

AN END TO THE ODYSSEY: EQUAL ATHLETIC OPPORTUNITIES FOR WOMEN

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I. PREFACE

Princess and maids delighted in that feast; then, putting off their veils, they ran and passed a ball to a rhythmic beat.¹

So Homer, c. 800 B.C., sings of Princess Nausikaa before she befriends Odysseus near a stream on the island of Skheria. Homer's adventurer accepts his royal rescuer's "game of her own" without surprise. Three millennia later, many American colleges are still unsure how men and women can have as equal a chance to "pass a ball" against other colleges as to parse the epic of Odysseus and Penelope in their classrooms.

Title IX of the Education Amendments of 1972,² which bans sex discrimination in all education programs that receive federal financial assistance, should have assured those opportunities. Almost a quarter-century later, however, its promise is still unfulfilled,³ and major litigation to define its application to athletics has begun only recently.

These delays have created an air of crisis, division, and anger on many campuses. Because most college presidents and athletic directors do not know what Title IX requires, they frequently overestimate the difficulties of

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1. HOMER, *THE ODYSSEY* Book VI, lines 99-101 (Robert Fitzgerald trans., Doubleday Anchor Books 1963).

2. Pub. L. No. 92-318, Title IX, 86 Stat. 374 (codified as amended in 20 U.S.C. §§ 1681-88 and scattered sections of 29 U.S.C. and 42 U.S.C. (1994)).

3. See, e.g., Alexander Wolff, *The Slow Track*, *SPORTS ILLUSTRATED*, Sept. 28, 1992, at 52. Although this Article discusses only intercollegiate athletics, Title IX also applies to recreational and intramural athletics; these activities raise different issues, and their compliance with Title IX is easier, less costly, and has been achieved more widely.

compliance. In my experience, supporters of men's collegiate teams are especially likely to lack clear information, and to be frustrated with what they believe are overly rigid obligations. Yet a generation's delay in enforcement has led women student-athletes and their coaches to view compliance with increasing urgency.

We should be asking why equal opportunity has been so long in coming. When we ask instead why we must provide it at all, we harm not merely women in higher education but the entire future of American amateur athletics. As parents, as taxpayers who vote to fund high school athletics, as coaches at all levels of play, and as collegiate alumnae, today's female high school and college athletes can be tomorrow's supporters of athletics for girls and boys, women and men.⁴ But they will give that support only if they first have a fair chance to participate themselves.

Perhaps most seriously, the apparent abruptness of Title IX's current enforcement has caused deep rifts on many campuses between male and female student-athletes, as each group is told, or comes to believe, that its opportunities must be limited in order to increase those of the other group.⁵ Coaches and administrators must recognize that genuine concern about the extent or cost of change can sound more like blame than caution, and must take special care to emphasize legally adequate opportunities for all students, in ways that unify rather than separate them.⁶

Yet the very real tensions at many institutions will not be reduced simply by saying the right things. New opportunities cost money, and money is hard to come by. An institution that truly is willing to make the effort can and will find the resources to support intercollegiate athletics equitably, but that generality is no longer reassuring. Preserving the student-athlete community requires providing athletes with specific ways to understand how their own sports and careers will prosper through equitable treatment.

This Article, based on a symposium panel sponsored by the *Duke Journal of Gender Law & Policy*,⁷ tries to provide some of those answers. Part I

4. I am indebted to Phyllis Schornagel for this emphasis. See also E. M. Swift, *Why Johnny Can't Play*, SPORTS ILLUSTRATED, Sept. 23, 1991, at 60 (analyzing the troubled financial status of scholastic athletics).

5. The American Football Coaches Association and the College [I-A] Football Association, for example, have lobbied for congressional reconsideration of the Title IX regulations based on the large number of participants in football and the resulting number of women's opportunities which must be provided simply to complement this single sport; see *infra* part II-B. The proponents of this effort disavow any desire to exempt football from Title IX coverage as such, but both women's advocates and representatives of other men's sports have expressed concern over that result. See Ronald D. Mott, *Title IX Hearing Slated for May*, NCAA NEWS (Overland Park, Kan.), March 29, 1995, at 1; A. Knight, *An Appeal to the Republican Referees*, WASHINGTON POST NAT'L WKLY EDITION, Feb. 6-12, 1995, at 22; M. Lorenz, *Statistical Reality is the Key to Gender Equity*, COLLEGE FOOTBALL ASS'N, SIDELINES, Nov. 1994, at 3; S. Hiller, *Statistical Equality Does Not Add up to Equity*, COLLEGE FOOTBALL ASS'N, SIDELINES at 8.

6. An especially pernicious example of potential divisiveness is the argument that Title IX will advantage only white women primarily at the expense of black male football players. See Debra E. Blum, *Competing Equities? Some Fear That Steps to Help Female Athletes May Curb Opportunities for Blacks*, CHRON. OF HIGHER EDUC. (Washington, D.C.), May 26, 1995, at A37.

7. The *Duke Journal of Gender Law & Policy* held a conference entitled *Gender and Sports: Setting a Course for College Athletics* on Feb. 17-18, 1995. I commend the *Journal's* editors for

reviews Title IX's origins, constitutional legitimacy, and enforcement history. Part II briefly summarizes the legal requirements of Title IX. These two parts explain why an old statute has so recently and rapidly acquired new meaning, in order to give readers a common and neutral vocabulary for thinking about Title IX.

I then pose the kinds of specific, practical decisions that colleges make every day in seeking to comply with Title IX, by applying the statute and its requirements to a hypothetical intercollegiate athletics program. Presented in Part III, this case study uses actual profiles of six institutions and national NCAA survey data about student participation and institutional athletic costs and revenues.⁸ I invite readers to study the case, and to attempt their own solutions, before reviewing in Part IV the solutions proposed by my symposium co-panelists.⁹

This essay is not part of the "black-letter" debate about what Title IX should mean — a discourse which the courts are resolving substantially in any event. It is intended instead to demystify for athletes, coaches, and administrators the process of obeying Title IX, to engage the reader in achieving real opportunity in a real situation, and to demonstrate in plain language how that can be done. I hope, in other words, to show very practically how athletic gender equity may be seen not as a burden, but as a moral opportunity.

II. TITLE IX'S CONSTITUTIONAL BASIS AND ENFORCEMENT HISTORY

A. Batter Up

Title IX was modeled after Title VI of the Civil Rights Act of 1964.¹⁰ Title VI prohibits racial discrimination in activities benefiting from federal funds, and was enacted to attack persistent widespread segregation in America's public schools a decade after *Brown v. Board of Education*.¹¹ Title IX

organizing an exemplary and enormously enjoyable conference, and thank them for their enthusiastic support of this work in particular. Both audio and video tapes of all symposium sessions are available through the *Journal*.

8. The most extensive, though still incomplete, data are in NCAA, THE SPORTS AND RECREATION PROGRAMS OF THE NATIONS UNIVERSITIES AND COLLEGES, REPORT NO. EIGHT ON THE INTERCOLLEGIATE ATHLETIC, PHYSICAL EDUCATION AND RECREATIONAL PROGRAMS OF THE MEMBER INSTITUTIONS OF THE NATIONAL COLLEGIATE ATHLETIC ASS'N, 6-48 (1994) [hereinafter REPORT NO. EIGHT]; DANIEL L. FULKS, REVENUES AND EXPENSES OF INTERCOLLEGIATE ATHLETICS PROGRAMS: FINANCIAL TRENDS AND RELATIONSHIPS — 1993, *passim* (1994) (published by the NCAA); 1991 NCAA GENDER-EQUITY STUDY 4-27 (1992) (on file with the NCAA).

9. I was fortunate to have as co-panelists Donna Lopiano, Executive Director of the Women's Sports Foundation and former Director of Women's Athletics at the University of Texas-Austin; Judy Sweet, Director of Athletics at the University of California-San Diego and former President of the NCAA; Susan Kiechel, an Auburn graduate and a successful plaintiff in a Title IX suit to have women's soccer at Auburn upgraded to a varsity sport (*infra* note 28); and moderator Douglas Lederman, a Senior Editor at the *Chronicle of Higher Education* and an expert reporter on intercollegiate athletics. All credit for their perceptive analyses goes to them; any blame for unintentional inaccuracy in reporting their thoughts is, of course, my own.

10. Pub. L. No. 88-352, §601, 78 Stat. 252 (1964) (codified at 42 U.S.C. § 2000d (1994)).

11. 347 U.S. 483 (1954).

thus has the same clear constitutional underpinnings as Title VI, which can be summarized as follows.¹²

First, federal support means that discrimination in an activity is not merely an institutional error but amounts to biased action by the government itself. The due process guarantees of the Fifth Amendment, read to include for the federal government the equal protection guarantees of the 14th Amendment prohibit such a result.¹³

Receipt of federal funds provides the constitutional and moral jurisdiction for Title IX. These funds derive from, inter alia, mandatory personal income taxes. No taxpayer should be invidiously excluded from the benefits of a program that he or she is forced to support. Nor should the government have to subsidize activities from which citizens are arbitrarily shut out.

Second, the federal government's "spending powers" provide independent constitutional authority to impose reasonable conditions on the receipt of federal financial assistance, as a condition of allocating scarce federal resources. In these terms, requiring a college not to discriminate on the basis of sex, as a condition for receiving federal assistance, is no different from requiring that its dormitories have smoke alarms when they are built with federal funds.

