SEX DISCRIMINATION IN ATHLETICS: A REVIEW OF TWO DECADES OF ACCOMPLISHMENTS AND DEFEATS

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I. INTRODUCTION

As women's athletics enters into a mid-life growth pattern, following an initial explosion in women's intercollegiate programs in the 1970's and early 1980's, it faces great uncertainties. The absorption of the defunct Association of Intercollegiate Athletics for Women (AIAW) by the NCAA,[1] the effects of the Supreme Court's *Grove City College v. Bell* decision[2] on enforcement of Title IX in athletics,[3] the loss of football television revenues by the NCAA,[4]

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1. The National Collegiate Athletic Association (NCAA) is a private organization made up of a voluntary membership of approximately 800 four-year colleges and universities located throughout the United States. Member schools agree to be bound by NCAA rules and regulations and are obligated to administer their athletic programs in accordance with NCAA rules. Over half of the NCAA's members are state-subsidized universities, and most receive some form of federal financial assistance. *See* 1986-87 NCAA Manual, NCAA Publications (Mission, Kansas 1986); *See also* Association For Intercollegiate Athletics For Women v. NCAA, 558 F. Supp. 487 (D.D.C. 1983), *aff'd*, 735 F.2d 577 (D.C. Cir. 1984).

2. *See* Grove City College v. Harris, 500 F. Supp. 253 (W.D. Pa. 1980), *rev'd* Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982), *aff'd* 465 U.S. 555 (1984).

3. *See Title IX Not a Dead Issue, But It's Mellowing*, NCAA News, July 14, 1982, at 1, 3, col. 1, 1; *NCAA Attorney Discusses Changes in Title IX*, NCAA News, July 28, 1982, at 3, col. 1 (the two articles cited above are reprints of a speech entitled "Is Title IX a Dead Issue?" presented by Attorney Mr. William D. Kramer at the annual workshop of the College Sports Information Directors of America in Dallas, Texas on June 29, 1982); *After Grove City*, Athletic Business, May, 1985, at 10, col. 1.

4. NCAA v. Bd. of Regents of Oklahoma and Univ. of Georgia Athletic Ass'n, 546 F. Supp. 1276 (W.D. Okla. 1982), *modified* 707 F.2d 1147 (10th Cir. 1984), *aff'd* 468 U.S. 85

and its potential effect on the funding of non-revenue producing sports championships,[5] and the failure to ratify the Equal Rights Amendment to the federal Constitution[6] all pose serious questions to those individuals concerned with continued development of women's athletic programs. With little time to reflect on how far and how fast they have come with their programs,[7] women's athletic program administrators and the legal experts who represent their interests face new and increasingly difficult problems to solve.[8]

Many indicators, including increases in participation, specta-

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(1984); *See also Court Voids NCAA's TV Contracts, But Joy Doesn't Reign Supreme,* Washington Post, June 26, 1984, at C7; *College Football Set Free,* Boston Globe, June 26, 1984, at 45; *Fewer Appearances for Smaller Schools,* USA Today, June 28, 1984, at C2; *Ruling is Expected to Increase Number, Variety of College Football Teams on TV,* Wall St. J., June 28, 1984, at 4; *NCAA Pacts to Televise College Football Violate Antitrust Law, High Court Rules,* Wall St. J., June 28, 1984, at 4; *Fat Cats Win Again; Amateurs The Losers,* Washington Times, June 28, 1984, at B1; Barbash, *Supreme Court Breaks NCAA Hold on Televised College Football Games,* Washington Post, June 28, 1984, at 1; *NCAA's Reeling, But Don't Expect a KO Any Time Soon,* (AP Wireservice), Jacksonville Times-Union and Journal, July 1, 1984, at D13; *NCAA Setback on TV Poses Threat of Disorder,* N.Y. Times, July 15, 1984, at 56; *College Football TV in Disarray as Groups Scramble for Contracts,* NCAA News, July 18, 1984, at 1; *Supreme Court Rules NCAA's Limits on TV Football Games Are Illegal,* Chronicle of Higher Educ., July 25 1984, at 1; *Uncertain Times Ahead for NCAA,* USA Today, September 17, 1984, at C1; *Big TV Revenues Now Tougher to Get, Most College Football Powers Discover,* Chronicle of Higher Educ., January 9, 1985, at 37; *Financial Report in the Black, But Budget Restraints Urged,* NCAA News, January 9, 1985, at 1.

5. Wong and Ensor, *The Impact of the U.S. Supreme Court's Antitrust Ruling on College Football,* 3 Entertainment & Sports Law., 3 (Winter 1985).

6. For information on the Equal Rights Amendment, *see,* the following: *The Equal Rights Amendment, Hearings Before the Senate Subcomm. on Constitutional Amendments,* 91st Cong., 2d Sess. (1970); *Equal Rights 1970, Hearings Before the Senate Comm. on the Judiciary,* 91st Cong., 2d Sess. (1970); S. Rep. No. 92-689, Senate Comm. on the Judiciary, 92d Cong., 2d Sess. (1972); *Equal Rights for Men and Women, Hearings Before Subcomm. No. 4. of the House Judiciary Comm.,* 92d Cong., 1st Sess. (1971); H.R. Rep. No. 92-259, House Judiciary Comm., 92d Cong., 1st Sess. (1971). *See also Discrimination Against Women, Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor,* 91st Cong., 2d Sess. (1970). *See also,* DAVIDSON, GINSBURG AND KAY, SEX-BASED DISCRIMINATION, (1974); *ERA Dies,* Time, July 5, 1982 at 29; *What Killed Equal Rights?,* Time, July 12, 1982 at 32-33.

7. *See generally* Visser, Lesley, *They're Playing To Rave Notices,* Boston Globe, Nov. 11, 1985, at 49, 64, col. 1, 1.

8. *See Women's Progress in Athletics May Be Slowing, Leaders Fear,* Chronicle of Higher Educ., November 6, 1983, at 23, 26, col. 2, 1; *see generally* TOKARZ, KAREN L., *Women, Sports, and the Law: A Comprehensive Research Guide to Sex Discrimination in Sports,* (August, 1986), and Tokarz, *Separate but Unequal Eductional Sports Programs: The Need For a New Theory of Equality,* 1 BERKELEY WOMEN'S L.J. 1 (Fall 1985).

tors, and local and national media coverage, point to growth in women's athletics.[9] The development of athletic opportunity for women may be attributed, to a large extent, to Title IX of the Education Amendments of 1972,[10] a federal statute which prohibits sex discrimination. Before Title IX, women comprised only fifteen percent of the total number of athletic participants in college.[11] By 1984, thirty and eight-tenths percent of all participants in NCAA intercollegiate athletics were women.[12]

As compiled by the NCAA, the average number of women's varsity sports operated in a member institution's athletic program had risen from 5.61 in 1977 to 6.9 in 1984, while aggregate expenditures for women's intercollegiate athletics have increased from $24.7 million in 1977 to $116 million in 1981.[13] The AIAW studied the relative amounts of financial aid given to male and female athletes from 1973 to 1982. The AIAW estimated that for 1973-74, NCAA Division I schools spent an average of $1.2 million on men's athletic programs but only $27,000 in women's programs.[14] By the 1981-82 academic year, the institutions expended an average of $1.7 million on men and $400,000 on women.[15] This result was contrary to the predictions made by many opponents of Title IX, who generally thought increased money spent on women's programs would decrease the amount of money provided for men's programs.[16]

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9. *See generally* Summary, Miller Lite Report on Women in Sports, Milwaukee, WI (December 1985).

10. P.L. 93-380, 88 Stat. 484, (1974); *see generally* Alfano, *Coach's Career Reflects Rise in Women's Sports,* N.Y. Times, Dec. 16, 1985, at C6, col. 1; Alfano, *Pioneer Immaculata Recalls a Simpler Era,* N.Y. Times, Dec. 17, 1985, at B17, B18, col. 1. *See also Many Women Link Anti-Sex-Bias Law to Outstanding Olympic Performances,* Chronicle of Higher Educ., August 29, 1984, at 31, 32, col. 2, 1.

11. Fields, *Title IX at IX,* Chronicle of Higher Educ., June 23, 1982, at 1, 12, col. 2, 1.

12. *Id.*

13. *See Women's Programs List Legislative Priorities,* NCAA News, June 6, 1984, at 1, 12, col. 1, 1.

14. *Supra* note 11, at 1.

15. *Supra* note 11, at 12. The average women's athletic budget for a Big Ten Conference school in 1974 was $3,500. In 1977-78 that amount had increased on an institution by institution basis to anywhere between $250,000 to $750,000 per year. *Supra* note 11, at 1.

16. *See* Koppett, *Moaning Colleges Map Defenses Against Title IX,* Sporting News, January 27, 1979, at 39, col. 1; *Hot Issues on NCAA Agenda* Sporting News, January 31, 1979, at 19, col. 1; Neinas, *Title IX Now a Money Issue,* NCAA News, September 30, 1979, at 2, col. 3. *See also,* Crowe, *NCAA Members Increase Budgets by 75 Pct. in 4 Years, Study Finds,* Chronicle of Higher Educ., Sept. 22, 1982, at 9, col. 2.

Participation in and funding of women's athletics have increased for many reasons. One major factor is the drastic change in society's attitudes toward women, including women's own perception about their athletic capabilities and participation.[17] These attitudinal changes have helped increase athletic opportunities for women.[18] Second, the NCAA has repeatedly indicated it is committed to equal athletic opportunity without regard to sex.[19] Despite its late entry into providing athletic opportunities for women, the NCAA has made significant strides in doing so since 1981.[20] In 1982-83, its subsidy of thirty women's championships was $2.2 million and exceeded its support of 28 men's championships that were nonrevenue producing by eight and four-tenths percent.[21] Within its ranks, however, there is disagreement concerning the direction the association should take following the dissolution of the AIAW and NCAA's assumption of control over women's intercollegiate athletics.[22]

For instance, at a May 1984 meeting of administrators of NCAA women's athletic programs, representatives present requested the meeting's minutes indicate a show of support for House Rule 5490.[23] This civil rights legislation, with Senate Bill 2568[24] was proposed as a response to the *Grove City College* deci-

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17. *Supra* note 9.

18. *See The Changing Face of Girls' Sports* Boston Globe, March 11, 1980, at 48, col. 1.

19. *See NCAA Files Statement Regarding Civil Rights Legislation*, NCAA News, June 6, 1984, at 1, 3, col. 2; *Association Files Title IX Comments*, NCAA News, March 8, 1979, at 4, 7, col. 1, 1.

20. *See, e.g. Association Expands Staff For Women's Programs*, NCAA News, Sept. 13, 1982, at 1, 11, col. 2, 3.

21. *Supra* note 11.

22. *See* Goodman, *Women's AD's Worried*, Boston Globe, February 29, 1984; at 61, 65, col. 6, 1.

