The Intromissibility of a Paretian Athletic Director

BY LOUIS M. GUENIN

The intercollegiate teams of a college comprise about 500 players. Most other students who enjoy participating in athletics gain satisfaction through intramural and recreational programs. Varsities have recently provoked something of a commotion. It has been alleged that in fielding varsities, most colleges discriminate "on the basis of sex" in violation of Title IX of the Education Amendments of 1972. This sweeping claim is the outcropping of an interpretation lying several layers below in a strata of government regulation. Atop the outcropping has grown a conversational tangle. My purpose here is to expose the weaknesses in those strata and to suggest several interesting considerations about efficient resource allocation, local justice, and social choice that the tangle has hidden. These considerations point the way to a consensus view of equal opportunity.

Biography of a Fallacy

For an understanding of equal opportunity in athletics—a topic on which, contrary to popular

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impression, Title IX is silent— the Department of Education's interpretive apparatus has cranked slowly. After a quarter century, the entire output thereof collapses to a single precept (hereafter "*Q*"): if the ratio of its male to female varsity athletes does not equal the ratio of its male to female undergraduates, a college perpetrates sex discrimination. *Q* assigns to the members of each sex taken as a whole a quota of varsity spots equal to that sex's proportion of the student body.

The relevant 1979 agency policy begins with three purported indicia of discrimination—whether the sex ratios of athletes and students are equal, whether that not obtaining, there occurs continuous expansion of women's athletics, and whether, both of the foregoing not obtaining, there is met every athletic interest of female students. In the policy, the agency does not in fact state whether equality of sex ratios is good or bad. In 1979 many colleges were predominantly male. Equality of the sex ratios could then have masked—as indeed it may still—discrimination against women. Today at least the impact of the policy is clear: it effectively mandates *Q*. This follows because the second two indicia are seldom attainable. The drafters did not anticipate the circumstance in which continual expansion is infeasible for colleges already offering every practicable women's sport. Nor did they recognize that the largesse of the third condition would work discrimination against men unless an athletic program met men's every interest, an infeasible feat from the start. Criticized for the Procrustean

bed onto which it has forced the concept of equal opportunity, the agency has rejoined approvingly that two-thirds of some set of investigated colleges satisfies the third condition. This response neglects whatever discrimination against males is thereby condoned and omits mention of the pressure exerted by the agency to comply with *Q.*

It seems that *Q* is the stepchild of coincidence. On the one hand, the agency's policy is the work of its prosecutorial Office of Civil Rights, which struggled to interpret distributively the notion of "equal athletic opportunity" broached in a 1975 agency regulation. Prosecutors may be adroit at pursuing procedural injustices but are unlikely authors of subtle methods for allocating scarce resources. On the other hand, college athletic directors, for whom it is possible to overestimate the fascination of the *Federal Register*, were not quick to espy the policy. When plaintiffs first brought private suits, the policy was the only governmental interpretation extant. Despite (or because of) its subsequent notoriety, the policy has never been proposed as a federal regulation.

It is easy to see that *Q* defies logic and its legal superiors.

Q deploys the inference that if objectionable discrimination entails disproportionate participation (which is doubtless true), then whenever disproportionate participation occurs, objectionable discrimination occurs. This is the fallacy of affirming the consequent. *Q* finds sex discrimination (for example, against men in theatre and dance) when innocent explanations for dis-

proportionate participation (for example, interests and repertoire) are obvious.

Since 1977 the Supreme Court has rejected inferences of discrimination predicated on comparing some subset's representation in a set of beneficiaries with the subset's representation in a set larger than the set of actual applicants. *Q* is such an inference, as it references not the set of varsity aspirants but the set of undergraduates. An explicit proviso to Title IX also rejects any quota predicated upon the rejected form of inference. That is to say nothing of the disapproving view of quotas in *Bakke v. Regents of the University of California* (1978).

