 (1999).

⁸⁹ See NCAA, FINAL REPORT OF THE NCAA GENDER-EQUITY TASK FORCE 1, 3 (1993).

scholarships, and support strongly favored men's athletics⁹⁰—an imbalance that still exists today.⁹¹ The list of emerging sports for women helps member institutions overcome the challenges of adding new women's sports. Even though emerging sports are not official NCAA championship sports, schools can count them toward the NCAA's requirement for the minimum number of sports a school must sponsor.⁹² Division I and II schools can also count financial aid to emerging sports athletes towards the NCAA's minimum financial aid requirements.⁹³ Less directly, the emerging sports list helps focus program expansion in ways likely to produce a sufficient number of teams for meaningful championship-focused competition.

Emerging sports become NCAA championship sports if at least forty member institutions add the emerging sport within a ten-year period, though extensions have been granted for sports that show "steady progress" toward that goal.⁹⁴ Several sports on the first list of emerging sports have gone on to become official championship sports, including the following: rowing (1996), ice hockey (2000), water polo (2000), and bowling (2004).⁹⁵ The list of emerging sports currently consists of squash, which has been on the list since its inception in 1994, as well as equestrian (1998), rugby (2002), and sand volleyball (2010).⁹⁶

The NCAA's Committee on Women's Athletics administers the emerging sports list and is responsible for proposing emerging sports

⁹⁰ See *id.* at 1 (finding that, according to a 1991 survey of NCAA member institutions, men received 69.5% of athletic opportunities, 70% of scholarship money, 77% of operating budgets, and 83% of recruiting dollars).

⁹¹ See NCAA, NCAA GENDER EQUITY REPORT 5 (2005–2006). The NCAA's most recent gender equity survey reveals that women receive 45%, 41%, and 42% of athletic opportunities at schools in Divisions I, II, and III, respectively. *Id.* Women's sports received 34% of the operating budget at Division I schools with football programs, 48% at Division I schools without football, 44% at Division III schools and 42% at Division II. *Id.*

⁹² See *NCAA's Emerging Sports for Women*, NCAA, http://www.ncaa.org/wps/portal/ncaa/home?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/about+the+ncaa/diversity+and+inclusion/gender+equity+and+title+ix/new+emerging+sports+for+women (last visited Feb. 2, 2011).

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ See *NCAA Emerging Sports Timeline*, *supra* note 87. Other sports have been removed from the emerging sports list for lack of growth, including archery, badminton, and synchronized swimming. *Id.*

⁹⁶ See *id.* In June 2010, the Committee on Women's Athletics recommended to remove squash from the list for lack of growth. See also Greg Johnson, *CWA Recommends Removing Squash as Emerging Sport*, NCAA NEWS, June 17, 2010, http://www.ncaa.org/wps/wcm/connect/ncaa/ncaa/ncaa+news/ncaa+news+online/2010/association-wide/cwa+recommends+removing+squash+as+emerging+sport_06_17_10_ncaa_news.

legislation to the membership.⁹⁷ According to the NCAA's published criteria, the Committee considers whether the activity is a sport—defined as an activity that involves “physical exertion” and exists for “the purpose of competition”—and whether it has potential for growth.⁹⁸ To demonstrate potential for growth, twenty schools must offer varsity or competitive club teams in the sport, and there should be other evidence of potential interest in a college-level competition.⁹⁹ Interest in college-level competition is illustrated by high participation rates in college intramurals, high school teams, or non-scholastic competitive teams, and support from governing bodies, conferences, the U.S. Olympic Committee, and professional organizations.¹⁰⁰ Finally, though the Committee requires a sport's proponents to include suggestions for how the sport is structured, organized, and played, these matters are determined by the NCAA membership.¹⁰¹ Recently, it was reported that the NCAA's decision to add sand volleyball as an emerging sport raised questions about scoring, season of play, number and structure of competitions, uniforms, and number of scholarships,¹⁰² suggesting that consensus on these issues is not a prerequisite to designation as an “emerging” sport.

B. *Competing Proposals for Competitive Cheer*

“Acrobatics and tumbling” (“A&T”) is the new name for competitive cheer governed by the National Collegiate Acrobatics and Tumbling Association (formerly the NCSTA), the consortium of varsity competitive cheer programs that sanctioned a handful of competitive college events on Quinnipiac's schedule in 2009–2010. In September 2010, the NCATA announced its mission to gain recognition for acrobatics and tumbling as an NCAA emerging, and eventually championship, sport.¹⁰³ Signifying independence from the NCA's national championship, whose competition format Judge Underhill considered incompatible with competitive cheer, NCATA also announced that it would hold its own inaugural championship at the University of Ore-

⁹⁷ See *NCAA's Emerging Sports for Women*, *supra* note 92.