23. H.R. 5490, *A Bill to clarify the application of Title IX of the Education Amendment of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title VI of the Civil Rights Act of 1964*, 98th Cong., 2d Sess., April 12, 1984, *see also Civil Rights Act of 1984*, House Report 98-829, part 1 and 2, 98th Cong. 2d Sess. The report noted in part that, "The purpose of this legislation is simple and straight-forward: to reaffirm pre-*Grove City College* judicial and enforcement practices which provided for broad coverage of these antidiscrimination provisions." *Id.* at 1.

24. S. 2568, *To clarify the application of Title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title VI of the Civil Rights Act of 1964*, 98th Cong., 2d Sess., April 12, 1984.

sion,[25] which ruled that Title IX applies only to the individual programs receiving federal funding at an institution of higher education and not to an entire institution. The proposed bills that would have ensured athletic programs still fell within the parameters of Title IX.[26] Despite the representative's request, the NCAA filed a statement supporting the objectives of House Rule 5490 but objecting to the bill's construction.[27] In general, the NCAA indicated[28] the impact of *Grove City College* was overstated, the bill's authority would be overinclusive, and the demands of inspection and enforcement would be too burdensome and costly.[29]

Beyond Title IX concerns, athletic administrators are increasingly worried about continued funding of women's intercollegiate programs.[30] Some worry the NCAA made commitments to attract women's athletic programs into the Association in the early 1980's it will find hard to maintain.[31] Especially in light of the reduced

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25. *Supra* note 2; *See also Shelving of Civil Rights Bill Leaves Women's Athletics in Lurch*, Wall St. J., November 9, 1984, at 14, col. 1; Weir, *A Threat to Women in Sports*, USA Today, November 3, 1983, at C1, 2, col. 3, 1.

26. Legislation to overturn the Supreme Court's *Grove City College* decision failed to pass through Congress in 1984. The House of Representatives had passed the legislation (H.R. 5490) by a vote of 375-32 in June 1984. However, the Senate version of the legislation (S. 2568) failed to gain passage. Similar legislation was introduced in 1985. *See Bill to Overturn Grove City Rule Killed in Senate*, Chronicle of Higher Educ., October 10, 1984, at 1, 22, col. 2, 4, 1; *Bill to Reverse High Court's* Grove City *Decision Gets Bipartisan Support*, Chronicle of Higher Educ., April 18, 1984, at 21, col. 1; *House Passes Civil Rights Bill*, NCAA News, July 4, 1984, at 7; *House Backs Bill to Counter Supreme Court Ruling in Grove City Case; and Senate Unit Postpones Action*, Chronicle of Higher Educ., July 5, 1984, at 13.

27. *Supra* note 19.

28. *Supra* note 19.

29. In response to the Supreme Court's *Grove City College* decision, the Women's Sports Foundation instituted a letter-writing campaign to have its membership influence passage of Senate bill 2568. The foundation stressed the importance of Title IX in the development of women's intercollegiate athletics and its continued need for future progress. *See Title IX Needs You*, Women's Sports, September 1984, at 49, col. 1.

30. Indicative of the financial concerns of athletic administrators is that since the emergence of the NCAA as the dominant organization in both men's and women's collegiate sports, there has been a tendency toward combining championships (for example, indoor track and skiing) to cut costs. *See Intercollegiate Skiing Halts Its Downhill Slide—NCAA Combines Men's and Women's Championships to Make Sure Enough Will Be Competing*, Chronicle of Higher Educ., March 9, 1983, at 18, col. 1.

31. However, at the 1985 NCAA Convention, Division 1A institutions (105 major football playing institutions) voted to require themselves to each sponsor at least eight women's and eight men's sports programs by the 1986-87 academic year. The vote on the requirement was 74 to 37. Approximately 30 Division 1A member institutions did not meet the

funding from college football television contracts due to the *Board of Regents of University of Oklahoma v. NCAA*.[32] For instance, at the May 1984 meeting of NCAA women's athletic program administrators, John Toner, who was then president of the NCAA and who chaired the session, stated:

> It seems to many who are responsible for generating the dollars to pay intercollegiate athletics costs that there must be some correlation between added program costs and increased revenues to support those costs. It seems to me that it is time for women leaders to concentrate on how they can stimulate and enlarge the income from women's programs.[33]

As women reach the competitive level of men's athletics, they also begin to face the same pressures to succeed, market, and control corruption in their programs. Merrily Dean Baker, University of Minnesota women's athletic director notes: "The potential for corruption is there and may already by employed in some places. I think our greatest challenge will be to avoid the pitfalls of the men."[34] The NCAA's director of enforcement David Berst notes further "We already have the worst example in men's programs. We hope that women conclude it's intolerable to end up in this same situation."[35]

Another concern is that while participants[36] and fans[37] interest in women's intercollegiate athletics continues to grow in the 1980's, there is a steady erosion in the number of women holding positions as administrators, and especially, coaches.[38] From 1973 to 1984 the

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qualifications at the time of the vote and faced being dropped from the division and being ineligible for championships in 1986. *See Major Football-Playing Universities Must Field Teams in at Least 8 Women's Sports by 1986, New Rule Says*, Chronicle of Higher Educ., January 30, 1985, at 29, 31, col. 2, 1. Significantly, at the Fifth Special NCAA Convention during the summer 1985, the Division 1A membership reduced the above requirements to six women's sports in 1986, and seven women's sports in 1987. *See* 1986-87 NCAA Manual, bylaw 11-1(g)-(1), at 141.

32. 546 F. Supp. 1276.

33. *Supra* note 13.

34. *Id. See also The Fine Art of Recruiting Superstars for Big-Time Women's Basketball*, Chronicle of Higher Educ., Mar. 30, 1983 at 21, col. 2; and *Recruiting Now Favors the Rich*, Boston Globe, May 5, 1983, at 67.

35. *Id.*

36. *Supra* note 9.

37. *Supra* note 9.

38. Alfano, *Signs of Problems Amid the Progress*, N.Y. Times, Dec. 15, 1985, sec. 5, at 1, 6, col. 1.

percentage of men coaching women's sports on the NCAA's division I level rose from ten percent to fifty and one-tenth percent.[39] While this problem may be in part a reflection of the limited experience of women in the coaching ranks,[40] some women also contest it is because they have a limited role in the governing procedures of the NCAA.[41]

As women's athletics faces these challenges, it may no longer rely on once available legal options. Title IX and other legislation, initially, were vanguards of changing societal attitudes, as well as legal factors, that helped bring about substantial change in sex discrimination in the United States. Women brought complaints about unequal treatment to court and, even more importantly, were often successful in their litigation. Recently, however, a number of setbacks have besieged the women's movement. Failure to enact the Equal Rights Amendment, and limitations the United States Supreme Court imposed on Title enforcement have caused concern among promoters of women's athletics.[42] A direct result of the *Grove City College* decision was the immediate termination of

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39. *Id. See also* Acosta and Carpenter, *Women in Athletics—A Status Report*, Brooklyn College (1985); *Women's Coaching Opportunities Dwindling, Report Says*, NCAA News, Oct. 14, 1985, at 3, col. 1.

40. The lack of professional sport leagues for women, especially in basketball, may contribute to the lack of experienced women head coaches, because in part it provides no feeder system by which talented players may go through a transition from player to coach. *See generally Miller Time in Pros? Not Likely*, N.Y. Daily News, Feb. 2, 1986, at 58, col. 1; *New League for Women*, N.Y. Times, Oct. 28, 1984, sec. 5, at 4; and, *Proud Pioneers*, Boston Herald, Mar. 9, 1979, at 12.

41. Donna DeVarona, President of the Women's Sports Foundation and 1964 Olympic Gold Medalist, has noted that the loss of the Title IX is significant:

> I think everyone knows that women's athletics made tremendous strides under Title IX. But I don't think too many people realize that Title IX is no longer effective for us. They've taken that away, and if we just stand by, they'll take away a lot more.
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> . . . Right now there is no visible pressure on athletic administrators and women have no recourse. Title IX did not come with dollar requirements, but there was a heavy understanding that if schools discriminated, they might lose federal funding. Without that, who knows what they'll do?
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> . . . Unfortunately, people do not always do the right things voluntarily.

See Dodds, *Title IX In With a Fury, Exits to Anger of Women*, L.A. Times, Nov. 5, 1985, at E2, col. 2.

42. Judith Holland, associate athletic director at UCLA, has noted that: "Title IX had a big influence . . . you had to expect that sooner or later it would die out or be ignored . . . our history is replete with issues that are big one day and put aside the next." *See* Dodds, *supra* note 41.

twenty-three Title IX investigations.[43] At the forefront of concerns facing women's athletics in the 1980's are the retrenchment of programs so instrumental in the progress achieved in women's athletics, the absence of an organization such as the AIAW to champion the movement's specific issues, and potential funding problems.[44]

This Article attempts to distinguish among the various legal theories and principles utilized in sex discrimination cases over the last two decades and identify those that are currently most viable.[45] The legal principles discussed include equal protection, Title IX, and state equal rights amendments.[46] The following section examines theories in detail, with particular concern given to courts' applications of legal precedent in sports related litigation.

In section three the authors review Title IX's development as a potent weapon for those who sought expansion of playing opportunities for women. The section addresses standing, scope and applicability of Title IX, and Office of Civil Rights Title IX compliance reviews. Section four examines sex discrimination suits' impact on student-athletes with emphasis on the difference courts have given to suits involving "contact" and "non-contact" sports. Psychological, physiological, and competitive arguments are reviewed. Section five focuses on sex discrimination in athletic em-

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43. *See 23 Cases on Civil Rights Closed After Court Rules*, N.Y. Times, June 3, 1984, at 36, col. 1.

44. For further information, *see also* Carpenter, *Title IX: After Grove City*, Sports and Law: Contemporary Issues, 48 (1985).

45. For further information on sex discrimination in athletics, *see* BERRY AND WONG, LAW AND BUSINESS OF THE SPORTS INDUSTRIES, (1986); and, R. YASSER, SPORTS LAW, (1985).

46. For further information on sex discrimination in athletics, *see Sipleins & Popovich, Sex Equity in the Public School*, 12 URB. LAW. 509 (1980); Ingram & Bellaver, *Sex Discrimination in Park District Athletic Programs*, 64 WOMEN'S L.J. 33 (Winter 1978); Comment, *A Litigation Strategy on Behalf of the Outstanding High School Female Athlete*, 8 GOLDEN GATE L. REV. 423 (1979); Comment, *The Female High School Athlete and Interscholastic Sports*, 4 JOURNAL OF LAW AND ED. 285 (1975); Comment, *Sex Discrimination in Interscholastic High School Athletics*, 25 SYRACUSE L. REV. 535 (SPRING 1974); Comment, *Sex Discrimination in Athletics*, 21 VILL. L. REV. 876 (October, 1976); Note, *Legal Problems of Sex Discrimination*, 15 Alberta L. Rev. 122 (1977); Note, *Sex Discrimination in High School Athletics*, 6 IND. L. REV. 661 (1973); Note, *Sex Discrimination and Intercollegiate Athletics*, 61 IOWA L. REV. 420 (December 1975); Note, *Sex Discrimination in High School Athletics: An Examination of Applicable Legal Doctrines*, 66 MINN. L. REV. 1115 (1982); Note, *Sex Discriminination in High School Athletics*, 57 MINN. L. REV. 339 (1972); Note, *Title IX: Women's Intercollegiate in Limbo*, 40 WASH. & LEE L. REV. 297 (1983); Note, *Emergent Law of Women and Amateur Sports: Recent Developments*, 28 WAYNE L. REV. 1701 (1982).

ployment. This examines sex based bias in the hiring of coaches and personnel in related athletic positions such as game officials and media access to locker rooms.