Title IX's constitutional legitimacy was well-defined upon its enactment, since the benefits of federal funds in American colleges and universities are enormous. Title IX, like Title VI and analogous provisions involving handicap discrimination, reaches athletic activities that themselves receive no direct federal funds because benefits created anywhere in an institution flow throughout the institution as a whole.

While there is no useful legislative history to guide Title IX's application to athletics,¹⁴ the statutory text is clear:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .¹⁵

12. These issues have been addressed in countless articles and in numerous briefs, but the analysis is basically unchanged from that in the first journal article to address Title IX, Alexandra P. Buek & Jeffrey H. Orleans, *Sex Discrimination — A Bar to a Democratic Education: Overview of Title IX of the Education Amendments of 1972*, 6 CONN. L. REV. 1, 12–15 (1973).

13. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (a companion case to *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), holding that the public schools of Washington, D.C. were governed by federal law and thus subject directly to the 5th Amendment rather than the 14th Amendment).

14. The sole reference is a response by Senator Birch Bayh (D-Ind.), the chief Senate sponsor, to a less than entirely serious inquiry by Senator Peter H. Dominick (R-Colo.) as to how Title IX might affect access to football locker rooms:

What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. We are not requiring that intercollegiate football be desegregated, nor that the men's locker room be desegregated.

117 CONG. REC. 30,407 (1971) (statement by Sen. Bayh).

15. 20 U.S.C. § 1681(a) (1994).

This language provides an individual remedy to every *person*. But like decisions to establish particular curricula, choosing to sponsor different athletic teams is intrinsically a *group-based* decision, presupposing minimum numbers of people with both similar and complementary interests and skills. Like individual faculty or students, individual team members are chosen for their specific potential contributions. At the same time, however, like academic departments, teams are by definition groups.

More specifically, teams are groups with limited membership, a condition that makes it particularly difficult to judge when decisions about those groups are discriminatory. When admission to an academic course is limited by neutral criteria such as prerequisite study or grade-point-averages, enrollment patterns ought not to differ significantly by gender (assuming equal access to those prerequisites and equal use of those opportunities). But choosing teams by the usual and analogous criteria of skill levels ordinarily yields just the opposite result — teams composed separately of women and men.¹⁶ Indeed, Title IX not only permits separate-sex teams but usually requires them (with consistent judicial approval, as noted *infra* Part III), precisely because a single competitively-based team in most sports is likely to be all male at any level.

As the process of defining Title IX began, the history of so-called “separate-but-equal” approaches to racial segregation admittedly did not bode well for creating parallel men’s and women’s athletic programs that would guarantee individual rights.¹⁷ Still the issues were narrower practically, and less divisive morally than was true as to race since there was general public acceptance of both the idea that there should be genuine opportunities for women, and the likelihood that opportunities could be provided on separate-sex teams. Because intercollegiate athletics in 1972 were relatively undeveloped, both generally and for women specifically, it seemed possible to strive for full women’s participation without having to limit that of men.

However, a series of administrative and legal delays squandered these hopes,¹⁸ and the athletic world subsequently changed dramatically.¹⁹ Title IX’s application to traditional male intercollegiate athletics was an unwelcome surprise to many partisans of these sports. And many women, justifiably concerned that separate teams never would be equal, believe their fears have been confirmed.

16. In sports such as golf, swimming, tennis, and track, athletic competition could be conducted with evenly mixed teams of men and women, competing both separately and in “mixed” events with a single team score. However, there has been virtually no such competition at any time or on any level of competitive adult American athletics with the exception of mixed doubles tennis, and Title IX does not require such competition. Whether there would be social, educational, or budgetary benefits to such a change is an intriguing inquiry but beyond the scope of this essay.

17. See Buek & Orleans, *supra* note 12, at 17–26.

18. See *infra* notes 27–30 and accompanying text.

19. See *infra* notes 31–35 and accompanying text.

B. Time-Out

As is usual for broadly-worded legislation like Title IX, the Office for Civil Rights (OCR) of the then Department of Health, Education and Welfare (HEW) issued in 1973-74 a draft and then final regulations, followed in 1979 by a draft and final athletics Policy Interpretation, which had numerous public hearings and revisions.²⁰ Rejecting challenges to the application of the rules to "big-time" or "revenue-producing" football, Congress made clear in 1974 that it viewed Title IX as covering all collegiate athletics, and that it accepted HEW's rules as an appropriate framework for doing this.²¹

At this point in the lives of most regulatory statutes, initial litigation would have either established the validity of these agency rules or made clear what challenges to them would be entertained. Litigation also would have disclosed whether the lower federal courts disagreed sufficiently to warrant Supreme Court review. For Title IX, this finally happened once litigation began in the 1990's. As a result of these cases, the HEW regulations and Policy Interpretation of the 1970's still provide the basis for continued judicial oversight.²²

By the time Title IX was enacted, for example, the two major provisions of the Civil Rights Act of 1964, Title VI,²³ on which Title IX was based, and Title VII,²⁴ which bars invidious discrimination in employment, had been subject to definitive and unanimous Supreme Court rulings. Coming in the same October 1970 Term of Court, seven years after the enactment of Titles VI and VII, the rulings provided a full range of guidance which lower court opinions have only recently provided for Title IX — allocating burdens of proof, defining the role and required degree of precision for numerical analyses in both proof and remedy (in, respectively, enrollment patterns and schools' student bodies in school desegregation cases, and labor pools in

20. 34 C.F.R. § 106 (1995); Policy Interpretation, 44 Fed. Reg. 71, 413 (1979).

For a review of the initial and final versions of the Policy Interpretation, see generally John Gaal & Louis P. DiLorenzo, *The Legality and Requirements of HEW's Proposed "Policy Interpretation" of Title IX and Intercollegiate Athletics*, 6 J.C. & U.L. 161 (1980) (outlining HEW's draft of a policy interpretation on Title IX, concluding that it contains numerous ambiguities and vague definitions which won't be resolved until the interpretation is actually applied), reprinted in LEGAL ISSUES IN ATHLETICS: ARTICLES RECOMMENDED BY THE NACUA SECTION ON ATHLETICS 203 (Jeffrey H. Orleans & Edward N. Stoner II eds., 1989) [hereinafter LEGAL ISSUES IN ATHLETICS]; John Gaal et al., *HEW's Final "Policy Interpretation" of Title IX and Intercollegiate Athletics*, 6 J.C. & U.L. 345 (1980), reprinted in LEGAL ISSUES IN ATHLETICS, supra at 237 (examining the final interpretation and finding it more concrete than the draft, but nonetheless still ambiguous and confusing).

21. After declining to adopt an exclusionary amendment sponsored by Senator John Tower (R-Tex.), Congress approved the Javits Amendment, Pub. L. No. 93-380, § 844, 1974 U.S.C.A.N. (88 Stat. 484, 612) 541, 695 (making Title XI's application to collegiate athletics clear).

22. For a balanced summary of current caselaw and issues in applying Title IX to athletics, see the following: ELLEN J. VARGYAS, *BREAKING DOWN BARRIERS: A LEGAL GUIDE TO TITLE IX* (1994); Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 14-26, 36-39 (1992).

23. 42 U.S.C. § 2000d.

24. 42 U.S.C. § 2000e.

employment cases), and providing for the nature and duration of possible remedies and for the standards by which a defendant ultimately might demonstrate compliance.²⁵

Each of these Civil Rights Act precedents was accepted as a legitimate and mandatory framework, grounded in relevant legislative history and extensive prior development of the issues in the lower courts. And each precedent guided courts throughout the country in identifying violations and developing remedies, with no greater apparent difficulty in specific cases than in any other area of federal regulation.

Title IX's application enjoyed no such normal progress. Seven years after its enactment, in 1979, a delay in enforcement began which lasted for almost two decades. Each administration under Presidents Ford, Carter, and Reagan hesitated about athletics — first about the regulation (President Ford), then about the "Policy Interpretation" (President Carter), and then simply about the issue itself (President Reagan). As a result, the public's perception of Title IX's constitutional legitimacy was seriously eroded. A statute that was out of sight was also, to the public, out of mind.

Parallel judicial delay was punctuated by the 1984 Supreme Court opinion in *Grove City College v. Bell*,²⁶ which made clear that Titles VI and IX covered only those institutional activities that receive direct federal financial assistance.²⁷ Prior to *Grove City*, a number of circuits had voided Title IX's coverage of athletic and other institutional activities which did not receive

25. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (directing school boards, in developing desegregation plans, to consider altering attendance areas, pairing or consolidating schools, transporting students by bus, and any other method effectuating a racially unitary system); *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971) (holding that some ratios of racial balance or mixing are useful starting points for school authorities to dismantle dual school systems); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (prohibiting employers from using tests or measurement procedures unless they are a demonstrably reasonable measure of job performance, regardless of the employer's lack of discriminatory intent).

Swann was the most extensive and specific case of a line of Supreme Court school desegregation cases that applied Title VI or the 14th Amendment. For later Title IX discussions of "proportional opportunities" in athletics, see *infra* part III. *Swann* and *North Carolina State Board of Education* gave lower courts detailed templates for defining acceptable enrollment proportions (a clear precedent for the use of numerical standards in Title IX) and specific instructions to use a remedy which remains far more controversial than adding athletic teams for women — requiring pupils to be transported outside their neighborhood school districts. See *North Carolina State Bd. of Educ.*, 402 U.S. at 45-46; *Charlotte-Mecklenburg*, 402 U.S. at 22-25, 29-31.

