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Title Ix: Women'S Collegiate Athletics In Limbo

TITLE IX: WOMEN'S COLLEGIATE ATHLETICS IN LIMBO

Men's intercollegiate football and basketball are among the largest revenue-producing spectator sports in the United States.[1] In contrast, women's college athletics enjoy relatively little popular or monetary support.[2] Nonetheless, in the past decade the number of women participating in collegiate sports programs and the money expended in support of women's athletics have increased dramatically.[3] The main legislative impetus behind the increased emphasis on women's sports is Title IX of the Education Amendments of 1972 (Title IX),[4] which prohibits any federally funded education program from discriminating on the basis of gender.[5] The uncertainty of Title IX's continuing impact on collegiate athletic programs threatens the further growth of women's

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[1] FORBES, March 1, 1982, vol. 129, no. 5, at 16. For the years 1982-1985 college football had contracted through its governing body, the National Collegiate Athletic Association (NCAA), to earn $281.2 million from national television broadcasting rights alone during the period. *Id.* A recent federal district court ruling, however, found that the contracts for the broadcasting rights to college football games formed between the NCAA and the national broadcasting networks could not be enforced. University of Oklahoma v. National Collegiate Athletic Assoc., 546 F. Supp. 1276, 1311 (W.D. Okla. 1982). In *University of Oklahoma*, the court ruled that the broadcasting contracts violated antitrust laws in forbidding individual universities to sell the rights to their own football games. *Id.* at 1323. The ruling, if ultimately upheld, potentially could permit the major college football programs to earn millions more dollars in television revenue. Wash. Post, Sept. 23, 1982, at E1, col. 1. Until the courts reach a final decision in the case, the current broadcasting contracts will remain in effect. *Id.*

[2] SPORTS ILLUSTRATED, July 26, 1982, vol. 57, no. 4, at 11-12. In July, 1982, the combined budgets of women's athletic departments across the nation equalled approximately sixteen per cent of the combined budgets of men's athletic departments. *Id.*

[3] *Id.* The number of member schools in the Association of Intercollegiate Athletics for Women (AIAW), which was the controlling body of women's collegiate athletics, rose from 280 in 1971 to 971 in 1982. *Id.; see infra* note 8 (AIAW superceded by NCAA). In addition, the expenditures of women's athletic departments rose from one percent of the men's budgets in 1971 to sixteen per cent in 1982. *Id.*; *see supra* note 2 (women's athletic budgets sixteen per cent of men's in 1982).

[4] 20 U.S.C. § 1681-1686 (1976).

[5] 20 U.S.C. § 1681 (1976). Section 901 of Title IX provides that any educational program or activity that receives federal financial assistance shall not discriminate against anyone on the basis of gender. *Id.* Subsequent to the general proscription against gender discrimination, section 901 enumerates specific educational institutions exempted from the law's strictures. *Id.* Exempted from Title IX's prohibitions are educational institutions that traditionally admit members of only one sex, institutions that train individuals for military service, and institutions under the control of religious organizations whose compliance with Title IX would violate religious tenets. *Id.* The section additionally provides a schedule for compliance with Title IX for traditionally single-sex institutions that change from the process of admitting members of only one sex to the admission of members of both sexes. *Id.* Section 901 also exempts groups such as single-sex fraternities and soroities and other organizations such as the Boy Scouts and Girl Scouts from Title IX. *Id.* Section 901 defines the term "educational institution" for the purpose of Title IX as any public or private pre-

college sports.[6] If courts find that Title IX does not proscribe gender discrimination in college sports programs, no currently recognized federal controls requiring significant expenditures for women's athletics will remain.[7] Without governmental restraints, colleges are unlikely to continue to increase the amounts of money appropriated to women's athletics.[8]

The applicability of Title IX to collegiate athletic programs initially depends upon whether the language of Title IX limits the law's application to certain federally supported education programs.[9] Opponents of a broad application of Title IX favor a strict reading of the law, known as the "program-specific" approach to Title IX.[10] The program-specific

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school, elementary, or secondary school, or any institution of vocational, professional, or higher education. *Id.* If an institution is composed of more than one school, college, or department, however, the term refers to each separate school, college, or department. *Id.*

Section 902 of Title IX details the enforcement provisions that the law makes available to federal agencies empowered to extend federal financial assistance to educational programs or activities. *Id.* § 1682. The only express enforcement procedure extended to federal agencies in section 902 is the termination of continuing federal financial assistance to programs or activities not in compliance with Title IX. *Id.* Section 902 permits a termination of federal funds, however, only after the federal department or agency has advised the institution that the school is not in compliance with Title IX and the department or agency has determined that that institution will not voluntarily comply with the law. *Id.* Section 903 provides for federal judicial review of department or agency action taken under section 902. *Id.* § 1683. Subsequent sections of Title IX proscribe discrimination against the blind, describe Title IX's effect on other laws, and provide for the maintenance of separate living facilities for the different sexes in compliance with Title IX. *Id.* §§ 1684, 1685, 1686.

[6] *See infra* text accompanying notes 13 & 14 ("program-specific" interpretation of Title IX would lead to the law's inapplicability to athletic programs).

[7] *See infra* text accompanying note 113 (civil rights actions have previously not provided sufficient protection for women athletes).

[8] The NCAA, the major force resisting Title IX, has assured Title IX proponents and women athletes that the NCAA opposes the application of the law to collegiate athletics solely because of the drastic means by which Title IX attempts to achieve equality of the sexes. *See* Koch, *Title IX and the NCAA*, 3 W. ST. L. REV. 250, 251 (1976) (gender equality in collegiate athletics should be achieved through internal NCAA efforts, not statutory law). The NCAA claims to favor equality of opportunity in intercollegiate athletics. *Id.* The lack of advancement in women's athletics before the passage of Title IX and the NCAA's interest in protecting men's football and basketball from any possible cutback in funding make the NCAA's assurances less than convincing. The concern over the future of women's collegiate sports heightened with the absorption of the AIAW by the NCAA. *See* SPORTS ILLUSTRATED, July 26, 1982, vol. 57, no. 4, at 11-12. The AIAW controlled women's intercollegiate athletics for eleven years before the association's demise. *Id.* The lack of an organization that will speak exclusively for women athletes endangers the ability of women to control their own athletic programs in the future. *Id.* The AIAW, however, now is challenging the NCAA's holding of championships in women's sports. Wash. Post, Oct. 21, 1982, at E3, col. 6. The AIAW contends that the NCAA is violating federal antitrust laws. *Id.*

[9] *See* Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 GEO. L.J. 49, 62 (1976) (language of Title IX forbids its application to collegiate athletic programs).