II. LEGAL PRINCIPLES

Sex discrimination in athletics has been challenged using a variety of legal arguments, including state equal rights amendments[47] and the Equal Pay Act,[48] but have relied mainly upon equal protection laws or Title IX.[49]Sharpe, 347 U.S 497 (1954).

A state equal rights amendment can also be used to attack alleged sex discrimination; however, not all states have passed such legislation. The fourth argument concerns two separate statutes: the Equal Pay Act and Title VII of the Civil Rights Act of 1964.[50] Although neither statute was passed to deal specifically with sex discrimination, both have been used to challenge employment-related discrimination.

Equal protection arguments are based on the fifth and fourteenth amendments to the United States Constitution, which guarantees equal protection of the law to all persons found within the United States.[51] Title IX is a relatively recent method of attacking sex discrimination. Although the original legislation was passed in 1972, implementation was delayed for the promulgation of regulations and policy interpretations.[52] Even with the delays, many have claimed the rise in participation by women in athletics was directly related to the passage of Title IX.[53]

Regardless of whether a plaintiff employs an equal protection or Title IX approach, he or she usually contends there is a fundamental inequality. When the court attempts to deal with these

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47. *See supra* note 6.

48. Equal Pay Act of 1963, 29 U.S.C. § 206 (1976).

49. *See supra* note 10.

50. *Supra* note 48.

51. U.S. CONST. amend. XIV, § 1. The fourteenth amendment provides, in relevant part, that no state shall "deny any person within its jurisdiction the equal protection of the laws." This prohibition on the states applies to the federal government through the process of "reverse" incorporation of the fourteenth amendment into the fifth amendment. *See, e.g.* Bolling v. Sharpe, 347 U.S 497 (1954).

52. *See* Comment, *HEW's Final "Policy Interpretation" of Title IX and Intercollegiate Athletics*, 6 J.C. & U.L. 345 (1980).

53. *Supra* note 41.

claims, it considers three factors. The first is whether the sport from which women are excluded is one involving physical contact. Total exclusion from all sports or from any non-contact sport is considered a violation of equal educational opportunity. The second factor the courts consider is the quality and quantity of opportunities available to each sex as well as the amount of money spent on equipment, the type of coaches provided, and the access to school-owned facilities. The third factor the courts consider is age and level of competition involved in the dispute. The younger the athletes involved, the fewer the actual physiological differences that exist. Without demonstrable physiological differences, the justification of inherent biological differences as a rational basis for the exclusion of one sex from athletic participation is negated.

For instance, in *Pavey v. University of Alaska*,[54] female student athletes brought against the University of Alaska for discrimination in the operation of its athletic program in violation of Title IX, and the fourteenth amendment's due process and equal protection clauses. The University filed a third party suit against the NCAA and the AIAW that charged the two association's inconsistent rules required the institution to discriminate in its athletic program in violation of federal laws. The NCAA and AIAW moved for dismissal of the suit. The district court denied the motions. It held the University's suit stated a valid claim, the University was reasonably trying to avoid a confrontation with the two association's rules that could cause a disruption in the school's student athletes' participation in intercollegiate athletics, and the facial neutrality of the association's rules did not negate the University's claim that those rules, in combined effect, forced the institution to discriminate in its athletic program.[55]

A. Equal Protection

Historically, sex has been an acceptable category for classifying persons for different benefits and burdens under any given law.

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54. 490 F. Supp. 1011 (D. Alaska 1980).

55. For further information on *Pavey* and like cases involving intercollegiate athletics, *see Suits Focus on Men's, Women's Rules Differences*, NCAA News, March 31, 1980, at 3, col. 1; *Courts Decide in Three Rules Difference Cases*, NCAA News, June 15, 1980, at 1, 3, col. 1, 1.

In 1872, the United States Supreme Court, in *Bradwell v State*,[56] noted "The paramount destiny and mission of a woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."[57] In 1908, the Supreme Court stated[58] that a classification based on gender was constitutionally valid. It was not considered to be a violation of equal protection, whether based on actual or imagined physical differences between men and women. Modern equal protection theories have now gained preeminence, and the use of gender to classify persons is considered less acceptable.

Under traditional equal protection analysis, the legislative gender-based classification must be sustained unless it is found patently arbitrary and/or bears absolutely no rational relationship to a legitimate governmental interest.[59] Under this traditional rational basis analysis, overturning discriminatory laws is extremely difficult. In sex discrimination sports litigation this implies women may be excluded from athletic participation upon a showing of a rational reason for their exclusion and by providing comparable options for those who are excluded. The rational reason must be factually supported and not be based on mere presumptions about the relative physical and athletic capabilities of women and men. It remains, however, a relatively easy standard for the defendant to meet as it invokes only the lowest standard of scrutiny by the court.

The courts have not found sex to be a suspect class, which would elevate it to the status held by race, national origin, and alienage. If the courts were to decide sex is a suspect class, it would make all rules that classify on the basis of gender subject to strict

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56. 83 U.S. (16 Wall) 130 (1873).

57. *Id.* at 141.

58. Muller v. Oregon, 208 U.S. 412 (1908).

59. In Ridgefield Women's Political Caucus, Inc. v. Fossi, 458 F. Supp. 117 (D. Conn. 1978), plaintiff girls and taxpayer parents brought claims against town selectmen seeking to enjoin the town from offering public property at a nominal price to a private organization that restricted membership to boys. The district court found for the plaintiffs, ruling that the defendants had no right to offer land at less than fair value to the private organization in question as long as this organization restricted membership and the town failed to offer to girls recreational opportunities comparable or equivalent to those provided by the organization in question. Until such services are offered, any conveyance of the property at a nominal fee would constitute governmental support of sex discrimination in violation of the equal protection clause of the fourteenth amendment.

scrutiny analysis. Under this standard, the rule makers would have to prove there are compelling reasons for the classification and there is no less restrictive alternative. They would also have to prove the classification was directly related to the constitutional purpose of the legislation and this purpose could not have been achieved by any less objectionable means. Many rules and laws would fail to meet this high standard, and hence would be judged to be discriminatory.

Some courts have moved away from the broad interpretation of the rational relationship test by increasing the burden on the defendant. This intermediate test, between the rational basis and strict scrutiny test, was established by the United States Supreme Court in *Reed v. Reed*.[60] The court established therein that sex-based classifications "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[61] Mere preferences or assumptions concerning the ability of one sex to perform adequately are not acceptable bases for a discriminatory classification. The United States Supreme Court again addressed this issue in *Frontiero v. Richardson*.[62] In a plurality opinion, Justice Brennan reasoned that ". . . although efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency'. . . there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality."[63] A factual basis for any gender classification must exist. This intermediate test is still one step away from a declaration by the courts that sex is an inherently suspect class.

Because no majority opinion has applied a strict scrutiny analysis in a case challenging a gender-based classification, courts may opt to apply either a rational basis test or the intermediate standard of review. The intermediate standard requires more than an easily achieved rational relationship but less than a strict scrutiny standard for compliance. The class must bear a substantial rela-

60. 404 U.S. 71 (1971).
61. *Id.* at 76.
62. 411 U.S. 677 (1973).
63. *Id.* at 690.

tionship between a classification and a law's purpose must now be founded on fact, not on general legislative views of the relative strengths and/or abilities of the two sexes.

Three key elements commonly are considered in an equal protection analysis of athletic discrimination cases. The first is state action which must be sufficiently present, before any claim can be successfully litigated. Without it an equal protection argument under the United States Constitution does not apply. This factor has significant ramifications in cases in which the athletic activity is conducted outside the auspices of a state or municipal entity or a public educational institution. One example would be a youth sport league, such as little league baseball.[64]

The second factor is whether the sport involves physical contact. In contact sports the courts have allowed separate men's and women's teams. This "separate but equal" doctrine is based on considerations of the physical health and safety of the participants. When separate teams do not exist, however, both sexes may have an opportunity to try out and meet the necessary physical requirements on an individual basis. A complete ban on participation of one sex will not be upheld if based on generalizations about characteristics of an entire sex rather than on a reasonable consideration of individual characteristics.[65]

The third factor to be considered is whether both sexes have equal opportunities to participate in athletic competition. This "equal opportunity" usually requires the existence of completely separate teams or an opportunity to try out for the one available team. If there are separate teams, however, it is permissible for the governing organization to prohibit co-ed participation. Unlike classifications based on race, when gender is a determining factor "separate but equal" doctrines may be acceptable. The issue then may become whether the teams are indeed equal.[66] Other factors that have been taken into consideration are the age of the participant and the level of the competition. Physical differences between boys

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64. *See e.g.*, King v. Little League Baseball, Inc., 505 F.2d 264 (6th Cir. 1974) and *infra* note 141.

65. *See, e.g.*, Clinton v. Nagy, 411 F. Supp. 1396 (N.D. Ohio 1974).

66. *See, e.g.*, O'Connor v. Bd. of Educ. of School Dist. No. 23, 645 F.2d 578 (7th Cir. 1981); *cert. denied.*, 454 U.S. 1084, (1981); Ritacco v. Norwin School Dist., 361 F. Supp. 930 (W.D. Pa. 1973).

and girls below the age of twelve are minimal. Therefore, health and safety considerations that might be applicable to older athletes have not constituted legitimate reasons for restricting young athletes' access to participation.[67]

The legal analysis of any particular case, however, will depend on the philosophy of the court and the particular factual circumstances presented.[68] Some courts are reluctant to intervene in discretionary decisions made by an association governing athletic events unless there are obvious abuses.[69] Other courts have been reluctant to intervene in discretionary decisions because they do not believe they have the administrative knowledge or time necessary to oversee the administration of sport programs effectively.

Historically, challenging sex discrimination based on the equal protection laws has not been totally effective. The constitutional standard of rational relationship has been a very difficult one for a plaintiff to overcome. The use of the intermediate standard, a more stringent test, has led to some of the recent successful challenges of alleged sex discrimination. However, the plurality decision of the United States Supreme Court in *Frontiero v. Richardson*[70] lessens the impact of the intermediate standard. A strong decision by the court to apply the intermediate standard or find that sex should be included as a suspect category would greatly assist plaintiffs in attacking alleged sex discrimination.

Another disadvantage of the equal protection laws is that they constitute a private remedy. Therefore, the plaintiff must be in a position to absorb the costs of litigation. This reduces the number of complaints filed and encourages settlement before final resolution of a number of equal protection claims.[71]

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67. *See, e.g.*, Bednar v. Nebraska School Activities Ass'n, 531 F.2d 922 (8th Cir. 1976).

