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## *Whose Educational Opportunity?*

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# WHOSE EDUCATIONAL OPPORTUNITY?

R. SHEP MELNICK\*

Title IX anniversaries have always been an opportunity to celebrate the law's accomplishment while acknowledging that much more needs to be done. In many ways I agree with this common if anodyne assessment. Any review of Title IX's impact, though, needs to acknowledge that since 1972 women's educational accomplishments have been nothing short of astounding. Women now constitute sixty percent of college students, a number that keeps rising.<sup>1</sup> They are more likely than men to graduate from college, and they receive more post-graduate degrees. As the Brookings Institution's Richard Reeves recently pointed out, at the K-12 level, "[g]irls outperform boys at every stage, and in almost every subject . . . two-thirds of the students graduating high school with a GPA in the top 10 percent of the distribution are female."<sup>2</sup> Once the doors of opportunity swung open, women and girls rushed through.

A partial exception, of course, is athletics. But even here the change has been huge. In the mid-1960s, only 15,000 women were involved in intercollegiate sports—compared to 152,000 men.<sup>3</sup> The number of female college athletes had doubled to 30,000 by the time Title IX passed in 1972; it doubled again over the next five years while enforcement remained moribund;

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1. Charlotte West, *An Unnoticed Result of the Decline of Men in College*, HECHINGER REPORT (Oct. 27, 2021), <https://hechingerreport.org/an-unnoticed-result-of-the-decline-of-men-in-college-its-harder-for-women-to-get-in/>.

2. Richard V. Reeves, *No the Boys Are Not Doing Just Fine*, CHRON. HIGHER EDUC. (July 28, 2022), <https://www.chronicle.com/article/no-the-boys-are-not-doing-just-fine>; see also HANNA ROSIN, *THE END OF MEN AND THE RISE OF WOMEN* 149 (2012); THOMAS DiPRETE & CLAUDIA BUCHMANN, *THE RISE OF WOMEN: THE GROWING GENDER GAP IN EDUCATION AND WHAT IT MEANS FOR AMERICAN SCHOOLS* 1-3, 39 (2013).

3. GERALD GURNEY ET AL., *UNWINDING MADNESS: WHAT WENT WRONG WITH COLLEGE SPORTS AND HOW TO FIX IT* 145-46 (2017). See also Amy Wilson, Managing Dir., Off. of Inclusion, *Title IX 50<sup>th</sup> Anniversary: The State of Women in College Sports*, NCAA 17 (2022), [https://s3.amazonaws.com/ncaaorg/inclusion/titleix/2022\\_State\\_of\\_Women\\_in\\_College\\_Sports\\_Report.pdf](https://s3.amazonaws.com/ncaaorg/inclusion/titleix/2022_State_of_Women_in_College_Sports_Report.pdf).

and by the turn of the millennium, it had reached 156,000.<sup>4</sup> Today there are nearly 225,000 female intercollegiate athletes, forty-four percent of the total.<sup>5</sup> Over these decades colleges added more than three times as many women's teams as men's teams. At the high school level, fewer than 300,000 female students participated in interscholastic sports in 1972, a mere seven percent of the total.<sup>6</sup> By 2019, those figures had risen to nearly three and a half million.<sup>7</sup>

Now that Title IX has hit the big 5-0, it is time to take a step back from these frequently repeated statistics, and look at the peculiar features of the regulatory structure we have created to govern athletics in the thousands of educational institutions that receive federal funds. How have we translated the abstract objective of equal educational opportunity into a measurable operational goal? Where have we put our enforcement focus and why? Who reaps the benefits and who bears the cost of this regulatory approach? What have been its most important unintended consequences? These questions are standard fare in most studies of bureaucratic and regulatory politics. When policies are framed in terms of civil rights, though, they are usually ignored. In *The Transformation of Title IX: Regulating Gender Equality in Education* and *The Crucible of Desegregation: The Uncertain Search for Educational Equality*, I explain why these standard political and policy questions are worth examining in the civil rights context.<sup>8</sup> Here I will focus on sex discrimination in athletics.

## I. THE ATHLETICS ANOMALY

Although Title IX contributed to the remarkable progress of women in education, that progress has been more the product of profound cultural change than enforcement of legal rules. Thomas DiPrete and Claudia Buchmann's data show that there is hardly a country in the developed world that has not experienced this remarkable cultural transformation. The "reversal from a male advantage to a female advantage in educational attainment," they conclude, "has unfolded not only in the United States but also in most industrialized societies."<sup>9</sup> Few of these countries have a law similar to Title IX.

For a couple of reasons, athletics has been an outlier. Here the requirements of Title IX were less clear and schools' resistance to change greater than in other

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4. GURNEY ET AL., *supra* note 3.

5. Wilson, *supra* note 3.

6. *Id.* at 15.

7. *Id.*; see also GURNEY ET AL., *supra* note 3.

8. R. SHEP MELNICK, *THE TRANSFORMATION OF TITLE IX: REGULATING GENDER EQUALITY IN EDUCATION* (Brookings Inst. 2018); R. SHEP MELNICK, *THE CRUCIBLE OF DESEGREGATION: THE UNCERTAIN SEARCH FOR EDUCATIONAL EQUALITY* (Forthcoming May 2023).

9. DIPRETE & BUCHMANN, *supra* note 2, at 1.

areas of education. A fundamental feature of sports makes athletics particularly hard to handle: elsewhere we expect schools to offer male and female students equal access to their programs and to judge them by their accomplishments, not their sex. With athletics, in contrast, we segregate by sex. To do otherwise would be to put female players at a severe disadvantage. “Separate but equal” is the central premise of regulation of athletics under Title IX. The inherent difficulty of determining what constitutes “equal” in this context has been exacerbated by a peculiar feature of American higher education: its celebration of highly competitive, exceedingly well-publicized, and extraordinarily expensive athletic programs. As James Shulman and William Bowen put it in their important book, *The Game of Life: College Sports and Educational Values*, “no other country has anything resembling America’s college sports programs.”<sup>10</sup> For the first forty years of Title IX’s life, these features of athletics made it the preeminent source of legal and political conflict.

How, in practice, has the federal government defined what constitutes “separate but equal” in athletic programs, and where has it put its enforcement emphasis? To a large extent the answers are (a) equal numbers of male and female *varsity* athletes and athletic scholarships; and (b) high visibility intercollegiate sports. The rationale for these choices is far from obvious. Why focus so intensely on the relatively small number of varsity athletes attending college rather than the much larger number of students who engage in club, intramural, recreational, and fitness activities? Why pay so much attention to colleges when the number of students affected, the extent of inequality, and the health consequences are so much greater for elementary and secondary students? The answers to these infrequently examined questions lies in bureaucratic imperatives, interest group politics, and hotly contested judicial commands.

## II. A LONG SEQUENCE OF CHOICES

As is so often the case in American politics, athletic policy under Title IX was not the product of a single decision made after a systematic analysis of evidence, alternatives, and likely consequences. Rather it was the result of a long series of incremental steps taken by administrators, judges, and legislators without much attention to how these many parts fit together. To appreciate the policy choices embedded in the resulting regulatory structure, it is necessary to review the key regulatory actions taken by federal officials since 1972 and their underlying rationale.

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10. JAMES L. SHULMAN & WILLIAM G. BOWEN, *THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES*, at xxv (2001).

When Title IX was before Congress in 1971-72, athletics received virtually no attention. According to Representative Patsy Mink (D-Hawaii), an avid supporter for whom the law was later named, “[w]hen it was proposed, we had no idea that the most visible impact would be in athletics. I had been paying attention to the academic issue.”<sup>11</sup> During the brief Senate floor debate on Title IX, the only mention of sports came from Birch Bayh (D-IN), the amendment’s main Senate sponsor, who assured his colleagues, “[w]e are not requiring that intercollegiate football be desegregated, nor that the men’s locker room be desegregated.”<sup>12</sup> Yet athletics—especially college football—soon dominated the intense controversy over how to interpret Title IX. In 1975, the Department of Health, Education, and Welfare (HEW) Secretary Casper Weinberger noted with exasperation (and sarcasm), “I had not realized until the comment period closed that the most important issue in the United States today is intercollegiate athletics.”<sup>13</sup>

#### *A. First Steps: The 1975 Regulations*

When HEW finally issued its first—and, remarkably, only—formal regulations on athletics under Title IX, it resolved two issues but left many more up in the air. The first was whether Title IX applied to schools’ sports programs. HEW’s answer was an unequivocal “yes.” Here they received a rare assist from Congress. The National Collegiate Athletic Association (NCAA) strenuously opposed any form of regulation that would threaten football and men’s basketball. They worked with Senator John Tower (R-TX) on legislation exempting “revenue-generating” sports from Title IX regulation. That legislative strategy ultimately backfired. Although the Senate passed the Tower amendment, the conference committee substituted an amendment specifying that HEW’s Title IX regulations shall include “with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.”<sup>14</sup> Although this required HEW to acknowledge the special features of football, it also established without a doubt the federal government’s authority to apply Title IX to sports. The NCAA then turned to the courts for help. It lost again.

That did not put an end to all questions about the law’s coverage of athletics. The original version of Title IX—like Title VI of the 1964 Civil Rights Act on which it was modelled—contained a “pinpoint” provision applying its mandates

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11. *Quoted in* SUSAN WARE, TITLE IX: A BRIEF HISTORY WITH DOCUMENTS 3 (2007).