[10] *See id.* (Title IX not applicable unless program receives direct federal assistance).

theory of Title IX would limit the law's application solely to programs that receive direct federal financial assistance.[11] The program-specific theory is in direct opposition to the "institutional" interpretation of Title IX, which provides that any educational institution that receives any federal aid must comply in every program with Title IX.[12] A strict program-specific application of Title IX would endanger the Department of Education's ability to force compliance with Title IX in collegiate athletic departments, since virtually no college sports programs receive direct federal financial assistance.[13] Thus, if courts apply Title IX on a program-specific basis, sexual discrimination in college sports will be beyond the direct reach of Title IX's sanctions.[14]

Proponents of the program-specific approach find support for their interpretation of the law in section 901 of Title IX, which prohibits gender discrimination in any education program or activity receiving federal financial assistance.[15] The law appears to contain expressly program-specific language.[16] As a result of the limiting language of Title

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The term "program-specific" derives from the language of Title IX, which proscribes gender discrimination in "any education program or activity receiving federal financial assistance." 20 U.S.C. § 1681 (1976). Federal financial assistance consists of a number of different federal grants. 45 C.F.R. § 86.2(g) (1979). Federal aid that meets the Title IX definition of federal financial assistance may include loans or grants of federal assistance made available for building or repairing facilities, or loans or grants made available for scholarships, or grants or loans made available to students. *Id.* In addition, federal financial assistance may consist of grants of federal real or personal property to an institution, the provision of federal services to an institution, the sale of government property to an institution for a nominal consideration, or any other contract made with an institution that has as a purpose the provision of assistance to any education program or activity. *Id.*

[11] *See* Koch, *supra* note 8, at 521 (language of Title IX limits the law's application to programs that receive direct federal aid).

[12] 34 C.F.R. § 106.41 (1981). The Department of Education regulations promulgated with regard to Title IX's effect on athletic programs provide that there shall be no discrimination on the basis of gender at any level of athletic competition at a "recipient" institution. *Id.* The regulations define a recipient as any institution to which the federal government extends financial assistance directly or through another recipient and which operates an education program or activity that receives or benefits from the assistance. *Id.*, § 106.2(h). Thus, the regulations apply to every sport in which a college or university participates regardless of whether the institution's athletic program directly receives financial aid. *Id.*, § 106.2.

[13] *See* University of Richmond v. Bell, 543 F. Supp. 321, 323 (E.D. Va. 1982). Most college athletic programs receive their revenues through ticket sales from revenue-producing sports, alumni contributions, and general university funds. *See Hearings on Title IX Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 46-47 (1975) (remarks of Darrell Royal, President of the American Football Coaches Association, head coach, University of Texas) [hereinafter cited as *Hearings*]. In fact, attorneys for the government have stated that only one-half of one per cent of collegiate athletic programs receive direct federal financial assistance through funds to build gymnasiums. Wash. Post, Sept. 9, 1982, at A23, col. 1.

[14] *See supra* note 8 (without federal controls continued advancements in collegiate sports for women are unlikely).

[15] 20 U.S.C. § 1681 (1976). *See supra* note 5 (text of Title IX).

[16] *See supra* note 4 (language of Title IX program-specific).

IX, proponents of a program-specific interpretation argue that statutory construction demands a program-specific reading of Title IX.[17] Proponents of a limited interpretation maintain that to give the law any other reading would destroy congressional intent and give Title IX a meaning and scope that Congress arguably did not intend in enacting the law.[18]

In addition to the language of the law, the legislative history of Title IX also supports the program-specific theory.[19] Although the original version of Title IX expressly embodied an institutional approach,[20] the adopted version of the law contains program-specific language.[21] Proponents of the program-specific approach argue that Congress' substitution of a program-specific application for the institutional approach indicates congressional intent to limit applicability of Title IX.[22] Furthermore, some areas of Title IX other than gender discrimination are clearly institutional,[23] which program-specific proponents view as indicative of Congress' recognition of the differences between the institutional and program-specific limitations to the prohibitions against gender discrimination.[24]

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[17] *See* Bennett v. West Texas State Univ., 525 F. Supp. 77, 79-80 (N.D. Tex. 1981) (regulations attempting broader enforcement than statute under which regulations are promulgated are invalid).

[18] *See* Morton v. Ruiz, 415 U.S. 199, 237 (1974) (agency decision under statute should be overturned if not consistent with congressional intent); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95 (1973) (incorrect agency interpretation of statute should not be followed); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969) (courts need not defer to administrative construction of statute where agency interpretation clearly is wrong).

[19] *See* Kuhn, *supra* note 9, at 64-65 (Congress intended Title IX to be program-specific). *See infra* text accompanying notes 20-22 (legislative history of Title IX indicates conscious intent to adopt program-specific version of the law). *But see infra* text accompanying note 33 (institutional approach also may draw support from Title IX's legislative history).

[20] 117 CONG. REC. 30156 (1971). The original Senate version of Title IX, which Senator Bayh of Indiana proposed, prohibited gender discrimination "under any program or activity conducted by a public institution . . . which is a recipient of Federal financial assistance." *Id.* The Senate, however, rejected Sen. Bayh's original version of the law. *Id.*

[21] 20 U.S.C. § 1681 (1976). *See supra* text accompanying note 5 (language of adopted version of Title IX program-specific).

[22] 20 U.S.C. § 1681 (1976) (present version of Title IX contains program-specific language); *see* Kuhn, *supra* note 9, at 64-65 (change in language of adopted draft of Title IX indicates conscious congressional intent to adopt program-specific approach to the law). Courts that have ruled that Title IX is program-specific with regard to gender discrimination often have emphasized the difference in the two versions of Title IX when examining the law's legislative history. *See infra* text accompanying notes 44-46 (courts rule Congress intended program-specific scope of Title IX). Generally, a change in the form of a law will indicate specific congressional intent. C. SANDS, 2A SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION § 48.18 at 224 (4th Ed. 1973).