68. *See, e.g.*, Brenden v. Indep. School Dist. 742, 342 F. Supp. 1224 (D. Minn. 1972), *aff'd*, 477 F.2d 1292 (8th Cir. 1973).

69. *See, e.g.*, for situations where the courts decided to review the discretionary decisions of different types of amateur athletic associations, Kentucky High School Athletic Ass'n v. Hopkins County Bd. of Educ., 552 S.W.2d 685 (Ky. Ct. App. 1977); Missouri *ex rel* Nat'l Junior College Athletic Ass'n v. Luten, 492 S.W.2d 404 (Mo. Ct. App. 1973); Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976) *aff'd* 570 F.2d 320 (10th Cir. 1978).

70. 411 U.S. 677.

71. For further information on athletic participation and equal protection, *see* Note, *Constitutional Law-Equal Protection-Sex Discrimination in Secondary School Athletics*, 46 TENN. L. REV. 222 (Fall 1978).

III. TITLE IX

Section 901(a) of Title IX of the Education Amendments of 1972 provides: "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. . . ."[72]

Title IX became law on July 1, 1972.[73] It specifically and clearly recognizes the problems of sex discrimination and forbids such discrimination in any program, organization, or agency that receives federal funds. A long process of citizen involvement preceded the first set of regulations. In July 1975, the Department of Health, Education & Welfare (HEW) issued the regulations designed to implement Title IX.[74] The regulations were criticized as vague and inadequate.[75] In December 1978, HEW attempted to alleviate the criticism by releasing a proposed policy interpretation that attempted to explain, but did not change, the 1975 requirements.[76] However, not until December 1979, seven years after the original passage of Title IX, did the Office of Civil Rights (hereinafter OCR)[77] release the policy interpretation for Title IX.[78] These final guidelines specifically included intercollegiate athletics. Developed after numerous meetings and countless revisions, they reflected comments from universities, legislative sources, and the public.

The policy interpretation contained some very strict guidelines for OCR to apply in assessing Title IX compliance, including the following:

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72. Education Amendments of 1972, P. L. 92-318, Title IX—Prohibition of Sex Discrimination, July 1, 1972 (now codified as 20 U.S.C. § 1681(a)).

73. *Id.*

74. 45 CFR § 86 A-F.

75. *See* Note, *Judicial Deference to Legislative Reality: The Interpretation of Title IX in the Context of Collegiate Athletics*, 14 N.C. CENT. L.J. 601 (1984).

76. For an examination of the legislative history of Title IX in respect to athletics, *see* Comment, *The Evolution of Title IX: Prospects for Equality in Intercollegiate Athletics*, 11 GOLDEN GATE L. REV. 759 (1981); Note, *Title IX and Intercollegiate Athletics: Adducing Congressional Intent*, 24 B.C.L. REV. 1243 (1983); Gaal, DiLorenzo Evans, *HEWS's Final "Policy Interpretation" of Title IX and Intercollegiate Athletics*, 6 J.C. & U.L. 345 (1980).

77. The Department of Health, Education and Welfare (HEW) was divided into two agencies, the Department of Education and the Department of Health and Human Services. The Office of Civil Rights (OCR) is part of the Department of Education.

78. *Supra* note 52.

1. The inclusion of football and other revenue-providing sports;

2. "Sport-specifics" comparisons as the basis for assessing compliance;

3. "Team-based" comparisons (grouping sports by levels of development) as the basis for compliance assessments;

4. Institutional planning that does not meet the provisions of the policy interpretation as applied by OCR.[79]

The policy interpretation also outlined "nondiscriminatory factors" to be considered when assessing Title IX compliance. These factors include differences that may result from the unique nature of particular sports, special circumstances of a temporary nature, the need for greater funding for crowd control at more popular athletic events, and differences that have not been remedied but which an institution is voluntarily working to correct. In the area of compensation for men's and women's coaches, OCR assessed rates of compensation, length of contracts, experience, and other factors, while taking into account mitigating conditions such as nature of duties, number of assistants to be supervised, number of participants, and level of competition.[80]

The major issues Title IX raises revolve around the scope of the legislation and the programs to which it applies. The July 1975 policy regulations issued by HEW covered three areas of activity within educational institutions: employment, treatment of students, and admissions. Several sections of the regulations concerned with the treatment of students included specific requirements for intercollegiate, intramural, and club athletic programs.

One important issue is whether Title IX applies to an entire institution or only to the programs within an institution that receive direct federal assistance. The United States Supreme Court ruled in *Grove City College v. Bell*[81] that only those programs

79. Memorandum, "HEW Final Policies on Title IX/Athletics," To: AIAW Executive Committee, From: Renouf & Polivy, Attorneys at Law, Dec. 6, 1979, at 9-10 (document on file with the author); *see also*, Gaal & DiLorenzo, *Legality and Requirements of HEW's Proposed "Policy Interpretation" of Title IX and Intercollegiate Athletics*, 6 J.C. & U.L. 161 (1980), and *supra* note 52.

80. *See supra* note 52.

81. 687 F.2d 684. *See also U.S. Asks Supreme Court to Reject Plea by College to*

within an institution that receive direct financial assistance from the federal government should be subject to Title IX strictures. This interpretation is often referred to as the "programmatic approach" to the Title IX statute.[82] Other lower courts have reached the opposite conclusion, that the receipt of any federal aid to an institution, whether it be limited to only certain programs or indirect (for example, student loan) programs, should place the entire institution under the jurisdiction of Title IX. This interpretation is called the "institutional approach" to Title IX.[83]

While Title IX does not require the creation of athletic programs or the same sport offerings to both sexes—for example, a football program for women or a volleyball program for men—it does require equality of opportunity in accommodation of interests and abilities, in athletic scholarships, and in other benefits and opportunities.[84]

Athletics and athletic programs were not specifically mentioned in Title IX when it first became law in 1972. Congress was generally opposed to placing athletics programs under the realm of Title IX. Taking the position that sports and physical education are an integral part of education, however, HEW specifically included athletics, despite strong lobbying efforts to exempt revenue-producing intercollegiate sports from the Title IX requirements. This specific inclusion of athletics occurred in 1974 and extended from general athletic opportunities to athletic scholarships. Among the principles governing inclusion of athletic scholarships was the idea that all recipients of federal aid must provide "reasonable opportunities" for both sexes to receive scholarship aid. The existence of "reasonable opportunities" was determined by examining the ratio of male to female participants. Scholarship aid would

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Review Sex-Bias Law, Chronicle of Higher Educ., February 2, 1983, at 13, col. 2.

82. For an examination of this approach in an athletic related case, *see* Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981), *aff'd*, 699 F.2d 309 (1983).

83. For further information concerning the institutional and programmatic approaches to Title IX application, *see The Application of Title IX to School Athletic Programs*, 68 CORNELL L. REV. 222 (1983); *The Program-Specific Reach of Title IX*, 83 Colum. L. Rev. 1210 (1983). *See also* Haffer v. Temple Univer., 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd* 688 F.2d 14 (3rd Cir. 1982), (interpreting the "institutional approach" to Title IX.) *See also Temple Won't Challenge Court Ruling that Sex:-Bias Law Applies to Sports*, Chronicle of Higher Educ., November 24, 1982, at 13, col. 2.

84. *See* Othen v. Ann Arbor School Bd. 507 F. Supp. 1376 (E.D. Mich. S.D. 1981).

then be distributed according to this participation ratio.[85]

Another section of the ORC Title IX regulations specified requirements for athletic programs.[86] Contact sports were subject to regulations distinct from those governing noncontact sports. The regulations in this section state that separate teams were acceptable for contact sports and for teams in which selection was based on competition skill. For noncontact sports, if only one team existed, both sexes must be allowed to compete for positions on the team.[87] The Office of Civil Rights, which monitors compliance of Title IX, has considered many factors in determining the equality of opportunity, and as was noted by one court included:

> In assessing the totality of athletic opportunity provided, institutions shall be guided by regulations implementing Title IX of the Educational Amendments of 1972, and shall assess at least the following:
> a. Appropriateness of equipment and supplies.
> b. Games and practice schedules.
> c. Travel and per diem allowances.
> d. Opportunity for coaching and academic tutoring.
> e. Coaches and tutors.
> f. Locker rooms, practice and competitive facilities.
> g. Medical and training services.
> h. Housing and dining facilities and services.
> i. Publicity.
> Athletic expenditures need not be equal but the pattern of expenditures must not result in a disparate effect on opportunity. Institutions may not discriminate in the provision of necessary equipment, supplies, facilities, and publicity for sports programs.[88]

As noted by the court, equal expenditures were not required, but comparative budgets could be considered in relation to those factors listed.[89]

The procedures of Title IX analysis were established in special administrative guidelines, which listed specific factors that should be examined in athletic programs. The guidelines reviewed the number of sports, the type of arrangements, and benefits offered to women competing in athletics. When teams of one sex were fa-

85. 45 C.F.R. § 86.13 (c).
86. *Id.* at § 86.41 (c).
87. *Id.* at § 86.
88. *See* Aiken v. Lievallen, 39 Or. App. 779, 593 P.2d 1243 (1979).
89. *Id.* See also 45 C.F.R. § 86.41 (c).

vored in such areas as funding, coaching, and facilities, resulting in severely reduced opportunities for the other sex to compete, the courts would closely examine program expenditures, number of teams, and access to facilities to determine if the school was fulfilling the requirements of Title IX. As a general rule, although Title IX did not require the adoption of programs and equivalent funding, increases in either or both were often necessary to redress past discrimination.

The final area the regulations covered the Title IX method of enforcement. Compliance with the dictates of the law is monitored by the Office of Civil Rights (OCR) located in the Department of Education. OCR initiates the procedure that makes random compliance reviews and investigates complaints submitted by individuals. The first step in the process is to examine the targeted institution's records to review its attempted compliance with Title IX. Following a preliminary review, the OCR has the option of conducting a full hearing or dropping the case.

If the OCR calls a full hearing, the institution has the right to have counsel present and to appeal any adverse decision; the complainant has neither of these rights. The affected individual is not a party involved in the hearing. Instead, the OCR becomes the complainant and pursues the claim. If the OCR finds the institution has not substantially complied, it may turn its finding over to federal or local authorities for prosecution under the appropriate statutes.

Since 1979, there have been a number of attempts to change Title IX. Many of the proposals would lessen the impact of Title IX. Senator Hatch of Utah introduced one of these proposed changes on June 11, 1981. His amendment would have specifically restricted the scope of Title IX to those programs that receive direct funding from the federal government.[90] It was also designed to specify that money received by students in the form of scholarships, grants, or loans does not constitute federal aid for Title IX purposes.[91] Passage of this amendment would have effectively eliminated claims by women in the areas of athletics and other ex-

90. S. 1361, as reported in *Courts, Congress Challenge Title IX* WEAL (Women's Equity Action League) Washington Report June-July, 1981 at 3, Washington, D.C.