Griggs established the fundamental principle of Title VII "disparate impact" cases. For an apparently neutral employment practice that disproportionately excludes women or members of minority groups, as demonstrated by statistical evidence, to be constitutional there must be a compelling business justification. *Griggs*, 401 U.S. at 430-31. Later Title VII cases expanded the use of statistics in Title VII cases, see, e.g., *Hazlewood Sch. Dist. v. United States*, 433 U.S. 299, 307-14 (1977), and approved numerically-based remedies, such as proportionate hiring and promotion plans, in cases of disparate impact violations. See, e.g., *United States v. Paradise*, 480 U.S. 149, 178-86 (1987) (approving a plan requiring a black officer to be promoted for each white officer promoted).

26. 465 U.S. 555 (1984).

27. *Id.* at 571-74.

direct federal funds. The Supreme Court ruling halted enforcement of Title IX until it was overruled by the Civil Rights Restoration Act of 1987.²⁹

That Congress did not take the opportunity to change the Title IX regulation in the Civil Rights Restoration Act legitimized the athletics and other controversial sections of the regulation.³⁰ But neither the administration under President Bush nor the early administration under President Clinton were particularly aggressive in using their restored enforcement authority. Instead, the most important cause for the ultimate inception of Title IX litigation was another Supreme Court ruling. In 1992, the Court held that students not only could seek injunctive relief under Title IX but also could obtain money damage awards.³¹ Starting a lawsuit against one's own college is a stressful decision, but the availability of damages increased the incentive for defendants to settle, and thus for students to be plaintiffs.³²

The resumption of litigation, however, comes in a very different context from the 1970s, for intercollegiate athletics are vastly altered. In the last twenty years significant new resources have been committed to men, and now must be balanced for women at a time when new dollars are hard to find. At the same time, the courts are far more willing to identify and remedy institution-wide problems, and far less willing to accept such practical defenses as limited resources than they were two decades ago.

C. Time-In

A modern Princess Nausikaa, graduating from college this spring but still barely walking when Title IX was enacted, has grown up with major changes in scholastic and collegiate athletics. Some changes have directly affected how games are played — the waxing and waning popularity of artificial turf; shot clocks and three-point lines; metal bats and shovel oars, and the end of six-girl, half-court basketball. Others have been more aesthetic — neon yellow softballs, satin knickers, and shoes and jerseys in more colors than Joseph's coat. But no difference has been more striking than the number and variety of the institutions that currently compete and the stakes for which they play.

The last two decades have seen an explosion in membership, public attention, and financial costs and rewards (gross, if not always net) in Division I men's basketball and Division I-A football.³³ These dramatic changes

29. Civil Rights Restoration Act of 1987, ch. 38, 102 Stat. 28 (1988) (codified as amended at 20 U.S.C. § 1687 (1994) (restoring Title IX claims to most athletic programs, where an entire institution is covered by Title IX if any of its programs or activities receive federal funds).

30. See *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982) (holding that § 901(a) of Title IX of the Education Amendments of 1972 included employees as well as students in its definition of "persons"). For a discussion of the history of the Civil Rights Restoration Act see Brake & Catlin, *supra* note 20, at 9.

31. *Franklin v. Gwinnett County Sch.*, 503 U.S. 60, 73-76 (1992).

32. See, e.g., *Kiechel v. Auburn Univ.*, CA 93-V-474-E (M.D. Ala. July 19, 1993) (order approving class action settlement); *Roberts v. Colorado State Univ.*, 814 F. Supp. 1507 (D. Colo.), *aff'd sub nom. Roberts v. State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993).

33. In 1972-73, the academic and competitive year after Title IX was enacted but before

were fueled principally by the financial rewards offered by television contracts and advertising rights for the Division I Men's Basketball Championship and regular-season conference basketball; for conference football packages after the Supreme Court found the NCAA's exclusive football telecast requirement to be illegally anti-competitive;³⁴ and for new bowl games designed to exploit these new opportunities.

Though Title IX's goals have not been achieved fully, women's athletics have changed as well. Both the number and proportion of undergraduate athletes who are women have grown extraordinarily, as have similar figures for girl athletes in secondary schools.³⁵ Women's athletics in 1972 were governed separately by the Association of Intercollegiate Athletics for Women (AIAW), not by the NCAA. Women's athletics operated without athletic financial aid or extensive recruiting, and built upon a much smaller base of girls' scholastic athletics. The benefit of the NCAA overtaking the AIAW, or of the evolution of women's athletics to reflect many of the men's practices, may be subject to debate, but the differences that these developments represent cannot be underestimated.

Most schools that expanded men's athletic programs, seeking to share in the visibility and revenue of the basketball championship and the bowls, did not address either the implications for greater women's opportunities, or how to capitalize on the men's expansion to help develop those opportunities. Large initial disparities between men's and women's opportunities were magnified as men's programs were publicly and self-consciously "upgraded." Now that Title IX obligations of colleges are being acknowledged, whether voluntarily or judicially, schools' financial resources are being squeezed sharply.

From the post-war GI Bill through the program expenditures originating in Sputnik and then in the Great Society, it was the federal funding under-

the NCAA included women's sports, the NCAA had 665 institutional members, 237 in Division I and 428 in Divisions II and III, and sponsored an average of nine men's sports per institution. NCAA, 1972-73 ANNUAL REPORTS 11-14' (1974).

In 1981-82, the first year in which the NCAA sponsored women's championships, institutional membership totaled 789, 277 in Division I and 510 in Divisions II and III, and 97 institutions played "major" Division I-A football. The average institution again sponsored just over nine men's sports, as well as 6.4 women's sports. NCAA, 1981-82 ANNUAL REPORTS, 17-26 (1983).

In 1993-94, institutional membership alone grew to 906, 301 in Division I and 557 in Divisions II and III, and 107 institutions played "major" Division I-A football. The average institution sponsored 8.4 men's sports and 7.4 women's sports. NCAA, 1993-94 ANNUAL REPORTS 27-36 (Michael V. Earle ed., 1995).

34. NCAA v. Board of Regents, 468 U.S. 85, 120 (1984).

35. For example, the NCAA estimates that total women participants in NCAA-sponsored sports increased from 69,096 in 1981-82 to 90,927 in 1991-92, at 863 rather than 753 institutions. The 1981-82 estimates are twice the 1971-72 numbers and four times the figures for 1966-67. Compare NCAA, THE SPORTS AND RECREATION PROGRAMS OF THE NATIONS UNIVERSITIES AND COLLEGES REPORT NO. SIX ON THE INTERCOLLEGIATE ATHLETIC, PHYSICAL EDUCATION AND RECREATIONAL PROGRAMS OF THE MEMBER INSTITUTIONS OF THE NCAA 14-23 (1984) (estimating the 1981-82 figures at twice the 1971-72 numbers and four times the figures for 1966-67) with REPORT NO. EIGHT, *supra* note 8, at 19-21 (1994) (sumarizing the 1991-92 women participants in NCAA sponsored sports).

pinning Title IX jurisdiction that so expanded and revolutionized both institutions of higher education and students' access to them. Federal grants built dormitories, libraries, laboratories, and other facilities; federal awards supported the faculty, staff, and student salaries and expenses to conduct research of every conceivable kind; and federal dollars have been a major source of both undergraduate and graduate financial aid.

Even before the resumption of Title IX jurisdiction in the late 1980s, however, federal funding for higher education began to decrease sharply, in total dollars and as a percentage of needed expenditures. Any spending reductions large enough to meet the "Contract with America's" ostensible deficit reduction goals will likely erode these resources even further. And virtually all States have experienced their own severe funding problems.

In sum, as Title IX at last is taken seriously in athletics, institutional situations are far more difficult than when the law was enacted. Thus, at least psychologically, there seem to be greater disparities between men's and women's opportunities just when the overall financial pictures of institutions have worsened. The time of growth is past, just as the need for growth is acknowledged.

Moreover, judicial enforcement of civil rights guarantees now involves extensive institutional intervention, which was not the case when Title IX was passed and for which the athletics community is substantially unprepared. Applying *Griggs, Swann*,³⁶ and their lower court progeny, judges are accustomed to acting as administrators for both large public bureaucracies, on behalf of their "clients" (school districts, welfare and prison systems, police and fire departments), and the employment structures of universities, corporations and unions, on behalf of their employees.

Not only are courts more willing to define and resolve group-based civil rights claims in general, but repeated litigation has eroded judicial willingness to respect university autonomy in particular, and athletic programs may find "academic freedom" defenses more difficult to sustain than would academic departments.³⁷ Intercollegiate athletics has become a routine arena for judicial supervision, and that supervision is based on a small sample of institutions at that.³⁸

For legal counsel, neither the rapid recent development of the law nor its current state are surprising. Attorneys understand that the vast scope of federal expenditures on behalf of education provides full jurisdiction for Titles VI and IX, as discussed *supra* Part I.A. But students, coaches, and administrators usually are not lawyers, and many of them are genuinely confused by these developments.

Conversely, most judges know little about intercollegiate athletics, and

36. *Swann*, 402 U.S. 1; *Griggs*, 401 U.S. 424; See *supra* note 25 and accompanying text.

37. Colleges and universities in general, and athletics administrators in particular, may believe that courts are not well equipped to make detailed judgments about their operations. But courts are no more or less equipped to do so in higher education, and specifically in athletics, than they are in other school or welfare systems, hospitals, prisons, or any other non-profit or service agencies.

38. See *infra* notes 39-40.

have been given little chance to learn as the caselaw develops (in contrast, for example, to faculty employment litigation). Instead, prevailing law derives from very few factual situations, almost none of which include the kind of ambivalent facts that yield the most careful analysis. For example, cases involving institutions with badly imbalanced patterns of opportunity have yielded requirements for "proportionality" among participants almost as a *sine qua non*, as discussed in *infra* Part III.