12. 117 CONG. REC. 30,407 (1971).

13. *Sex Discrimination Regulations: Hearings Before the Subcomm. on Post-Secondary Education*, 94th Cong. 439 (1975).

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

only to the particular programs that receive federal funding, not the entire educational institution. The Supreme Court's interpretation of this statutory provision in the *Grove City* case temporarily put a halt to enforcement of federal rules on college athletics, which seldom receive federal financial support.<sup>15</sup> In 1988, Congress passed legislation broadening the law's coverage. Despite the fact that enforcement of rules on athletics remained in limbo for most of the 1980s, many schools expanded their athletic offerings for female students. Here, too, the driving force was culture, not federal regulation.

A second step HEW took in 1975 was to allow schools to establish separate teams for male and female students. In the early days of Title IX, some men's coaches claimed that they would comply with the new law by letting female undergraduates try out for the football team. Not surprisingly, the prospect of an occasional female placekicker on the men's football team did not satisfy the women's organizations monitoring compliance with Title IX. HEW's regulations provided that schools may "sponsor separate teams for members of each sex where selection for such teams is based upon competitive skills or the activity involved is a contact sport."<sup>16</sup> Since almost all teams base selection on "competitive skills," single-sex teams are permitted nearly everywhere.

This led to the hardest question: How do we know if these separate teams provide "equal athletic opportunities for member of both sexes?" Should school officials and regulators look at total spending? The number of teams? The number of athletes? The quality of fields and equipment? Which athletic opportunities should they review—varsity, club, intramural, recreational, fitness? The size and expense of football—"the fat man tipping the canoe of Title IX," as one commentator described it<sup>17</sup>—complicated all such comparisons.

HEW's 1975 regulations explained that Title IX applies to all levels of sports: "interscholastic, intercollegiate, club or intramural."<sup>18</sup> But then the rules became hopelessly fuzzy. On the pivotal question of *which* sports a school must offer, they required schools to offer a "selection of sports and levels of competition" that "effectively accommodate the interests and abilities of members of both sexes."<sup>19</sup> The latter phrase would echo through the Title IX debate for decades. After initially requiring schools to conduct annual surveys

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15. *Grove City Coll. v. Bell*, 465 U.S. 555, 575 (1984).

16. *Nondiscrimination on Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance*, 40 Fed. Reg. 24,128, 24,132 (June 4, 1975).

17. JESSICA GAVORA, *TILTING THE PLAYING FIELD: SCHOOLS, SPORTS, SEX, AND TITLE IX* 60 (2003).

18. *Nondiscrimination on Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance*, 40 Fed. Reg. at 24,142.

19. *Id.* at 24,143.

of undergraduates to ascertain their “interests and abilities,” HEW eventually conceded that a school could use any “reasonable method” for determining the “interests and abilities of both sexes” that it “deems appropriate.” If female students are more interested than males in intramural sports but less interested in varsity sports, or if they are more interested in their studies than in sports, so be it. After all, we know that female students are on the whole more serious about their studies than are their male counterparts.

*B. Policymaking through Interpretation I: The Elusive “Three-Part Test”*

For those advocating substantial expansion of women’s sports, HEW’s regulations provided educational institutions with too much discretion. To clarify the federal government’s expectations, in 1979 the Carter Administration issued an “interpretation” of the 1975 regulations without providing any opportunity for public participation or any substantial explanation for its new policy. Buried in HEW guidelines “designed specifically for intercollegiate athletics” was the “Three-Part Test” that years later became the centerpiece of Title IX regulation.<sup>20</sup>

A key section of the 1979 “interpretation” offered more details on the “Effective Accommodation of Student Interest and Abilities.” Within this subsection lay a one-sentence explanation of how regulators would determine whether a school has provided “opportunity for individuals of each sex to participate in intercollegiate competition.”<sup>21</sup> On its surface, this crucial section offered three separate paths to compliance. Prong One—providing intercollegiate participation opportunities “substantially proportionate” to male and female enrollments—was the easiest to measure and therefore the surest route to compliance.<sup>22</sup> The Office for Civil Rights (OCR) later described this “parity” standard as the only “safe harbor” for complying with Title IX.<sup>23</sup> Prong Two requires schools that have not yet achieved proportionality to demonstrate that they are steadily moving in that direction by adding new women’s teams. The meaning of “continuing practice of program expansion” later became a bone of contention. How recent and how large must the expansion be to allow the school to pass this part of the test?

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20. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,413, 71,413-423 (Dec. 11, 1979).

21. *Id.* at 71,418.

22. *Id.*

23. Norma V. Cantú, Assistant Sec’y for Civ. Rts., *Dear Colleague Letter, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. (Jan. 16, 1996), <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

Most controversial was Prong Three, which required schools that have neither achieved proportionality nor recently added women's teams to "demonstrate that the interests and abilities" of the underrepresented sex have been "fully and effectively accommodated."<sup>24</sup> According to one interpretation of Prong Three, a school can comply by demonstrating that it has accommodated the "interests and abilities" of female students as "fully and effectively" as they have accommodated the "interests and abilities" of male students.<sup>25</sup> That was the understanding adopted by OCR the next year in its *Title IX Intercollegiate Athletics Investigator's Manual*.<sup>26</sup>

According to an alternative interpretation of Prong Three—the one adopted by OCR and the courts in the mid-1990s—schools that fail to meet Prongs One and Two must demonstrate that they have *fully* accommodated the "interests and abilities" of female athletes, even if they do not do the same for male students.<sup>27</sup> This means that whenever there are enough women at a school with the "interest and ability" to form a varsity team, the school is obliged to fund it, even if that means either adding to the athletic budget or disbanding existing men's teams to come up with the cash. How well the school accommodates the interests and abilities of *male* students becomes irrelevant. The only question is whether more women's teams can be created in order to move closer to the parity standard announced in Prong One. Under this reading of Prong Three, eliminating or downgrading women's sports teams will almost always be deemed a violation of federal law, even if those budget cuts are packaged with greater cuts for men's teams.

As many commentators have pointed out, over the long run the latter interpretation of Prong Three in effect turns the Three-Part Test into a one-part test.<sup>28</sup> Colleges must either offer athletic participation opportunities proportional to undergraduate enrollments (Prong One) or steadily move in that direction by adding more women's teams (Prongs Two and Three). Surveys showing that more men than women are interested in varsity sports become irrelevant. Parity becomes the only "safe harbor."

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24. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418.

25. Petition for Writ of Certiorari, *Cohen v. Brown*, 101 F.3d 155 (1st Cir. 1996) (No. 96-1321), 1997 WL 33557633, at \*5 (quoting Valerie M. Bonnette & Lamar Daniel, *Title IX Intercollegiate Athletics Investigator's Manual*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. 122 (1980)).

26. See Bonnette & Daniel, *supra* note 25.

27. See Cantú, *supra* note 23.

28. For the clearest statement, see Earl C. Dudley Jr. & George Rutherglen, *Ironies, Inconsistencies, and Intercollegiate Athletics: Title IX, Title VII, and Statistical Evidence of Discrimination*, 1 VA. J. SPORTS & L. 117, 204 (1999).



*C. Policymaking through Interpretation II: The Other Brown Case*

For nearly a decade and a half, the Three-Part Test remained in limbo, ignored by OCR during the Reagan and Bush Administration. It rose to prominence in the early 1990s when colleges facing hard financial times started to reduce their athletic expenditures by eliminating or downgrading both male and female teams. By then not only had Congress eliminated the “pinpoint” provision, but the Supreme Court had authorized suits for monetary damages to enforce its provisions.<sup>29</sup> Disgruntled female athletes sued, claiming that their schools had failed to meet the requirements of Prong One (almost always easy to prove), Prong Two (especially easy to prove at schools that were cutting sports), and the pivotal Prong Three.

Facing possible court defeats, many schools agreed to reinstate the female teams in question. Brown University, though, did not. Its outspoken president, Vartan Gregorian, insisted that the Ivy League school had offered an unusually large number of sports to women (in fact second only to Harvard in this regard), and that it had responded to the “interests and abilities” of women as fully as it had to the “interests and abilities” of men. He was infuriated by federal judges’ determination that he could not make any cuts in women’s athletics until it had as many female as male varsity athletes. How can it be, he asked, that the university can be “free to cut libraries and academic departments, but not athletics”? He told a congressional oversight committee, “I am a frustrated university administrator who does not like bureaucracy and who does not like to be intimidated by lawyers.”<sup>30</sup>

The First Circuit’s response to Brown proved to be the most important federal court decision on Title IX and athletics. Responding to the school’s claim that its 60/40 split between male and female athletes reflected student interest, the First Circuit emphatically rejected the school’s “unproven assertion” that male and female students might differ in their commitment to varsity sports. Writing for a 2-1 majority, Judge Hugh Bownes insisted that “women’s lower rate of participation in athletics reflects women’s historical lack of opportunities to participate in sports.”<sup>31</sup> Women show less interest in sports only because they have been offered fewer opportunities and have been expected to conform to female stereotypes that discourage competitiveness,

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29. *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 67 (1992).