91. *Id.*

tracurricular activities, health care, guidance counseling, and residential housing, since these programs do not generally receive direct federal funding. It would have also restricted application of Title IX to employment discrimination claims, thereby relegating these problems to the less inclusive legislation of Title VII of the Civil Rights Act of 1964.[92] Supporters of the amendment found merit in the proposal because it advocated the lessening of federal involvement in education. Furthermore, some educators argued that the lack of governmental restraint would not necessarily create a situation in which women's athletic programs would suffer. Instead, they claimed, administrators would become more innovative in terms of women's programs once they were freed from threats of legal action if these programs did not immediately meet the standards of men's programs.[93] Senator Hatch's proposal was not passed, and he subsequently withdrew the legislation.

Another proposed amendment, commonly referred to as the Family Protection Act, advocated the repeal of Title IX.[94] Its provisions would have removed from the jurisdiction of federal courts the right to determine whether the sexes should be allowed to intermingle in athletics or in any other school activity.

A third effort to restrict the power of Title IX involved a bill introduced by Senators Hatch and Edward Zorinsky of Nebraska.[95] It proposed the OCR reimburse institutions for expenses incurred during any OCR investigation of institutional programs or activities.[96] Opponents of this bill argued that should the OCR be required to reimburse schools without a corresponding increase in its own budget, the total budget actually available for enforcement would diminish.[97] Opponents also argued less money for enforcement would restrict the number of investigations the OCR initiated, thereby limiting the potential deterrent value of the threat of such an investigation.[98] None of the proposed amendments to Title

92. *Id.*

93. *Id.*

94. Introduced on June 17, 1981 as companion bills by Rep. Albert Smith (R-AL), H.R. 3955, and Sens. Roger Jepsen (R-IA) and Paul Laxalt (R-NV), S. 1378. As reported in WEAL Washington Report, *supra* note 90.

95. S. 1091, as reported in WEAL Washington Report, *supra* note 90, at 3.

96. WEAL, Washington Report, *supra* note 90.

97. *Id.*

98. *Id.*

IX have been enacted.[99]

A. *Equal Rights Amendment*

There has been no federal legislation enacted prohibiting sex discrimination to date. Supporters of the Equal Rights Amendment (ERA)[100] argued that passage of a constitutional amendment would have remedied the lack of such a general prohibition.[101] In order to amend the United States Constitution, the proposed amendment must first be passed by a three-quarters vote of both the United States Senate and the House of Representatives.[102] Then it must be ratified by at least 38 state legislatures.[103] The ERA was passed in both Houses of Congress in 1972[104] but it did not receive the necessary 38 ratifications from state legislatures by the required deadline of July 1, 1982.[105]

In some instances, individual states have adopted equal rights amendments to their state constitutions. Thus, equal rights amendments have impacted athletics at the state level, but not at the federal level. Several cases have been decided in the complainant's favor on the basis of a state ERA.[106] All of these cases, how-

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99. For further information on Title IX, *see* Cox, *Intercollegiate Athletics and Title IX*, GEO. WASH. L. REV. 34 (1977-1978); Tashjian-Brown, *Title IX: Progress Toward Program Specific Regulation of Private Academia*, 10 J.C. & U.L. 1 (1983); Kadzielski, *Title IX of the Education Amendments of 1972: Change or Continuity?* 6 J. L. & EDUC. 185 (1977); Kadzielski, *Postsecondary Athletics in an Era of Equality: An Appraisal of the Effect of Title IX*, 5 J.C. & U.L. 123 (1978-79); Martin, *Title IX and Intercollegiate Athletics: Scoring Points for Women*, 8 OHIO N.U.L. REV. 481 (1981); Comment, *Sex Discrimination in Athletics: Conflicting Legislative and Judicial Approaches*, 29 ALA. L. REV. 390 (1977-1978); Comment, *Half-Court Girls' Basketball Rules: An Application of the Equal Protection Clause and Title IX*, 65 IOWA L. REV. 766 (1980); Comment, *Title IX's Promise of Equality of Opportunity in Athletics: Does It Cover the Bases?* 64 KY. L.J. 432 (1975-76); Comment, *Title IX and Intercollegiate Athletics: HEW Gets Serious About Equality in Sports?* 15 NEW ENG. L. REV. 573 (1979-80); Comment, *Title IX: Women's Collegiate Athletics in Limbo*, 40 Wash. & Lee L. Rev. 297 (1983); Comment, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*. 88 YALE L.J. 1254 (Apr.-July); Note, *The Application of Title IX to School Athletic Programs*, 68 CORNELL L. REV. 222 (Nov. 1982-Aug. 1983); *Women and Athletics: Toward a Physicality Perspective*, 5 Harv. Women's L.J. 121 (1982).

100. *Supra* note 6.

101. *Supra* note 6.

102. U.S. CONST. art. V.

103. *Id.*

104. *Supra* note 6.

105. *Supra* note 6.

106. *See, e.g.*, Darrin v. Gould, 85 Wn. 2d 859, 540 P.2d 882 (1975). *See also*, Packel v.

ever, could have been decided based on other legal arguments in states without ERA's.[107]

In general, the proposed federal ERA absolutely prohibited gender discrimination and required any law using gender as a basis for classification be subject to a strict scrutiny analysis by the courts. ERA opponents claimed this prohibition was an unnecessary step. They believed women's rights are sufficiently protected by the United States Constitution, state equal protection laws, and other federal legislation such as the Equal Pay Act, Title VII, and Title IX.[108]

ERA supporters argued that without proper enforcement, neither Title IX nor Title VII would alleviate the basic problems of sex discrimination.[109] The strength of Title IX, in particular, was and remains dependent on federal funding, since a reduction in funding could effectively diminish OCR's enforcement capabilities. In addition to this financial vulnerability, sex discrimination statutes are also subject to congressional revisions, which may lessen or even negate much of the available protection. It has been argued that a constitutional amendment would be more sheltered from political interests.[110] Supporters of a constitutional amendment argue the effectiveness and importance of an equal rights amendment can be demonstrated in *Darrin v. Gould*.[111] In *Darrin*, the lower court considered the equal protection argument and ruled in favor of the defendant. The Washington Supreme Court,

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Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. 45, 334 A.2d 839 (1975), in which the State of Pennsylvania, as plaintiff, claimed the PIAA's bylaws denied female athletes the same opportunity to practice and compete in interscholastic sports afforded male athletes. Citing the Pennsylvania ERA as authority, the court found a PIAA rule that prohibited mixed competition a practice "unconstitutional on its face under the ERA." *See also*, 60 Op. Cal. Att'y. Gen. 326 (1977).

107. *But see* MacLean v. First Northwest Indus. of America, Inc., 24 Wn. App. 161, 600 P.2d 1027 (1979) *rev'd* 96 Wn. 2d 338, 635 P.2d 633 (1981), where a class action was brought against the City of Seattle and the corporation operating a professional basketball team alleging "Ladies Night" price-ticketing policies were violative of the state's equal rights amendment and of the state law that prohibited sex discrimination. The court of appeals reversed a lower court decision and found the ticket practice a violation of the amendment.

108. *Supra* note 6.

109. *Supra* note 6.

110. *Supra* note 6.

111. 85 Wn. 2d 859. *See* Comment, *Sexual Equality in High School Athletics: The Approach of Darrin v. Gould*, 12 Gonz. L. Rev. 691 (Summer 1977).

however, reversed the decision in favor of the plaintiffs, based on the state's equal rights amendment argument.[112] Regardless of the precarious position in which protection against sex discrimination exists, an equal rights amendment on the state level is often helpful and may be crucial to the success of sex discrimination cases[113] and greater athletic opportunities for women.[114]

IV. TITLE IX AND ATHLETICS PROGRAMS

A. *Standing*

The first legal challenge to Title IX was brought by the NCAA. The NCAA sought declaratory and injunctive relief for the invalidation of the Title IX regulations promulgated by HEW in *National Collegiate Athletic Association v. Califano.*[115] The NCAA specifically sought relief for the invalidation of the Title IX regulations promulgated by HEW with respect to sex discrimination in athletics.[116] Summary judgment was granted to HEW as the district court held the NCAA did not have standing as an association representing its member schools to pursue the suit.[117] The NCAA appealed the district court decision.[118] The appeals court reversed the lower court ruling and held that while the NCAA does not have standing to sue in its own right, it does have standing to sue on behalf of its members.[119]

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112. According to information supplied by the National Organization for Women, (NOW) as of 1984, 16 states had enacted their own individual equal rights amendments. (Telephone interview with authors September, 1984).

113. Four states responded to Title IX by opening all teams to both sexes. The result was that boys dominated all the teams, and fewer girls than before could compete. For instance in Indiana, the first and second-place volleyball teams (previously all female) had one and three boys, respectively. In West Virginia, the first-place girls' bowling team was composed of five boys. Michigan was forced to change its rule so that boys could not compete on a statewide level on girls' teams. This information came from reports sent to member organizations by the National Federation of State High School Athletic Associations. *See* NATIONAL FED'N PUBLICATION, Summer 1975 (in-house publication).

114. For further information on individual state's ERAs, *see* Broder and Wee, *Hawaii's Equal Rights Amendment: Its Impact on Athletic Opportunities and Competition for Women,* 2 U. HAWAII L. REV. 97 (1979).

115. 444 F. Supp. 425, 428 (D. Kan. 1978) *rev'd* 622 F.2d 1382 (10th Cir. 1980); *see also Appeals Court Ruling Favors NCAA,* NCAA News, Apr. 30, 1980 at 1, b, col., 3, 3.

116. 444 F. Supp. 425, 428.

117. 444 F. Supp. 425.

118. 622 F.2d 1382 (10th Cir. 1980).

119. *Id.*

B. *Scope and Applicability of Title IX*

A major issue in Title IX litigation centers on arguments concerning its scope. The specific question is whether Title IX applies only to the specific departments receiving direct funding (commonly referred to as the "programmatic approach") or extends to any department within an institution that benefits from federal assistance (commonly referred to as the "institutional approach").[120] The dilemma is often expressed as whether Title IX is, or is not, program-specific. An integral factor in the resultant litigation has been the determination of what constitutes qualifying federal assistance. In some cases, it has been argued federal student loan programs constitute federal aid to an institution, while other interpretations define federal aid as only those funds specifically earmarked or directly given to a particular program. Therefore, in terms of the scope of Title IX, the questions become very complex: What constitutes federal aid? Is indirect aid or direct aid required by the statute? Once federal assistance is found, is only the particular program that benefits directly from the aid subject to Title IX regulation, or is the entire institution?

The decision in *Grove City College v. Bell*,[121] has answered some of these questions, but other issues remain to be clarified through further litigation or legislation. Many of the cases preceding *Grove City College v. Bell* dealt with the "programmatic" versus "institutional" issue.[122] The resolution of certain issues in

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120. *See supra* note 83 and accompanying text.

121. 687 F.2d 684 (3d Cir. 1982).