[23] 20 U.S.C. § 1684 (1976). When dealing with educational discrimination against persons with impaired vision, Congress adopted a specifically institutional approach. *Id.* Section 904 of Title IX provides that no recipient of federal financial assistance shall deny admission to any course of study on the ground of blindness. *Id.*

[24] *See* Othen v. Ann Arbor School Bd., 507 F. Supp. 1376, 1382-83 (E.D. Mich. 1981) (Title

The program-specific theory directly contravenes the official Department of Education interpretation of Title IX,[25] the institutional approach.[26] Under an institutional application of Title IX, any educational institution that receives federal assistance must comply in every university program with Title IX, regardless of whether the aid is earmarked specifically for use by that program.[27] Consequently, an institutional application of Title IX would proscribe gender discrimination in the athletic program of a college or university that receives federal aid.[28] Virtually all colleges or universities receive some type of federal financial assistance.[29]

Legislative history also supports the institutional interpretation of Title IX.[30] Since the original enactment of Title IX, Congress has made several attempts to amend Title IX specifically to exclude intercollegiate athletic programs or to limit coverage of Title IX to programs or activities that receive direct federal funding.[31] All of the amendments

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IX must be given program-specific scope due to legislative history); *infra* text accompanying notes 42-45 (*Othen* court ruled Title IX to be program-specific); *see also infra* note 46 (other courts that have adopted the limiting view of Title IX's legislative history).

[25] 34 C.F.R. § 106.41 (1981). Section 301(a)(3) of the Department of Education Organization Act transferred HEW's enforcement and administrative functions under Title IX to the Department of Education. 20 U.S.C. § 3441(a)(3) (1976 Supp. IV). HEW originally obtained Title IX's enforcement and administrative functions under Title IX. *See* North Haven Board of Education v. Bell, _____ U.S. _____, 72 L. Ed. 2d 299, 305 (1982).

Statutory construction generally requires courts to view with deference agency interpretive regulations. Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); NLRB v. Seven-Up Corp., 344 U.S. 344, 348 (1952); Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1932).

[26] *See supra* note 12 (regulations promulgated under Title IX are institutional).

[27] 34 C.F.R. § 106.41 (1981).

[28] *See infra* text accompanying notes 89 & 91 (federal aid may be in form of student grants and still force compliance with Title IX).

[29] *See infra* text accompanying note 89 (schools that attempt to remain free from federal regulation by consciously not accepting federal aid still deemed to receive federal financial assistance through federal grants to students).

[30] Haffer v. Temple University, 524 F. Supp. 531, 534-35 (E.D. Pa. 1981). *See infra* note 31 (failure of Congress to pass amendments to Title IX indicates intent to retain institutional version). *See also supra* text accompanying note 19 (program-specific approach also draws support from Title IX's legislative history).

[31] Note, *Title IX and Intercollegiate Athletics: HEW gets Serious About Equality in Sports?*, 15 NEW ENG. L. REV. 573, 576 (1980). Senator Tower of Texas twice attempted to amend Title IX by excluding revenue producing college sports. 120 CONG. REC. 15322 (1974); 121 CONG. REC. 22775 (1975). The first attempt died in conference, the Senate defeated the second. Amend. 1343 to S. 1539, 120 CONG. REC. 15322 (1974); S. 2106, 121 CONG. REC. 22775 (1975). Senator Helms of North Carolina twice attempted to limit Title IX and the HEW regulations to programs and activities that receive direct federal assistance. 121 CONG. REC. 17300 (1975); 121 CONG. REC. 23845 (1975). The first attempt was not reported out of committee. S. CONG. R. 46, 121 CONG. REC. 17300 (1975). Congress defeated the second. S. 2146, 121 CONG. REC. 23845 (1975). Senator McClure also attempted to amend Title IX to limit the law to programs that receive direct federal aid. 122 CONG. REC. 28136 (1976); 122 CONG. REC. 28144 (1976). Both attempts failed. Amend. 389, 122 CONG. REC. 28136 (1976); Amend. 390, 122 CONG. REC. 28144 (1976).

failed.[32] Thus, since attempts to limit the scope of Title IX by amendment have failed, proponents of the institutional approach maintain that courts must give Title IX an expansive reading so that the law will achieve the goals that Congress intended.[33] In addition, proponents of the institutional approach argue that Congress' failure to pass a resolution disapproving of the Department of Education's institutional regulations indicates an implicit acknowledgment that the regulations are consistent with Congress' intended application of Title IX.[34]

The ambiguous legislative history concerning the scope of Title IX has resulted in an inconsistent application of the law in the federal courts.[35] The Department of Education's official interpretation of Title IX as institutional with regard to gender discrimination,[36] has heightened the confusion surrounding Title IX's effect on collegiate athletic programs,[37] since courts must view an administrative agency's interpretation of a statute with deference.[38] Despite the official Department of Education position favoring the institutional application of Title IX, recent federal court decisions indicate growing support for the program-specific limitation of Title IX's prohibition of gender discrimination.[39]

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[32] *See supra* note 31 (all attempts to amend Title IX in Congress have failed). The rejection of an amendment generally indicates that the legislature does not intend a different interpretation of a statute than the current construction given by the administrative agency in control of the statute's administration. Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 305-06 (1933).

[33] *See* United States v. Zazove, 334 U.S. 602, 610 (1948) (statutes should be liberally construed to effectuate congressional intent).

[34] Haffer v. Temple Univ., 524 F. Supp. 531, 535-36 (E.D. Pa. 1981); *aff'd*, 688 F.2d 14 (3d Cir. 1982); *see* Blau v. Lehman, 368 U.S. 403, 412-13 (1962) (congressional inaction after court interpretation of statute indicates acquiescence to agency interpretation); Alstate Construction Co. v. Durkin, 345 U.S. 13, 16-17 (1953) (congressional failure to amend statute to curb administrative agency's power viewed as indicative of Congress' continued authorization of agency's control). Title IX was patterned after Title VI of the Civil Rights Act, which prohibited racial discrimination in federally funded programs. 42 U.S.C. §§ 2000d-2000d-6 (1978); Cannon v. University of Chicago, 441 U.S. 677, 696 (1979). Civil rights statutes such as Title VI and Title IX are entitled to broad interpretation to facilitate the remedial purposes of the statutes. *Cannon*, 441 U.S. at 686 n.7. Courts have found Title VI to be institutional in nature. *See Haffer*, 524 F. Supp. at 537.