30. *Hearing on Title IX of the Education Amendments of 1972 Before the House Subcomm. on Postsecondary Educ., Training, and Life-Long Learning of the House Comm. on Economic and Educ. Opportunities*, 104th Cong., 115 (1995) (statement of Vartan Gregorian); Marvin Lazerson & Ursula Wagener, *Missed Opportunities: Lessons from the Title IX Case at Brown*, 28 CHANGE: MAG. HIGHER LEARNING 46, 50 (1996).

31. *Cohen v. Brown Univ.*, 101 F.3d 155, 179 (1st Cir. 1996).

assertiveness, and physical vigor. Brown University, Judge Bownes wrote, had “ignore[d] the fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women’s interests and abilities.”<sup>32</sup> He added, “[h]ad Congress intended to entrench, rather than change, the status quo—with its historical emphasis on men’s participation opportunities to the detriment of women’s opportunities—it need not have gone to all the trouble of enacting Title IX.”<sup>33</sup> Correcting these “stereotyped notions” will require substantial effort. Changing public attitudes “is not sport for the short-winded: the institution must remain vigilant, upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex, until the opportunities for, and levels of competition are equivalent by gender.”<sup>34</sup>

In short, Brown and all other colleges have an obligation not just to provide more athletic opportunities to current students, but to recruit and admit more students with athletic interests until women in their institution demonstrate the same level of interest in varsity sports as men. Other circuit courts agreed. Ninth Circuit Judge Cynthia Holcomb Hall explained that Title IX “recognizes that, where society has conditioned women to expect less than their fair share of the athletic opportunities, women’s interest in participating in sports will not rise to a par with men’s overnight.”<sup>35</sup> Already Title IX has “altered women’s preferences, making them more interested in sports.”<sup>36</sup> Borrowing from the movie *Field of Dreams*, advocates of the parity standard adopted the slogan, “[b]uild it and they will come.”<sup>37</sup> From concrete opportunities will come new attitudes about sports, undermining old stereotypes about women. “Education” took on a new and expanded meaning: it now meant reeducating prospective students and the public at large about the perniciousness of sex stereotypes.<sup>38</sup>

#### *D. Administrative Leapfrogging*

Soon after the First Circuit’s initial ruling in *Cohen v. Brown University*, OCR issued a “clarification” that incorporated the First Circuit’s understanding

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32. *Id.*

33. *Id.* at 180-81.

34. *Cohen v. Brown Univ.* 991 F.2d 888, 898 (1st Cir. 1993) (internal citation and quotation marks omitted).

35. *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 769 (9th Cir. 1999).

36. *Id.*

37. *See GAVORA*, *supra* note 17, at 70-90; U.S. COMM’N ON CIV. RTS., TITLE IX ATHLETICS: ACCOMMODATING INTERESTS AND ABILITIES 11-13 (2010) (summarizing remarks of Jocelyn Samuels).

38. The author has developed this argument further in *THE TRANSFORMATION OF TITLE IX: REGULATING GENDER EQUALITY IN EDUCATION*, *supra* note 8, at 235-46.

of Prong Three. OCR made it clear that the Three-Part Test—previously a little-noted subsection of its 1979 “interpretation” of its 1975 regulations—had become the centerpiece of federal regulation of athletics. That “interpretation,” the head of OCR wrote, had enjoyed not only “the bipartisan support of Congress” but also “the support of every court that has addressed issues of Title IX athletics.”<sup>39</sup> When the First Circuit handed down its second ruling a few months later, it in turn leaned heavily on this OCR “clarification.” This was a vivid illustration of the policy “leapfrogging” so common in the American civil rights state: the courts defer to agency guidelines while incrementally expanding upon them; the agency then argues that the judiciary has endorsed its reading of the statute, emboldening it to be a little more aggressive; and the court then incorporates this administrative iteration into its interpretation of the law. Each denies adding anything new while together they build a more demanding regulatory program.<sup>40</sup>

The most controversial feature of OCR’s 1996 announcement was its description of Prong One as a “safe harbor” that would protect schools from further investigation. This seemed to indicate that achieving parity was the only sure way to comply with Title IX. While it refused to define “substantial proportionality,” its examples showed that it would tolerate little deviation from complete parity: the shortfall for women can be no greater than the number needed to sustain a “viable” team, which means around ten to fifteen students. OCR also explained that in counting “athletic opportunities,” it would *not* include “unfilled slots” on varsity teams: “participation opportunities must be real, not illusory.”<sup>41</sup> OCR was already worried about schools fiddling with the numbers. This raised the specter that if not enough females signed up for a team (or if some dropped out), the number of male athletes must be reduced proportionally.

Most importantly, the 1996 “Clarification” endorsed the First Circuit’s that to determine whether a school complied with Prong Three, it would *not* look at the overall distribution of varsity slots compared to the distribution of “interests and abilities” among male and female undergraduates. Rather, it would examine *only* the underrepresented sex’s “unmet interest in a particular sport” and the extent to which female athletes can “sustain a team” and find suitable competition in that sport. To determine “unmet interest,” schools must look beyond basic statistics to consider requests from current and admitted students, interviews with coaches and undergraduates participating in club and intramural

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39. Cantú, *supra* note 23.

40. For other examples, see MELNICK, *THE TRANSFORMATION OF TITLE IX: REGULATING GENDER EQUALITY IN EDUCATION*, *supra* note 8.

41. Cantú, *supra* note 23.

sports, and participation levels at local high schools. For example, if OCR finds that a particular sport is played by high school girls in the region, the burden shifts to the college to explain why it does not offer that sport. Colleges bear responsibility for recruiting, admitting, and training female athletes. Although these “general principles” were “designed for intercollegiate athletics,” they “often will apply to elementary and secondary interscholastic athletic programs” as well.<sup>42</sup>

Two years later OCR issued a “Dear Colleague” letter ratcheting up its rules on athletic scholarships: scholarship money awarded to male and female athletes must be within one percent of the proportion of male and female varsity athletes at the school. That is, if men constitute sixty percent of varsity athletes, they can receive no more than sixty-one percent of scholarship grants. When some schools complained that this was not required by OCR’s previous guidelines, the head of OCR claimed this was a “longstanding” standard implicit in its 1979 “substantial proportionality” test.<sup>43</sup> This came as a surprise to the coauthor of OCR’s 1990 compliance manual for Title IX, who claimed that the agency was not only “enforcing a policy that is counter to their written policy,” but also “of questionable legality.”<sup>44</sup> Once again OCR avoided political debate—and evaded the rulemaking procedures mandated by the Administrative Procedure Act—by denying that it was doing anything new.

The combination of the regulatory demand for more women’s teams and the continuing arms race in college football put enormous pressure on colleges’ athletic budgets, even as the economy improved over the course of the 1990s. As a result, many schools dropped “minor” men’s teams. A General Accounting Office report found that in the 1980s and 1990s colleges discontinued 171 men’s wrestling teams, 84 men’s tennis teams, 56 men’s gymnastics teams, 42 men’s fencing teams, 27 men’s track teams, and 25 men’s swim teams.<sup>45</sup> From 1992 to 1997 alone, National Collegiate Athletic Association (NCAA) schools lost 200 men’s teams and as many as 20,000 male athletes, primarily in Division I programs.<sup>46</sup> By 2000, there were 330 more women’s varsity teams than men’s

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42. *Id.*

43. Mary Frances O’Shea, Nat’l Coordinator for Title IX Athletics, & Norma V. Cantú, Assistant Sec’y, Off. for Civ. Rts., *Dear Colleague Letter: Bowling Green State University*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. (July 23, 1998), <https://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html>.

44. *Quoted in* Jim Naughton, *Clarification of Title IX May Leave Many Colleges in Violation Over Aid to Athletes*, CHRON. HIGHER ED. (July 24, 1998), <https://www.chronicle.com/article/clarification-of-title-ix-may-leave-many-colleges-in-violation-over-aid-to-athletes-104757/>.

45. U.S. GEN. ACCT. OFF., GAO REPORT 01-297, INTERCOLLEGIATE ATHLETICS: FOUR-YEAR COLLEGES’ EXPERIENCES, UNIV. ADDING AND DISCOUNTING TEAMS 11, 13 (Mar. 2001).

46. *Id.*; WELCH SUGGS, A PLACE ON THE TEAM: THE TRIUMPH AND TRAGEDY OF TITLE IX 139 (2005).

teams competing in intercollegiate sports.<sup>47</sup> Some of these men's teams sued, claiming reverse discrimination. They all lost.<sup>48</sup>

### III. THE SUBMERGED CHOICES

When the athletics issue returned to the fore in the late 1980s, policy debate centered on whether colleges can base their sports offerings on the “interests and abilities” of current students, or whether they have an obligation to move toward “parity,” that is, a distribution of male and female athletes that matches the proportion of males and females in the student body. OCR and the courts settled on the latter as the goal of Title IX regulation. That left two crucial matters up in the air: (1) what counts as an “athletic opportunity”? and (2) where should the agency focus its enforcement effort? On both issues debate within the agency, in court, and elsewhere was so limited as to scarcely merit the term. The answers implicitly provided by OCR in its standard operating procedures and enforcement practices were (1) to count *varsity* positions and little else, and (2) to focus primarily on intercollegiate sports, all but ignoring the far large sports programs of public elementary and secondary schools.

Why these crucial choices? Why such a narrow focus? To answer these questions, we must leave the world of legal analysis and venture into the world of bureaucratic politics. Two powerful forces were at work. One was the need for clear, enforceable metrics. The other was interest group pressure. Both pointed in the same direction.

