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## Title IX From the Red Rose Crew to Grutter: The Law and Literature of Sports

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## ESSAY

# Title IX From the *Red Rose Crew* to *Grutter*: The Law and Literature of Sports

by Joseph Z. Fleming\*

### INTRODUCTION

Hindsight provides foresight in both rowing<sup>1</sup> and in the law.<sup>2</sup> A rower sits in a shell and faces the direction opposite of that in which the shell glides across the water, and maintains a straight course by observing landmarks while moving away from them.<sup>3</sup> The rower aligns the stern of the shell with the landmark or precedent, so that he or she remains on course by looking back at the preceding landmark.<sup>4</sup> Similarly, courts rely on precedent as landmarks from which to craft new decisions.<sup>5</sup>

Such attention to the past undoubtedly will influence the Supreme Court if it reexamines Title IX of the Civil Rights Act

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<sup>1</sup> See SUSAN LEZOTTE, ROWING POWER AND ENDURANCE 33 (1987). Lezotte discusses the fact that in rowing, a rower sits in a boat (or shell) facing the back (or stern) and does not face the direction in which the shell is moving. *Id.* As a result, the steering is performed by maintaining a straight course looking at a landmark which is in front of the rower as he or she moves away from it. *Id.* Occasionally, instead of looking at the "background," the rower may be able to look around and take a glimpse of what is in front of the boat in the direction the rower is rowing toward, to try to see whether the boat is free of rocks, stumps, boats and other hazards. *Id.* at 34.

<sup>2</sup> OLIVER WENDELL HOLMES, THE COMMON LAW 32 (Mark DeWolfe Howe ed., Belknap Press 1963) (1881).

<sup>3</sup> LEZOTTE, *supra* note 1, at 33.

<sup>4</sup> See *id.*

<sup>5</sup> HOLMES, *supra* note 2, at 32.

(“Title IX”)<sup>6</sup> in the aftermath of *Grutter v. Bollinger*,<sup>7</sup> in which the Court recently held that the University of Michigan Law School has a “compelling interest”<sup>8</sup> in attaining a “diverse”<sup>9</sup> student body. In *Grutter*, the Court validated the school’s admissions program, which uses race as one of a number of criteria upon which it evaluates applicants.<sup>10</sup> The Court determined that the admission practice was narrowly tailored to obtain educational benefits and did not violate the Equal Protection Clause.<sup>11</sup> The focus upon diversity in *Grutter* suggests that the Court will uphold Title IX if the statute faces new legal challenges.

### I. THE TITLE IX LANDSCAPE

Title IX prohibits gender discrimination at educational institutions receiving federal funding.<sup>12</sup> The U.S. Department of Education, acting through its Office of Civil Rights, administers Title IX and supporting regulations, entitled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.”<sup>13</sup>

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<sup>6</sup> Title IX of the Education Amendments of 1972 [Title IX], 20 U.S.C. §§ 1681–88 (1988). Title IX applies only to those institutions that receive federal financial assistance. *See* 20 U.S.C. § 1681.

<sup>7</sup> 123 S. Ct. 2325 (2003).

<sup>8</sup> *See id.* at 2340–42.

<sup>9</sup> *See id.*

<sup>10</sup> *Id.* at 2331–32.

<sup>11</sup> *Id.* at 2340–42.

<sup>12</sup> 20 U.S.C. § 1681(a) (“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.”). Title IX specifies that its proscription of gender discrimination should not be “interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance” between the persons participating in the program and the total number of persons in the relevant community. 20 U.S.C. § 1681(b). Subsection (b) also provides, however, that the statute:

shall not be construed to prevent the consideration in any . . . proceeding . . . of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

*Id.*

<sup>13</sup> *See, e.g.*, 34 C.F.R. § 106.41(a) (2003) (“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from

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Title IX's impact has been particularly notable in the realm of collegiate athletics, ever since female golfer Terry Williams received an athletic scholarship to attend the University of Miami (Florida) in 1973.<sup>14</sup> Federal regulations mandate that each collegiate institution's athletic programs afford commensurate opportunities to male and female athletes.<sup>15</sup> Section 106.41(c) of title 34 of the Code of Federal Regulations, entitled "Equal Opportunity," addresses the most critical issue here. Regardless of what teams, if any, an institution offers, its athletic program must afford equal opportunities to male and female athletes.<sup>16</sup> The section reads, in pertinent part:

In determining whether equal opportunities are available the Director will consider, among other factors: (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) The provision of equipment and supplies; (3) Scheduling of games and practice time; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutoring; (6) Assignment and compensation of coaches and tutors; (7) Provision of locker rooms, practice and competitive facilities; (8) Provision of medical and training facilities and services; (9) Provision of housing and dining facilities and services; (10) Publicity.<sup>17</sup>

To obtain such equality in athletics, schools must abide by the proportionality rule;<sup>18</sup> each school must divide its total number of intercollegiate varsity athletic positions by sex, in direct reflection

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another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.").

<sup>14</sup> See Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 SETON HALL J. SPORT L. 391, 395 (1997).

<sup>15</sup> See 34 C.F.R. § 106.41(c).

<sup>16</sup> See *id.*

<sup>17</sup> *Id.*

<sup>18</sup> See, e.g., *Cohen v. Brown Univ.*, 101 F.3d 155, 170–71 (1st Cir. 1996).

of the proportional relationship between the number of male versus female students enrolled at the school.<sup>19</sup>

## II. ROWING LOG: A REGISTER OF GENDER EQUITY COMMENTARY IN LITERATURE

Combining concepts of law and rowing would enable a “sea change” in the sport of rowing.<sup>20</sup> Men’s crews are rapidly being out funded and, in certain cases, swamped by women’s collegiate crews.<sup>21</sup> This is often related to the enactment of Title IX. As discussed, to obtain equality in sports, federal funding of educational institutions mandates that there be equality of sports teams, or proportionality.<sup>22</sup> Legal articles<sup>23</sup> and cases<sup>24</sup> reflect that

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<sup>19</sup> See 20 U.S.C. § 1681. For an analysis that gives an overview of Title IX, not only of the regulations and the process which resulted in the promulgation of the regulations and all of the details that involve gender equity and equal opportunity and accommodation and the type of proportionality issues that are discussed in this Essay, but also an excellent chronology starting with 1972 through the twenty-fifth anniversary of the passage of Title IX, see Heckman, *supra* note 14, at 395. An additional benefit of the Heckman article is that it discusses the chronological history of other related events.