[35] *See infra* text accompanying notes 46 & 48 (some courts ruling Title IX program-specific while other find the law to institutional).

[36] 34 C.F.R. § 106.41 (1981).

[37] *See infra* text accompanying note 102 (diametrically opposing court decisions on Title IX reflect current confusion surrounding the law).

[38] *See* Thorpe v. Hous. Auth., 393 U.S. 268, 281 (1969) (reviewing court must grant deference to administrative agency's interpretation of regulations); *see also supra* note 25 (courts must treat administrative interpretation of statute with deference). *But see supra* text accompanying note 18 (courts must reject administrative construction of statute that exceeds congressional intent).

[39] *See* Rice v. President and Fellows of Harvard College, 663 F.2d 336, 338 (1st Cir. 1981) (receipt of federal funds by law school for specific programs such as work-study created no Title IX claim for woman who could not identify a specific federally funded program in which she suffered gender discrimination), *cert. denied*, _____ U.S. _____, 102 S.

A federal district court in Michigan supported the program-specific limitation of Title IX in *Othen v. Ann Arbor School Board.*[40] In *Othen*, a female high school student sought a permanent injunction prohibiting sexual discrimination on the school's golf team.[41] The *Othen* court initially acknowledged the history of sexual discrimination in the United States and the need to provide women with an equal opportunity in all aspects of life, including athletics.[42] Nonetheless, the *Othen* court held the regulations adopted under Title IX invalid since the regulations codified an institutional application of Title IX.[43] Focusing on the change in language between the initial Title IX draft and the final form of the law,[44] the *Othen* court held that the "clear language" of Title IX required a program-specific application of the law.[45] Several other federal decisions have supported the *Othen* court in finding Title IX to be program-specific with regard to gender discrimination.[46]

Several federal courts, however, relying on the Department of Education's interpretation of Title IX,[47] have supported the institutional application of the law to athletic programs.[48] In *Haffer v. Temple University,*[49] for example, Temple University sought summary judgment in

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Ct. 1976 (1982); Bennett v. West Texas State Univ., 525 F. Supp. 77, 80 (N.D. Tex. 1981) (female athletes' claims of gender discrimination not actionable under Title IX when university's athletic program received no direct federal aid); Jacobs v. College of William and Mary, 517 F. Supp. 791, 798 (E.D. Va. 1980) (claim of employment discrimination against college athletic department not actionable under Title IX), *aff'd*, 661 F.2d 922 (4th Cir. 1981), *cert. denied*, 454 U.S. 1033 (1982); *see also infra* text accompanying notes 45, 46 & 78 (other decisions following program-specific application of Title IX).

[40] 507 F. Supp. 1376 (E.D. Mich. 1981).

[41] *Id.* at 1378.

[42] *Id.* at 1379. The *Othen* court acknowledged a court's duty to try to grant female athletes the same opportunities available to male athletes. *Id.* The *Othen* court, however, noted that a court may ensure equal opportunities are available only when the questions presented are within the framework of power assigned to the judicial branch of the government. *Id.*

[43] *Id.* at 1381.

[44] *Id.*; *see supra* text accompanying notes 20-22 (program-specific interpretation of legislative history of Title IX focuses on difference in language between original version and adopted draft of law).

[45] 507 F. Supp. at 1381. In addition to finding Title IX program-specific, the *Othen* court ruled that a program which benefits from indirect federal assistance does not fall within the purview of Title IX. *Id.* The *Othen* court stated that Title IX applies only to a program that receives direct federal financial assistance. *Id. But see* Grove City College v. Bell, 687 F.2d 684, 697-98 (3rd Cir. 1982) (every program at an institution that receives general federal aid through grants to students indirectly benefits from the aid and therefore Title IX applies to all the school's programs).

[46] *See supra* note 39 (other courts holding Title IX to be program-specific).

[47] *See supra* note 12 (regulations under Title IX adopt institutional approach).

[48] *See* Haffer v. Temple Univ., 688 F.2d 14, 17 (3rd Cir. 1982) (Title IX controls university athletic program due to university's receipt of general federal aid); Grove City College v. Bell, 687 F.2d 684, 697 (3d Cir. 1982) (federal grants given to college athletes sufficient to bring college under Title IX guidelines).

[49] 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3rd Cir. 1982).

an action that women students instituted for Title IX violations in the operation of the school's athletic departments.[50] Temple based its motion on a program-specific reading of Title IX.[51] The Eastern District Court of Pennsylvania denied the motion for summary judgment, adopting the institutional interpretation of the legislative history of Title IX.[52] The *Haffer* court ruled that Title IX prohibits gender discrimination in college athletic departments whenever the school receives substantial federal aid, regardless of whether the athletic program receives federal funds.[53]

The *Haffer* court based the decision on an expansive reading of the phrase "receiving federal financial assistance" in Title IX.[54] The court found that Temple's receipt of over nineteen million dollars in federal financial aid supported the conclusion that every program in the university benefitted from the receipt of federal money and thus fell under the Title IX guidelines.[55] As an alternative to the institutional approach, the *Haffer* court held that even if a court must give Title IX a program-specific interpretation, the Temple athletic program still would be subject to Title IX since the department's employees and athletes received substantial assistance through various federal financial programs.[56] The *Haffer* court found case law support in *Iron Arrow Honor Society v. Schweiker*.[57] In *Iron Arrow* the Fifth Circuit upheld the right of the Department of Health, Education and Welfare (HEW) to terminate federal aid to the University of Miami for supporting an all-male honorary society.[58] The *Iron Arrow* court held that the recognition which

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[50] 524 F. Supp. at 532.