#### A. Bureaucratic Simplicity

The Office for Civil Rights within the Department of Education is a small agency with a big job. Its mandate is to prevent the nearly 25,000 educational institutions that receive federal funding from discriminating on the basis of race, sex, disability, age, language, or religion. Title IX is only one of its statutory responsibilities, and athletics is just one part of Title IX. (By 2011, sexual harassment had become a more pressing and controversial issue). OCR is expected to investigate promptly the nearly 10,000 complaints it receives each year. As its responsibilities have expanded, its staff has shrunk. As a result, to make its job tractable, it needs a simple way to count “athletic opportunities.”

One way to proceed would be to count all the forms of athletic participation offered by a school and see if they are proportional to the sex distribution on

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47. U.S. GEN. ACCT. OFF., *supra* note 45. SUGGS, *supra* note 46, 139; GAVORA, *supra* note 17, at 52-53.

48. These cases are examined in Brenda L. Ambrosius, Note, *Title IX: Creating Unequal Equality through Application of the Proportionality Standard in Collegiate Athletics*, 46 VAL. U.L. REV. 557, 576-77 (2012).

campus. How many students go to yoga classes, ask for slots on the tennis courts, play on ultimate Frisbee and other intramural teams, and participate in club or varsity sports? Gathering such data would be laborious, but far from impossible. Simply adding up the total number of “athletic opportunities” for each sex, though, would make little sense. But how should they be weighed? Should a yoga class that serves 100 students over a year be equated with a football team with 100 members? That hardly seems right. Do 200 intramural team members equal fifty varsity baseball players? Maybe. Should fifty members of a club-level lacrosse team equal a twenty-five-member varsity basketball team? Given these imponderables, it is not surprising that regulators gave up and simply focused on the number of varsity athletes.

The First Circuit acknowledged the appeal of regulatory simplicity in its interpretation of the Three-Part Test. The “relative interest” test championed by Brown, the court argued, would “aggravate the quantification problems that are inevitably bound up with Title IX” and “overcomplicate an already complex equation.”<sup>49</sup> Trying to “assess the level of interest in both the male and female student populations and determine comparatively how completely the university was serving the interests of each sex” would raise “thorny questions as to the appropriate survey population, whether from the university, typical feeder schools, or the regional community.”<sup>50</sup> The court’s reading of Prong Three, in contrast, “requires a relatively simple assessment of whether there is unmet need . . . sufficient to warrant a new team or the upgrading of an existing team.”<sup>51</sup> The First Circuit concluded that “the simpler reading is far more serviceable.”<sup>52</sup> Since then, this “simpler reading” always meant counting *varsity* slots.

As important as the tacit decision to count only varsity slots was, it did not eliminate all issues of quantification. What counts as a varsity sport? Does “competitive cheer and tumbling” count? “No,” said a federal district court judge in Connecticut.<sup>53</sup> Can a school count as a varsity athlete a student who is injured, one who leaves the team during the season, or one who never gets into a game? That these matters have created controversy indicates how important such statistical details can become. For understandable reasons, regulatory agencies often crave simple, quantifiable measures of compliance.

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49. *Cohen v. Brown Univ.*, 991 F.2d 888, 900 (1st Cir. 1993).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 64 (D. Conn., 2010).

### *B. Organized Interests*

Courts respond to litigants and agencies respond to pressure. Who is well enough organized to press for a particular understanding of “athletic opportunities” in court, in the executive branch, and in Congress? Not yoga enthusiasts or members of intramural teams. Their stakes are too small and their organizational capacity too limited. As political scientists and economists have repeatedly pointed out, how costs and benefits are distributed and how they are perceived has a huge influence on political decisions.<sup>54</sup>

What groups have demonstrated sufficient interest and organization to play a major role in policymaking? Four sets stand out. One is the members of college teams and their coaches whose status had been downgraded as a result of budget cuts. They were already organized, with captains and coaches. Some of those coaches faced unemployment; some students faced loss of scholarship; others were angered by declining competitive opportunities. We know that people and organizations respond more to imminent losses than to potential gains. It is not surprising, therefore, that court suits by these directly interested parties (aided by lawyers working on a contingency-fee basis) jump-started Title IX regulation in the early 1990s.

The second source of support for the heavy emphasis on intercollegiate sports were organizations devoted to increasing the visibility and profitability of women’s professional teams. Leading the way was the Women’s Sports Foundation (WSF), founded by tennis star Billy Jean King in 1974. Run by professional athletes, it sought not only to raise the profile of women’s sports, but also to use intercollegiate sports as a pipeline for professional sports and Olympic competition. If the NFL and NBA can turn colleges into cost-free farm teams for their highly profitable leagues, why should not their female counterparts do the same? Moreover, one of the strongest political arguments for the parity standard has been that the prominence of female sports stars such as soccer players Mia Hamm and Hope Solo, skier Lindsay Vonn, and tennis stars Venus and Serena Williams makes them valuable role models for girls across the country.

More surprising is the support this focus on highly competitive sports has received from women’s legal advocacy groups, especially the National Woman’s Law Center (NWLC), the preeminent Title IX litigation organization. Why has the NWLC devoted so much effort to promoting a policy that benefits only a narrow slice of female students? (When I posed this question to one NWLC attorney several years ago, she replied, “I have always wondered about

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54. R. Douglas Arnold provides the most thorough examination of these factors in *THE LOGIC OF CONGRESSIONAL ACTION* 25-28 (Yale Univ. Press 1992).

that, too”) They might have seen this formulation as their best chance for gaining organized allies and for winning court suits under the Three-Part Test. Given the determination of the NWLC and other advocacy groups to “change the culture,” the visibility of college sports seemed well suited for promoting images of strong, ambitious, and stereotype-busting women and girls.

The extent to which both the WSF and the NWLC have emphasized highly competitive athletics as a method for breaking down gender stereotypes is evident in their opposition to counting “competitive cheer and tumbling” as an intercollegiate sport and counting flag football as an interscholastic (high school) sport. These sports, the NWLC explained, do not “provide the same level of competitive or championship opportunities as other varsity sports.”<sup>55</sup> Therefore, they “should not be counted by schools in their Title IX athletic participation numbers.”<sup>56</sup> “Competitive cheer and tumbling,” NWLC has implied, not only provides colleges an inexpensive way to increase their female athlete numbers, but reinforces stereotypes about women and girls cheering on men’s teams.

Opposition to flag football is at first harder to understand, but nevertheless enlightening. In 2012 NWLC brought suit against the State of Florida, challenging its decision to count high school flag football, an increasingly popular sport for high school girls, as a varsity sport. Girls who play flag football in high school, it explained, will not have “opportunities to play at the college level and earn athletic scholarships.”<sup>57</sup> According to this understanding, high school sports should prepare female athletes for college sports, which should then prepare them for professional or Olympic sports. At each stage the number of participants declines precipitously, with more and more resources lavished on fewer and fewer athletes.

The final organization supporting the regulatory focus on intercollegiate athletics is the most surprising and in the long run the most important: the National Collegiate Athletic Association (NCAA). In the mid-1970s the NCAA strenuously objected to HEW’s modest rules on college sports. Thirty years later it objected just as strenuously to the Bush Administration’s effort to weaken the Three-Part Test. Why the change? The answer can be summarized in one word: cooptation. After failing to neuter Title IX, leaders of the NCAA decided, “if you can’t beat ‘em, take ‘em over.” To protect its cash cows, football and men’s basketball, it promoted the rapid development of women’s intercollegiate

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55. *The Next Generation of Title IX: Athletics*, NAT’L WOMEN’S L. CTR. 4 (June 2012), [www.nwlc.org/wp-content/uploads/2015/08/nwlcathletics\\_titleixfactsheet.pdf](http://www.nwlc.org/wp-content/uploads/2015/08/nwlcathletics_titleixfactsheet.pdf).

56. *Id.*

57. *Id.*; see also Walter Villa, *A Touchdown For Women’s Sports?*, ESPN (June 21, 2012), [www.espn.com/high-school/girl/story/\\_/id/8080354/flag-football-growing-high-school-sport-girls](http://www.espn.com/high-school/girl/story/_/id/8080354/flag-football-growing-high-school-sport-girls).



teams—with tournaments sponsored (and cross-subsidized) by the NCAA. If this strategy required abandoning “minor” men’s sports (meaning those which generate little revenue) such as diving, wrestling, and gymnastics, so be it. In doing so, the NCAA not only expanded its portfolio—after all, women’s soccer and basketball are far more popular than men’s wrestling—but purchased the good will of women’s sports advocates.

The NCAA’s born-again position on Title IX was fully on display in its salute to the fiftieth anniversary of the law, *The State of Women in College Sports*.<sup>58</sup> Produced by the organization’s Committee on Women’s Athletics, its Gender Equity Task Force, its Committee to Promote Cultural Diversity and Equity, and its Minority Opportunities and Interest Committee, the report celebrated the progress made by women’s intercollegiate sports, highlighted how much more needed to be done to expand athletic opportunities for women, and explained how the NCAA was encouraging a number of “emerging sports” for college women. Behind all their statistics and organizational efforts lay the assumption that the only sports and athletes worth counting are those with “championship” status. That is NCAA-speak for sports and athletes that participate in NCAA-sponsored championship competitions. This perspective permeated the report, influencing its reporting on high school athletics as well as college sports: its graphs on interscholastic sports indicate the number of female athletes who are “part of the recruiting pool to fill roster spots on NCAA championship sports teams.”<sup>59</sup> The NCAA’s strategy is to do well—expanding its championship domain—while doing good—expanding “athletic opportunities” as it chooses to define the term. It should be noted that one can read the entire fifty-page report and find no discussion of how any of these activities provide *educational* benefits.