<sup>20</sup> See LEZOTTE, *supra* note 1 and accompanying text.

<sup>21</sup> Scott R. Rosner, *The Growth of NCAA Women’s Rowing: A Financial, Ethical and Legal Analysis*, 11 SETON HALL J. SPORT L. 297, 308–09, 328 (discussing the growth of women’s rowing in the National Collegiate Athletic Association (“NCAA”) as being “primarily attributable to its positive impact on institutions attempting to comply with the interests and abilities aspect of Title IX via the substantial proportionality test”). Rosner also discusses the ethical issue that has arisen at institutions where elevation of the women’s rowing team to varsity intercollegiate status occurs, while the male counterpart remains at the club level. *Id.* at 328. The suggestion is made that the disappointment of men’s crew members with “what they perceive as unfair treatment” is exacerbated if, prior to the institution’s decision to add a varsity women’s team only, there had been a thriving men’s crew but no women’s team. *Id.* The concept is suggested that nevertheless the men’s crew can “benefit” from this decision because it may “result in better equipment in the form of ‘hand-me-downs’ from the women’s team, as well as a new boathouse.” *Id.*

<sup>22</sup> See *supra* Part I.

<sup>23</sup> See Patricia A. Cain, *Women, Race, and Sports: Life Before Title IX*, 4 J. GENDER RACE & JUST. 337 (2001) (providing an overview of the history of Title IX, and the increasing opportunities and roles for women in sports); Eryn M. Doherty, *Winning Isn’t Everything . . . It’s the Only Thing: A Critique of Teenaged Girls’ Participation in Sports*, 10 MARQ. SPORTS L. J. 127 (discussing the need to protect young girls from dangers associated with competitive sports); Brian L. Porto, *The Legal Challenges to “Big-Time” College Sports: Are They Threats or Opportunities for Reform?* 27 VER. B. J. & L. DIG. 41 (discussing the commercial impacts and dangers for the values of sports and the

the price for receiving federal funding can be obtained at the cost of eliminating certain male sports teams to provide gender equity. Under Title IX, a university with a large football team may equalize numbers of male players and funding with female players and funding in other sports.<sup>25</sup> In many cases, however, equality has been caused by elimination of teams that were traditionally regarded as men's sports, such as rowing.<sup>26</sup> Additionally, the focus on increasing female participation and funding for such sports gradually eliminates men's crews.<sup>27</sup> This has been documented to be the case in connection with other sports as well, often but not always, due to the size of football teams and

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concept that Title IX can be a powerful engine for reform in college sports, and also criticizing "college sports' unique hybrid status as athletic entertainment enterprise housed within institutions of higher learning"); see also Nancy Hogshead-Makar, *The Ongoing Battle Over Title IX*, USA TODAY, July 1, 2003, (Magazine) at 64 (discussing the challenge by the National Wrestling Coaches' Association of Title IX).

<sup>24</sup> The First Circuit, in *Cohen v. Brown University*, observed:

Title IX is not an affirmative action statute; it is an anti-discrimination statute, modeled explicitly after another anti-discrimination statute, Title VI. No aspect of the Title IX regime at issue in this case—inclusive of the statute, the relevant regulation, and the pertinent agency documents—mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals. Like other anti-discrimination statutory schemes, the Title IX regime *permits* affirmative action. In addition, Title IX, like other anti-discrimination schemes, permits an inference that a significant gender-based statistical disparity may indicate the existence of discrimination. Consistent with the school desegregation cases, the question of substantial proportionality under the Policy Interpretation's three-part test is merely the starting point for analysis, rather than the conclusion; a rebuttable presumption, rather than an inflexible requirement. In short, the substantial proportionality test is but one aspect of the inquiry into whether an institution's athletics program complies with Title IX.

101 F.3d 155, 170–71 (1st Cir. 1996) (emphasis added).

<sup>25</sup> See Eugene G. Bernardo II, *Unsportsmanlike Conduct: Title IX and Cohen v. Brown University*, 2 ROGER WILLIAMS U. L. REV. 305, 361–62 (concluding that Title IX as applied is denying men equal protection rights and that men are being "treaded upon by an unconstitutional quota system that requires women's interests and abilities to be met at a higher degree than those of men").

<sup>26</sup> See Rosner, *supra* note 21.

<sup>27</sup> See *id.*

budgets.<sup>28</sup> Wrestling is an example of a sport impacted as is discussed in more detail below.<sup>29</sup>

The reasons for such changes have been well chronicled, in not only legal articles but in other literary works that have become part of the literature of the law.<sup>30</sup> One of the best chronicles is *The Red Rose Crew: A True Story of Women, Winning and the Water* by Daniel J. Boyne<sup>31</sup> (“*The Red Rose Crew*”). *The Red Rose Crew* is the story of a group of amazing women who rowed their way to international success and glory, battling gender bias, bureaucracy, and male domination in one of the most grueling and competitive sports.

The discrimination against women in rowing was characterized by such barriers as the inability of women to compete in the “Head

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<sup>28</sup> See, e.g., John Irving, Editorial, *Wrestling With Title IX*, N.Y. TIMES, Jan. 28, 2003, at A21.