122. Various federal district courts had taken a programmatic approach. *See, e.g.*, Hillsdale College v. Dep't of Health, Educ., and Welfare, 696 F.2d 418 (6th Cir. 1982) *vacated and remanded* 466 U.S. 901 (1984) (for further consideration in light of Grove City College v. Bell, 465 U.S. 555 (1984)); Bennett v. W. Texas State Univ. 525 F. Supp. 77 (N.D. Tex. 1981) *rev'd without published opinion* 698 F.2d 1215 (N.D. Tex. 1983).

In University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982), the University of Richmond, a private institution, refused to give the (OCR) investigator access to data requested in conjunction with the investigation of a complaint alleging sex discrimination in the institution's athletic program. The university argued the agency had no authority to request any information because the athletic department received no federal funding. The OCR argued that because the athletic department benefits from other federal funding received by the university, specifically federal student loan and grant programs, it falls under Title IX jurisdiction.

In its opinion, the court redefined federal student funding as payment for services rendered to the college and as such was not deemed direct assistance to the institution. Even if these funds were construed as aid to educational institutions, the court decided they do not

Grove City College was extremely important, not only in terms of the potential ramifications for hundreds of schools whose only federal assistance exists in the form of indirect aid or student participation in loan programs, but also because it established a precedent and settled contradictory approaches and decisions among the circuit courts.[123]

The decision in *North Haven Board of Education v. Bell*[124] had particularly important ramifications for Title IX litigation. While the case did not specifically deal with athletics, the Supreme Court resolved two fundamental questions about the scope of Title IX applicable to athletics. First, it decided Title IX prevented discrimination against employees as well as against students. Second, it determined both the power to regulate and to terminate federal assistance are program-specific. Thus, Title IX sanctions are limited to particular programs receiving federal financial assistance.[125]

The issue of "programmatic" versus "institutional" was ultimately decided by the Supreme Court in *Grove City v. Bell.*[126] This 1984 decision had an immediate and dramatic impact on then-pending litigation initiated by the Department of Education (successor to HEW and responsible for Title IX enforcement) against colleges and school systems allegedly violating Title IX.

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constitute the requisite direct aid necessary for Title IX jurisdiction as was determined by North Haven Bd. of Educ. v. Bell 456 U.S. 512 (1982), which established the program-specific interpretation of the statute. *See also Univ. of Richmond Sues to Halt U.S. Probe of Its Sports Programs,* Chronicle of Higher Educ., May 11, 1981, at 8, col. 1; *Judge Bars Civil Rights Office's Probe of Richmond Athletic Department,* Chronicle of Higher Educ., July 21, 1982, at 9, 10, col. 2, 1; *Court Bars Title IX Athletics Probe,* NCAA News, July 14, 1982, at 3, col. 3; *Decision That Limits Title IX Will Stand,* NCAA News, Sept. 20, 1982, at 1, 12, col. 1, 1, and *Civil-Rights Office Dropping Sex-Bias Investigation at William and Mary,* Chronicle of Higher Educ., Dec. 15, 1982, at 23, col. 1.

An institutional approach was originally taken by the court in Haffer v. Temple Univ., 524 F. Supp. 531 (E.D. Pa. 1981) *aff'd* 688 F.2d 14 (3d Cir. 1982) and by the court of appeals in *Othen,* 699 F.2d 309 (6th Cir. 1983).

123. *See also,* Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n, 443 F. Supp. 753 (S.D. Ohio, 1978), *rev'd* 647 F.2d 651 (6th Cir. 1981), which involved OHSAA rule excluding girls from participation contact sports. The district court found the rule unconstitutional based on the Due Process clauses of the fifth and fourteenth amendments. On appeal, parts of the lower court's decision were reversed and the case was remanded for further proceedings although an injunction against the rule was maintained.

124. 456 U.S. 512 (1982).

125. *Id.*

126. 465 U.S. 555 (1984).

The Department of Education had to drop cases in which policies in an athletic department were being challenged if it could not be established that the athletic departments[127] or programs directly received federal funds. Cases against the University of Alabama, University of Maryland, Penn State University, the New York City school system, and at least 19 other institutions were immediately discontinued or severely narrowed when no such connection could be found.[128]

The Office of Civil Rights (OCR) commenced a proceeding in March 1984, which may indicate the strategy the OCR will employ in future Title IX actions.[129] The OCR informed Auburn University that an investigation had revealed Title IX violations in the Auburn athletic department.[130] The OCR conceded that it no longer had jurisdiction over the athletic department, but charged

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127. *Id.* Although the *Grove City College* decision did not directly involve the application of Title IX to athletics, Justice Brennan (with whom Justice Marshall joined, concurring in part and dissenting in part) noted at 595 n.9:

> . . . Congress has consistently endorsed the Department's regulation of college athletic programs, and indeed has affirmatively required such regulations. *See, e.g.*, Pub. L. 93-380, Sec. 844, 88 stat. 612 (1974) ("The Secretary shall prepare and publish . . . proposed regulations implementing the provisions of Title IX . . . relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletics reasonable provisions considering the nature of particular sports.") See also Brief for Council of Collegiate Women Athletic Administrators as Amicus Curiae 4-16. *Cf.* Haffer v. Temple Univ.. . . . The opinion for the Court, limited as it is to a college that receives only "(s)tudent financial aid . . . (that) is *sui generis*", *ante*, at 16, obviously does not decide whether athletic programs operated by colleges receiving other forms of federal financial assistance are within the reach of Title IX. *Cf.* 688 F.2d, at 15, n.5 (discussing the many forms of federal aid received by Temple University and its athletic department).

Brennan's concurring dissent in Grove City College v. Bell, 104 S. Ct. 1211, 465 U.S. at ___.

128. *Supra* note 45.

129. Immediately following the *Grove City College* decision, the OCR dropped its efforts to cut off federal aid to the University of Maryland and Auburn University for Title IX violations in their athletic departments. The OCR decided it did not have jurisdiction to investigate the departments because they received no direct federal funding. However, in the case of Auburn University, the OCR decided it would still seek to pursue enforcement on the student financial aid program at Auburn since that program recieved federal aid. Financial aid was involved because the OCR charged that the institution had failed "to award athletics scholarships and grants-in-aid so as to provide reasonable opportunities for such awards for students of each sex in proportion to the number of students of each sex participating in intercollegiate athletics." For further information, *see Grove City Decision Spurs OCR Actions*, NCAA News, March 21, 1984, at 1, 16, col. 1.

130. *Id.*

that its investigation also revealed Title IX violations in the awarding of financial aid.[131] The OCR therefore commenced proceedings to terminate all federal funding for the Auburn financial aid program.[132] Concentration on athletic scholarship policies may be the most effective legal tool remaining for the OCR unless and until federal legislation is passed reaffirming Title IX's applicability to all of a school's or college's programs.

Such legislation was introduced by a bipartisan coalition of senators and congressmen in April 1984.[133] The legislation proposed to change the wording in Title IV, Title IX, the Rehabilitation Act (rights of the handicapped), and the Age Discrimination Act, to state that discrimination was prohibited in the programs and activities of any "recipient" of federal funds. The bill further defined "recipient" as "any state or political subdivision thereof, . . . or any public or private agency, institution or organization, or other entity . . . to which federal financial assistance is extended (directly or through another entity or a person)."[134] As of 1985, however, no legislation has been enacted to reverse the Supreme Court's decision.[135]

C. *Office of Civil Rights Title IX Compliance Reviews*

The Office of Civil Rights is responsible for conducting compliance reviews of Title IX. It selects schools at random to review for Title IX compliance and also reviews schools based on complaints brought by individuals. The OCR begins a Title IX investigation by notifying the school and then collecting data on the over-

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131. *Id.*

132. *Id.*

133. *Supra* note 26.

134. *Supra* note 26.

135. For articles concerning Title IX court decisions, *see Even Colleges That Get Only Indirect Aid Must Obey U.S. Bias Laws, Court Says,* Chronicle of Higher Educ., September 1, 1982, at 19, col. 2; *Ruling Could "Decimate" Protection Against Sex Bias, Official Says,* Chronicle of Higher Educ., September 1, 1982, at 20, col. 1; *Sports Not Covered by Bias Law Unless U.S. Pays, A Judge Rules,* Chronicle of Higher Educ., March 9, 1981, at 5, col. 1; *Bell Unveils "flexible" Approach to Settling Complaints of Sex Bias in College Athletics,* Chronicle of Higher Educ., April 27, 1982, at 1, col. 1; *First Circuit Takes Programmatic View of Title IX,* Sports Law Reporter, Vol. 4, No. 10, February 1982, at 1, col. 1; *Judge Says Title IX Doesn't Cover College's Sports Program,* Chronicle of Higher Educ., September 9, 1981, at 8, col. 1, 2, and, *Court to Decide Case on Title IX and Student Aid,* Chronicle of Higher Educ., March 2, 1981, at 1, 12, col. 6. 3.

all athletic program. The information may include the number of teams, scheduling of games and practice times, travel and per-diem allowances, compensation of coaches, provision of facilities, and publicity. Based on a review of the data, the OCR will determine whether the equivalent treatment, benefits, and opportunities mandated by Title IX have been afforded to both sexes.

A finding of inequality in a single component of the program is not a basis in and of itself for the OCR to find a school in noncompliance with Title IX. The OCR's approach in investigating and determining compliance with Title IX has been to focus on the *overall* provision of equivalent opportunities in the athletic program. Therefore, the OCR will look to other components of the athletic program before it finds the school to be in noncompliance. In addition, Secretary Terrel H. Bell of the Department of Education adopted a nonconfrontation approach in 1981. Under this policy, the OCR may find schools in compliance with Title IX if the schools agree to rectify any violations of Title IX found through the OCR's investigation.

OCR officials will meet with the administrators of an investigated institution and review the OCR's proposed findings before issuing a letter of noncompliance. If the institution voluntarily forms a committee to adopt a plan to rectify its violations within a reasonable period of time, the institution will be granted a letter of compliance for implementing a corrective plan. The Department of Education is then responsible for monitoring the progress of the plan. If the plan is not implemented within the time specified or proves to be an inadequate remedy, the OCR may find the institution in noncompliance and take further legal action.[136]

136. The Office of Civil Rights had issued decisions after Title IX compliance reviews on a number of institutions, including the following: University of Akron; Bentley College; University of Bridgeport; Central Michigan University; Central Missouri University; University of Hawaii at Manoa; University of Illinois, Urbana Campus; University of Iowa; University of Kansas; Kansas State University; Michigan State University; University of Missouri, Kansas City; University of Nevada, Reno; Northwest Missouri State University; Pensacola Junior College; St. Olaf College; Texas A & M University; University of Texas at Arlington; and Yale University.

V. Sex Discrimination Cases And The Student-Athlete

The following section discusses cases concerning the presence or absence of teams available to either sex. Within each category, the cases have been further divided into those dealing with contact and those dealing with noncontact sports. This was done because the litigants' approach—and sometimes the Courts' result—differ due to the type of sport and resulting physical contact involved.