The first, most important, and most disturbing consequence of the NCAA’s revised Title IX strategy was its obliteration of the Association for Intercollegiate Athletics for Women (AIAW), which had served as the women’s counterpart to the NCAA during the 1970s. The AIAW was run by women who adamantly rejected the NCAA’s model of competition. The NCAA achieves its status, makes its money, and wields its power by promoting and commercializing competition at the highest level. Athletic scholarships and intensive recruitment of promising high school athletes are integral parts of the NCAA’s professionalized sports world. The leadership of the AIAW, in contrast, was serious about promoting *student* athletes in practice as well as in name. This meant, above all, prohibiting athletic scholarships and extensive recruiting.

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58. Wilson, *supra* note 3, at 1.

59. *Id.* at 16.

As Mary Jo Festle has explained in her history of the AIAW, for its leaders, “equality” did not mean “sameness”: “women should not have to adopt all of men’s practices or get subsumed into a male-run organization.”<sup>60</sup> For them, “[t]he AIAW was the vehicle through which they pursued both equality and difference—fighting for more teams and bigger budgets but in a less commercialized, less exploitative, less expensive, and more student-centered brand of competition.”<sup>61</sup> “Must the Women’s Rights movement demand for our young girls a share in the things that are wrong in sports today as well as a share in the rights in order fully to prove equality?” asked one of the founders of the AIAW.<sup>62</sup> Their answer was “No.” But in the years that followed, federal regulators in effect said “Yes.”

Although Title IX was initially a boon to the AIAW, it soon became a threat. As the number of women athletes and college teams increased, so did the AIAW’s membership, rising from 280 schools in 1972 to 659 in 1974.<sup>63</sup> Some of its members argued that raising the profile of women’s sports required athletic scholarships and recruiting. The AIAW’s ban on scholarships, these internal critics maintained, violated Title IX, which seemed to require the same scholarship rules for both sexes. Moreover, many colleges decided it would be easier to comply with Title IX if men’s and women’s teams were placed in a unified athletic department. This almost always meant that men ran the women’s athletics programs, a violation of another AIAW tenet, namely, that women should control the development of women’s sports.

Facing a Title IX lawsuit, the AIAW capitulated on the scholarship issue. This seemingly small change had a domino effect on women’s intercollegiate sports. Athletic scholarships, Welch Suggs notes, “shifted the emphasis from women already enrolled to those who could be recruited. Armed with scholarships, coaches needed to get out and find the best possible recipients.”<sup>64</sup> Colleges expected to get something for their money, and that meant winning teams. To compete with other schools, “they had to choose athletes on the basis

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60. MARY JO FESTLE, *PLAYING NICE: POLITICS AND APOLOGIES IN WOMEN’S SPORTS* 225 (Colum. Univ. Press, 1996).

61. *Id.*

62. *Quoted in id.* at 137. *See also* YING WUSHANLEY, *PLAYING NICE AND LOSING: THE STRUGGLE FOR CONTROL OF WOMEN’S INTERCOLLEGIATE ATHLETICS, 1960–2000* (2004); SHULMAN AND BOWEN, *supra* note 10, at 125; SUGGS, *supra* note 46, at 45–65.

63. FESTLE, *supra* note 60, at 171.

64. SUGGS, *supra* note 46, at 61.

of athletic ability, not as a way of providing students with a healthy extracurricular activity.”<sup>65</sup>

Meanwhile, the NCAA waged an aggressive and successful effort to lure women’s sports programs away from the AIAW. Its crucial advantage was money: it proposed a number of championships for women’s sports to begin in 1981–82. In contrast to the AIAW, which required schools to pay their own way to tournaments, the NCAA used the cash it received from men’s sports to establish and publicize new championships as well as to subsidize women’s teams’ travel to them. Enticed by the NCAA’s money, visibility, prestige, and media connections, most of the AIAW’s members jumped ship. After losing an antitrust case against the NCAA, the AIAW declared bankruptcy and disappeared.<sup>66</sup> So did its model for women’s sports.<sup>67</sup> According to Jeffrey Orleans, an OCR attorney who helped write Title IX regulations during the 1970s and later advised the Ivy League on how to comply with them, for Title IX the consequences of the shift from the AIAW to the NCAA “cannot be underestimated.”<sup>68</sup>

#### IV. QUI BONO?

The potent combination of bureaucratic tractability and interest group pressure led Title IX regulation to place heavy emphasis on that portion of school athletics that affects a small number of highly engaged and competitive “student-athletes”—a misleading term in far too many instances. Seldom was this odd emphasis publicly debated or even acknowledged. In this context the

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65. *Id.* According to one longtime woman athletic administrator, this meant a “180-degree turn” for women’s programs:

I’d been here all these years trying to develop a program for the young women who came to this university to get an education, and [] liked to compete in sport . . . Now suddenly, with [the Title IX] act, we were going out to find the student-athlete who we thought the university should have . . . And as soon as we began to do that the emphasis for women’s sport changed.

Patricia Ann Rosenbrock, *Persistence and Accommodation in a Decade of Struggle and Change: The Case of Women Administrators in Division IA Intercollegiate Athletic Programs 57-58 (1987)* (Ph.D. dissertation, University of Iowa).

66. In a surprisingly candid description of NCAA’s embrace of women’s sports, the 2022 report explained that after its effort to exempt athletics from Title IX failed, “the NCAA intently pursued initiating national championships for women, and by 1982 was hosting women’s championships in all three divisions. The NCAA’s entry into women’s sport governance, viewed as a hostile takeover by the overwhelming majority of AIAW leaders, resulted in the AIAW closing its doors in 1982.” Wilson, *supra* note 3, at 6.

67. FESTLE, *supra* note 60, at 214-15, 222-23; WUSHANLEY, *supra* note 62, at 150-52; SHULMAN & BOWEN, *supra* note 10, at 15-18.

68. Jeffrey H. Orleans, *An End to the Odyssey: Equal Athletic Opportunities for Women*, 3 DUKE J. GENDER L. & POL’Y 131, 139 (1996).

key questions become: (1) Who benefits from this narrow focus and who pays the price? and (2) Is this good for women's *education*?

Although she celebrates the fact that "Title IX has encouraged a transformational amount of social change," the feminist historian Susan Ware notes that "the history of Title IX has been fraught with unintended consequences."<sup>69</sup> This includes what Gerald Gurney, Donna A. Lopiano, and Andrew Zimbalist call "roster inflation shenanigans," reporting tricks that increase the number of female athletes on paper but not on the field.<sup>70</sup> For example, some schools require female cross-country runners also to run indoor and outdoor track so they can count these athletes two or three times. Other schools have found crew to be an easy way to increase the number of female athletes since they can enter many boats in regattas, including those with inexperienced rowers. Many schools now place a hard cap on men's teams' rosters, turning away "walk-ons" despite the fact that they impose no additional costs and are usually happy to serve as benchwarmers. All these features of regulation flow from its methods for counting the number of varsity athletes.

#### *A. Money and Beneficiaries*

To evaluate the wisdom of the focus on intercollegiate sports it is helpful to examine two sets of statistics. The first is the cost of these sports. The second is the number of varsity athletes. The bottom line is that intercollegiate sports is tremendously expensive, and the male and female students who benefit from this spending are few in number, particularly in the highest spending schools.

Despite the enormous TV revenues generated by college football and men's basketball, only about twenty schools nationwide—all of them in the so-called "Power Five" athletic conferences—show a surplus even on paper. Gurney, Lopiano, and Zimbalist note that, "[w]hen capital expenses and indirect costs are included in the accounting analysis, the number of college athletic programs running a true surplus in any given year dips below ten."<sup>71</sup> A Knight Commission report estimated that by 2020 the top ten public universities would be spending over \$250 million on athletics, up from \$100 million in 2009.<sup>72</sup> According to that report, in 2005, Football Bowl Subdivision schools spent an average of \$11,000 on undergraduates as a whole, but over \$60,000 on each

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69. WARE, *supra* note 11, at vi, 23.

70. GURNEY ET AL., *supra* note 3, at 156-61. Arizona State adopted this strategy when it constructed a two-mile artificial lake to provide a site for women's crew—despite the fact that in that desert state not a single high school had a rowing team.

71. *Id.* at 204.