<sup>29</sup> See *id.*

<sup>30</sup> See, e.g., RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 1 (1988). Posner takes the position that law and literature is a field that, while difficult to organize, may be compared with the analysis of law and economics. See *id.* Posner premises his argument on the proposition that “Law and economics involves the application of economic theory to legal questions.” *Id.* From this, Posner builds a case that an analysis may show that the “spirit of legal doctrine is economic, or it may provide an argument for why some rule of law should be changed to make the law more efficient.” *Id.* Posner, therefore, concludes “thus law and economics has a positive and a normative program, both derived from a single theory of human behavior.” *Id.* There are many who would disagree with this analysis, but Posner concludes that because there is a relationship that exists between economics and the law, there should be, or could be, a relationship between literature and the law. See *id.* While the latter would be less tidy, because there is no central theory of literature, or programmatic thrust, and the relationship between law and literature does not just run in one direction, there could be and should be the study of law and literature to use legal insights to enhance understanding of literature and there may be some mutual comparisons that would be of benefit.

As one will be able to note from the text of this Essay, the citations to various authorities, and the mixing of literature and the law, there is a way to fit references into an article about a legal subject that include literary analogies. Whether these analogies are relevant is up to the reader. Obviously, the literature does not control the law, but if an analogy or a model is good for an adversary purpose, or it seeks to enable a judge to explain a position, then it can be used. There are many examples of this. See, e.g. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) (Rehnquist, J., dissenting) (discussing Arthur Conan Doyle, *Silver Blaze*, in *THE COMPLETE SHERLOCK HOLMES* 397, 400 (1936))

<sup>31</sup> DANIEL J. BOYNE, *THE RED ROSE CREW: A TRUE STORY OF WOMEN, WINNING, AND THE WATER* (2000).

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of the Charles Regatta,” one of the important rowing events, held annually on Boston’s Charles River.<sup>32</sup> Men’s crews—from Harvard, Massachusetts Institute of Technology, Northeastern, and Boston University—and three private clubs—Union, Riverside and Cambridge Boat Club—sponsored the race, but refused to admit women. *The Red Rose Crew* described the reason for this as follows:

The reason for this was largely cultural, tied to the ideal of “womanhood” perfected in the 1950s. Rowing built male character, muscle, and fraternal ties that might later on prove important in the worlds of commerce, politics, and war. What use did a woman have for these? Teddy Roosevelt had rowed, and so had his cousin Franklin, both while they had attended Harvard College. Although rowing might no longer enjoy a popular audience, oarsmen often had influence that extended into powerful political circles.<sup>33</sup>

Although the provisions of Title IX passed in 1972, it was still not easy to encourage rowing as a women’s sport. As is pointed out in *The Red Rose Crew*, rowing pioneer Gail Pierson learned that:

[m]aking women’s rowing socially acceptable was as much of a challenge as getting appropriate funding and physical resources. Another part of her mission as president of the [National Women’s Rowing Association] . . . lay in educating the younger generation of women who were the beneficiaries of the Olympic decision and the Title IX legislation. And so, when she was invited to lecture at other colleges on economic theory, she also gave talks on rowing and women’s weightlifting. For those women who were just beginning to set foot on the water, they had little or no idea what they could or couldn’t do.<sup>34</sup>

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<sup>32</sup> See Thomas E. Weil, Jr., *Brief Time Line 1950–2000*, Friends of Rowing History, at <http://www.rowinghistory.net/Time%20Line/TL%201950+%20im.htm> (last visited Mar. 1, 2004).

<sup>33</sup> See BOYNE, *supra* note 31, at 28–29.

<sup>34</sup> *Id.* at 40–41.

In addition, even when women were encouraged to start participating in sports, they still faced harsh critics and a gender-biased media:

Radcliffe women were often heckled on the Charles, and off the water, they were harassed by the press. . . . A 1973 *Parade* article commented that “the principal complaint the girls come up with are calluses on their hands.” . . . A sports columnist from the *Boston Evening News* thought it was humorous to begin his coverage of a local woman’s regatta with the lead: “Who says the female of the species is a lousy driver? They were all over the Charles River last Sunday and had only one collision.”<sup>35</sup>

Despite passage of Title IX in 1972, the negative attitude regarding women in sports continued. As *The Red Rose Crew* illustrated, “Aside from the issue of physical resources lay the attitude that women could never be serious competitive athletes in something that required such strength and sweat. Acceptable women’s sports at the time included swimming, track and field, figure skating, and gymnastics.”<sup>36</sup>

And when women were allowed to use some of the men’s facilities or transportation, they were often subjected to second-class treatment and insults:

After practice, when the women came off the river, they had to pile straight onto the shuttle bus. They were not allowed to use the boathouse showers or the bathrooms. Cold and sweaty in the chilly months of fall and spring, the women waited until the men had taken their hot showers and joined them for the long ride back to school. Most of the Yale men seem unconcerned about the women’s plight, and some barely even acknowledged their female counterparts. They did, however, take note of their comings and goings off the bus; the places where women were let off were known as “crack stops.”<sup>37</sup>

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<sup>35</sup> *Id.* at 41.

<sup>36</sup> *Id.* at 86.

<sup>37</sup> *Id.* at 96–97.