Against this background, it is not surprising that to many athletics administrators Title IX seems to have dropped suddenly from the sky. The history of its definition, administration, and judicial enforcement is one of delay and dispute rather than persistence and prosecution. The most prominent cases seem to leave room for neither ambiguity nor legitimate practical concerns. Against the relevant civil rights precedent, however, the caselaw is neither surprising nor unreasonable.

III. WHAT TITLE IX REQUIRES

A. Generally

The caselaw begins during the period of no federal enforcement, with the application of state requirements analogous to those of Title IX.³⁹ Next, federal lawsuits settled or decided in the last few years provide clear templates for both the "participation" and "resource" obligations even of large Division I institutions that include football. These rulings were reinforced in the public mind by the Supreme Court's denial of *certiorari* in one heavily-briefed case involving both sets of issues.⁴⁰

The federal appellate courts have applied similar substantive standards and similar burden of proof allocations. This section does not review either

39. See, e.g., Edward Branchfield & Melinda Grier, Aiken v. Lieuallen and Peterson v. Oregon State University: *Defining Equity in Athletics*, 8 J.C. & U.L. 369, 380 (1981) (discussing the application of Oregon's state civil rights requirements to athletics programs of two Oregon universities); Doralice M. Graff et al., Blair v. Washington State University: *Making State ERA's a Potent Remedy for Sex Discrimination in Athletics*, 14 J.C. & U.L. 575, 588 (1988), reprinted in LEGAL ISSUES IN ATHLETICS, *supra* note 20, at 255 (addressing the pursuit of advances for female athletes under Washington State's Equal Rights Amendment which were not available under federal law).

40. Roberts v. Colorado State Univ., 814 F. Supp. 1507, 1519 (D. Colo.) (holding that plaintiffs are entitled to a permanent injunction reinstating the women's varsity softball team), *aff'd sub nom.* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993).

The other major cases, in chronological order, are Haffer v. Temple Univ., C.A. No. 80-1362 (order approving settlement) (E.D. Pa. Sept. 6, 1988), 678 F. Supp. 517 (E.D. Pa. 1987) (denying defendants' summary judgment motion in Title IX gender discrimination action brought by female student athletes), *aff'd*, 991 F.2d 888 (1st Cir. 1993); Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992) (issuing preliminary injunction restoring demoted women's gymnastics and volleyball teams to varsity status), *aff'd*, 991 F.2d 888 (1st Cir. 1993), *remanded*, 879 F. Supp. 185 (D.R.I. 1995) (issuing permanent injunction relating to "participation" claims, the "resource" claims having been settled before the permanent injunction hearing); Sanders v. University of Tex., No. A-92-CA-405 (W.D. Tex. Oct. 24, 1993) (issuing order approving settlement with university agreeing to increase participation rate by women athletes and raise the portion of financial aid going towards women athletes).

the regulations or the cases in detail, but provides a sufficient non-technical summary to permit the reader to consider the hypothetical in Part III.⁴¹

First, institutional resources for intercollegiate women's athletics must be equally effective as (*not* necessarily equal to) those for men's athletics. Once the number and types of teams are set, providing for them should not be an issue. All funds made available to or expended by the intercollegiate athletics program must be considered in this equation, not just those funds directly contributed by the institution itself, and specifically including outside "booster" or "friends" funds.

Resources are not a difficult conceptual problem, however much they may be a practical one, and courts properly do not accept limited budgets as a reason not to provide constitutionally-based rights. Courts do, however, permit phase-in plans for compliance when the plans are complete, progressive, and demonstrably likely to provide full compliance in an appropriate period of time and against a clearly-articulated legal standard. But taking advantage of that opportunity requires acknowledging, and committing to fill the necessary resource needs in the first place.

Second, the courts have endorsed the OCR's regulation standard that the ratio of varsity intercollegiate "participation opportunities" for men and women should be "substantially proportionate" to their ratio within full-time undergraduate enrollments, absent a clear reason for a different result. This requirement applies to individual participants, not to numbers of teams, and fixes the proportions of athletic grants-in-aid to be equal to the participant ratios.

An important practical point should be noted about the intersection between resources and the determination of the number of participants. As a matter of human nature, observers from student-athletes to judges are less likely to be rigidly formulaic about the precise numbers of required athletic "slots" when an institution's resources clearly and robustly support women's opportunities that are fully equivalent to those for men in the day-to-day details of athletic life. Institutions that have not adequately and enthusiastically supported whatever women's teams they already sponsor will not be very credible when they try to avoid adding new ones.

B. "Participation"

Consistent with school desegregation and employment discrimination caselaw, the participation criterion assumes that differences between ratios of athletic opportunities and gender ratios in potential participant groups are improper unless they are shown by specific proof either to be caused by factors beyond the defendant's control or not to affect real opportunity. The desegregation precedent makes it clear that tests of this sort should be applied in a case-by-case, fact-specific manner.⁴²

41. See generally cases cited *supra* note 40 (defining the obligations of universities under Title IX by applying the standards set out in the Policy interpretation); Title IX Regulations, 34 C.F.R. § 106 (1995); Policy Interpretation, 44 Fed. Reg. 71,413-23 (1979) and sources cited *supra* note 20.

42. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20-26, 31-32 (1971);

Substantial proportionality is a presumption which may be rebutted by demonstrated evidence: a starting point for analysis, rather than a conclusion, and one which calls for reasonably approximate ratios, not identical ones. Careful use of such numerical presumptions is not only well-established judicially in other civil rights contexts,⁴³ but also makes common sense. An impressionistic, "I know it when I see it" standard⁴⁴ would provide student-athletes and institutions alike with neither predictable measures of compliance nor clear ways to define when an institution's obligations finally are met.

Given the fact that most athletics administrators are unfamiliar with the thirty years of civil rights law on which "proportionality" is based, it is not surprising that the rule has raised significant fears. Meanwhile, judicial discussion of specific athletic programs has not always been clear, entirely accurate, or fully open to institutional explanations. This is the case particularly when enrollment ratios are substantially more than half female.

It is fundamentally necessary for courts not to substitute formulas or equations for a realistic assessment of what teams a specific school can sponsor effectively. But schools also must acknowledge that when they control the composition of teams through extensive recruiting, a "proportional" result seems quite plausible.⁴⁵ The caselaw debate about which statistical tests to use, or what disparities are acceptable, and for what reasons, should not obscure the general legitimacy of statistical measures of opportunity.⁴⁶

Applying the school desegregation and fair employment "labor market" precedents to this area requires realistic consideration of how competitors are selected and encouraged to participate, and admits of realistic limits upon the capacity of institutions to develop teams.⁴⁷ This type of numerical

North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45-46 (1971); see generally *supra* note 23 and accompanying text; Kelley v. Board of Trustees, 832 F. Supp. 237, 241-42 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994) (providing a representative discussion of the "substantially proportionate" test), *cert. denied*, 115 S. Ct. 938 (1995); Policy Interpretation, 44 Fed. Reg. 71,413, 71,418 (stating that a school is not required to add a team in a sport for which there is not a "a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions.").

43. See, e.g., Hazlewood Sch. Dist. v. United States, 433 U.S. 299, 307-09 (1977); *supra* note 25 and accompanying text.

44. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (commenting upon his definition of pornography).

45. See John Weistart, *Can Gender Equity Find a Place in Commercialized College Sports?*, 3 DUKE J. GENDER L. & POL'Y 191 (1996).

46. See generally Kelley, 832 F. Supp. 237, 240-42, *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995) (holding that cutting a men's swim team, while maintaining the women's swim team, did not violate Title IX because the women continued to receive a lesser share of the school's overall athletic opportunities); Roberts v. Colorado State Univ., 814 F. Supp. 1507, 1512-13 (D. Colo. 1993), *aff'd sub nom.*, Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 580 (1993) (comparing the percentage of female students to the percentage of female athletes and holding that a 10.6% disparity failed the proportionality test).

47. See generally Hazlewood, 433 U.S. 299 (1977); North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971); Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971); Griggs v. Duke Power Co., 401 U.S. 424 (1971). Title VII does not require an employer which

standard permits institutions both to anticipate their obligations clearly, and as *Swann* makes clear to claim judicial protection when those obligations are satisfied.⁴⁸

Federal rules also specify two permissible explanations for an institution lacking substantial proportionality, though each seems effective more as a transitional rather than a permanent measure. Introduced in the 1979 Policy Interpretation as "bridges" when women's athletic programs were generally undeveloped and "substantially proportionate" participation was unlikely at most campuses, these tests may no longer be relevant when programs have had time to grow to full maturity.⁴⁹

One of these alternatives is showing that an institution has had a substantial and continuing recent expansion of women's intercollegiate opportunities.⁵⁰ For many institutions, however, most new teams for both sexes were created before the 1980s enforcement hiatus. Courts can be reminded that these promising beginnings remain the basis of today's programs, and that when Title IX jurisdiction was voided, many institutions had no legal obligation to add women's opportunities, and did not do so. But courts also will and should look at what institutions have done since that jurisdiction reattached — a long enough period of time that institutions could have taken stock again, and acted if necessary.