72. *Restoring the Balance: Dollars, Values, and the Future*, KNIGHT COMM'N INTERCOLLEGIATE ATHLETICS 7 (2010) [http://knightcommission.org/images/restoringbalance/KCIA\\_Report\\_F.pdf](http://knightcommission.org/images/restoringbalance/KCIA_Report_F.pdf).

athlete.<sup>73</sup> By 2008 they were spending a little over \$13,000 on undergraduates but almost \$84,500 on athletes—6.3 times as much.<sup>74</sup> Colleges in the Southeastern Conference spend almost \$145,000 on each athlete, 10.8 times as much as on the average student.<sup>75</sup> A 2015 study by the *Chronicle of Higher Education* and the *Huffington Post* found that the net amount Division I public colleges spent on athletic programs had increased by sixteen percent over the preceding five years.<sup>76</sup> The NCAA's 2022 report shows that in recent years athletic expenditures have continued to rise in all divisions and for both men's and women's sports.<sup>77</sup>

A substantial amount of the money spent on intercollegiate sports comes from mandatory student fees and subsidies from the school's operating budget, not from sports-generated revenues. The Knight Commission report found that since at most schools sports revenues "fall short of meeting the needs of athletic programs, almost all programs must rely on allocations from general university funds, fees imposed on the entire student body, and state appropriations to meet the funding gaps."<sup>78</sup> In fact, they warn, "reliance on institutional resources to underwrite athletics programs is reaching the point at which some institutions must choose between funding sections of freshman English and funding the football team."<sup>79</sup> Gurney, Lopiano, and Zimbalist estimated that in 2010 student athletic fees exceeded four billion dollars annually at NCAA schools.<sup>80</sup>

At the biggest-spending schools, most of this money goes to a tiny number of teams and athletes—especially football and men's basketball. Division I schools have come the closest to reaching parity as calculated by OCR. The average gap between the proportion of female undergraduates (fifty-four percent) and female athletes (forty-seven percent) is only seven percent—as compared to sixteen percent for D-II schools and fourteen percent for D-III schools.<sup>81</sup> That is in part because between 1988 and 2020, D-I schools eliminated 326 men's sports and added 702 women's sports.<sup>82</sup> But it is also because many large D-I schools lavish their athletic funds on such a tiny group: at the University of Texas at Austin, 368 men and 321 women out of an

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73. *Id.* at 4.

74. *Id.* at 4-5.

75. *Id.* at 5.

76. Brad Wolverton et al., *How Students Are Funding Athletics Arms Race*, CHRON. HIGHER ED. (Nov. 15, 2015), [www.chronicle.com/interactives/ncaa-subsidies-main#id=table\\_2014](http://www.chronicle.com/interactives/ncaa-subsidies-main#id=table_2014).

77. Wilson, *supra* note 3, at 27-34.

78. *Restoring the Balance: Dollars, Values, and the Future*, *supra* note 72, at 6.

79. *Id.*

80. GURNEY ET AL., *supra* note 3, at 202.

81. Wilson, *supra* note 3, at 18-19; GURNEY ET AL., *supra* note 3, at 146.

82. Wilson, *supra* note 3, at 24; GURNEY ET AL., *supra* note 3, at 162.

undergraduate population of 36,000; West Virginia University, 299 male athletes and 261 females out of 21,000 undergraduates; Kansas State, 291 male athletes, 297 female, 18,000 students; Iowa State, 274 male, 234 female, 27,000 total; Texas Tech, 335 male, 232 female, 25,500 total.<sup>83</sup>

When some schools started to drop “minor” men’s teams to support more women’s teams, the WSF, women’s advocacy groups, and OCR all objected. As Eleanor Smeal, former president of the National Organization for Women, put it, “[d]ropping men’s teams is a violation of the spirit and the letter of Title IX. The purpose of saying you’re not going to discriminate is not to limit the opportunities of the other class. We should not be talking about a zero-sum game.”<sup>84</sup> OCR has repeatedly taken the same position, insisting that cutting men’s teams is a “disfavored practice,” and that complying with Title IX should “not involve the elimination of athletic opportunities.”<sup>85</sup>

This position certainly constitutes good politics. Neither OCR nor women’s groups want to become locked in battle with well-organized, well-connected defenders of men’s sports. Far better to join forces and expand the athletic budget as a whole, letting the cost be dispersed more broadly—and thus arousing less opposition. The problem, as Brown’s president noted, is that what sports enthusiasts call “athletic opportunities” entails what economists call “opportunity costs.” Hiring a new coach means there is less money for a new assistant professor (or two or three or four). More equipment for crew, less for laboratories. “By judicial fiat,” President Gregorian complained, women’s sports “have risen past all other priorities including undergraduate scholarship, faculty salaries and libraries.”<sup>86</sup>

### *B. Admissions and Student Culture*

At large D-I schools, the primary cost of athletics is financial—paying for scholarships, outlandish salaries for coaches (and their ever-expanding coterie of assistant coaches), extensive travel, and lavish stadium and training facilities. D-III schools, in contrast, do not spend nearly as much because they do not offer athletic scholarships, play more games within their region, and only rarely

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83. GURNEY ET AL., *supra* note 3, at 157.

84. Quoted in Welch Suggs, *Education Dept. Offers U. of New Mexico Another Way to Comply with Title IX*, CHRON. HIGHER EDUC. (May 5, 2000), <https://www.chronicle.com/article/education-dept-offers-u-of-new-mexico-another-way-to-comply-with-title-ix/>. Senator Paul Wellstone, himself a college wrestler, once proposed legislation to prohibit colleges from cutting funds for athletics without public justification. SHULMAN & BOWEN, *supra* note 10, at 14.

85. Annette Gurley, Chief Officer of Teaching and Learning, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS., *Resolution Agreement Chicago Public School District #299 OCR Case Nos. 05-11-1034 and 05-89-1020* at 9 (July 1, 2015), [www2.ed.gov/documents/press-releases/chicago-public-schools-agreement.pdf](http://www2.ed.gov/documents/press-releases/chicago-public-schools-agreement.pdf).

86. Quoted in GAVORA, *supra* note 17, at 76.

aspire to national championships. They also provide athletic opportunities to a much wider swath of students. At Ivy League and New England Small College Athletic Conference (NESCAC) schools, as much as a quarter (and at a few schools nearly half) of undergraduates play varsity sports at one point in their career.<sup>87</sup> For these colleges the biggest question is not how much money is spent on sports, but how intercollegiate athletics influences the makeup of the student body and the culture of the school. The combination of Title IX's narrow focus and the NCAA's take-over of women's sports has changed who gets accepted and what they do after they arrive on campus.

These questions were examined in detail by former Princeton president William Bowen and his coauthors in two data-rich volumes, *The Game of Life* and *Reclaiming The Game*.<sup>88</sup> When they examined the academic qualifications and classroom performance of male athletes, their findings were depressing but not surprising. Male athletes, especially those in "major" sports, entered college with lower SAT scores and grade point averages than their peers. They managed to do even worse in their college classes than their high school records predicted. They were disproportionately likely to end up near the bottom of their class. Athletes tended to hang out with other athletes, have closer connections with their coaches than with their teachers, and flock to a small number of less-demanding majors. This often had the effect of solidifying an anti-intellectual "jock" culture. All these trends have gotten worse since the 1970s. Although schools differ in the magnitude of these trends, the trajectory is downward across the board.

For women athletes the picture is a bit more surprising and definitely more depressing. Among the women who attended college in the mid-1970s, before Title IX regulations took hold, female athletes differed little from their peers. Few of them had been recruited. Their SAT and high school grades were similar to those of nonathletes. They graduated at the same rate. For these women "there was no evidence of systematic academic underperformance in college."<sup>89</sup> By one measure they *outperformed* their peers: after graduating they earned more M.D.s, more law degrees, more Ph.D.s, more masters degrees—and more money. They were, Shulman and Bowen hypothesize, more energetic, competitive, and focused than nonathletes.<sup>90</sup>

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87. *The 25 Schools Stocked With Jocks*, NEWSWEEK (Sept. 12, 2010, 7:00 AM), <https://www.newsweek.com/25-schools-stocked-jocks-71873>.

88. SHULMAN & BOWEN, *supra* note 10; WILLIAM G. BOWEN & SARAH A. LEVIN, *RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES* (Princeton Univ. Press, 2003).

89. SHULMAN & BOWEN, *supra* note 10, at 146.

90. *Id.* at 160-61.

Over the next several decades, the picture for women athletes changed dramatically. Recruiting went up, and the gap between the SAT scores and grade point averages of athletes and nonathletes grew. So did the extent of academic underperformance by female athletes. By 1999, women athletes recruited by coaches at selective, non-scholarship schools had a fifty-three percent better chance of being admitted than nonathletes with a similar academic record, “essentially twice the degree of advantage enjoyed by legacies and minority students.”<sup>91</sup> Students applying to Ivy League schools in the late 1990s with a combined SAT score between 1300 and 1400 had only a fifteen percent chance of being admitted.<sup>92</sup> For recruited male athletes that jumped to sixty percent. For recruited female athletes it reached seventy percent.<sup>93</sup> The SAT deficits for women recruited to play ice hockey and basketball were particularly large.<sup>94</sup> After the 1970s SAT scores for the nonathletes admitted to these schools rose significantly, but the scores for recruited athletes fell. “For the 1989 and 1999 cohorts,” Shulman and Bowen conclude, “the pattern of admissions advantage for women is amazingly similar to the pattern for men.”<sup>95</sup>

By the 1990s women athletes were graduating less frequently than their peers and were performing worse in their courses than those with similar academic qualifications upon entering college. Fewer graduated with honors or were inducted into Phi Beta Kappa. In this respect, Shulman and Bowen note, “[t]he women athletes appear to have caught up with their male counterparts—a dubious distinction!”<sup>96</sup>

Such underperformance was not simply the result of time pressures. Women who spend as much time on school newspapers, musical performance, and student government tend to do better than expected in their classes, not underperform. Recruited athletes who stop playing sports and thus have more time to devote to studies continue to underperform academically. Conversely, nonrecruited walk-ons who manage to make the team do *not* underperform.<sup>97</sup> Regardless of sex, recruited athletes simply have less interest in and commitment to academic work than do their peers. According to the authors, “whatever combination of peer effects, ‘jock culture,’ and the different priorities and incentives [that] has led male athletes to underachieve academically has now been replicated within women’s sports, where underperformance appears

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91. *Id.* at 131.