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Women rowers also suffered from monetary shortages; quite often, their teams received lesser funding from their universities than those of the men's squads, even after Title IX's enactment.<sup>38</sup>

Heroic efforts to overcome barriers, such as those of the women described in *The Red Rose Crew*, unfortunately are not even the most extreme examples of what women had to, and in many cases still have to, endure in order to participate in competitive sports. The question of gender equity is one of extremes, however. There is a great deal of hostility caused by the provisions of Title IX, insofar as they are regarded as restricting the rights of men in order to facilitate the rights of women.<sup>39</sup> A well-recognized literary example considering the ramifications or policies that better one group at the expense of another was *Harrison Bergeron* by Kurt Vonnegut, Jr.<sup>40</sup>

As with many of Vonnegut's short stories, this one takes place in the future, in 2081, when "everybody was finally equal."<sup>41</sup> According to the story, "All this equality was due to the 211th, 212th, and 213th Amendments to the Constitution and to the unceasing vigilance of agents of the United States Handicapper General."<sup>42</sup> The story's protagonist, Harrison Bergeron, did not want equality, however, because it was achieved by handicapping

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<sup>38</sup> See *id.*

<sup>39</sup> As Professor Nancy Hogshead-Makar writes:

Essentially, foes attempt to argue that Title IX is a quota, that it amounts to affirmative action, and that it discriminates against men. When Congress passed the current regulations in 1975, no fewer than nine amendments were introduced that would have weakened the law. Throughout the 31 years of Title IX's existence, Congress has heard from the law's detractors repeatedly, but it expressly rejected every attempt to curb its effectiveness.

In the 1980s and 1990s, these same arguments were heard before Federal appellate courts across the country. Every Federal appeals court that has examined this issue has upheld the regulations and concluded that Title IX does not constitute reverse discrimination and is not a quota law. It is difficult to find greater unanimity of judicial opinion on any topic.

Hogshead-Makar, *supra* note 23, at 64.

<sup>40</sup> See Kurt Vonnegut, Jr., *Harrison Bergeron*, reprinted in *LAW IN LITERATURE: LEGAL THEMES IN SHORT STORIES* 54 (Elizabeth Villiers Gemmette ed., 1992). *Harrison Bergeron* is often included in literary works that are used in connection with teaching legal philosophy and issues.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

those who were more qualified. For example, ballerinas, who appeared on a television show and who otherwise might be better than their peers, were “burdened with sashweights and bags of birdshot, and their faces were masked, so that no one, seeing a free and graceful gesture or a pretty face” would be embarrassed, or feel badly.<sup>43</sup> Equality, in short, was achieved by handicapping everyone to ensure a minimum, or base, level of performance.

Harrison Bergeron interrupted the television program and, as part of a revolt, he freed the handicapped ballerinas from their bonds so that they could engage “in an explosion of joy and grace,” allowing them to “neutraliz[e] gravity with love and pure will.”<sup>44</sup> The price of the revolt was that Harrison Bergeron was shot and killed on live television.

Another classic example of the nexus between law, literature, and sports is embodied in the writing of John Irving, a wrestling enthusiast.<sup>45</sup> Irving’s *The World According to Garp* is the bizarre story of T.S. Garp, the bastard son of Jenny Fields, a feminist leader ahead of her time.<sup>46</sup> Fields is lionized by a group of women who never speak, known as the “Ellen Jamesians.”<sup>47</sup> In this story, Irving also discusses wrestling and has one of the characters grow up in wrestling rooms, which were regarded as “very safe for children—being padded everywhere and always warm.”<sup>48</sup> The *Chicago Sun-Times* praised this book as being “the most powerful and profound novel about women written by a man in our generation.”<sup>49</sup>

Irving’s awareness of women’s issues as illustrated in *The World According to Garp*, combined with his lifelong connection to wrestling, a male-dominated sport, make it apparent that he

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<sup>43</sup> *Id.* at 54–55.

<sup>44</sup> *Id.* at 58.

<sup>45</sup> John Irving competed in or coached wrestling for over thirty years and was inducted into the National Wrestling Hall of Fame in 1992. Nat’l Wrestling Hall of Fame & Museum, Outstanding Americans, *John Irving*, at <http://www.wrestlinghalloffame.org/awards/?oa&honoree=128> (last visited Feb. 23, 2004).

<sup>46</sup> JOHN IRVING, *THE WORLD ACCORDING TO GARP* (Ballantine Books 1990) (1978).

<sup>47</sup> *Id.* at 192.

<sup>48</sup> *Id.* at 80.

<sup>49</sup> *Id.* at back cover.

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might have interesting opinions about Title IX.<sup>50</sup> Indeed, Irving has considered the ramifications of Title IX specifically in a *New York Times* editorial.<sup>51</sup> He stated that Title IX was passed by Congress to put an end to sex discrimination in schools, but as enforced, it was “functioning as a gender quota of law.”<sup>52</sup> While noting that the legislation was intended to prohibit discrimination against either sex, Irving assessed Title IX as follows:

[W]hat happened in 1979—and in subsequent re-evaluations of the law—has invited discrimination against male athletes. The 1979 interpretation required colleges to meet at least one of the following three criteria: that the number of athletes from each sex be roughly equivalent to the number of students enrolled; that colleges demonstrate a commitment to adding women’s sports; and that they prove that the athletic interests of female students are effectively accommodated. The problems lie in complying with the first criterion. In order to achieve gender proportionality, men’s collegiate sports are being undermined and eliminated. This was never the intention of Title IX.

The proportionality rule stipulates that the ratio of male to female athletes be proportionate to the ratio of male to female students at a particular college. . . . Can you imagine this rule being applied to all educational programs—classes in science, engineering, accounting, medicine or law? What about dance, drama or music—not to mention women’s studies?<sup>53</sup>

Irving’s editorial also noted that he was not only wrestling with the problems relating to his favorite sport, but also rowing. In protesting the 1979 revisions to Title IX, he detailed the efforts of Arizona State University to install a women’s rowing program:

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<sup>50</sup> See Irving, *supra* note 28. Notably, Irving won an Academy Award for his screenplay of *The Cider House Rules*, adapted from his 1985 novel, which also addressed serious women’s issues. Oscar.com, Legacy: Past Winners, at [http://www.oscars.com/legacy/pastwinners/screen\\_adapt1.html](http://www.oscars.com/legacy/pastwinners/screen_adapt1.html) (last visited Feb. 23, 2004).