The only measure of when an institution properly may stop expanding (absent "interest" considerations, below), seems to be reaching substantial proportionality. From that perspective this defense becomes a question of whether an institution has done a recent stringent self-study, or perhaps has recently added substantial funding, and has a clear plan for doing whatever remains needed.

has engaged in past discrimination to have its workforce mirror the local labor market proportions of women and members of minority groups, among qualified workers in the affected job categories, if it has made good-faith affirmative efforts to achieve those results and has been prevented from doing so by factors beyond its control.

48. The most common criticism of a "substantially proportionate" standard is that the large number of players on football teams, particularly non-scholarship or non-recruited "walk-ons," requires large numbers of "offsetting" women, at substantial cost and leaving little opportunity to sponsor other men's teams.

A detailed discussion of this issue is beyond the scope of this Article. But solutions are clearly possible when on the one hand, institutions do not shirk their substantial core responsibilities toward women athletes, and on the other hand, courts and regulators recognize that walk-ons playing on "subvarsities" in any sport may have very different experiences from the majority of varsity players. If walk-on opportunities truly are available non-discriminatorily to both men and women in a wide variety of sports, large numbers of football walk-ons ought not require the creation of women's teams "at the margin" only to provide *pro forma* statistical parity.

In any event, the proper proportionality consideration of the last few players on a football team is usually the *last* question in a Title IX analysis, not the first. With perhaps one exception, *see* *Cohen v. Brown Univ.* 809 F. Supp. 978, 991 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993), the reported cases all have participation disproportions which would be of concern even with much smaller football squads — which is the primary reason the cases have yielded such a strict standard.

49. 44 Fed. Reg. 71,413, 71,418.

50. *Id.*

Secondly, an institution also may show that it equally effectively accommodates the interests and abilities of potential male and female intercollegiate athletes.⁵¹ But this defense also points ultimately toward substantial proportionality, so long as sufficient numbers of women athletes appear to seek opportunities. This defense also raises serious practical concerns.

Specifically, the women athletes whose interests secure a team are usually less skilled than those who eventually will be recruited to comprise that team. Recruitment rules and inducements differ among NCAA Divisions (including the permissibility of offering grants-in-aid and recruiting off-campus). But few institutions at any level compete seriously with athletes simply drawn from the student body at large: most competitive teams are extensively recruited in many respects.

Thus, an institution that adds teams in order to meet "student interest" will, for competitive reasons, recruit a next generation of athletes who are better than the players whose desires generated the teams. The institution then finds itself in the anomalous position of sponsoring teams to accommodate the interests of students who have graduated, and who would no longer be good enough to play on those teams. Moreover, "club" or other non-varsity teams that are taken as evidence of student "interest" may not be in sports for which an institution can permanently and cost-effectively recruit players, compete, or attract fan support at the varsity level.⁵²

The pattern of institutional teams, thus, should reflect long-term institutional interests and not the desires of any particular student generation. As with more clearly academic decisions, institutions are better off determining for themselves just what mix of men's and women's sports, from among the many choices which could comply with Title IX, they wish to offer.⁵³ Such deliberate choices provide a clearer basis for institutional planning than the shifting wishes of students provide, no matter how talented or interested any group of students may be at any one time.

Defining Title IX's regulatory and caselaw standards in the abstract, of course, is an easier task than making them work in a real institution. The reader now is invited to do just that at the fictional Thistle Valley University.

51. *Id.*

52. For example, a college located in Texas may enroll many students who have played ice hockey while growing up, not only in the northern part of the United States but also in areas of the Sun Belt, and may have enough interested and capable players to support either a men's or women's team, or both. But of the 123 schools the NCAA lists as sponsoring men's ice hockey in all three Divisions, and of the 13 schools sponsoring women's ice hockey, only one men's team is in the southern region. It would thus be neither wise nor, in my opinion, within the remedial scope of Title IX to require a Texas institution to add a hockey team in order to remedy a lack of intercollegiate athletic participation by members of either sex. See NCAA, 1993-94 ANNUAL REPORT 31-36 (1995).

53. The fact that intercollegiate athletics often involve specially recruited students, and are activities designed to attract these students rather than to provide opportunities for the majority of students who are not recruited, is an issue separate from Title IX. In any event, this phenomenon is neither the cause nor the result of modern "big-time" college athletics; some variant of this model has obtained since the beginning of intercollegiate sports. See RONALD A. SMITH, SPORTS AND FREEDOM: THE RISE OF BIG-TIME COLLEGE ATHLETICS 213-18 (1988).

IV. CASE STUDY — THISTLE VALLEY UNIVERSITY

Thistle Valley University (TV-U) is typical in both its broad outlines and its details. It has made an effort to provide intercollegiate opportunities for women, but has done so without a real plan or any specific attention to what Title IX requires, and it clearly needs to do more. TV-U has substantial financial problems in athletics independent of women's opportunities, but it has capacities for meeting its obligations which it has not yet begun to exploit.

The reader's task only begins by trying to apply to TV-U the Title IX obligations outlined above. After defining what TV-U needs to do, the greater challenge is figuring out how to get there quickly and effectively.

Although every Division I athletic director faces challenges, as the new Athletic Director at TV-U you seem to be setting an NCAA record. While TV-U has significant budgetary, morale, and competitiveness problems, its most immediate concern is that a Title IX lawsuit is likely to be filed by a group of current women athletes. You have found a complete absence of prior analysis of women's opportunities, much less any plan for change.

Your President, in office for barely a year, has told you to avoid this lawsuit. Indeed, he has said that making TV-U a leader in women's athletics should be your most important goal. That's exactly the position you want him to take. But as you walk across campus to his office to present your recommendations, six months to the day after beginning at TV-U, you are acutely aware of the stringent constraints under which you have had to develop your plans.

A. Institutional Context

TV-U is a public Division I-AA institution that serves its entire state, especially the populous western region. It is the only four-year college in a metropolitan area of 175,000 people, but it must compete for public attention and financial support with the highly successful I-A athletic programs, and the conference television packages, of the two major "statewide" public institutions. Regional professional teams in the four major team sports are significantly televised, although no such teams are located in TV-U's state.

TV-U is a charter member of the Gigantically Really Alarmingly Big Conference, known popularly as the GRAB. The GRAB was formed in 1972 and includes seven other public I-AA schools in five contiguous states. Like TV-U, the other five charter members grew from teacher-college status to regional missions in the early 1970s. Two schools began as junior-colleges in the late 1960s and were added as members in the late 1980s.

The athletic programs of the other seven GRAB members present roughly the same mix of sports, men's and women's opportunities, and budget problems as TV-U presents. But none has come under Title IX scrutiny, and the regional director of OCR has said publicly that TV-U's current transitions make this an opportune time for it to change its women's athletics program. Your GRAB colleagues interpret this to mean that they should see what happens to TV-U before finalizing their own plans. In other words, you are unlikely to get much leadership from the conference.

The most important institutional change is your new President. He comes from a private liberal arts college in another state, which had a broad Division III athletics program funded wholly from general fund revenues, so he has no experience with the kind of budgetary and competitive pressures under which TV-U's athletic program operate. Moreover, he inherited at his former institution a court-ordered plan regulating faculty hiring on the basis of sex, and he is not eager to operate under any such orders at TV-U, in athletics or otherwise.

Nor is he eager to antagonize either faculty or students. Recent state-wide budget problems have led to the closing of two small academic departments, to substantial tuition increases, and to a legislative prohibition on further student fee increases for any reason. TV-U's intramural and recreational sports opportunities are severely strained, and your faculty athletics committee has not been helpful in making the case for change in varsity athletics, either to the campus or to the community. The committee includes neither student nor community members, and has tended to focus on rules enforcement.

Given both of these general factors, and the current state of your intercollegiate program (as described below) your president has made it clear that he wants not just a Title IX plan, but an overall approach to intercollegiate athletics which meets the following objectives:

- a quality athletic and educational experience for all intercollegiate athletes, regardless of sex or race, focusing on in-state students;
- a clear definition of what Title IX requires of TV-U, and in what period of time, plus a plan for TV-U that satisfies Title IX in both letter and spirit;
- visible and sustained competitive improvement;
- clear adherence to NCAA rules, including a flawless NCAA certification process in 1996-97, plus a public image of integrity and community service; and,
- a one-third reduction in the institutionally-subsidized intercollegiate athletics deficit, with no new institutional funds available for at least three years.

B. Institutional Demographics

TV-U has an undergraduate enrollment of 9,800 students, 52% male and 48% female; it was 56% male five years ago and is projected to be 49% male in the next five years. Two-thirds of the students are in-state, with another one-fifth from the contiguous GRAB states. About 60% of the students graduate in five years (about 80% are registered for full loads at any one time; about 75% of those graduate in five years). Slightly higher percentages of women are in-state students and five-year graduates.

There are no significant differences in the racial composition of male and female intercollegiate athletes, or in the home states of athletes by race

compared to the home states of non-athletes by race. Nor are there significant academic differences among TV-U intercollegiate athletes based on sex or on race (except for initial admission exceptions noted in Program Elements, *infra* section E).

C. Intercollegiate Athletic Program and Participation

Tables 1 and 2 provide basic information about TV-U's seven men's and seven women's sports, as well as three men's and four women's sports that have been discussed as possible additions.

- The Sponsorship columns show the number of schools in the GRAB sponsoring the sport (including TV-U), whether championships are sponsored by the GRAB and by TV-U's state high school association, and the number of Division I schools in TV-U's NCAA region which sponsor the sport.
- The Participation columns show the number of participants in each sport, the percentage of recruited athletes who are from TV-U's state and from all GRAB states, the NCAA's maximum permissible grant-in-aid equivalencies, and the number of equivalencies awarded by TV-U (all calculated at the in-state-tuition rate, with a total cost each of \$9,100).
- The Participation columns show that 67% of TV-U's intercollegiate participants are men and 33% are women; 69% of grant-in-aid equivalencies are awarded to men and 31% to women (the percentages based on the maximum NCAA figures would be 64% and 36%).
- The Success columns show for the last five years each team's average rank in the GRAB standings and number of the GRAB championships won.