92. BOWEN & LEVIN, *supra* note 88, at 76.

93. *Id.*

94. *Id.* at 92-93.

95. SHULMAN & BOWEN, *supra* note 10, at 131.

96. *Id.* at 148.

97. BOWEN & LEVIN, *supra* note 88, at 161.



to be at least as widespread.”<sup>98</sup> Ironically, because coaches at schools that do not offer athletic scholarships cannot use financial pressure to keep their recruits on the team, they tend to look for students with a laser-like focus on their chosen sport. These are typically teenagers who have devoted most of their young lives to developing their talent for soccer or football or basketball or hockey, which helps explain the pattern of academic underachievement.<sup>99</sup>

The group that bears the cost of the sizable benefits bequeathed to male and female recruited athletes is made up of those anonymous students who were *not* accepted at selective schools. As Bowen and Levin put it, “[e]ach recruited athlete who attends one of these schools has taken a spot away from another student who was, in all likelihood, more academically qualified—and probably more committed to taking full advantage of the educational resources available at these schools.”<sup>100</sup> The value of these slots has increased markedly in recent decades.

The growth of a self-segregating athletic subculture made up of both male and female students has also had consequences for the culture of the larger college community. Bowen and Levin quote one faculty member who expressed a sentiment shared by many others. His major concern was “the impact on the classroom of academically disinterested athletes.”<sup>101</sup> Faculty, he reported, “are upset by the athletes’ lack of preparation for classes, their underachievement, and their tendency to sit in the back row and do nothing.”<sup>102</sup> A special committee established at Amherst College to examine the role of athletics in that highly selective school devoted a section of its report to the anti-intellectual culture associated with college sports, quoting a student leader who stated, “[i]t is demoralizing to the academic student that there are some athletes, especially on a few teams, who don’t care about academic work.”<sup>103</sup> A similar theme was expressed in a faculty report at Amherst’s archrival, Williams College. There the faculty of the economics and history departments, the majors of many athletes, were disturbed by “evidence of anti-intellectualism, of clear disengagement and even out-right disdain, on the part of varsity athletes . . . . Such an attitude is especially troubling because it affects the entire chemistry of the class.”<sup>104</sup>

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98. *Id.* at 150.

99. *Id.* at 165-66.

100. *Id.* at 250 (emphasis in the original).

101. *Id.* at 114

102. *Id.*

103. *Id.*

104. *Id.*

It is almost certain that male athletes bear more responsibility for this degradation of academic culture than do their female counterparts. But it is also likely that these costs fall disproportionately on women students. Female students are excelling both in high school and in college. Given the de facto quotas most selective schools establish for male applicants—they do not want the proportion of men to drop below forty-five percent—the competition for admission at selective schools is particularly fierce for females. Female students are also generally more serious about their course work in college, which means they will be most offended and most harmed by the anti-intellectualism of the sports subculture.

The columnist Jane Eisner has argued that “instead of moderating the role of athletics in higher education, Title IX too often has stimulated colleges simply to impose a flawed male model on women’s sports.” “Sadly,” she writes, “this hubristic sports culture is now entangling more and more women. The promise of Title IX . . . has given us Chamique Holdsclaw and Brandi Chastain. It’s also given us an increasing number of female student athletes who are as academically weak and socially isolated as the men.”<sup>105</sup> Bowen and Levin similarly lament the fact that “Title IX was, in effect, superimposed on the pre-existing ‘male model’ of athletics.”<sup>106</sup> This, they claim, was not inevitable. Title IX “could have served as a signal to colleges and universities (and to the NCAA) that it was time to recalibrate the entire athletics enterprise so that it would be more congruent with educational goals.”<sup>107</sup> This would have meant “reducing the emphasis on recruiting, spending less money on athletic scholarships (if not eliminating them altogether), and in other ways carefully considering the adoption of other aspects of the model of athletics that was pioneered and developed by the AIAW.”<sup>108</sup> That, for Title IX, was the road not taken—and never even discussed in the regulatory process.

### *C. Costs for Female Athletes*

One might conclude that the trends affecting both male and female college athletes impose indirect costs on many women but provide substantial benefits to those who get a chance to participate in intercollegiate sports. On the fortieth anniversary of enactment of Title IX, NWLC pointed out that women who play sports not only are healthier, but “have higher levels of self-esteem, a lower incidence of depression, and a more positive body image compared to non-

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105. Jane Eisner, *Female Athletes Gain Equality—But Also Help Erode Standards*, PHILA. INQUIRER (Jan. 25, 2001), [http://articles.philly.com/2001-01-25/news/25308916\\_1\\_college-sports-athletes-liberal-arts](http://articles.philly.com/2001-01-25/news/25308916_1_college-sports-athletes-liberal-arts).

106. BOWEN & LEVIN, *supra* note 88, at 214.

107. *Id.*

108. *Id.*

athletes.”<sup>109</sup> They are “less likely to smoke or use drugs and have lower rates of both sexual activity and pregnancy,” and “more likely to graduate from high school, have higher grades, and score higher on standardized tests than do non-athletes.”<sup>110</sup> In the long run, the NWLC claims, a larger number of female athletes “leads to an increase in women’s labor force participation down the road and greater female participation in previously male-dominated occupations, particularly high skill, high wage ones.”<sup>111</sup>

While this may well be true for the millions of high school students who play a sport, is it also true for the much smaller number of female athletes who move up to intercollegiate sports or for high school students who aspire to do so? As many observers have noted, in order to be spotted by a college coach it is usually necessary for a young woman to have specialized in one sport for many years. Multisport athletes have disappeared from college campuses, and are rapidly disappearing from high school sports programs as well. For those who see soccer or lacrosse or crew as the ticket into college and an athletic scholarship, other activities, including schoolwork, recede in importance.<sup>112</sup> This often means summer camps and playing for year-round travel teams (in addition to or instead of a high school team). Those who do not start early will have a hard time catching up. But those who do start early are susceptible to burnout.

In 2012 *The Atlantic* published an article with the provocative title, “How Title IX Hurt Female Athletes: The groundbreaking legislation, which was supposed to help women thrive in sports, has had several unintended, negative consequences.”<sup>113</sup> It featured a Boston College sophomore, Sophia Gouraige, who fit the profile of a specialized, highly competitive female athlete. During her sophomore year she developed interests outside lacrosse and came to dread practice. Finally, she quit. “When you go to college, it’s all about how to win the national championship.” “Why can’t sports just be fun?” she asked.<sup>114</sup> Diane Auer Jones, a former assistant secretary of education, has argued that OCR’s guidelines in effect put the parochial interests of the coaches (whose “job or salary may be determined by the number and type of sports offered”) ahead of the welfare of students, who are likely to have a broader array of interest. Moreover, “as girls move from high school to college, they decide to focus on

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109. *The Next Generation of Title IX: Athletics*, *supra* note 55, at 3.

110. *Id.*

111. *Id.*

112. See SUGGS, *supra* note 46, at 175-87.

113. Linda Flanagan & Susan H. Greenberg, *How Title IX Hurt Female Athletes*, ATLANTIC (Feb. 27, 2012), [www.theatlantic.com/entertainment/archive/2012/02/how-title-ix-hurts-female-athletes/253525/](http://www.theatlantic.com/entertainment/archive/2012/02/how-title-ix-hurts-female-athletes/253525/).

114. *Quoted in id.*

individual athletic activities, such as yoga, circuit training, or jogging, instead of competitive team sports”—hardly irrational choices. But, of course, what Jones describes as “life-fitness or life-wellness” sports do not count in the current Title IX calculus.<sup>115</sup>

To make matters worse, female athletes face more health risks than do their male counterparts. According to Susan Ware, eating disorders are so widespread among female athletes “that the term ‘female athlete triad’ was coined to describe how eating disorders and compulsive exercise can lead to muscle depletion and bone loss, as well as amenorrhea (cessation of menstruation), making women athletes more prone to injury as well as stress-induced immune disorders.”<sup>116</sup> Female athletes are also four to six times more likely than male athletes to tear their anterior cruciate ligament (ACL).<sup>117</sup>

One might have imagined that more women’s varsity teams would mean more opportunities for women coaches. But not so. Mary Jo Kane, director of the University of Minnesota’s Tucker Center for Research on Girls & Women in Sport, argues that “the most significant unintended consequence of Title IX is the dearth of women in leadership positions.”<sup>118</sup> According to the 2022 NCAA report, “[w]hen Title IX was passed in 1972, more than 90% of women’s teams were coached by female coaches. In 2020 75% of NCAA teams have male coaches.”<sup>119</sup> Only forty percent of head coaches for *women’s* teams were women.<sup>120</sup> Apparently, when colleges decide they wanted to produce winning women’s teams, they turn to male coaches and athletic directors.