<sup>51</sup> See Irving, *supra* note 28.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

One of the most ludicrous examples of this was the attempt by Arizona State University in Tempe—a cactus-studded campus in the middle of the Sonoran Desert—to add a competitive women’s rowing team. There’s not a lot of water in Arizona. But the school asked the city to create a body of water (by flooding a dry gulch) on which the team could practice. Because of a lack of funds, the school had to drop the plan. This is probably just as well; taxpayer dollars would have financed scholarships either to rowers from out of state or to teach Arizona women (most of whom have never held an oar) how to row. But Arizona State is to be commended. It not only worked to meet the numerical demands of proportionality, it tried to adhere to the original spirit of Title IX by adding opportunities for women, not by cutting opportunities for men.<sup>54</sup>

Irving concluded with a plea for fair application of Title IX: Years ago, I was playing in a Little League baseball game when an umpire made what I thought was a memorable mistake. Later, in another game, he made it again. I realized it was no mistake at all—he meant to say it. Instead of hollering “Play ball!” at the start of the game, this umpire shouted “Play fair!”

Keep Title IX; eliminate proportionality. Play fair.<sup>55</sup>

### III. THE CATCH AND GRUTTER

In rowing, there is a point at which the rower, after completing the stroke, slides away from the bow toward the stern, while extending both arms forward toward the stern of the boat as far as possible.<sup>56</sup> This motion forces the oars to be pushed toward the front of the shell, so that the process of rowing can start again. When the rower has moved as far toward the stern of the shell as

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> A stroke is the rowing process of pulling the oars against the water, and the bow is the front of the boat. See LEZOTTE, *supra* note 1, at 11.

possible before starting the stroking process again, the rower is in the pause position known as “the catch.”<sup>57</sup>

The catch, in connection with the criticism of Title IX, comes in a sense of trying to establish the point at which the controversy is channeled into a decision. That leads to the question of what is fair, and who and what determines what is fair, in terms of achieving the proportionality required by Title IX. For those who, in the name of “equality” or “proportionality” or “gender fairness” or “neutrality” are eliminated from a sport, the catch is probably reminiscent of a “catch-22” in which rules ironically negate themselves, or create opportunities that are illusory.<sup>58</sup> Last year, however, the Supreme Court in *Grutter v. Bollinger*<sup>59</sup> affirmed the constitutionality of a program that has arguably disadvantaged certain persons for the benefit of a law school’s goal of diversity among its student body. And it did so by glancing backward at its precedent, just as a rower would.

In crafting the *Grutter* majority opinion, Justice O’Connor looked backward in an adherence to precedent; she relied heavily upon the Court’s landmark decision in *Regents of the University of California v. Bakke*.<sup>60</sup> Justice O’Connor noted in *Grutter* that 25 years had passed since *Bakke*, which reviewed and invalidated a set aside program (reserving 16 out of 100 seats in the medical school class for members of a certain minority group). *Bakke* also held, however, that the “State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic

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<sup>57</sup> *Id.* at 11.

<sup>58</sup> See JOSEPH HELLER, CATCH-22 47 (Corgi 1985) (1962), for this classic illustration: There was only one catch and that was Catch-22, which specified that a concern for one’s own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn’t, but if he was sane he had to fly them. If he flew them he was crazy and didn’t have to; but if he didn’t want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.

<sup>59</sup> 123 S. Ct. 2325 (2003).

<sup>60</sup> 438 U.S. 265 (1978).

origin.”<sup>61</sup> Justice O’Connor noted that in *Bakke*, however, justices struggled to determine the contours appropriate for a race-conscious admission policy. “Four Justices would have upheld the program against all attack on the ground that the government can use race to ‘remedy disadvantages cast on minorities by past racial prejudice.’”<sup>62</sup> Four other Justices avoided the constitutional question altogether and struck down the program on statutory grounds.<sup>63</sup> Despite this lack of consensus, Justice Powell drafted the Court’s lead opinion, and championed “not only for invalidating the set-aside program, but also for reversing the state court’s injunction against any use of race whatsoever.”<sup>64</sup> As a result, Justice O’Connor explained, the Court reversed “that part of the lower court’s judgment that enjoined the university ‘from any consideration of the race of any applicant.’”<sup>65</sup>

In *Grutter*, the University of Michigan Law School had an admissions program that was focused on academic ability as well as talents, experiences, and potential to contribute to the university community. Requirements for admission included undergraduate grades and law school test scores as well as letters of recommendation and a personal essay “describing the ways in which the applicant will contribute to the life and diversity of the Law School.”<sup>66</sup> The Court explained that “[s]o-called ‘soft variables’ such as ‘the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant’s essay, and the areas and difficulty of undergraduate course selection’ are all brought to bear in assessing an ‘applicant’s likely contributions to the intellectual and social life of the institution.’”<sup>67</sup>

Moreover, O’Connor emphasized that diversification of the student body promoted the strength of the law school, rather than the strength of each individual:

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<sup>61</sup> *Id.* at 320. This language was relied on by the Court in *Grutter*. 123 S. Ct. at 2336.

<sup>62</sup> *Grutter*, 123 S. Ct. at 2335–36.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 2335–36.

<sup>66</sup> *Id.* at 2332.

<sup>67</sup> *Id.*

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The policy . . . reaffirm[s] the Law School’s longstanding commitment to “one particular type of diversity,” that is, “racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.”<sup>68</sup>

Justice O’Connor concluded that, “[b]y enrolling a ‘critical mass’ of [underrepresented] minority students, the Law School seeks to ensur[e] their ability to make unique contributions to the character of the Law School.”<sup>69</sup>

Justice O’Connor found that the benefits of this program were substantial and not theoretical. In language that is very important for the purposes of evaluating the decision in *Grutter* and the issues raised by Title IX, she noted that diversity is essential to achieve success not only in education and sports but also in business and even matters of national security:

[H]igh-ranking retired officers and civilian leaders of the United States military assert that, “[b]ased on [their] decades of experience,” a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.” . . . At present, “the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the [Reserve Officers Training Corps (“ROTC”)] used limited race-conscious recruiting and admissions policies.” To fulfill its mission, the military “must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting.” We agree that “[i]t requires only a small step from this analysis to conclude

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<sup>68</sup> *Id.* at 2332 (citations omitted).