TABLE 1. Sport Sponsorship and Participation — Men

SPORT	SPONSORSHIP				PARTICIPATION					SUCCESS	
	#GRAB SCHLS	CHAMPS?		DIV.I Schls in Region	# of Partics.	% Recruits from		NCAA Grant Max.	# Inst. Eqvs.	5-yr. GRAB Record	
		GRAB	SHS			State	GRAB Students			Rank	Champs
Current											
Baseball	7	Y	Y	88	32	66	91	11.7	10	3	1
Basketball	8	Y	Y	90	13	46	85	13	13	4	1
Football	8	Y	Y	75	82	62	84	63	55	4	0
Soccer	8	Y	Y	64	24	88	100	9.9	7	2	2
Tennis	8	Y	Y	83	9	100	100	4.5	3	2	2
Wrestling	4	N	N	18	18	11	83	9.9	6	NA	NA
X-Country	8	Y	Y	90	11	100	100	5	2	2	3
Total	8	NA	NA	90	189	64	89	116.8	96	NA	9
% Total M/W	-	-	-	-	67	-	-	64	69	-	-
Possible											
Outdoor Track	6	Y	Y	81				7.6			
Golf	5	N	Y	87				4.5			
Lacrosse	3	N	[Y]	13				12.6			

Notes:

Actual recruit numbers are 121 in-state, 168 from all GRAB states.

State high school association will begin a single, all division, lacrosse championship in 1995.

TABLE 2. Sponsorship and Participation — Women

SPORT	SPONSORSHIP			PARTICIPATION					SUCCESS		
	#GRAB SCHLS	CHAMPS?		DIV.I Schls in Region	# of Partics.	% Recruits from		NCAA Grant Max.	# Inst. Eqvs.	5-yr. GRAB Record	
		GRAB	SHS			State	GRAB Students			Rank	Champs
Current											
Basketball	8	Y	Y	90	15	60	87	15	13	3	2
Fencing	2	N	N	3	9	78	100	5	2	NA	NA
Soccer	8	Y	Y	58	18	89	100	11	6	4	1
Softball	5	[Y]	Y	52	18	83	100	11	7	2	1
Tennis	8	Y	Y	87	11	82	100	8	4	3	1
Volleyball	8	Y	Y	89	13	69	92	12	8	2	1
X-Country	8	Y	Y	88	8	100	100	5	3	2	2
Total	8	NA	Y	90	92	79	97	67	43	NA	8
% Total M/W	-	-	-	-	33	-	-	36	31	-	-
Possible											
Outdoor Track	5	[Y]	Y	84				11			
Golf	5	[Y]	Y	64				6			
Lacrosse	3	N	[Y]	11				11			
Field Hockey	4	N	[Y]	21				11			

Notes:

Actual recruit numbers are 73 in-state, 89 from all GRAB states.

GRAB will begin formal championships in softball, outdoor track, and golf whenever the sport is sponsored by 6 or more conference schools; state high school association will begin single, all division, lacrosse and field hockey championships in spring and fall, 1995, respectively.

TV-U has sponsored all its current men's sports since the GRAB was formed. It added women's sports in the period from 1976, when 30% of its undergraduates were women, to 1984, when 40% were women. In 1991, TV-U dropped women's gymnastics upon the elimination of the GRAB championship (that decision was due to insufficient institutional sponsorship) and added women's fencing. TV-U has committed itself publicly to "enhance" softball whenever the GRAB sponsors a championship. Conference rules provide for a championship when six schools sponsor a sport at the varsity level.

TV-U has considered adding various "possible" sports based on whether other GRAB and regional schools sponsor them, and on the extent of high school play. TV-U has not surveyed its women students about their intercollegiate athletic interests or their athletic experiences or capabilities.

The upgrade of fencing from a club team in 1991 reflected the presence on campus of two faculty members who competed in college plus a group of women students with some prior experience. Most new fencers since then have had no prior training before beginning the sport at TV-U. The two potential Title IX plaintiffs are second-year students who began fencing when they came to TV-U. They allege that the prior athletic director told them that fencing will be eliminated under the "new administration" when softball is upgraded.

D. Intercollegiate Athletic Context

Tables 3 and 4 summarize athletic budget information. Total expenditures are just short of \$3 million, including \$1.9 million allocable to men's sports, approximately \$.75 million allocable to women's sports, and about \$.3 million in unallocated administrative salaries. The institution has been subsidizing the intercollegiate athletics deficit, which is just under \$1.5 million. Approximately 72% of total allocable expenditures go towards men's sports, and the percentages for the major components are similar.

TABLE 3. Intercollegiate Athletics — Expenditures (\$ 000's)

Men	Grant \$ @ \$9100	Recrting. \$	Sal/Bens. \$	Coach #'s Full Re	Other \$	Total \$
Baseball	91.0	7	41	2-1	25	164.0
Basketball	118.3	38	151	3-1	82	389.3
Football	500.5	47	321	7-4	182	1050.5
Soccer	63.7	4	28	1-1	21	116.7
Tennis	27.3	1	7	1-1	12	47.3
Wrestling	54.6	3	32	2-1	15	104.6
X-Country	18.2	1	5	1-1	9	33.2
Total	873.6	101	585	17-10	346	1905.6
% Total M/W	69	78	74	65/56	72	72

Women	Grant \$ @ \$9100	Recrting. \$	Sal/Bens. \$	Coach #'s Full Re	Other \$	Total \$
Basketball	118.3	14	111	3-1	54	294.3
Fencing	18.2	1	6	0-2	6	31.2
Soccer	54.6	3	22	1-1	18	97.6
Softball	63.7	3	13	1-1	17	96.7
Tennis	36.4	2	7	1-1	10	55.4
Volleyball	72.8	5	38	2-1	23	138.8
X-Country	27.3	1	5	1-1	9	42.3
Total	391.3	29	202	9-8	137	756.3
% Total M/W	31	22	26	35/44	28	28

TABLE 4. Intercollegiate Athletics — Revenues and Net Budgets (\$ 000's)

SOURCE	UNALLOC.	OTHER			OTHER		TOTAL
		FB	MBB	MEN	WBB	WMN.	
Gate	0	177	117	0	2	0	296
Net Guar.	0	95	86	0	0	0	181
Recd	[0]	[180]	[98]	[0]	[3]	[0]	[281]
Paid	[0]	[85]	[12]	[0]	[3]	[0]	[100]
Radio/TV	0	58	12	0	1	0	71
Concess./ Mrchdese.	5	45	18	1	2	.5	71.5
"Friends"	6	22	17	3	8	1.2	57.2
NCAA	30	19.3	5.3	15	5.3	16	90.9
Stdnt. Fee	735	0	0	0	0	0	735
Total	776	416.3	255.3	19	18.3	17.7	1502.6
- Exps.	-281	-1050.5	-389.3	-465.8	-294.3	-462	-2942.9
Net	495	-634.2	-134	-446.8	-276	-444.3	-1440.3

Notes:

Net institutional deficit = \$1,440.3 million.

Unallocated expenses – Athletic Director, Senior Woman Athletic Administrator, academic assistant.

Student Fees – \$75 x 9800; these pay for the student attendance of all events.

NCAA unallocated revenues – \$30,000 academic sport.

NCAA allocated revenues – \$14,400 sport sponsorship fund (distribution for 13th and 14th sports @ \$7700), allocated at \$1000 per sport, and \$47,000 grant-in-aid fund (distribution for 141 equivalencies), allocated at average of \$333.33 in proportion to number of equivalencies awarded in each sport.

NCAA "basketball" moneys (1 annual share, about \$250,000) are allocated by GRAB presidents to conference office expenses, not passed through to schools.

Radio/TV includes share of any conference revenues.

As shown in the Success columns of Tables 1 and 2, TV-U's competitive success over the last five years has been modest. Substantial alumni concern about football led your predecessor to promise your football coach, upon the latter's hiring a year ago, that he would "have what he needed" financially, although he has not yet made any specific requests. You also have been given to understand that a strong wrestling program is helpful for football admissions purposes. Your veteran men's basketball coach has told you that he deserves "the same level of support which football is going to get."

As your President has discovered, the alumni who are concerned about these sports include some present and former trustees as well as some prominent legislators. But they believe your President is a "catch" academically, and his "honeymoon" will give you some cover in terms of actions taken that will affect football and men's basketball. Still, at your basketball "Midnight Madness" practice, your President mentioned that some new championship banners in these sports would not hurt his budget discussions in the state capital.

Although your President is generally a hands-off manager, for both Title IX and faculty-relations reasons he has asked you to find out whether there is any sentiment in the GRAB to set a conference maximum of fifty equivalencies in football. That would be five fewer than TV-U currently awards, and would result in a savings of up to \$45,500 annually (at the current in-state, full-grant cost of \$9,100) which might be transferred to other functions.⁵⁴

E. Program Elements

1. *Recruiting and Admissions.* Tables 1 and 2 also give the geographic distribution of recruited athletes, showing that 36% of male recruits and 21% of female recruits are from outside TV-U's state. Table 3 presents recruiting budgets, showing 78% of the recruiting funds are spent on men's sports. Of the total current athletes, forty-three men and ten women received some sort of admissions exception, including twenty-eight in football, five in men's basketball, four each in baseball and wrestling, and three in women's basketball.