The division of cases is not by legal theory, since very often the litigation makes use of several prominent theories—for example, equal protection, Title IX, and state equal right amendments (in certain states). Therefore, to distinguish between the cases would entail too much repetition without sufficiently differentiating the decisions.

The courts generally view contact sports and noncontact sports differently. Thus, in cases involving sex discrimination in athletics, the arguments used will vary depending on whether or not the particular sport is designated a contact sport. Under Title IX, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports in which the purpose or major activity involves bodily contact. In some jurisdictions, baseball and soccer have also been labeled contact sports. For contact sports certain arguments are commonly propounded. The most frequent defense raised is that women, as a group, lack the physical qualifications necessary for safe and reasonable competition against men in a sport in which bodily contact is expected to occur. It is argued that women are more susceptible to injury because they have a higher percentage of adipose (fatty) tissues and a lighter bone structure. Because of these physiological differences, the argument goes, contact sports are more dangerous for all women.

Plaintiffs in such litigation counter this argument by insisting that physical capability should be determined on a case-by-case basis. When there is no opportunity for participation in a certain sport, a blanket prohibition is overinclusive and violates equal protection by assuming that all women have identical physical structures and that all men are stronger and more athletically capable than women. Indeed, the health and safety rationale behind such total exclusion may fail a court challenge, as has been demon-

strated in some cases. In one case, a women who was 5'9" tall and weighed over 200 pounds was denied a chance to play football because her supposedly lighter bone structure would render her more susceptible to injury. There was, however, no height or weight requirements for men, and the court thus found exclusion from participation to be unacceptable.[137]

Although the most important consideration used to substantiate separate teams for contact sports is the health and safety of the participants, this argument does not apply to noncontact sports. Since there is no legitimate and important state interest for allowing exclusion from noncontact sports, citing sex as the sole exclusionary factor would constitute a violation of United States constitutional guarantees of the equal protection clause. Thus, defendants make different arguments in noncontact sport sex discrimination cases. The most common argument is that if men and women are allowed to compete together and/or against each other, the psychological development of both would be impaired. This stance is generally based on a variation of the "tradition" argument, which says that allowing men and women to compete as equals will irreparably disturb the innate nature of relationships between the sexes.

Another commonly made argument is that if all men and women are allowed to compete together, men will dominate the co-ed teams. The underlying rationale here is that since men are inherently stronger and more physically capable than women, co-ed teams will actually limit womens opportunities. Plaintiffs in such cases argue this justification does not account for individual differences among participants. Additionally, it does not recognize the argument that if women are given opportunities to compete against men from the beginning of their athletic careers, their capabilities would improve and men may not be able to totally dominate the athletic field.

A. One Team Only

The general rule in both contact and noncontact sports is that when only one team is available, both sexes must be allowed to try out for and play on that team. The student-athlete's capability and

137. Clinton v. Nagy, 411 F. Supp. 1396 (N.D. Ohio 1974).

risk of injury must be determined on an individual basis, with recognition that the contact or noncontact sports designations only matter if there is opportunity for athletes of both sexes to compete. If there is ample opportunity for women to compete on their own, courts appear less apt to allow women to compete with men in contact sports.[138]

B. Contact Sports

In cases where contact sports are involved and there is no women's team, there is a split in decisions as to whether to allow a female to play on the men's team. In the majority of cases, as represented by *Clinton v. Nagy*,[139] the courts have upheld the women's sex discrimination claim and have allowed participation on the men's team.[140] In some cases, the plaintiff-female was not successful because of the lack of state action or there was no violation of the sex discrimination laws.[141]

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138. For further information, *see The Case for Equality in Athletics*, 22 CLEV. ST. L. REV. 570 (Fall 1973); *Female High School Athlete and Interscholastic Sports*, 4 J. L. & Educ. 285 (April 1975); *The Emergent Law of Women and Amateur Sports: Recent Developments*, 28 WAYNE L. REV. 1701 (Summer 1982).

139. *See supra* note 137 and accompanying text.

140. For further information *see Irrebuttable Presumption Doctrine: Applied to State and Federal Regulations Excluding Females from Contact Sports*, 4 U. DAYTON L. REV. 197 (1979); *Title IX of the Education Amendment of 1972 Prohibits All-Female Teams in Sports Not Previously Dominated by Males*, 14 SUFFOLK U.L. REV. 1471 (Fall 1980); *Girls' High School Basketball Rules Held Unconstitutional*, 16 J. FAM. L. 345 (Fall 1978).

141. *See also*, the following decisions:

(a) Lavin v. Chicago Bd. of Educ. 73 F.R.D. 438 (1977), Lavin v. Illinois High School Ass'n 527 F.2d 58 (7th Cir. 1975), in which the trial court denied the class action claim because plaintiff was no longer a member of the "class" after graduation and because plaintiff did not present an argument that showed she was qualified enough to make the boy's squad, so was not a member of that particular "class" of girls either. The court did allow plaintiff's individual claim for damages.

(b) Muscare v. O'Malley, Civil No. 76-C-3729 (N.D. Ill. 1977), where in ruling for the plaintiff, a 12-year-old girl, the court reasoned that offering tackle football for males, and only touch football to females, was a violation of equal opportunity under the fourteenth amendment.

(c) Lincoln v. Mid-Cities Pee Wee Football Ass'n, 576 S.W.2d 922 (Tex. Civ. App. 1979), where an action was brought by an eight-year-old female who wanted to play on a Pee Wee Football team. The appeals court stated that the discrimination complained of must be state action or private conduct that was encouraged, or closely interrelated in function with state action. The court found neither and held that the Texas ERA did not cover purely private conduct.

(d) Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977), where the district court held for the plaintiff, based on an equal protection analysis. The court held that the appro-

For instance, in *Junior Football Ass'n of Orange County, Texas v. Gaudet*,[142] the trial court granted a temporary injunction allowing plaintiff to play football in the Junior Football Association until she reached puberty. This decision was based on article 1, section 3a of the Texas Constitution, which provides: "Equality under the law shall not be denied or abridged because of sex, race,

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priate analysis requires a triangular balancing of the importance of the opportunities being unequally burdened or denied against the strength of the state's interests and the character of the group being denied the opportunity. The court found that the complete prohibition by CHSAA violated Hoover's rights to equal protection and that the school had three options: allow co-ed teams; discontinue the sport for males; or field a second, all-female team.

(e) Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117 (E.D. Wis. 1978), where plaintiffs were granted the right to participate in a varsity interscholastic program in any sport in which only a boys' team was provided. The court awarded summary judgment finding that:

> . . . exclusion of girls from all contact sports in order to protect female high school athletes from unreasonable risk of injury was not fairly or substantially related to a justifiable government objective in the context of the Fourteenth Amendment, where demand for relief by the instant plaintiffs would be met by establishing separate girls' teams with comparable programs. *Id.* at 1118-19.

(f) Simpson v. Boston Area Youth Soccer, Inc., Case No. 83-2631 (Super. Ct. Mass. 1983) (settled), where defendant soccer association excluded plaintiff, a sixth-grade female, from the all-male soccer team in her town. Plaintiff had played for three years on co-education teams, and many of her former teammates were on the team. Although the defendant also maintained a girls' league, no team in that league was readily accessible to the plaintiff. Plaintiff was also considered an above-average soccer player and maintained that the girls' league would present inferior competition. The case was settled when defendant soccer league agreed to change its constitution and bylaws to allow females to play on male teams, with such teams being entered in the boys' league.

(g) Force v. Pierce City R-VI School Dist., 570 F. Supp. 1020 (W.D. Mo. 1983), where the court granted injunctive relief for the plaintiff, a 13-year-old female seeking to play on the interscholastic football team, and held that:

> (1) no sufficiently substantial relationship was shown between blanket prohibition against female participation on a high school football team and Title IX of the Educational Amendments of 1972, high school activities association rules and regulations, maintaining athletic educational programs which are as safe for participants as possible, or administrative ease, and (2) under the circumstances, rules and regulations of high school activities association and manner of promulgation and enforcement thereof constituted "state action," thus subjecting association's actions to equal protection clause requirements and, as such, enforcement of rule which effectively prohibited members of opposite sex from competing on same team in interscholastic football would be enjoined. *Id.*

(h) Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973), in which plaintiff tennis player brought suit against a state high school association because of its rule barring mixed competition in interscholastic sports when no girls team existed at her school. The trial court granted an injunction against enforcement of the rule. On appeal, the decision was affirmed, but the suit was remanded to the lower court to specify that the rule be barred only in noncontact sport situations.

142. 546 S.W.2d 70 (Tex. Civ. App. 1976).

color, creed or national origin."

The Amateur Athletic Association in *Gaudet* appealed, contending there was not sufficient state action to authorize the injunction. The association argued there was insufficient evidence of state involvement to authorize the temporary injunction and the court agreed. The court noted: "Not every subversion by the federal or state government automatically involves the beneficiary in 'state action,' and it is not necessary or appropriate in this case to undertake a precise delineation of the legal rule as it may operate in circumstances not now before the court."[143]

C. *Noncontact Sports*

In cases involving noncontact sports where there is no women's team, the trend and majority of cases allow the women to participate on the men's team. Cases such as *Gilpin v. Kansas State High School Activities Association, Inc.*[144] *Brenden v. Independent School District 742*[145] and *Reed v. Nebraska School Activities Association*[146] allowed women to participate on men's cross-country, tennis, and golf teams where there were no women's teams.[147] Other courts have reached an opposite result and have

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143. Simkins v. Moses H. Cone Memorial Hosp. 323 F.2d 959, 967 (4th Cir. 1963).

144. 377 F. Supp. 1233 (D. Kan. 1974), in which plaintiff, a junior high school cross country runner, was held to be effectively deprived of an opportunity to compete. The court held that the KSHSAA rule prohibiting mixed competition was unconstitutional and noted: "Thus, although the Association's overall objective is commendable and legitimate, the method employed to accomplish that objective is simply over-broad in its reach. It is precisely this sort of overinclusiveness which the Equal Protection Clause disdains." *Id.* at 1243.

145. 342 F. Supp. 1224 (D. Minn. 1972), *aff'd*, 477 F.2d 1292 (8th Cir. 1973), in which plaintiffs protested as a rule prohibiting mixed tennis and cross country ski race competitions. The court found the application of the rule arbitrary, unreasonable, and unconstitutional.

146. 341 F. Supp. 258 (D. Neb. 1972), in which plaintiff challenged a state high school athletic association's practice of providing a public school golf program for boys, while providing none for the girls and prohibiting girls from participation with or against boys. The district court held for plaintiff reasoning that her interest to compete and receive coaching outweighed the association's concerns.