<sup>69</sup> *Id.* (citations omitted).

that our country's other most selective institutions must remain both diverse and selective."<sup>70</sup>

Thus, Justice O'Connor asserted that the military's successful employment of race-conscious criteria in the composition of its officer corps has demonstrated the relative safety of employing such measures at the law school<sup>71</sup>—albeit for a limited duration.<sup>72</sup> In fact, Justice O'Connor extrapolated a broader principle, emphasizing that “[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective.”<sup>73</sup>

Justice O'Connor also suggested that there should be an expectation that, since it has been twenty-five years since Justice Powell in *Bakke* first approved of the use of race to further an interest in public education and the number of minority applicants had increased, it might be expected that in twenty-five years the use of racial preferences would no longer be necessary.<sup>74</sup>

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<sup>70</sup> *Id.* at 2340 (citations omitted). The Reserve Officers Training Corps (“ROTC”) is primarily comprised of students already admitted to participating colleges and universities.

<sup>71</sup> *Id.* (citations omitted).

<sup>72</sup> *Id.* at 2346. Justice O'Connor clarified:

We are mindful, however, that “[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.” Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all “race-conscious programs must have reasonable durational limits.”

*Id.* (citations omitted).

<sup>73</sup> *Id.* at 2340.

<sup>74</sup> *Id.* at 2346–47.

## IV. THE FATE OF TITLE IX

The decision in *Grutter* is the most recent Supreme Court decision, but it is obviously not the final decision.<sup>75</sup> Supreme Court rulings are based upon shifting majorities, and it is conceivable that there soon will be changes in the Court. The reality is that “liberal” Justices may find that the Fourteenth Amendment prohibition against discrimination does not allow for the continuation of racial preference, or any type of preference programs.<sup>76</sup> It is equally possible that “conservative” Justices will

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<sup>75</sup> See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–4 (1999), (discussing the concept of “decisional minimalism,” which is “the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided”). Sunstein notes that:

[a] court that leaves things open will not foreclose options in a way that may do a great deal of harm. A court may well blunder if it tries, for example, to resolve the question of affirmative action once and for all, or to issue definitive rulings about the role of the First Amendment in an area of new communications technologies. A court that decides relatively little will also reduce the risks that come from intervening in complex systems, where a single-shot intervention can have a range of unanticipated bad consequences. There is a relationship between judicial minimalism and democratic deliberation. Of course minimalist rulings increase the space for further reflection and debate at the local, state, and national levels, simply because they do not foreclose subsequent decisions. And if the Court wants to promote more democracy and more deliberation, certain forms of minimalism will help it to do so.

*Id.* at 4.

<sup>76</sup> A Title IX decision also could be affected by a justice’s social values—in as much as they stand distinctly from political leanings. Actions of this sort have unfolded in the past. As Peter Irons illustrates, in *Buck v. Bell*, 274 U.S. 200 (1927), Justice Oliver Wendell Holmes opted to sustain:

Virginia’s “eugenic sterilization” law, under which several thousand “feeble-minded” and “morally delinquent” women had their Fallopian tubes cut by court order. Holmes endorsed the forced sterilization of Carrie Buck, the eighteen-year-old “daughter of a feeble minded mother” and herself “the mother of an illegitimate feeble minded child,” as he stated the facts from the case record. His opinion reeked of the arrogance of aristocracy, and could easily have been written by Herbert Spencer. “It is better for all the world,” Holmes pontificated, “if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.” Comparing forced sterilization with compulsory vaccination, Holmes had a last, callous word for Carrie Buck and her family: “Three generations of imbeciles are enough.”

conclude that they do not want to interfere with a congressional mandate, or a policy that has been in effect for a long period, even if they might have reached a different result.<sup>77</sup>

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Five decades later, a journalist who tracked down Carrie Buck and dug into old records discovered that she had been committed to Virginia's "State Colony for Epileptics and Feeble Minded" only because she had been raped by the eminent doctor who employed her as a housekeeper. Her daughter, Emma, was a perfectly normal child, and the "eugenic expert" who recommended her sterilization was later honored by the German Nazi regime for helping draft its "Race Hygiene" law, which laid the tracks that ended in the gas chambers of Auschwitz and other death camps. Holmes knew nothing about the scientific fallacies of the 'eugenic' movement; more important, he did not feel any duty to look behind the fabricated record in the *Buck* case. His philosophy of "judicial restraint" allowed state officials to exercise their "police powers" without any effective oversight.

PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 252, 258–59, 286 (1999). Irons also notes that Louis Brandeis, widely known as "the people's lawyer," was the Boston attorney who argued for Oregon in the Supreme Court case of *Muller v. Oregon*, 208 U.S. 412 (1908). He wrote the famous "Brandeis Brief" in this case, which challenged an Oregon statute limiting working hours of women in laundries to ten hours a day. The decision reflected "chivalry" but basically prevented women from working as hard as men, which, according to Irons, was based upon the "spirit of Sir Walter Raleigh" and reflected the "marriage of sociology and chivalry." IRONS at 259. According to Irons, the ultimate piece of irony is that Pierce Butler of Minnesota, who was appointed to the court and was one of the "Four Horsemen of Reaction" and a conservative who voted against the New Deal, was the sole dissenter in *Buck*. *Id.* at 286. Irons notes that "Holmes told another Justice that Butler was 'afraid of the Church' on that issue." *Id.* The result suggests that sometimes conservative and liberal Justices are not what they appear to be, and the matter is confusing.