Because more males than females aspire to varsity play, *Q* assures spots for a greater proportion of interested women than men. Colleges operating under *Q* present an artificially higher female than male supply function and thereby set a lower percentile requirement, in sex-relative athletic talent, to qualify for a women's *vis-à-vis* a men's team. Title IX proscribes preferential treatment of either sex. In a 1979 law review article, Professor Ruth Bader Ginsburg observed that it would be anomalous to apply any different standard to a sex-based than to a race-based preference. Insofar as the Fourteenth Amendment prohibits denial to any person of "the equal protection of the laws," race is seldom considered to be a characteristic by which government may treat persons differently. In *Adarand v. Pena* (1995), the Court held that strict scrutiny should be given race-based preferences even if "benign." By Justice Ginsburg's majority opinion in *U. S. v. Virginia*

(1996), the Court similarly ruled that government action in which persons are treated differently according to sex will deny equal protection unless the action bears an "exceedingly persuasive justification." At minimum, that requires that the end constitute an "important governmental objective." *Q* resoundingly fails to satisfy this criterion as *Q* contravenes Title IX's ban on sex discrimination and antiquota proviso.

An occasional report has suggested a judicial consensus upholding *Q*. To the contrary, seven of twelve federal appellate courts have never ruled on Title IX and athletics. In none of four appellate cases other than *Cohen v. Brown University* (1st Cir. 1996) in which the subject surfaced in various guises (all during 1993–94) did a court systematically explore whether the agency policy is valid. In affirming a judgment against Brown for violating *Q*, the First Circuit majority's principal ground was that the court could not revisit whether the agency policy was valid because a different panel of the court had recognized the policy earlier in the case. The panel accorded that recognition in 1993 while indulging the presumption that equal proportions of men and women desire varsity play. Later this presumption collapsed when national and local studies consistently revealed roughly twice as many male as female varsity aspirants. Binding only in New England, *Brown* is unpersuasive elsewhere by dint of a now discredited presumption.

Every major athletic conference falls within the territory of the federal appellate circuits whose precedents foretell invalidation of *Q* or that have yet to consider it. The Ninth Circuit, following *Adarand* and *Virginia*, recently invalidated a statute conferring preferences by race and sex in construction contracts. It later validated a California constitutional amendment proscribing such preferences by public entities, an amendment that the court described as effectively an exegesis of the equal protection clause. Following *Adarand*, the Fifth Circuit in *Hopwood v. Texas* (1996) declared that racial preferences in admissions, though allegedly benign, deny equal protection. Given *Virginia*, it could scarcely reach a different conclusion about *Q*. (Notwithstanding *Hopwood*, the agency advised Texas officials that state institutions may consider race in admissions. An unfortunate unreliability in legal interpretation was confirmed when such advice was contradicted by the solicitor general.) The most recent trial court decision rejects *Brown* and disposes of *Q*, finding *Q* neither necessary nor sufficient to refute a charge of discrimination. Judge Rebecca Doherty observed in *Pederson v. Louisiana State University* (1996) that one must assume variation in interests. *Q* also contravenes the 1975 regulation's direction that colleges heed student interests. *Q* is ripe for invalidation in future suits by or against colleges.

Distortions

The former Soviet Union amused Western observers with inartful factory quotas. When a ministry prescribed output of nails in pounds per period, some factories produced small quantities of huge nails. The similarly artificial impress of *Q* is a universe of athletic teams uncorrelated with student interests. Ignoring demand, *Q* requires, at a typical college whose enrollment is half male and half female, that women constitute half the varsity complement. Inasmuch as a football team alone will comprise more than 100 players, women will usually not occupy half the varsity spots even after a college fields virtually every women's team desired. Most colleges have striven to meet *Q*, adding women's teams to the point that access to them is barely competitive. Meanwhile varsity spots are available for only a small proportion of the men who would like one. In service of *Q*, many men's teams are being curtailed or terminated.