[51] *Id.* In *Haffer*, Temple University relied on the *Othen* and *Bennett* cases in arguing that Title IX was program-specific when applied to college athletic programs. *Id.* at 537; *see Othen*, 507 F. Supp. 1376, 1382; *Bennett*, 525 F. Supp. 77, 79-80; *see also supra* note 39 (courts holding Title IX to be program-specific). The Temple athletic department received no direct federal funding. 524 F. Supp. at 532.

[52] 524 F. Supp. at 533; *see supra* text accompanying notes 31-34 (failure to amend Title IX indicative of congressional intent to apply Title IX institutionally).

[53] 524 F. Supp. at 533.

[54] *Id.* (citing 20 U.S.C. § 1681 (1976)).

[55] *Id.* at 539. The *Haffer* court found support for the "benefit" interpretation of the term "receiving federal aid" from the Title VI civil rights cases, which adopted the institutional approach. *Id.*; *see supra* text accompanying note 34 (Title VI cases support institutional reading of Title IX).

[56] 524 F. Supp. at 540. The federal government paid 80% of the wages of over 50 part-time and several full-time employees of the Temple athletic department through the federally funded College Work-Study Program, 42 U.S.C. § 2571 (1973). 524 F. Supp. at 540. Intercollegiate athletes at Temple also received several hundred thousand dollars each year in federal financial aid. *Id.*

[57] 652 F.2d 445 (5th Cir. 1981), *vacated*, _____ U.S. _____, 102 S. Ct. 3475 (1982); *see* text accompanying notes 69-72 *infra* (*Iron Arrow* reversed in light of subsequent Supreme Court decisions). In *Iron Arrow*, the Department of Health, Education and Welfare (HEW) sought to terminate the federal funds provided to the University of Miami due to the presence of the all-male Iron Arrow Honor Society. 652 F.2d at 446. The University sought an injunction against the HEW to forbid the termination of federal funds. *Id.*

[58] 652 F.2d at 448. The Iron Arrow Society, which the first president of the University

the University gave the society, combined with evidence of tangible support that the University furnished to Iron Arrow, constituted "substantial assistance" to the society.[59] The Fifth Circuit reasoned that the University's substantial assistance encouraged the society's gender discrimination policies, thus violating Title IX and mandating a withdrawal of federal financial assistance.[60]

The Supreme Court first considered the scope of Title IX in *North Haven Board of Education v. Bell*.[61] In *North Haven* the Court considered the validity of the HEW regulations on gender discrimination in employment in educational institutions.[62] The Title IX employment regulations, like the regulations governing athletics, are institutional in approach, which has led several federal courts to invalidate the employment regulations.[63] In *North Haven*, two Connecticut state school boards filed suit seeking to invalidate the employment regulations.[64] The boards filed the suits in response to actions that female employees of the school boards instituted alleging gender discrimination in hiring and job assignments.[65] The *North Haven* Court held that the statutory language of Title IX clearly is program-specific in the sections that proscribe

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of Miami established, was the only campus group to receive a charter from the university. *Id.* at 447.

[59] *Id.* at 447-448. Evidence that the University of Miami furnished support to Iron Arrow included the school's alumni association providing mailing and postage for Iron Arrow material, secretarial support that the school made available to Iron Arrow, the University's finance office's handling of three society accounts, and the maintenance of a private room for the society in the school's student union building. *Id.*

[60] *Id.* at 448. In addition to finding that Iron Arrow had indirectly received assistance sufficient to bring the society under Title IX, the Fifth Circuit ruled that even if Iron Arrow had received no tangible aid from the University, the University nonetheless provided "substantial assistance" to the society. *Id.* The *Iron Arrow* court concluded that substantial assistance was present since the society could not exist without the school. *Id.*

Several other federal court decisions also support a broader reading of Title IX. *See, e.g.*, Wright v. Columbia Univ., 520 F. Supp. 789, 793-94 (E.D. Pa. 1981) (antidiscrimination policy against physical handicaps is institutional in scope); Grove City College v. Harris, 500 F. Supp. 253, 257 (W.D. Pa. 1980) (students' receipt of federally funded education grants sufficient to bring school under Title IX), *aff'd*, 687 F.2d 684 (3d Cir. 1982); Bob Jones Univ. v. Johnson, 396 F. Supp. 597, 601 (D. S.C. 1974) (university is recipient of federal funds subject to Title IX civil rights action where sole federal aid received was veterans' educational benefits paid to some students), *aff'd. mem.*, 529 F.2d 514 (4th Cir. 1975).

[61] _____ U.S. _____, 72 L. Ed. 2d 299, 303 (1982).

[62] _____ U.S. at _____, 72 L. Ed. 2d at 307.

[63] _____ U.S. at _____, n.9, 72 L. Ed. 2d at 307 n.9; *see supra* note 38 (courts invalidate regulations not consistent with Title IX); *see also* Dougherty County School System v. Harris, 622 F.2d 735, 737-38 (5th Cir. 1980) (agency regulations concerning employment discrimination promulgated under Title IX were invalid since Title IX is program-specific, but Title IX upheld as permitting the regulation of some employment practices), *vacated*, ___ U.S. ___, 102 S. Ct. 1164 (1982); *see* 45 C.F.R. § 86.51 (1981) (Title IX agency regulations on gender discrimination in employment).

[64] _____ U.S. at _____, 72 L. Ed. 2d at 305-06.

[65] *Id.* at _____, 72 L. Ed. 2d at 306.

gender discrimination and provide enforcement of the proscription.[66] The Court's determination that Congress specifically intended to prohibit gender discrimination in employment in federally funded education programs in adopting Title IX, however, rendered dicta the Court's program-specific interpretation of Title IX.[67] Furthermore, the *North Haven* Court upheld HEW's regulations as consistent with the program-specific scope of Title IX and thus found the regulations valid.[68]

The uncertainty of the *North Haven* decision's effect on Title IX areas other than employment discrimination compounded when the Supreme Court vacated in a memorandum opinion the Fifth Circuit's judgment in *Iron Arrow*.[69] The Court remanded the case to the Fifth Circuit for further considerations in light of the *North Haven* decision.[70] Since the Fifth Circuit relied on an institutional application of Title IX in *Iron Arrow* in ruling that Title IX forbade the honor society from admitting only males,[71] the Supreme Court's decision suggests that the Court intends to apply Title IX with a program-specific approach in all areas.[72]

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[66] *Id.* at _____, 72 L. Ed. 2d at 303-04. The *North Haven* Court did not examine the legislative history of Title IX in finding the law to be program-specific. *Id.* The Supreme Court relied solely on the language of Title IX in determining the scope of the law. *Id.* The Court long has held that where the meaning of a statute is clear on its face, a court should not interpret the law in a way different from the plain meaning expressed. United States v. Harris, 347 U.S. 612, 619 (1954) (plain meaning of law must be adhered to); Central Bank v. United States, 345 U.S. 639, 646 (1953) (court must not give interpretation to statute other than that which Congress clearly intended).