54. Aside from the expected adverse reaction by your football coach, some of your trustees, and the other GRAB schools, you are not sure the savings would reach this level. The state appropriates TV-U \$3,800 for each in-state full-time undergraduate. This offsets part of each grant cost. Under the NCAA "grant-in-aid" fund, which distributes funds from the Men's Basketball Championship television package based on the number of grants that a school awards, each of these grants "earns" a \$2,770 reimbursement. For readers conversant with the NCAA formula, these would be counted as the 159th to 163d institutional equivalencies; the 1993-94 NCAA formula paid \$2,770 for each grant in the "bracket" from 151st through 200th. Subtracting those figures from \$9,100, the "net" cost of these grants is thus only \$2,530 each, or a total for the five of \$12,650.

2. *Scheduling.* There is little variation among sports in out-of-conference geography, travel or strength of scheduling. The strongest non-conference schedules are in baseball, men's and women's basketball, football, volleyball, and wrestling.

3. *Facilities.* Facilities are adequate or better and are shared by men's and women's teams, both for competition times and for practice schedules.

The only major project anticipated currently is renovation of the football stadium. The stadium needs repairs, and some trustees would like to combine this need with the institutional commitment to the new coach as a basis for expanding capacity from 13,500 to 18,000 (i.e., above the average minimum attendance figure required to be classified I-A); the current total average attendance is under 10,000. The surface is grass, which for a mixture of financial and injury-related reasons would be retained under either the "barebones" or the "expanded" plan. The stadium is suitable for soccer, field hockey, and lacrosse, and already has lights. Neither the current stadium nor the planned changes would include a track, because the grandstand-field configuration will not accommodate it.

The baseball stadium is better than most in the region. The softball field is well-maintained but does not have a skin infield. The fencing team shares both practice and competition space with wrestling, with both sports subject to "bumps" for volleyball practice if that sport conflicts with either men's or women's basketball.

Golf, if added, would be at a local private club and an adequate but less challenging local public course. Both the private club and the city have indicated a willingness to waive fees for an initial period. There would not be adequate time at the private club for full practice and competition by both a men's and a women's team.

4. *Publicity.* The sports information office creates separate media guides for the football team, each basketball team, and for each of the other men's and women's sports teams. All are done well and of similar quality, although the football book has more extensive records. A sports information representative travels to away games with the football and both basketball teams, and occasionally with volleyball or baseball.

Men's basketball is on local commercial radio and women's away basketball is on the student station. Last year, TV-U voted in favor of modest subsidization by the GRAB of a conference men's basketball television package, funded by the NCAA basketball television revenues. TV-U has hosted both men's and women's conference championships in various sports. Your impression is that the institution has been more willing for the men's events than for the women's to absorb what otherwise might be deficits, through use of "volunteered" athletic department time and booster participation.

F. Personnel

As is true with other "auxiliary services" departments on campus, you have a very thin top administration — you, your Senior Woman Athletics Administrator (SWA), and a Director of Academic Services. The only other

department-wide professional staff are located in sports information and athletic medicine. Their costs are allocated across the various sports in the budget figures in Table 4.

Table 3 also shows coaching patterns — 65% of the full-time coaches and 56% of the part-time (in NCAA parlance, the “restricted earnings”) coaches work with the men’s sports, with tennis and cross-country coaches shared between men and women.

Most of the men’s coaches originally were hired from outside the institution, after searches that were at least regional in scope. Most of the women’s coaches began as faculty members or as restricted-earnings coaches in graduate school. The distribution between coaching duties and teaching physical education is basically the same in all sports, except that no teaching is required of most of the full-time football coaches and two each of the men’s and women’s basketball coaches.

Salaries generally vary with experience and your predecessor’s perception of the midpoint of the GRAB salary market. There have been small bonuses for winning conference championships. The state personnel office found no “equal pay” violations in a salary review two years ago, but that inquiry did not require any clear statement of what levels of athletic success or outside activity were expected from various coaches. Although you have no hard facts from other schools, you suspect that the new football coach’s contract is clearly at the top end of the GRAB salary scale.

To your knowledge, there are no separate salary agreements for the coaches through any of the booster groups. Courtesy cars traditionally have been available from local dealers who are boosters for three football coaches (it was two under the prior coach), the men’s basketball head coach, and the baseball and wrestling coaches on a shared basis. This year for the first time there also will be cars for the women’s basketball and volleyball head coaches.

Fortunately or unfortunately, none of your coaches have significant “shoe” arrangements. The men’s and women’s basketball coaches have a shared local TV show. The new football coach also has a show, while his predecessor did not have one. In each case, the TV station’s booster-owner has made arrangements directly with the coach.

G. Financial Development

You have tried hard to develop ways to raise money, both for general funds and in order to enhance women’s athletics. In particular, you have tried to identify projects that could be pursued by the institution’s development or community relations offices. This is your current list.

1. *Development Activities, Friends Groups, and Corporate Support.* The athletic department currently has no one person responsible for overall efforts in this area, nor a budget for such activities, and your predecessor was not active in seeking community financial support. The scattered current efforts are done by individual coaches for their separate sports, with some help from you, the SWA, and/or the sports information office. The President has given you general approval to create any position in this area that you can

fund at no cost to the institution.

A loose group of athletically involved trustees rebuffed the suggestion a few years ago of your Faculty Athletics Representative to initiate a GRAB rule requiring merged men's and women's booster groups. Your personal view is that merged groups are obviously "cleaner," but that they may work better when the women's groups first have developed some record of raising money on their own.

The one department-wide initiative is a year-old fund for women's athletics, established by your predecessor but never really pursued. You would like to use that fund to capitalize on the twentieth anniversary of women's athletics at TV-U, in 1996-97, and on the fact that a number of the women's sports will be twenty years old within the next few years, but you are not sure who can take on this project. You also suspect that many early athletic alumnae may not have very good memories of their experiences.

2. *Attendance and Community Involvement.* Attendance has not been very good, given the potential market. One reason for your predecessor's departure was his passivity both in seeking support from the community, in giving support to various community activities, and in handling women's sports generally. By the time he left even football and men's basketball had begun to slide. Exclusive of students, whose admission is covered by their student fees, paid attendance averages 4,475 for each of five home football games (average ticket price = \$8) and 1,800 for each of 13 men's home basketball games (average ticket price = \$5).

3. *Campus Media Resources.* The Chair of TV-U's Communications School has offered its resources, together with the awarding of course credit to interested students, to promote TV-U's athletics. A number of male and female athletes major in Communications. The Chair is on your faculty committee.

4. *Coach Activities — Shoe Contracts and Camps.* As noted, your coaches have no significant shoe contracts, although some other GRAB coaches, including some volleyball and women's basketball staffs, have both shoe and apparel arrangements. There has also been very little summer camp activity at TV-U, whether to produce income or to involve the community. Your coaches are split over whether the proceeds from either kind of activity should be retained by the coach, or at least by the sport in question (as generally favored by the coaches in baseball, men's and women's basketball, football and volleyball), or should go to the athletic department for use as it sees fit (as the other coaches generally suggest).

V. THE PANELISTS' PROPOSALS

A. Premises and General Process

There is a lot of work to be done at TV-U, and real practical constraints will affect even the most dedicated President and Athletic Director. All the

Duke panelists⁵⁵ agreed on two initial premises:

- i. TV-U can and should make rapid progress, showing a commitment in which its entire community can have confidence.
- ii. This clear beginning is far more vital than agreeing from the start on what "substantial proportionality" might mean at the end.

The panelists also agreed on how TV-U should start — it needs specific goals, methods, and timeframes, backed by designated resources and a clear vision of how the pace and results of its actions are consistent with Title IX. As TV-U demonstrates that change really has begun, it will earn the trust of its athletes and coaches. As truly equitable resources become available, and new opportunities begin, a far better climate for defining what "proportionality" ultimately means will be created.

At the same time, each panelist emphasized the urgency of TV-U's task. Former student-athlete Susan Kiechel pursued this point most dramatically. Remember, she said, that NCAA rules grant students only four seasons of competition. A year of hesitation and inaction represents the loss of one-fourth of a college athlete's entire competitive career.

Judy Sweet phrased this challenge to quick action in two acronyms — the need to leave the "TRUE" — "Traditional, Rigid, Unchanging Environment" — and instead to "GET REAL" — "Gender Equity Target: Real, Equal and Logical." To fully mobilize TV-U's many unused resources, she counseled the administration to educate the university community, and to do this while emphasizing that what it is doing is morally right.

Specifically, Ms. Sweet suggested that a campus-wide committee develop basic overall athletic principles and identify specific goals and methods for implementing them, especially through new sources of revenues and reduction of costs. Like all of the panelists, she underscored the need to seek new women's teams and resources, rather than to eliminate men's teams, and to strengthen current teams for both men and women so that all athletes have well-defined and enhanced opportunities.

Donna Lopiano repeated Judy's message: If you believe that you can do it, you and your institution will be able to do it. She too advised the president to use Title IX as an opportunity to reinforce a proper role for all athletics, and to develop a vision of athletics as a legitimate educational and moral activity. Do not "sell" winning, she cautioned. Instead, enroll and support young women and men whose integrity, effort, excitement, and service to their community will command allegiance whether or not they win.