A tragic side-effect has been the increased risk of sexual harassment. According to Linda Flanagan and Susan Greenberg, between 1999 and 2012, “36 coaches from the U.S. national swim team—including the former director—have resigned or been banned from the sport following allegations of sexual misconduct or inappropriate sexual behavior.”<sup>121</sup> The extent of sexual abuse is even more extreme in gymnastics.<sup>122</sup> One of the most gruesome features of the

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115. Diane Auer Jones, *More on Athletics and Title IX*, CHRON. HIGHER EDUC. (April 26, 2010), <https://www.chronicle.com/blogs/brainstorm/more-on-athleticstitle-ix>.

116. WARE, *supra* note 11, at 24.

117. SUGGS, *supra* note 46, at 186; Flanagan & Greenberg, *supra* note 113.

118. Flanagan & Greenberg, *supra* note 113.

119. Wilson, *supra* note 3, at 37.

120. *Id.*; see also R. Vivian Acosta & Linda Jean Carpenter, *Women in International Sport: A Longitudinal, National Study Thirty-Seven Year Update, 1977-2014*, at 18 (April 9, 2014), <http://www.acostacarpenter.org/2014%20Status%20of%20Women%20in%20Intercollegiate%20Sport%2037%20Year%20Update%20-%201977-2014%20.pdf>.

121. Flanagan & Greenberg, *supra* note 113, at 6-7.

122. Christine Hauser, *Report on Sexual Abuse in USA Gymnastics Urges ‘Culture Change’*, N.Y. TIMES (June 27, 2017), <https://www.nytimes.com/2017/06/27/sports/usa-gymnastics-child-sex-abuse.html>.

many stories about extreme sexual misconduct in college sports is the extent to which everyone—from students and parents to coaches and college presidents—turned the other way in order to protect the competitive position of their teams.

Given the tiny number of girls who will ever grow up to be professional athletes—not to mention the extremely short careers of most pros—why should we encourage them to devote themselves single-mindedly to such pursuits? To keep up with the boys, far too many of whom are making disastrous choices about how to prepare themselves for life after high school or college? For the vast majority of young people, education, not athletics is the key to economic success and social mobility. And, of course, equal educational opportunity is the objective of Title IX. All too often we lose sight of those basic facts.

#### V. REFOCUS, NOT RELAX

This recitation of the shortcomings of the existing regulatory regime should not culminate in an effort to ignore unequal athletic opportunities in educational institutions, but rather to refocus the effort in order to enhance *educational* opportunities and to avoid the many unintended consequences of current policy. This means above all looking beyond varsity teams at the college level.

The most obvious and important place to start is with public high schools. As the figures cited at the beginning of this essay indicate, here, too, change has been impressive. This occurred despite little enforcement by the federal government. The culture has changed, and so have the demands placed on schools by parents. But change has not been uniform across the country. Inequalities are far larger in the South than elsewhere, and they are especially large in schools with a high proportion of minority students.<sup>123</sup>

More than ten times as many students participate in interscholastic sports as in intercollegiate competition. Since high school is usually the place where girls' athletic "interests and abilities" are formed, more interscholastic athletes mean a wider pool from which colleges can recruit—reducing the advantage of affluent parents who can pay for sports camps and trainers. Child obesity rates have risen dangerously in recent decades, posing a particular threat to poor children. But in recent years public schools have offered fewer physical education classes as a result of budget pressures and the demands of No Child Left Behind. As Robert Putnam emphasized, "pay to play" policies have reduced the number of elementary and secondary students playing sports—

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123. Alia Wong, *Where Girls Are Missing Out in High School Sports*, ATLANTIC (June 26, 2015), <https://www.theatlantic.com/education/archive/2015/06/girls-high-school-sports-inequality/396782/>.

again disproportionately harming poor students.<sup>124</sup> Although a few states are approaching parity for interscholastic sports, in many other states the gap between boys' and girls' participation rates remains large.<sup>125</sup> These are among the many reasons for scrutinizing the athletic programs of high schools and elementary schools.

In 2010 the NWLC filed complaints against twelve school districts, one in each of OCR's regional offices.<sup>126</sup> This complaint not only forced OCR to investigate several very large districts, but also spurred it to initiate additional compliance reviews. To its credit, the Obama Administration took up the challenge. OCR's investigations of these complaints culminated in a number of settlement agreements. In addition, OCR initiated systematic reviews of the interscholastic athletic programs of large public school districts, including New York, Chicago, Houston, Indianapolis, Tampa, and Columbus. This was the first time the agency had devoted significant enforcement resources to athletics at the high school level.

This is certainly a promising development. Yet there remains the danger that OCR will respond primarily to complaints by affluent parents about the quality of varsity teams. Many of the agreements negotiated by the agency mandate new girls' varsity teams, improvements in fields and locker rooms, better scheduling and publicity, and the appointment of Title IX sports coordinators. Even schools that seemed to be doing relatively well were subject to extensive additional requirements. For example, the high schools in Portland, Maine, could boast of high participation rates by both boys and girls—over fifty percent for each—and a male–female gap of only 3.7%. But it was required to add girls' volleyball immediately and another girls' team the following year.<sup>127</sup> Hingham, Massachusetts, a wealthy suburb near Boston, offered every interscholastic sport sanctioned by the state: thirteen female, twelve male, and four coed sports. Its male–female participation gap was only 2.45%.<sup>128</sup> The settlement agreement required Hingham to eliminate that gap either by increasing squad sizes or creating new girls' teams. Hingham also agreed to

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124. ROBERT D. PUTNAM, *OUR KIDS: THE AMERICAN DREAM IN CRISIS* 174-183 (Simon & Schuster, 2015).

125. *The Next Generation of Title IX: Athletics*, *supra* note 55.

126. *Rally for Girls' Sports: She'll Win More Than a Game*, NAT'L WOMEN'S L. CTR. 3-5 (Nov. 2010), <https://nwlc.org/wp-content/uploads/2015/08/rallyforgirlssports2010.pdf>.

127. Letter from Thomas J. Hibino, Reg'l Dir., U.S. Dep't of Educ., Off. for Civ. Rts., to Emmanuel Caulk, Superintendent, Portland Pub. Schs., *Re: Compliance Rev. No. 01-11-5001* (Sept. 26, 2013), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/01115001-a.pdf>.

128. Letter from Thomas J. Hibino, Reg'l Dir., U.S. Dep't of Educ., Off. for Civ. Rts. Region 1, to Dorothy Galo, Superintendent, Hingham Pub. Sch. Dist., *Re: Compliance Rev. No. 01-10-5003* (Oct. 26, 2012), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/01105003-a.html>.

construct new playing fields and spend more on girls' teams to compensate for the greater support boys' teams received from private booster clubs.<sup>129</sup> In its 2022 "Report to the President and Secretary of Education," OCR found three high school Title IX athletics cases worthy of mention: in two the main issue was the condition of softball fields; in the other the need for a junior varsity girls' hockey team.<sup>130</sup> These are not the type of issues that limit participation in athletics in schools serving poor and minority students.

#### VI. ABOVE ALL, REMEMBER: IT'S THE *EDUCATION* AMENDMENTS

The chief danger facing all regulatory programs is what sociologists call "goal displacement," that is, the way in which quantifiable measures can supplant the original goals of a program or organization. We have become so accustomed to counting the number of male and female varsity athletes—especially at the college level—that we forget that this is but one measure of athletic opportunity and, perhaps even more importantly, that in many circumstances athletics becomes a barrier to education rather than a catalyst. Fifty years into Title IX regulation of sports, it is time to return to the fundamental questions about why we value athletics and how it can add to or subtract from the education we offer.

Former *Chronicle of Higher Education* reporter Welch Suggs gave his fine book, *A Place on the Team*, the appropriate subtitle, *The Triumph and Tragedy of Title IX*. On the one hand, regulation of athletics under Title IX has been a "triumph" because it opened up so many athletic opportunities for women. On the other hand, it has been a "tragedy" because intercollegiate sports have long been characterized by rampant corruption, exploitation of young athletes, and diversion of scarce educational resources (including, perhaps most important, the attention of students). In recent decades, Suggs laments, "female athletes have been sucked into this mess."<sup>131</sup> Since Suggs wrote those words, the level of spending, corruption, and exploitation has only gotten worse.

Although in some circumstances athletics can contribute to a well-rounded education, in practice, college athletics is often antithetical to the central mission of higher education. All too often it brings to campus unqualified "student athletes," creates an anti-intellectual subculture, and leads to subtle as well as overt forms of corruption. Nearly eighty years ago Robert Maynard Hutchins warned that of all the "crimes committed" by highly competitive college sports,

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129. *Id.*

130. Catherine E. Lhamon, Assistant Sec'y for Civ. Rts., *Safeguarding Students' Civil Rights, Promoting Educational Excellence*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. 25-27 (July 2022), <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2021.pdf>.

131. SUGGS, *supra* note 46, at 175.

“the most heinous is the confusion of the country about the primary purpose of higher education.”<sup>132</sup>

Thanks in part to Title IX, women and girls are now taking advantage of educational opportunities in ways hardly imaginable in 1972. It is now boys and men who are lagging behind, with disastrous consequences for many of them. Given the growing importance of education for promoting so many forms of well-being, we should keep our eyes on the prize, which in the long run is seldom a gold medal or a national championship.

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132. BOWEN & LEVIN, *supra* note 88, at 246.