<sup>77</sup> IRONS, *supra* note 76, at 478–79. Irons notes that although it was expected that a conservative group of Justices would overrule the *Roe v. Wade*, 410 U.S. 959 (1973), decision allowing abortions, it was a moderately conservative middle group of three Justices, who in fact were instrumental in upholding *Roe*, because of principles of "institutional integrity, and the rule of *stare decisis*." IRONS at 479. Irons discusses the political calculations and notes that "a whole generation of women had come to rely on *Roe* and its protection of abortion rights. To upset their 'settled expectation' by overruling *Roe* would provoke even greater political turmoil than the nation had experienced during two decades of abortion wars." *Id.* Irons further explains that:

"[t]he centrist Justices feared that a terrible price would be paid for overruling" a decision that had stood so long. The demands of blacks and workers require that *Plessy* [*v. Ferguson*, 163 U.S. 537 (1896),] and *Adkins* [*v. Children's Hosp.*, 261 U.S. 525 (1923),] be overruled; the demands of women require that *Roe* be affirmed. These are political calculations, pure and simple, but the centrist Justices insisted they had not made any "compromises with social and political pressures having, as such, no bearing on the principal choices that the Court is obligated to make" in deciding cases.

*Id.*

Consequently, it is difficult to guess what the Justices will do if the composition of the Court changes—other than to note that change will be inevitable. The fate of Title IX will be dependent upon what the Supreme Court will rule in the future. At present, however, *Grutter* provides a basis for assuming that Title IX will be upheld as a mechanism for preventing discrimination, despite the controversy and the potential for its constitutionality to be reviewed by the Supreme Court. The reasons for this include the following:

- (1) Title IX has been described as being primarily a provision to prevent discrimination.<sup>78</sup> Even the critics who are against proportionality do not have a problem with a prohibition of discrimination in terms of sports.<sup>79</sup>
- (2) *Grutter* suggests that where there is a basis for promoting diversity, the use of a “preference” that might otherwise be suspect, or even invalid, may be upheld.
- (3) There is reason to believe that the increasing number of women in sports creates the same type of diversity in society and equal opportunity which has been approved in *Grutter*.

While there may be arguments to the contrary, the same concepts that convinced the Court in *Grutter* that the military establishment requires diversity to function may suggest that greater diversity in society generally can occur if women and men are encouraged equally to compete. After all, the reasons that women were not allowed to row initially were based on the concept that the women would not be competing in business, or in other activities in which men were competing.<sup>80</sup> Thus, one can go back to the historical exclusion of women from certain sports, such as rowing,<sup>81</sup> and suggest that the reasons given for discrimination are no longer valid. The argument also can be flipped to suggest that such prior exclusionary reasons are in fact the basis for ensuring that women have access to entry into various sports, and

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<sup>78</sup> See *Cohen v. Brown Univ.*, 101 F.3d 155, 170 (1st Cir. 1996).

<sup>79</sup> See *Irving*, *supra* note 28.

<sup>80</sup> See *BOYNE*, *supra* note 31.

<sup>81</sup> *Id.*

that there is a need for preferential action, or “proportionality,” to ensure that result.

The reality is that sports hold great societal importance.<sup>82</sup> They are based on romantic concepts, myths, and a form of art<sup>83</sup> that link together families and generations.<sup>84</sup> They are the inspiration for great works of literature.<sup>85</sup> They are entertaining, they are the issues of front page news,<sup>86</sup> and they are the stuff of which many legal cases are made.<sup>87</sup> President Dwight Eisenhower once said that to relax he always turned to the sports page to get away from the news.<sup>88</sup> Today’s sports pages, however, have articles on gender discrimination, drugs, alcohol, gambling and even arbitration cases which may result in millions of dollars being paid to baseball players, on a basis as avidly followed by the readers of the sports page as some of the other scores and statistics.<sup>89</sup>

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<sup>82</sup> A. BARTLETT GIAMATTI, TAKE TIME FOR PARADISE: AMERICANS AND THEIR GAMES 65 (1989).

<sup>83</sup> See generally *id.* at 37–69.

<sup>84</sup> See Harvey Araton, *Proud Fathers Cheer the Women’s Sports Movement*, N.Y. TIMES, July 17, 2003, at C15, (describing the love of two professional football team players for their daughters). John Elway, the former quarterback, watched his daughter play in the position of forward at a top ten girls’ All-American basketball camp; and, Mick Luckhurst, the former place-kicker, watched his daughter, an All-State guard from Wesleyan High School. *Id.* When Elway complimented his daughter’s athletic skills in terms that confirmed she was a real competitor in her desire and her attitude, the *Times* noted, “these are words both lyrical and meaningful to the women’s sports movement.” *Id.*

<sup>85</sup> For dramatic excitement, the literature of rowing is a primary source of material. See DAVID HALBERSTAM, THE AMATEURS: THE STORY OF FOUR YOUNG MEN AND THEIR QUEST FOR AN OLYMPIC GOLD MEDAL (1985); see also DEVIN MAHONY, THE CHALLENGE xi (1989) (providing a story by the first woman coxswain of the Harvard Varsity Heavyweight crew and a description of the exciting tournaments that ultimately ended up with a victory of the coveted Grand Challenge Cup at the Henley Royal Regatta).

<sup>86</sup> See, e.g., Tyler Kepner, *Yankees Said to Be Closing Deal to Obtain Rangers’ Rodriguez*, N.Y. TIMES, Feb. 15, 2004, at A1 (detailing the Yankees’ acquisition of baseball’s reigning Most Valuable Player).

<sup>87</sup> See Heckman, *supra* note 14.

<sup>88</sup> Dwight D. Eisenhower, the thirty-fourth President of the United States, excelled in athletics and was an avid sports fan. See White House, *Dwight D. Eisenhower*, at <http://www.whitehouse.gov/history/presidents/de34.html> (last visited Feb 23, 2004).