[67] _____ U.S. at _____, 72 L. Ed. 2d at 309-14. The *North Haven* Court engaged in a lengthy examination of the legislative history of Title IX in determining whether Congress intended the law to control gender discrimination in institutional employment procedures. *Id.*

[68] *Id.* at _____, 72 L. Ed. 2d at 318; *see supra* text accompanying note 66 (Title IX given program-specific scope). The *North Haven* Court conceded that the Title IX employment regulations were ambiguous and arguably attempted to control the employment practices of an institution that received federal aid. _____ U.S. at _____, 72 L. Ed. 2d at 318. The Supreme Court nonetheless ruled that the regulations were consistent with a program-specific approach, since the regulations forbid employment discrimination on the basis of sex in "any education program or activity" receiving federal aid. *Id.* at _____, 72 L. Ed. 2d at 318, 319 (citing 34 C.F.R. § 106.1 (1980)).

[69] _____ U.S. _____, 102 S. Ct. 3475 (1982).

[70] *Id.*

[71] 652 F.2d 445, 448 (5th Cir. 1981). *See supra* text accompanying note 60 (university support of all-male society amounted to institution's fostering gender discrimination).

[72] 652 F.2d at 448. *See infra* text accompanying notes 79-80 (later decision interpreting *Iron Arrow* as demanding program-specific application of Title IX). In addition to the institutional reading of Title IX, the Fifth Circuit in *Iron Arrow* relied on a statement by the Secretary of HEW that stated that Title IX applies to programs which indirectly benefit from federal aid. 652 F.2d at 446 (5th Cir. 1981) (citing 39 Fed. Reg. 22229 (1974)). Thus, the Supreme Court's decision in *Iron Arrow* also may be an invalidation of the benefit theory. *See* _____ U.S. _____, 102 S. Ct. 3475, 3475 (1982). The fact that the four Justices (Brennan, White, Marshall, and Blackmun) who dissented in the *Iron Arrow* decision composed the majority (along with Justices Stevens and O'Connor) in *North Haven* adds to the confusion that the issuance of a mere memorandum opinion in *Iron Arrow* creates. *See id.*

The strict program-specific approach that the Supreme Court apparently adopted in *North Haven* and *Iron Arrow* formed the basis of the decision in *University of Richmond v. Bell*,[73] the first decision after *North Haven* to rule on the applicability of Title IX to collegiate athletics.[74] The Eastern District of Virginia in *University of Richmond* rejected the Department of Education's interpretation of Title IX as institutional.[75] Instead, the *University of Richmond* court ruled that the University of Richmond's athletic department did not have to comply with Title IX with respect to gender discrimination, thus adopting the program-specific interpretation of Title IX.[76] The *University of Richmond* court held that although the *North Haven* decision may prohibit a court from striking down Title IX regulations on gender discrimination, *North Haven* also established the program-specific interpretation of the regulations.[77] Thus, the *University of Richmond* court held that the Department of Education's institutional approach, which the Title IX regulations manifested, was invalid, and ruled the Department of Education could not attempt to regulate the university's athletic program.[78] The *University of Richmond* court also found that the benefit or substantial assistance theory that the *Haffer* court supported could not bring the University of Richmond's athletic program within the scope of Title IX.[79] The *University of Richmond* court reasoned that the benefit theory actually is another form of the institutional approach to Title IX, and therefore no longer is valid due to the Supreme Court's ruling in *North Haven*.[80]

Despite the *University of Richmond* court's rejection of the benefit theory, other courts have embraced the benefit theory as a means of bring-

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[73] 543 F. Supp. 321 (E.D. Va. 1982).

[74] *Id.* at 324.

[75] *Id.* at 327.

[76] *Id.* The *University of Richmond* case arose out of a request by the Office of Civil Rights for information concerning the school's athletic program and the University's compliance with Title IX. *Id.* at 323. Instead of issuing an assurance of compliance, however, the University challenged the office's ability to force compliance with Title IX. *Id.* The University contended that since the school's athletic program received no direct federal aid, compliance with Title IX was voluntary due to a program-specific interpretation of Title IX. *Id.*

[77] *Id.* at 327; *see supra* text accompanying note 66 (Title IX's language demands program-specific application).

[78] 543 F. Supp. at 327.

[79] *Id.* at 328-29. The Department of Education argued that the *University of Richmond* court should apply the benefit theory that the district court in *Haffer* and the Fifth Circuit in *Iron Arrow* previously applied. *Id.* at 327; *see supra* text accompanying notes 55 & 59 (*Haffer* and *Iron Arrow* courts adopting benefit theory application of Title IX). The Department of Education contended that federal aid furnished to the university, which helped build dormitories and dining halls that the school's athletes used, constituted federal financial assistance to the athletic department sufficient to bring the university within the scope of Title IX. 543 F. Supp. at 328. The *University of Richmond* court rejected the agency's argument. *Id.*

[80] 543 F. Supp. at 328.

ing under Title IX's guidelines programs that do not directly receive federal funds.[81] The benefit approach satisfies both the program-specific language of Title IX and the broad intent of the law.[82] In *Grove City College v. Bell*,[83] the Third Circuit applied the benefit theory to Title IX.[84] The *Grove City* court recognized Title IX as program-specific.[85] The Third Circuit, however, held that when an institution receives general federal financial assistance, each program within the institution indirectly benefits from the aid and the institution as a whole must comply with Title IX.[86] Grove City College had refused to comply with the Department of Education's requests for an assurance of compliance with Title IX.[87] To support its refusal to cooperate, the school relied on a program-specific reading of Title IX and the absence of direct receipt of federal aid by Grove City College.[88]

Although Grove City College did not receive direct federal financial assistance, the school did receive federal aid indirectly through Basic Educational Opportunity Grants (BEOG's) awarded to the College's students.[89] Adopting a variation of the institutional application of Title IX, the *Grove City* court initially noted that neither courts nor commentators have devoted much attention to the resolution of what constitutes a program or activity under Title IX.[90] The *Grove City* court then ruled

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[81] *See supra* text accompanying notes 55 & 56 (*Haffer* and *Iron Arrow* circuit court decisions both favor benefit theory as a means of applying Title IX to programs which receive no direct federal aid).