⁹⁸ See *Criteria for Emerging Sports*, NCAA, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/about+the+ncaa/diversity+and+inclusion/gender+equity+and+title+ix/es+-+criteria (last visited Feb. 1, 2011).

⁹⁹ *Id.*

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² See Gary Brown, *Emerging with a Spike*, NCAA CHAMPION MAG (online), Spring 2009, <http://www.ncaachampionmagazine.org/Exclusives/SandVolleyball.pdf>.

¹⁰³ See Press Release, NCSTA, NCSTA Will Sanction Events Through USA Gymnastics (Sept. 2, 2010) [hereinafter Sept. 2 Press Release].

gon the same weekend in April as NCA Nationals.¹⁰⁴ The organization's decision to remove the word "cheer" also reflected an effort to differentiate A&T from the activity of sideline cheerleading.¹⁰⁵ Seeking instead to align with an existing varsity sport, NCATA has affiliated with USA Gymnastics, the existing governing body for competitive gymnastics, which has agreed to sanction and oversee competitions between and among the various NCATA member institutions.¹⁰⁶ NCATA has also solidified some key features of its sport including size of squads (no more than forty), number of regular season competitions (six to eight), meet format (six rounds—compulsory, stunt, pyramid, basket toss, tumbling, and a team routine), and scoring (pre-determined start difficulty values for each skill in each round).¹⁰⁷

USA Cheer, the national governing body for cheerleading,¹⁰⁸ has also announced a separate effort to promote a version of competitive cheer it is calling "stunt."¹⁰⁹ Fifteen collegiate club teams, comprising twenty to thirty players,¹¹⁰ have agreed to follow its competition format and compete in stunt at the national college championships at Daytona Beach (coordinated with NCA Nationals).¹¹¹ Competitions will consist of four quarters—Partner Stunts, Jumps and Group Tumbling, Tosses and Pyramids, and Team Routine.¹¹² Each quarter consists of heats in which teams perform skill sequences at varying levels of pre-determined difficulty, with scores based on technical execution and synchronization.¹¹³

¹⁰⁴ See *id.*

¹⁰⁵ See Press Release, NCSTA, NCSTA Member Schools Announce Name Change to Stunts and Tumbling (Aug. 3, 2010).

¹⁰⁶ See Sept. 2 Press Release, *supra* note 103.

¹⁰⁷ See *id.*

¹⁰⁸ See *Biediger II*, 728 F. Supp. 2d at 80 n.20. USA Cheer is the governing body for cheerleading, including school and All-Star programs. Its president is Jeff Webb, the CEO of Varsity Brands, which owns and operates existing NCA and UCA national competitions. *Board of Directors*, USA CHEER, <http://www.usacheer.net> (follow "About Us" hyperlink; then follow "Board of Directors" hyperlink) (last visited Feb. 2, 2011).

¹⁰⁹ See Press Release, USA Cheer, USA Cheer Announces an NCAA Emerging Sport Initiative (Sept. 8, 2010), *available at* <http://www.prnewswire.com/news-releases/usa-cheer-announces-an-ncaa-emerging-sport-initiative-102458364.html>.

¹¹⁰ See USA CHEER, STUNT HANDBOOK 4 (2010), *available at* http://usacheer.net/aspnet_client/FreeTextBox/upload/documents/STUNThandbook1013.pdf (requiring that a team's "game roster" must consist of twenty to twenty-four players, though there can be a maximum of thirty players on a squad).

¹¹¹ See Press Release, USA Cheer, *supra* note 109.

¹¹² See USA CHEER, *supra* note 110, at 3. A head-to-head competition between two teams will likely last ninety minutes. Meets can be structured to allow multiple teams to compete at the same time. *Id.*

¹¹³ See *id.* at 7–9.