<sup>89</sup> See *Time for Arbitrators to Crunch Numbers*, USA TODAY, Jan. 21, 2004, at 6C (offering an analysis of the twenty-seven players and their roles in the salary arbitration as well as their current salary, the amounts requested, and the amounts offered).

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There have been Supreme Court decisions that have ruled on sports. Baseball was held to be immune from antitrust<sup>90</sup> and more recently, golf was found to be, by virtue of its own rules, subject to the Americans with Disabilities Act, so as to enable a golfer who could not walk a course to use a motorized cart.<sup>91</sup>

Nevertheless, ultimately one must remember that sports themselves have rules to create fairness which in turn impact final scores.<sup>92</sup> Sports have restrictions,<sup>93</sup> handicaps,<sup>94</sup> and procedures that impose fairness.<sup>95</sup> One unique law review article, *The Common Origins of the Infield Fly Rule* by Will Stevens,<sup>96</sup> commences with the statement: “The Infield Fly Rule is neither a rule of law nor one of equity; it is a rule of baseball.”<sup>97</sup> Stevens goes on to explain that the rule was developed to provide a fair procedure, by a type of handicap, so that if there is a certain type of fly ball hit in the infield, with two or three players on base, a fielder for defensive purposes could not drop the ball and then throw the ball to obtain more than one out and derive an unfair advantage.<sup>98</sup> Failing to catch a ball—that otherwise could have been caught—automatically, whether the ball is caught or not, means an infield fly can result in only one out. This rule achieves a result that is desired, one that affects the good of the game.<sup>99</sup>

The concept of the infield fly rule was based upon historical fact—baseball derived from an English origin and a “spirit” that was described as an “attitude of the amateur, of the gentleman, and

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<sup>90</sup> See *Fed. Baseball Club of Balt. v. Nat'l League*, 259 U.S. 200 (1922) (opining that baseball was not considered interstate commerce and thus was beyond the scope of the Sherman Act); see also *BASEBALL AND THE AMERICAN LEGAL MIND* pt. 2 (Spencer Weber Waller et al. eds., 1995).

<sup>91</sup> *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) (affirming the lower court's decision that Casey Martin could use a golf cart and that it would not be inconsistent with the rules of golf).

<sup>92</sup> *Id.*

<sup>93</sup> See generally *GIAMATTI*, *supra* note 82 (discussing the importance of rules in sports).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Will Stevens, *The Common Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474 (1975).

<sup>97</sup> *Id.*; see also *BASEBALL AND THE AMERICAN LEGAL MIND*, *supra* note 90, at 4 (providing the infield fly rule under the Official Rules of Baseball).

<sup>98</sup> See Stevens, *supra* note 96, at 1477.

<sup>99</sup> *Id.* at 1479.

of the sportsman,” which was to keep rules simple and allow “moral force to govern the game.”<sup>100</sup> The rule was necessary because the potential for double plays was unfair and a defense which could create a double play by subterfuge rather than by skill and speed was regarded as one that had to be corrected.<sup>101</sup> Stevens’ entertaining analysis of the infield fly rule compares the rules of baseball and Anglo-American jurisprudence:

The dynamics of the common law and the development of one of the most important technical rules of baseball, although on the surface completely different in outlook and philosophy, share significant elements. Both have been essentially conservative, changing only as often as a need for change is perceived, and then only to the extent necessary to remove the need for further change. Although problems are solved very slowly when this attitude prevails, the solutions that are adopted do not create many new difficulties. If the process reaps few rewards, it also runs few risks.<sup>102</sup>

The infield fly rule will not determine whether Title IX will be approved by the Supreme Court. It bridges a gap over troubled waters, however, between the important issues in sports and the important concepts of constitutional law that will continue to be applied to sports. The comparison of the infield fly rule, described as a conservative rule,<sup>103</sup> may have a parallel in terms of suggesting application of the *Grutter* test to Title IX, which makes it likely that Title IX will be upheld. This is due to the fact that Title IX has been in effect for many years, and an increasingly large group in our society depends upon Title IX to achieve objectives and benefits.<sup>104</sup> It is not unlike other situations in which precedent was controlling and desirable, despite great controversy.<sup>105</sup>

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<sup>100</sup> *Id.* at 1476.

<sup>101</sup> *Id.* at 1477.

<sup>102</sup> *Id.* at 1480–81.

<sup>103</sup> *Id.* at 1481.

<sup>104</sup> *See supra* note 23.

<sup>105</sup> *See IRONS, supra* note 76, at 478–79.

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Even conservative Justices have approved concepts that are firmly established because while they might disagree with past rulings, they appreciate that there are benefits from maintaining precedent.<sup>106</sup> In rowing, the rower is sitting facing backwards toward the stern and is only able to see what has passed, trying to measure and gauge what may happen in the future with only the occasional opportunity to take a glance in that direction. As with the rower, courts tend to rely on precedent to steer them in the correct direction.<sup>107</sup>

### CONCLUSION

The preference for moving forward based on review of precedent is an essential part of the common law.<sup>108</sup> Thus, *Grutter*, with its emphasis on promoting diversity, suggests that Title IX will continue to be upheld. The *Grutter* precedent will be of importance, even when a means of obtaining equality in certain cases will be denying equality, moving forward under Title IX. As with the rowing analogy, judicial decisions and literary analogies will guide society as it “beat[s] on, [a] boat[] against the current, borne back ceaselessly into the past.”<sup>109</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> HOLMES, *supra* note 2, at 32.

<sup>108</sup> *Id.*

<sup>109</sup> F. SCOTT FITZGERALD, *THE GREAT GATSBY* 189 (Simon & Schuster 1995) (1925). Although Jay Gatsby could be viewed as yet another male who did not fare well in water sports, the reference here is intended to suggest that *Grutter*'s precedent will sustain the proportionality goals of Title IX, allowing the United States to move forward as a society that benefits from the educational values of diversity.