Because of demand for them, an athletic department is not likely to halve its men's opportunities. Instead most will add many more spots for women than they eliminate for men. Inflation and keeping pace with rivals contribute to greater expenditures on athletics, but the financial impact of *Q* and the concomitant bow to commercial intrusions are unmistakable. Pressures from operating roughly twice as many teams as heretofore have induced athletic departments not only to consume more internal funds but to cloak themselves in commercial advertising. It may be argued that, at the government's behest, colleges must value intercollegiate *vis-à-vis* intramural athletics differently than they otherwise would.

Efficiency and Equal Opportunity

As furnished by or within a vol-

untary organization with a specified number of paying members, a public good known as a *club good* is characterized by (a) excludability and (b) partial nonrivalry (congestibility). For example, by selecting members and imposing fees, a golf course restricts access, and, up to the point when crowding occurs, an additional golfer's play does not diminish another's. A college may be viewed as a heterogeneous intergenerational multiproduct club receiving subsidies from taxpayers and grantors and providing many club goods to its tuition-paying student members. Like a publicly supported symphony orchestra, a varsity furnishes the means for exceptional players to perform, others to attend its performances, and still others to gain altruistic satisfaction or bask in its reflected glory. Financing derives from entertainment revenue, tuition, and subsidies. For these one or more club goods, the means of exclusion vary among tryouts, gate attendants, and remoteness. To control congestion, tolls are imposed in the form of talent thresholds and ticket prices. Congestion ranges from considerable, as when only recruits play or the arena is full, to nil, as when a women's roster is incomplete or seats are empty.

An allocation *x* of resources is efficient or "Pareto optimal" if and only if there is no other allocation of which it can be said that at least one person prefers the other and everybody either prefers the other or is indifferent between *x* and the other. Pareto optimality in turn requires that a public good *g* be supplied up to the point that the marginal cost of *g*, relative to other goods,

$$\frac{\partial c}{\partial G} \sum_{i=1}^{n} \frac{\frac{\partial u_i}{\partial c}}{\frac{\partial u_i}{\partial y}} = \frac{-dy_T}{dg}$$

reaches the sum, for all persons, of their marginal willingness to pay for *g* (equal to the quotient of the marginal utility of *g* and the marginal utility of other goods). By equations taking account of congestion, one can determine optimal club good provision, membership size, and tolls. But of course *Q* does not allow a Paretian athletic director to operate.

Nonetheless let us consider what might be done with *Q* dislodged. Let us assume that a college fields any profitable team. Such a team is effectively funded at the gate and by rights fees; its profits subsidize others. Students contribute to a club good whatever shares of a lump sum athletic fee or tuition are directed to it. However we characterize a team that vies for subsidy, we encounter difficulty in ascertaining how much individuals are willing to pay for any public good. One could ask by survey, "What aliquot fee would you be willing to pay or absorb to field a team in the sport of *a*?" Knowing that they can obtain a

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free ride on others' contributions, some may seek to minimize their aliquot share of cost by understating their willingness to pay. If they do not expect to be billed according to their response, others who desire some good may overstate their willingness to pay. Still others may struggle to quantify their views. A device called the Clarke-Groves mechanism induces truthfulness by adjusting aliquot fees so as to tax those who respond untruthfully about willingness to pay. Though ingenious, the device fails to assure Pareto optimality because it may raise more revenue than needed and, lest incentives against truthfulness arise from the prospect of sharing in an excess, an excess cannot be returned. Related research has borne fruit in mechanisms to render truthfulness a dominant strategy, in the design of surveys, and in results about what is "second best" to Pareto optimality.

Teams award varsity spots as they recruit and conduct tryouts. An account of fairness in selection would rehearse precepts familiar from college admissions. We are spared that exercise in detail because a coach's selections, even in our litigious society, are seldom contested. But in general we may insist on impartial consideration. That is not to deny that on occasion, as in defending affirmative action, one may argue that selection is not deserved, that impartial consideration should give way to other goals. By almost any account of equal athletic opportunity for sexes known to differ in athletic ability, one implicitly sets different performance standards for selection by sex. Nevertheless, in allotting varsity spots—presumably

using an account of equal opportunity to select from among the multitude of Pareto optima—we may insist on roughly equal selectivity. A college might offer subsidized varsity spots so that, given demand, the minimum sex-relative percentile in ability necessary to qualify for a women's team approximates that required to join a men's. Lacking measures of ability, a benchmark might be competitive access, the number of roster positions on subsidized varsities divided by the number of aspirants to subsidized varsities, computed separately by sex. Another survey question might be "Assuming equal competitive access for men and women, what number of varsity spots, if any, would you shift between the extant men's and women's programs?"