With some minor differences, both proposals conceive of a new, competitive discipline that is separate from sideline cheerleading and focused on competition based on accuracy and synchronous execution of physical skills. Both groups have proposed a competitive structure that is far more extensive and more tailored to the competitive purpose of sport than is currently available through commercially sponsored meets like NCA Nationals or by NCATA's meet structure as it existed in 2009–2010. One slight difference between them is signaled by the sports' respective names—A&T puts a higher premium on the skill sets that overlap with gymnastics, whereas stunt is less so. In this regard, either approach offers potential advantages that may appeal to the NCAA. Although incorporation of more gymnastics elements may help compensate for the declining number of collegiate opportunities in gymnastics, a sport that has less overlap with gymnastics may encourage more diversity to existing athletic offerings. Another difference is the maximum roster size in each proposal: USA Cheer limits squads to thirty, whereas NCATA allows up to forty athletes on the roster (perhaps owing to the sport's greater emphasis on specialized tumbling skills).¹¹⁴ The proposals appear to differ in the number of competitions per season, with USA Cheer proposing twelve to sixteen and NCATA currently requiring six to eight of its varsity members.¹¹⁵ Finally, USA Cheer proposes a twenty-scholarship maximum, whereas NCATA limits the number of equivalency scholarships to twelve.¹¹⁶ Though the twenty-scholarship maximum might appeal to NCAA member institutions seeking to correct disparities in distribution of scholarship dollars,¹¹⁷ it also might operate to deter member institutions from adding the sport. Only six women's sports, all of which have average squad sizes larger than competitive cheer, allow more than twelve scholarships at the Division I level.¹¹⁸

¹¹⁴ See Sept. 2 Press Release, *supra* note 103.

¹¹⁵ See USA CHEER, *supra* note 110, at 3 (detailing USA Cheer's proposal of twelve to sixteen meets and thirty team roster maximum); See Sept. 2 Press Release, *supra* note 103 (detailing NCATA's proposal, requiring six to eight meets and forty team members).

¹¹⁶ See *Recruiting Standards*, NAT'L COLLEGIATE ACROBATICS & TUMBLING ASS'N, <http://www.thencata.org/recruiting.html> (last visited Feb. 25, 2011).

¹¹⁷ See 34 C.F.R. § 106.37(c) (2010) (requiring that scholarships be allocated proportionately to athletic opportunities in each sex).

¹¹⁸ See NCAA OPERATING BYLAWS arts. 15.5.3.1.2, 15.5.7, in *DIVISION I MANUAL* (2010), available at <http://www.ncaapublications.com/productdownloads/D111.pdf>; NCAA, *SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 1981–82 to 2009–10*, at 98, 103, 122 (2010), available at <http://www.ncaapublications.com/productdownloads/PR2011.pdf>. Rowing (twenty scholarships, average squad size 60.7), track and field (eighteen scholarships, average squad size 38.5), and ice hockey (eighteen scholarships, average squad size 22.7).

In terms of the NCAA's published criteria for emerging sports, it is likely that one or both proposals would demonstrate sufficient interest in the emergence of competitive cheer.¹¹⁹ Collectively, NCATA's and USA Cheer's constituency reflects at least twenty existing varsity or competitive club teams, and interest can also be inferred from high participation rates in related sports and activities such as All-Star programs, gymnastics teams, and sideline cheerleading squads.¹²⁰ Compared to other sports that have been designated "emerging,"¹²¹ competitive cheer appears to have a strong potential interest base. Additionally, the sport can show that it has support from various governing bodies (USA Gymnastics and USA Cheer), and that there is a proposed season, competitive structure, and format.

III. COMPETITIVE CHEER, TITLE IX COMPLIANCE, AND THE BENEFITS FOR WOMEN'S SPORTS

Because one of the purposes of the Emerging Sports initiative is to support member institutions' Title IX compliance and promote women's sports, the NCAA should evaluate any proposal to recognize competitive cheer with both of those objectives in mind. A Title IX analysis for competitive cheer is also particularly warranted in light of the judicial and regulatory scrutiny that competitive cheer has already received.¹²² The 2010 decision of the U.S. District Court for the District of Connecticut in *Biediger v. Quinnipiac University* provides a helpful starting place for this analysis.¹²³ Do the proposals for an emerging sport of competitive cheer provide the varsity-like competition and stronger governance that the court found lacking for Quinnipiac during its 2009–2010 season?¹²⁴

¹¹⁹ The remainder of this Article uses "competitive cheer" to encompass both stunt and Acrobatics & Tumbling, unless otherwise specified.

¹²⁰ See *supra* notes 34, 110 and accompanying text.