[82] *See supra* text accompanying notes 66-68 (*North Haven* decision may demand both a program-specific reading and a broad application of Title IX).

[83] 687 F.2d 684 (3rd Cir. 1982).

[84] *Id.* at 693.

[85] *Id.* at 697.

[86] *Id.* at 698; *see infra* text accompanying note 94 (courts must apply benefit theory to give Title IX broad scope the law requires).

[87] 687 F.2d at 689.

[88] *Id.* at 689-90. As an institution affiliated with the United Presbyterian Church, Grove City College accepted no direct federal aid in order to maintain the school's philosophical autonomy. *Id.* at 689 n.7.

[89] *Id.* at 688-89. Of approximately 2,200 students at Grove City College, 140 received BEOG's. *Id.* at 688. Three hundred forty-two students at Grove City received Guaranteed Student Loans (GSL's). *Id.* The district court in *Grove City*, however, ruled that the receipt of GSL's could not bring the school under Title IX. *Id.* at 690 n.10. The Third Circuit held that 20 U.S.C. § 1682, which denies Title IX enforcement authority with respect to a contract of insurance or guarantee, precluded the Department of Education from justifying enforcement of Title IX through GSL's, or from terminating GSL's. 687 F.2d at 690.

[90] *Id.* at 697-98. The *Grove City* court noted that the few legal commentators and courts that have confronted the need to define "program" have recognized that neither the statutes nor the legislative history resolve the question of what constitutes the program or activity that Title IX regulates. *Id.*; *see e.g.*, Todd, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools*, 53 TEX. L. REV. 103, 107-13 (1974) ("program" not defined for purposes of Title IX); Comment, *Board of Public Instruction v. Finch: Unwarranted Compromise of Title VI's Termination Sanction*, 118 U. PA. L. REV. 1113, 1116-24 (1970) ("program" not defined for purposes of Title VI).

that when the federal government furnishes indirect or general aid to an institution, the institution must be the "program" referred to in Title IX.[91] The *Grove City* court explained the broad interpretation of program by relying on the Supreme Court's decision in *North Haven* and the *Haffer* decision.[92] The Third Circuit reasoned that in *North Haven* the Supreme Court implicitly adopted an institutional approach to the term "program" that is employed in Title IX.[93] Similarly, the *Grove City* court relied on the *Haffer* decision to support both a broad reading of Title IX and the adoption of the benefit theory application of the law.[94] The Third Circuit, therefore, held that Grove City College received federal financial assistance as defined by Title IX, and that the College had to comply with the Title IX regulations and the Department of Education's request for an assurance of compliance.[95]

Relying primarily on the *Grove City* opinion,[96] the Third Circuit affirmed on appeal the district court's holding in *Haffer v. Temple University*.[97] The *Haffer* court ruled that the Grove City decision rendered the fact that many athletes at Temple University received BEOG's suffic-

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[91] 687 F.2d at 698.

[92] *Id.* at 697-98; *see supra* text accompanying notes 54-56, 66-68 (*North Haven* and *Haffer* support institutional application of Title IX despite law's program-specific language).

[93] 687 F.2d at 697.

[94] *Id.* at 698. The *Grove City* court did not mention the apparent institutional approach that the district judge adopted in *Haffer*. *Id.*; *see* Haffer v. Temple Univ., 524 F. Supp. 531, 533 (E.D. Pa. 1981) *aff'd*, 688 F.2d 14 (3d Cir. 1982). The Third Circuit instead focused on the "substantial assistance" analysis of *Haffer*, which brought the Temple athletic program under Title IX. *Id.* at 698; *see supra* text accompanying notes 54-56 (district court relied partially on substantial assistance justification for applying Title IX to the Temple athletic program).

[95] 687 F.2d at 698. The Sixth Circuit, however, rejected the Third Circuit's finding in *Grove City* that students' receipt of BEOG's places an entire institution under Title IX. Hillsdale College v. HEW, No. 80-3207, slip op. at 22 (6th Cir., filed Dec. 16, 1982). In *Hillsdale College*, the Sixth Circuit faced a factual situation almost identical to that in *Grove City*. Hillsdale College, a small school that accepted no direct federal financial assistance, refused to comply with an HEW assurance of compliance request. *Id.*, slip op. at 2. HEW attempted to cutoff federal assistance, including BEOG's, provided to Hillsdale students because of Hillsdale's refusal. *Id.*, slip op. at 3-5. The Sixth Circuit, however, adopted a strict program-specific interpretation of Title IX, supported by the *North Haven* decision. *Id.*, slip op. at 12. *See supra* text accompanying note 66 (*North Haven* Court holding Title IX program-specific). The *Hillsdale College* court held that an entire institution can not be a "program" under Title IX, and that the receipt of BEOG's does not constitute aid to an institution under Title IX. No. 80-3207, slip op. at 19-20. As a result, the Sixth Circuit ruled that the HEW Title IX regulations were in excess of statutory authority. *Id.*, slip op. at 20. The *Hillsdale College* decision, however, fails to mention either the *North Haven's* Court's determination of Congressional intent with regard to Title IX, or the Court's holding that the Title IX employment regulations are valid. *See id.*, slip op. at 12-13.