An athletic director could also conduct a purely ordinal survey in which students might rank men's athletics, women's athletics, and other uses for an athletics subsidy. (The results could be rendered single-caved and compilable notwithstanding Arrow's theorem by stipulating that "other" may not be voted first, by allowing no ties on the ballots, and if the number of voters should be even, by discarding a random ballot.) Or there could be presented for approval voting a number of triples presenting different allotments for those three alternatives. For an extant team, one would not overlook the obvious, the turnout for the team and in intramurals.

By a local-justice analogue of a principle formulated by John Rawls, one way to select among Pareto optima is to permit only those inequalities beneficial to the overall welfare, as viewed by a majority

of its members, of the relevant social position that the inequality disfavors. Majorities of men and women may analyze no differently the importance of demand. An agency regulation requires that men's and women's housing be apportioned to demand, but inexplicably does not so provide for athletics. Rather than undergraduate women importuning more teams, one more often hears lawyers who, remote from any campus and dependent for a livelihood on Title IX disputes, complain of participation ratios. At a given college, a majority of women may prefer to trade an increased athletics budget for better housing, improved laboratory facilities, or lower tuition. In such cases, the status quo is not Pareto optimal.

Some suggest that if only a college were to reduce its football program, it might tolerate Q. Football rosters have already been pared—to the extent that, given risk of injury, teams now scrimmage less frequently and must play freshmen. Expense reductions risk a disproportionate effect: were a savings to sacrifice advantage in recruiting or preparation and a self-sustaining team were to lose another game per season, appear less often on television, or receive a less desirable bowl placement, the revenue loss could dwarf the savings, thereby hurting all subsidized teams. Tennis teams traveling by van have long understood why football teams travel by chartered plane. By accidents of the entertainment market, profitable teams exemplify inequalities justifiable by the Rawlsian analogue noted above.

The theory of club goods accommodates the fact that

some clubs pay members to join. For a major athletic program, athletic scholarships sound in the millions of dollars. An agency regulation mandates equality of female and male scholarship expenditures per athlete. Recently it has been argued that NCAA maxima by sport allow more full scholarships in the aggregate for men than for women and thereby drive expenditures per female athlete below those per male. This conjures a false conflict. For allocative fairness, the relevant quantity for comparison is *subsidized* expense per athlete. Profitable teams do not draw from, but augment, the subsidy pie. Just this view was adopted in interpreting an antidiscrimination law in a 1987 decision by the Supreme Court of Washington. The villain in any dilution of expenditures per female athlete is Q. Under Q's artificial impress, because of the ineluctably large size of a football roster more women's teams must be contrived even if demand for them is lean or exhausted.

Colleges embed many other inequalities traceable to external influences. Professors of physics are often paid less than professors of law, but not, it seems safe to say, because it is thought that lawyers are smarter and more deserving. In recently clarifying its view of what would constitute sex discrimination in the salaries of male and female coaches, the Equal Employment Opportunity Commission affirmed the appropriateness of paying higher salaries to coaches of teams that relative to others produce more revenue (even if they are not self-sustaining), generate "greater spectator attendance and media demands," or comprise more athletes and assistant coaches. The EEOC also adumbrated the idea that one team's revenue production may be less than another's because the former has been slighted in its expense budget. But it acknowledged that "many variables" of the entertainment market "are not within an institution's direct control." In the United States, only three college sports (football, basketball, and hockey) draw significant audiences.

Within the faculties of colleges and universities, society's font of ideas on justice and efficiency, reposes the expertise to guide a Paretian athletic director. All that seems lacking is the freedom to operate. ∎