¹²¹ For example, sand volleyball's popularity as an Olympic sport, as well as the popularity of volleyball generally, appeared to be the primary evidence that the sport could gain traction as a college varsity sport. Rugby's popularity as a club sport has not translated into interest in a varsity sport; only six colleges have varsity programs.

¹²² The NCAA has strongly encouraged, if not required, competitive cheer's organizers to include an opinion letter from OCR acknowledging that the proposed version of competitive cheer would constitute a varsity sport for Title IX purposes. See Trial Transcript at 34, *Biediger v. Quinnipiac Univ. (Biediger II)*, 728 F. Supp. 2d 62 (D. Conn. 2010) (No. 3:09cv621) (noting that the NCAA (in the person of Karen Morrison) had urged cheer organizers to request an "OCR interpretation" (of cheer's qualification as a sport under Title IX) and submit it as part of their applications for emerging sport status).

¹²³ See *Biediger II*, 728 F. Supp. 2d at 101.

¹²⁴ See *id.*

This Part examines why the proposals will comply with Title IX and also why moving away from cheer towards stunt or A&T would be beneficial for women and sports overall. First, both proposals for competitive cheer endorse a meet format designed to compare each team's technical and synchronous execution of stunts and maneuvers along objective, predetermined criteria. No longer would "crowd response" and incorporation of spirit props enter the equation.

Second, both proposals endorse more competitions per season, addressing the court's concern in *Biediger* that Quinnipiac competed in only a handful of competitions designed specifically for competitive cheer.¹²⁵ It is important to note, however, the court did not mandate a precise number of competitions per season, nor can one be presumed from comparison to other sports, because they have different frequencies of competition within a season. In the end, as long as courts and regulators employ the same neutral criteria to determine the appropriate number of competitions for competitive cheer that are used for other sports, courts and regulators would likely consider competitive cheer's season comparable to that of other sports.

Third, the proposals provide a consistent manner of scoring applied across all competitions, eliminating Judge Underhill's concern that Quinnipiac's team competed throughout its season under several different rules of play.¹²⁶ And they endorse a progressive, championship tournament that is open to the teams with the best records from the regular season, addressing the court's concern about open invitationals that do not rank, seed, or exclude teams on the basis of their performances during the regular season.¹²⁷ Last, both proposals reflect the willingness of governing organizations to standardize schedules and the rules of play. In sum, the proposals for competitive cheer contemplate an activity that courts and regulators would likely consider a varsity sport for purposes of Title IX.

Beyond whether competitive cheer would comply with Title IX as a technical matter, it would also be appropriate and consistent with the purpose of the Emerging Sports initiative for the NCAA to consider whether recognizing competitive cheer is good for women's sports generally. Women's sports advocates in the past have questioned the motives of schools that seek to count competitive cheer as a varsity athletic opportunity under Title IX.¹²⁸ This criticism has been directed

¹²⁵ See *id.* at 99–100.

¹²⁶ See *id.*

¹²⁷ See *id.* at 100.

¹²⁸ E.g., Olson, *supra* note 27, at 27–28, 30–32.

rightly at the institutions that have prematurely applied the label “sport” to an existing activity to demonstrate Title IX compliance while avoiding the more costly alternative of adding traditional sports.¹²⁹ This criticism does not apply to competitive cheer as described in the pending proposals, which contain aspects that militate against such abuse. By endorsing a schedule of competition that is comparable to that of other varsity athletes, competitive cheer advocates have effectively foreclosed institutions’ double-counting existing sideline cheer squads. Cheerleaders devote many hours per week to practice, performance, and participating in competition—sometimes in excess of twenty hours.¹³⁰ This leaves far too little time to simultaneously participate in a varsity sport, which also may subsume as much as twenty hours per week under NCAA rules.¹³¹

Nor is competitive cheer necessarily a “low-cost” alternative to other traditional or emerging sports. It is true that competitive cheer is conducted in a gymnasium, and thus does not require a high initial outlay as would be required to construct a specialized facility such as a boathouse, ice rink, or stable. But if Quinnipiac’s experience in 2009–2010 is any indication, operating costs associated with cheer are on par with other women’s sports. For instance, Quinnipiac spent \$130,000 on the team’s inaugural season; the high cost of travel put the team well over its initial \$50,000 budget.¹³² The operating costs for competitive cheer were close to the median cost per athlete for Quinnipiac’s other women’s teams.¹³³ Thus, the fact that cheer does not enjoy an excessive, obvious economic advantage over other sports will prevent college administrators from deploying it simply as a quick fix to Title IX compliance on a budget. This leaves room for such decision making to incorporate factors beyond Title IX compliance and to consider whether the sport is the right fit for the student body, based on such factors as interest level and opportunities for competition in the region.