55. This discussion is not intended to be a complete or verbatim review of the panelists' recommendations, but serves as a summary of the major points and as a commentary on how their approaches complemented one another. Readers interested in the full panel session may order audio or video tapes through the *Duke Journal of Gender Law & Policy*.

B. Recommendations — Judy Sweet

Judy Sweet saw limited but real strengths for TV-U's Athletic Director to present to his President. These include the President's own commitment to supporting equitable and competitive women's teams without a lawsuit, no competing four-year college in the community, a compatible conference environment, a recognizable history of creating women's sports, and the related opportunities of the communications department, fund-raising position, and some shared men's and women's television.

Not surprisingly, she identified far more — and potentially more serious — weaknesses, beginning with obvious program disparities, the lack of a plan for compliance, and the real possibility of a lawsuit. TV-U also has significant programmatic problems in its Division I-A and professional competition for statewide audiences, an athletic deficit of almost \$1.5 million, low morale and competitiveness, specific facility problems, and a poor record in fund-raising, marketing, public relations, and use of summer camps. In addition, there is no recent history of increased women's opportunities or information on women's interest and there are twice as many men's as women's opportunities and grants-in-aid. Finally, both the recent elimination of gymnastics, and the suggestion that increased support for softball will come at the price of fencing, are disturbing.

In contrast, men's sports, particularly football, and wrestling, have backing from alumni, trustees and legislators, more favorable admissions assistance, and better salaries, credentials and search procedures for their coaches. Facility choices also seem to favor men's sports. The football field is not usable for any other sport, the baseball field is superior to that for softball, and there is golf course availability for only one team.

Judy's participation recommendations were both immediate — to add women's golf and outdoor track, and to explore the possibility of women's crew, and long range — to explore both conference and non-conference opportunities in other sports. She also urged a full review of all coaches' qualifications and compensation.

To support these efforts, Judy emphasized not only generating new resources, especially through marketing and summer camps, but also reallocating current revenues and examining current management practices. Thus she advised creating a standard formula for funding all teams' operating expenses, possible reductions in recruitment costs, and helping athletes graduate in four years rather than five in order to reduce the cost of financial aid.

C. Recommendations — Donna Lopiano

Donna Lopiano's detailed plan to shape TV-U's program made clear that comprehensive and systematic action can succeed even in very difficult cases, although not necessarily immediately. Indeed, TV-U demonstrates that an institution with legitimate resource needs that wants to create genuine women's opportunities, rather than simply eliminate teams for men, requires time to offer "substantially proportionate" opportunities.

Ms. Lopiano divided her analysis into three phases — literal, philosoph-

ical, and political — advertently designed to lead TV-U's President to what she views as his most productive course.

In the literal first stage, Donna listed all of TV-U's minimum initial needs:

1. Renovating the football stadium;
2. \$475,000 in deficit reduction, equal to half of the President's desired goal;
3. \$715,000 to finance eighty-two more participation opportunities and forty-six more grant-in-aid equivalencies for women, including three or four new teams, reaching 48% of total participants and grant dollars;
4. \$160,000 to \$200,000 in added resources for current women's sports (which have lower per-capita resources than men's sports) and coaches' salary equity;
5. \$60,000 to \$75,000 for grants and salaries to keep pace with a 3% inflation rate.

These objectives require a total of more than 1.5 million new dollars, or a doubling of current revenues — without increasing student fees, which supply half of those revenues, and with all teams expected to be more competitive! Assuming her President agrees that these are unlikely results in a single year, Donna outlined a five-year plan to add overall resources and strengthen fencing in the first year, and then add a sport in each succeeding year.

Informing any plan, however, and validating it to the institutional community, must be a clear philosophy: Because daughters and sons are equally valuable, increasing women's opportunities should not mean reducing men's opportunities except as a last resort. An institution that truly believes "we can do this" should not have to take that step.

Implementing this positive philosophy requires a very practical sense of how to manage TV-U athletics so as to raise the necessary financial resources. This can be done through institutional measures (such as using the communications school and a development officer, having a specific plan for each sport, promoting summer camps and community clinics, and bringing potential donors into institutional activities) and through activism in TV-U's conference (to limit expenditures, place a moratorium on facility improvements, and cooperate in expanding the same women's sports).

Implementing that philosophy requires a willingness to impose financial and programmatic discipline: Evaluating every departmental expense, from media guides to travel costs, paring down activities that do not directly benefit students, whether videotaping of practices or unnecessary out-of-region recruiting, and limiting coaching staffs, travel and "walk-on" athletes.

Many of these measures will be difficult and, at least initially, unpopular. To stay the course, an institution needs political determination at every level, as Ms. Lopiano described for her President three possible scenarios. The first two possibilities lead to unacceptable outcomes: pleading a lack of

money and losing a lawsuit, and a less than whole-hearted commitment, followed inevitably by cuts in men's sports. Thus, the only practical choice is a comprehensive long-range plan, accompanied by continued education of the institutional community and continued legal and public pressure on the President.

More broadly, Ms. Lopiano's view of political determination includes specific leadership responsibilities for a wide variety of people at TV-U. The Director must improve TV-U's image in the community, head coaches must have explicit revenue and community expectations, all staff members must be positive about Title IX efforts, and trustees and donors must help with sports in which they take a special interest.

Finally, the President and Athletic Director together must solve a financial crisis that will persist even after their most diligent efforts. Ms. Lopiano listed five activities which together might generate as much as \$600,000 in new revenue each year⁵⁶ — still one million dollars less than the total from the initial list of TV-U's minimum necessary expenditures. For the President, that shortfall means giving up his hope of reducing the athletics deficit. For the President and Director together, even continuing that current level of institutional subsidy leaves one-half million additional dollars still to be raised.

VI. CONCLUSION

Thistle Valley University was designed to be a tough case, and it is one. Even in the best of circumstances, adding all possible sports to its women's program may leave some doubt as to "substantial proportionality." Even with exemplary management and financial success a large deficit will persist, a likely result at any level of competition: Division I-A institutions may have more opportunities to generate revenue than Division I-AA institutions such as TV-U, but their costs are higher. Division II and III institutions, conversely, have less revenue potential even if their costs are reduced.

At the same time, the panelists demonstrated beyond a doubt that substantial progress can be made for women without reducing men's opportunities, and that this progress can justify a finding of compliance with Title IX even if "proportionality" questions remain at the margin. Because Thistle Valley is not only a hard case but also a typical one, presenting solutions for TV-U shows that solutions should be available in virtually any context.

Institutions that have responded well to Title IX, whether on their own initiative or under the impetus of a lawsuit, have needed both time and determination in order to find the right answers and the funds to pay for them. At the same time, years without executive branch leadership, punctuated by a judicially-required lack of enforcement, have made it unnecessarily difficult to educate the athletic community about Title IX and to lead that

56. The list includes the following: playing an away football game at one of the in-state division I-A schools, increasing women's gate and concession receipts by 20% annually, tripling "friends" donations in three years, eventually netting \$300,000 annually from corporate and community activities, and saving \$50,000 annually in minor budget cuts in men's sports.

community from concern to commitment.

Moreover, these delays have led to profound dissatisfaction with what is perhaps the heart of Title IX enforcement, the "substantially proportionate" test for participation. While the athletic world has changed dramatically since this test was defined, OCR has been extremely reluctant to consider whether the test should be reformed or, alternatively, should be reaffirmed on the basis of current analysis. Federal judges have been equally reluctant to suggest their own reevaluation, and have adopted the test more or less automatically.⁵⁷

Yet many institutions have honest doubts about whether the presence of numerous "walk-on" football players should require the creation of full varsity women's teams when the institution's women's program is otherwise "substantially proportionate" and already includes all the women's sports in which the institution can find substantial appropriate competition. Not surprisingly, many women's advocates are deeply suspicious that this approach is simply a subterfuge used by institutions to avoid their legitimate obligations.⁵⁸

It is not too late to translate Title IX's hopes of gender equity into full and real opportunities for *all* collegiate athletes, men and women alike. In order to do so, we must concentrate on what is right about Title IX for all of them. Doing that means that OCR and the courts must accurately understand how intercollegiate athletics currently function, and must address directly the arguments for and against the "substantial proportionality" test in its current form.⁵⁹ The continued unwillingness of OCR to do so threatens to draw Title IX enforcement in athletics into the bitter debate about "affirmative action" generally, a result as destructive as it is unnecessary.⁶⁰

The nobility of our goal should not be at issue. A signal case in the law of school desegregation expressed its goal as "a plan that promises realistically to work *now* . . . [to have not] a 'white' school and a 'Negro' school, but just schools."⁶¹ Applying Title IX on the fields of those schools and colleges, we should strive *now* to see, and to have, not men's teams and women's teams, but simply the best teams that we can provide to all our daughters and sons alike.

57. See cases cited *supra* note 40 and accompanying text. But see *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 916 (M.D. La. 1996) ("[t]he jurisprudential emphasis on numerical proportionality is *not found* within the statute or the regulations Title IX does not mandate equal numbers of participants. Rather, it prohibits *exclusion* based on sex and requires *equal opportunity* to participate for both sexes.").

58. These concerns were evident throughout the work of the NCAA's Gender-Equity Task Force in 1992-93, of which the author was a member.

59. See, e.g., FINAL REPORT OF THE NCAA GENDER-EQUITY TASK FORCE, July 26, 1993, at 3-4.

60. See, e.g., Nicholas Lemann, *Taking Affirmative Action Apart*, N.Y. TIMES, June 11, 1995, (Magazine) at 36.

61. *Green v. County Sch. Bd.*, 391 U.S. 430, 439, 442 (1968).