[96] Haffer v. Temple Univ., 688 F.2d 14, 16 n.6 (3rd Cir. 1982) (per curiam). Opinions of one panel of the Third Circuit are binding on subsequent panels. *See Third Cir. Internal Operating Procedures*, Rule VIII(C). However, the judges of the circuit sitting *en banc* may overrule a prior circuit decision. *Id.*

[97] 688 F.2d 14 (3d Cir. 1982) (per curiam).

ient to warrant application of Title IX to Temple's athletic program.[98] The *Haffer* court also adopted *Grove City's* benefit theory analysis in applying Title IX to the Temple athletic department.[99] The Third Circuit ruled that since Temple as an institution received general federal aid,[100] Title IX governed the school's athletic department.[101] The *Haffer* court reasoned that the money given to the university frees federal funds that the university then applies in part to the school's athletic program.[102]

The diametrically opposing decisions of the district court in *University of Richmond* and the Third Circuit in *Grove City* and *Haffer* reflect the confusion surrounding Title IX and the law's applicability to collegiate athletic programs.[103] The Supreme Court's reluctance to issue a comprehensive decision that will define the scope of Title IX in all areas has resulted in an inconsistent application of the law to athletic programs.[104] Although the *University of Richmond* court ruled that *North Haven* eliminated Title IX's applicability to athletic departments,[105] the *Haffer* decisions present valid arguments for the prohibition of gender discrimination in collegiate athletics.[106] Title IX opponents offer little opposition to the argument that athletic departments indirectly benefit from general federal aid to universities, other than by claiming that the benefit does not constitute federal financial assistance under Title IX.[107]

In addition to the confusion that the inconsistent application of Title IX creates, the current Administration's reluctance and inability to enforce Title IX regulations clouds the future of women's athletics. The

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[98] *Id.* at 16.

[99] *Id.* at 16-17.

[100] *See Haffer*, 524 F. Supp. at 533. Temple receives more than 19 million dollars annually in federal aid. *Id.*

[101] 688 F.2d at 16-17.

[102] *Id.*

[103] *See supra* text accompanying notes 56, 78 & 98-101 (courts not consistent in applying Title IX to athletic programs).

[104] *See infra* note 105 (current confusion over Title IX's application to athletic programs similar to confusion over the law's application to employment discrimination prior to the Supreme Court's decision in *North Haven*).

[105] The current inconsistent application of Title IX to athletic programs is similar to the law's inconsistent application in the area of gender discrimination in employment under Title IX prior to *North Haven*. *Id. See supra* note 63 (courts differ on Title IX's application to employment discrimination).

[106] 524 F. Supp. at 540; 688 F.2d at 16-17; *see supra* text accompanying notes 54-56 (athletic departments benefit from general federal financial assistance sufficiently to subject them to Title IX). One of the most compelling arguments advanced by the district court in *Haffer* in favor of an institutional approach to Title IX is that if courts apply the law on a program-specific basis, a university could use federal money to support some programs in compliance with Title IX, transfer the university's general funds into the budgets of other programs, and discriminate freely in those programs. 524 F. Supp. at 539.

[107] University of Richmond v. Bell, 543 F. Supp. 321, 328 (E.D. Va. 1982); *see also supra* notes 73-80 (discussing *University of Richmond*).

Department of Education's decision not to appeal the *University of Richmond* case has caused Title IX proponents to question the Administration's dedication to equal opportunity in collegiate athletics.[108] Faced with the proposition of a program-specific scope of Title IX, and an Administration that will not challenge the limitation, women athletes must depend in the future on a benefit theory application of Title IX to gain equality in intercollegiate athletics.[109] The benefit theory remains viable in light of the *Grove City* and *Haffer* decisions.[110]

If courts ultimately hold that the benefit theory is merely a disguised institutional justification for Title IX's application,[111] however, Title IX proponents will have to test other approaches in an attempt to justify the law's continuing influence on college athletic programs. Future efforts to gain equality in collegiate athletics through Title IX may focus on attempts to find direct federal assistance to athletic programs through federal grants to athletes.[112] Beyond Title IX, female athletes may attempt in the future to seek equality through civil rights actions.[113] The unsuccessful outcome of these cases in the past, however, indicates that reliance on Title IX arguments is the best avenue for actions against discriminating athletic departments at the present time.[114] Until

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[108] Wash. Post, Sept. 9, 1982, at A23, col. 1. According to Title IX proponents, the government's decision not to appeal the *University of Richmond* case was a major setback to civil rights advancement and an indication that the Reagan administration would not enforce Title IX. *Id.* The decision not to appeal *University of Richmond* was viewed as a mark against the administration's commitment to Title IX enforcement. *Id.*

[109] *See supra* text accompanying note 66 (*North Haven* decision holds Title IX to be program-specific).

[110] *See supra* text accompanying notes 90-92; 98-102 (post-*North Haven* courts apply Title IX to college athletic programs).

[111] *See* University of Richmond v. Bell, 543 F. Supp. 321, 328 (E.D. Va. 1982) (benefit theory viewed merely as modified institutional approach); *see also supra* notes 73-80 (discussing *University of Richmond*).

[112] *See supra* text accompanying note 89 (receipt of BEOG's by Grove City College athletes sufficient to bring school's athletic program within Title IX); *see also* Haffer v. Temple Univ., 688 F.2d 14, 16 (3d Cir. 1982). The Third Circuit in *Haffer* first relied upon the receipt of federal grants by Temple's athletes as the means by which Title IX was applied to Temple's athletic program. *Id.* The *University of Richmond* court, however, rejected the receipt of grants as a basis for applying Title IX. University of Richmond v. Bell, 543 F. Supp. 321, 328-30 (E.D. Va. 1982).

[113] Athletes have previously instituted actions under 42 U.S.C. § 1983 (1976) of the Civil Rights Act as parties seeking equality in athletic programs. The actions have been successful when seeking to establish sports programs for a certain gender where none existed before the action. *See* Brenden v. Independent School Dist., 477 F.2d 1292, 1295 (8th Cir. 1973) (female high school student entitled under Civil Rights Act to participate in non-contact sports). The courts have refused to find, however, that § 1983 demands anything more than the opportunity to participate. *See* Fluitt v. University of Nebraska, 489 F. Supp. 1194, 1196 (D. Neb. 1980) (student not denied civil rights where afforded opportunity to participate in intercollegiate sport even though more opportunities were provided to the opposite sex).

[114] *See supra* note 113 (courts unwilling to apply civil rights arguments to athletic programs beyond basic right to participate).

the Supreme Court decides a case that directly concerns Title IX's application to collegiate athletic programs, the continued growth of women's sports will remain in doubt.

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