¹²⁹ *See id.*

¹³⁰ *See Biediger II*, 728 F. Supp. 2d at 96.

¹³¹ *See id.* at 81.

¹³² *See id.*

¹³³ *See Equity in Athletics Data Cutting Tool*, *supra* note 33 (follow “Get data for one institution” hyperlink; then search “Quinnipiac University” in “Name of Institution” text box). Quinnipiac spent \$4333 per athlete on competitive cheer in 2009–2010. *Id.* This was lower than the 2008–2009 per-athlete cost of five women’s sports (basketball (\$11,661), volleyball (\$7206), ice hockey (\$5661), softball (\$4930), and tennis (\$4470)), and higher than the per-athlete cost of four women’s sports (field hockey (\$2766), lacrosse (\$2503), soccer (\$2404), and track (\$866)). *Id.*

The NCAA's recognition of competitive cheer at the college level will also help underscore the characteristics that distinguish it from sideline cheerleading, which could improve Title IX compliance at the high school level. Due to a dearth of public records on high school participation,¹³⁴ the extent to which these schools are counting barely competitive cheerleading as a sport is unknown, but likely high. If the NCAA provides a clear example of what constitutes varsity competitive cheer, stakeholders in Title IX compliance, including administrators, parents, and athletes, will be better able to identify and challenge disproportionate athletic opportunities. Moreover, high schools seeking to bolster Title IX compliance are likely to capitalize on the existing interest in competitive cheer by adding programs in the NCAA model. Competitive cheer's potential to catch on at the high school level may also help distinguish it from other emerging sports that commentators have criticized as appealing only to those athletes with access to private schools and private training.¹³⁵ Ideally, the high school pipeline would help ensure that the sport is more racially and socio-economically diverse.¹³⁶

In addition, recognition of competitive cheer could benefit women's sports in important symbolic ways. Title IX has catalyzed an exponential increase in opportunities for female athletes, but it has left the definition of sport largely undisturbed. Women's sports have developed as counterparts to existing men's sports. In some cases women's sports have been modified from the male original, and unfortunately such differences usually reflect the operation of gender stereotypes about women's physical abilities; in the case of softball, they reflected a more insidious effort to ensure that the women's sport did not compete with the men's for status in the sport hierarchy.¹³⁷ Although the sports' existence today represents a feminist victory over cultural forces that sought to preserve sport as a male domain, it is time to expand that feminist project beyond replicating men's sports for women. Moreover it is time to ensure also that the label "sport" embraces as equal those sports that are women-driven. Recognizing competitive cheer could be

¹³⁴ Colleges and universities must supply this data pursuant to the EADA. *See* 20 U.S.C. § 1092 (2006). Legislation is currently pending to extend these obligations to school districts. *See* High School Athletics Accountability Act of 2009, S. 471, 111th Cong. (2009).

¹³⁵ *See* A. Jerome Dees, *Access or Interest: Why Brown Has Benefitted African-American Women More Than Title IX*, 76 UMKC L. REV. 625, 638 (2008) (pointing out that none of the NCAA emerging sports have been adopted by the National Federation of High Schools).

¹³⁶ *See id.* (arguing that the lack of access to emerging sports in high schools has resulted in fewer opportunities for black women to participate in college athletics).

¹³⁷ *See generally* JENNIFER RING, *STOLEN BASES: WHY AMERICAN GIRLS DON'T PLAY BASEBALL* (2009).

the first step toward this expansion of the feminist project. Male administrators and corporate leaders notwithstanding, competitive cheer is woman-driven in its relationship to and emergence from cheerleading. Cheerleading's predominantly female participants laid the groundwork for the activity's sportification by increasing the athleticism of the performance and by embracing opportunities to compete.¹³⁸

Competitive cheer might also advance the feminist project in sport by reclaiming an activity that for decades served to marginalize and oppress women. Initially the domain of men, cheerleading was a respected activity that provided campus men with access to status.¹³⁹ Women were excluded, largely due to concerns that the leadership and athleticism required for cheerleading, though appropriate traits for men, would be inappropriate for women.¹⁴⁰ Cheerleading gradually opened up to women, but on the condition that they would assume a sexualized rather than athletic role.¹⁴¹ Consequently, as the demographics of cheerleading shifted, so too did the status associated with it.¹⁴² Cultural pressure to polarize femininity and masculinity constructed cheerleading as the primary location for hegemonic femininity.¹⁴³ But to preserve the gender hierarchy, this hegemonic femininity was trivialized (through the deployment of the ditzy cheerleader stereotype, for example) as well as sexualized.¹⁴⁴ It also presented obstacles to girls who did desire to compete in traditional sports, because the contrast called the athletes' femininity into question.¹⁴⁵

The recognition of competitive cheer would serve as a symbolic victory over the sinister gendered forces that sought to use its ancestor, traditional cheerleading, to suppress female athleticism. Additionally, the stunting aspect of competitive cheer showcases women in the roles

¹³⁸ See ADAMS & BETTIS, *supra* note 24, at 39–40.

¹³⁹ See HANSON, *supra* note 25, at 11–13, 16. At some institutions, women are still excluded from the sidelines. Texas A&M, for example, has an over one-hundred-year tradition of electing only men to the high-status, elected position of Yell Leader. See ADAMS & BETTIS, *supra* note 24, at 30–31.

¹⁴⁰ See ADAMS & BETTIS, *supra* note 24, at 28; HANSON, *supra* note 25, at 16, 21–22.

¹⁴¹ See HANSON, *supra* note 25, at 17, 23.

¹⁴² See BRAKE, *supra* note 5, at 97.

¹⁴³ See Grindstaff & West, *supra* note 26, at 501.

¹⁴⁴ See BRAKE, *supra* note 5, at 97. Cheerleaders have had to navigate competing stereotypes of purity and sexual availability. Popular representations of cheerleaders have constructed their supporting role off the field as well, as trophy girlfriends for high-status male athletes. Other stereotypes deployed against sideline cheerleaders include ditziness, shallowness, and vanity. See ADAMS & BETTIS, *supra* note 24, at 21–25, 79–80; HANSON, *supra* note 25, at 102, 103–05.

¹⁴⁵ See ADAMS & BETTIS, *supra* note 24, at 66–67.

of both flyer and base, which not only provides athletic opportunities to women of diverse body types, but an alternative image to the traditional highly gendered role division in coed sideline cheerleading.¹⁴⁶ Competitive cheer also provides a different image of female athleticism to counterbalance the negative stereotypes associated with cheer. Collegiate cheer athletes are not sexualized entertainers. Their uniforms are modest and functional; a fan is likely to observe more makeup at a college softball game. When Quinnipiac and Maryland squared off in a competitive cheer meet earlier this year, they presented to the hundreds of adolescent and pre-pubescent All-Star cheerleaders in the audience¹⁴⁷ role models that did not need glitter, excessive makeup, and tiny midriff-baring tops to generate fan support, attention, and respect.¹⁴⁸ For all these reasons, the NCAA's recognition of competitive cheer as an emerging, and eventually championship sport, can help improve Title IX compliance and more generally benefit women's sports.

CONCLUSION

What is a sport? For advocates of women's sports, that question can be fraught. Defining it too broadly risks the watering-down of women's sports, whereas defining it too narrowly gives primacy to the male model of sport that is reflected in the current definition. The 2010 decision by the U.S. District Court for the District of Connecticut, *Biediger v. Quinnipiac University*, addresses the first problem by defining sport for Title IX purposes as a physical activity that is comparable to other sports in the nature of the competition. NCAA recognition of competitive cheer addresses the second by providing the potential to expand the definition of sport to include, for the first time, a new sport that is not a women's version of a men's sport. Endorsing competitive cheer would also reclaim as sport an activity for which the athleticism has been removed and replaced with expectations that are harmful to women. For these reasons, the NCAA should embrace competitive cheer as an emerging sport.

¹⁴⁶ See *id.* at 87–88; Laurel R. Davis, *Male Cheerleaders and the Naturalization of Gender*, in *SPORT, MEN, AND THE GENDER ORDER* 155 (Michael A. Messner & Donald F. Sabo eds., 1990).

¹⁴⁷ The author was in attendance. The event was the Quinnipiac All-Star and Competitive Cheer Challenge on February 28, 2010. After the All-Star teams and other college teams performed, Quinnipiac and Maryland competed against each other using the NCSTA meet format.

¹⁴⁸ Based on personal observation of the author.