147. For further cases, *see* Carnes v. Tennessee Secondary School Athletic Ass'n. 415 F. Supp. 569 (E.D. Tenn. 1976), involving a girl who wanted to play on the boys' high school baseball team. The court granted a preliminary injunction from a rule barring mixed competition in contact sports. The district court held that there was a likelihood that Carnes would prevail on the merits of the claim and a denial of injunction would result in irreparable harm to Carnes. *See also* Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir.

prevented females from participating on the men's team.[148] Again, where private organizations are involved, the plaintiff-women may have difficulty proving the necessary state action.[149]

One area of amateur sports, Little League Baseball, has been a frequent party to lawsuits involving noncontact sports and sex discrimination.[150] In 1984, a number of lawsuits involving such issues were also brought against the International Olympic Committee before the 1984 Summer Olympic Games were held in Los Angeles.[151]

1973); Haas v. South Bend Community School Corp., 259 Ind. 515, 289 N.E.2d 495 (1972); Bednar v. Nebraska School Activities Ass'n., 531 F.2d 922 (8th Cir. 1976).

148. *See, e.g.*, Harris v. Illinois High School Ass'n, No. S-Civ. 72-75 (S.D. Ill. 1972), involved an action brought by a girl who wanted to play on her high school boys' tennis team. There was no girls' team. The court held that gender classifications were rational. Plaintiff's claim that she had a "right" to participate in interscholastic sports was denied. *See also*, Gregoria v. Bd. of Educ. of Asbury Park, No. A-1277-70 (N.J. Super Ct. 1971); Hollander v. Connecticut Interscholastic Athletic Conf., Inc., Civil No. 12-49-27 (Conn. Super. Ct. 1971) *appeal dismissed*, 164 Conn. 658, 295 A.2d 671 (1972).

149. 208 U.S. 412 (1908).

150. *See*, the following cases which involved suits against Little League Baseball: Rappaport v. Little League Baseball, Inc., 65 F.R.D. 545 (1975), which involved a group of parents and plaintiff girls who filed suit against Little League Baseball because of its policy of excluding girls from participation. The Little League changed its policy after the complaint was filed. The court ruled the case moot; King v. Little League Baseball, Inc., 505 F.2d 264 (6th Cir. 1974); Magill v. Baseball Conference, 364 F. Supp. 1212 (W.D. Pa. 1973); Magill v. Avonworth Baseball Conference, 516 F.2d 1328 (3rd Cir. 1975); Fortin v. Darlington Little League, Inc., 376 F. Supp. 473 (D.R.I. 1974), *rev'd* 514 F.2d 344 (1st Cir. 1975); Nat'l Org. for Women Essex County Chapter v. Little League Baseball, Inc., 127 N.J. Super. 522, 318 A.2d 33 (1974).

151. See, in particular, Martin v. Int'l Olympic Comm., 740 F.2d 670 (9th Cir. 1984), which involved Mary Decker, Grete Waitz, and 50 other leading female runners who filed in August 1983 a sex discrimination suit against the International Olympic Committee, the Los Angeles Olympic Organizing Committee, the International Amateur Athletic Federation, the Athletics Congress, and others. The suit was filed in Los Angeles Superior Court, and sought an order that would force the defendants to include 5,000-and 10,000-meter runs for women at the 1984 Olympic Games in Los Angeles. These events are part of the men's events and were historically excluded from the women's program because of the belief that women could not physically handle the distances. The request for injunctive relief was denied by the court. The International Olympic Committee later added these events to the women's program for the 1988 Olympic Games in Seoul, S. Korea. *See also Female Runners Sue to Add Long Events*, N.Y. Times, August 12, 1983, at A18, col. 1; *Female Runners Lose Appeal*, N.Y. Times, June 22, 1984, at A19, col. 1; *Olympic Challenge: Women Sue for 5 and 10-K Races*, 70 A.B.A. J. 42 (March, 1984).

D. Women's Team, No Men's Team

The all-women, no-men type of case has arisen only with noncontact sports. In cases where there is a women's team and no men's team for noncontact sports, there is a split in decisions as to whether to allow a male to play on the women's team. In *Gomes v. Rhode Island Interscholastic League*,[152] the courts upheld the male's sex discrimination claim and allowed him to play on the women's volleyball team. In *Clark v. Arizona Interscholastic Ass'n.*,[153] the court refused to allow boys to compete on the girls' volleyball team.[154] The male-plaintiff may not succeed for a variety of reasons, including lack of state action where a private organizatuon is involved,[155] prohibition of males on women's teams to redress disparate treatment of females in interscholastic athletic programs,[156] interscholastic programs to promote athletic opportunities for females,[157] and the fact that there are more general ath-

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152. 469 F. Supp. 659 (D.R.I. 1979), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979).

153. 695 F.2d 1126 (9th Cir. 1982, *cert. den.* 104 S. Ct. 79 (1983).

154. For further information on Clark v. Arizona Interscholastic Ass'n, *see Constitutional Law—Equal Protection—Sex Discrimination Against Males in Athletics—Physiological Differences are Valid Reasons to Exclude Boys from Girls' Athletic Teams*, (Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982), *cert. den.*, 104 S. Ct. 79 (1983)), 6 WHITTIER L. REV. 151 (1984); *Equal Protection Scrutiny of High School Athletics*, (Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982), *cert. den.* 104 S. Ct. 79 (1983)), 72 KY. L.J. 935 (1983-1984).

155. *See* White v. Corpus Christi Little Misses Kickball Ass'n, 526 S.W.2d 766 (Tex. Civ. App. 1975). On appeal, plaintiff argued that denial of right to play in the girls' kickball because of his sex was a denial of equal protection under both the federal and state constitutions. The appeals court held the plaintiff failed to establish the requisite state action, because his participation was denied by a private organization acting without any connection to government except that the games were played in a public park.

156. *See* Forte v. Bd. of Educ. North Babylon Union Free School Dist., 431 N.Y.S.2d 321 (1980), which involved an action which was brought by plaintiff Forte on behalf of his son, a 17-year-old high school student who wanted to play on the North Babylon High Schcol volleyball team, which was all female. The court held for the defendant. The court reasoned that the rule the school district had enacted as a discernible and permissible means of redressing disparate treatment of females in interscholastic athletic programs.

157. *See* Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 1980, 31 Ill. Dec. 653, 394 N.E.2d 855 (1979), an action brought by plaintiff Petrie, who wanted to play on the girls' high school volleyball team since the school had no boys' team. The Illinois High School Association would not allow Petrie to play on the girls' team. The appeals court, affirmed a lower court decision which upheld the association's rule. The court found no violation of state law and reasoned the association's rule "substantially related to and served the achievement of the governmental objective of maintaining, fostering, and promoting athletic opportunities for girls."

letic opportunities for males.[158]

E. *Women's Teams and Men's Teams*

In sex discrimination cases involving athletes in which there are existing teams for both sexes, four different types of arguments are generally raised. The first is that "separate but equal is not equal." In these cases, the women sue to participate on the men's teams because the competition may be better and the women are far superior to the participants on the women's teams. As *O'Connor v. Board of Education of School Dist. No. 23*[159] illustrates, the court will generally approve "separate but equal" teams and rule against plaintiff-females who want to play on boys' teams and their arguments on playing ability. The second type of argument is that the separate teams are not equal, especially with respect to the benefits and opportunities provided to the teams. In *Aiken v. Lieuallen,*[160] plaintiff-female athletes contended they were discriminated against in the areas of transportation, officiating, coaching, and the school's commitment to competitive programs. In a similar case, a court awarded damages to plaintiff-female athletes and ordered equivalent funding for the men's and women's athletic programs.[161]

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158. *See,* Mularadelis v. Haldane Central School Bd., 74 A.D.2d 248, 427 N.Y.S.2d 458 (1980), an action brought by plaintiff Mularadelis, a member of the high school's girls' tennis team who was told by the school board he could no longer play on the team. The appeals court reversed a lower court decision and held for the school board on the basis that Title IX allowed for the exclusion of boys from the girls' team when there were, overall, more athletic opportunities for boys in the community; *see also* Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n Inc., 378 Mass. 342, 393 N.E.2d 284 (1979).

159. 645 F.2d 578 (7th Cir. 1981), *cert. denied,* 454 U.S. 1084, (1981), in which a junior high school girl sought to try out for the boys' team despite the existence of a separate but equal girls' team. The district court granted a preliminary injunction to the plaintiff holding the school's classification violated plaintiff's fundamental right to develop as an athlete. The appeals court reversed holding the plaintiff had not demonstrated a reasonable likelihood that the two-team approach for this contact sport was not substantially related to the objective of maximizing participation in sports.

160. 39 Or. App. 779, 593 P.2d 1243 (1979), in which plaintiff taxpayers and parents of student-athletes on the University of Oregon women's basketball team appealed a ruling of the chancellor of the Board of Higher Educ. that the university was not violating OR. REV. STAT § 659.150, that prohibited discrimination based on sex. On appeal, the court, after reviewing allegations of discrimination in areas of transportation, officiating, coaching, and university commitment, remanded the case to the chancellor for further review. For further information on *Aiken, see* Aiken v. Lievallen and Peterson v. Oregon State Univ.: *Defining Equity in Athletics,* 8 J.C. & U.L. 369 (1981-82).

161. Blair v. Washington State Univ. No. 28816 (Super. Ct. Wash. 1982), in which a

The third type of case occurs when two teams exist but the women compete under different playing rules than the men. These situations, challenged on equal protection grounds, have produced mixed results. The trend seems to be to disallow different rules when those rules are based purely on the gender of the athletes, especially when those rules place those who play under a disadvantage if they want to continue in the sport.

The fourth type of case involves different seasons for the same men's and women's sport. The courts have generally held separate seasons of play are not a denial of equal protection of the law.

F. Separate But Equal

The sexes are generally separated when it comes to participation in sports, and the challenges to this practice have been largely unavailing. The doctrine of "separate but equal" remains applicable to sex distinctions, even though it has been rejected for discrimination based on race. Thus, if separate teams exist for men and women, there may be a prohibition against co-ed teams or against women competing against men. The doctrine raises the critical question of whether or not such separate teams are substantially equal. The fact that two teams exist does not necessarily satisfy the doctrine. "Separate but equal" is based on the concept that the exclusion of a group is not unconstitutional if the excluded group is provided with comparable opportunities. If women are excluded from the men's basketball team but are provided with an equal one of their own, the school district will not be in violation of Title IX under the "separate but equal" theory. When the sexes are segregated in athletics, there must be an overall equality of expenditures, coaching, and access to facilities. Without this substantial equality, the existence of separate teams and the prohibition of women competing with men is unconstitutional.

Apart from these circumstances, the segregation of the sexes in athletics is generally upheld, although the courts are usually careful to examine the specific circumstances in each case before

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class action brought by present and former student-athletes at Washington State University alleged sex discrimination in its athletic programs. The claim was based on the Washington State Equal Rights Amendment. The court held for the plaintiffs and ordered in part increased financial support for women's athletics.

making a determination. As under an equal protection analysis, a court usually considers whether or not the particular sport in question is a contact[162] or a noncontact sport.[163] Physiological differences between the sexes have been found to be a valid reason for the exclusion of one sex from a contact sport. When dealing with noncontact sports, the courts have allowed co-educational partici-

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162. *See* the following cases:

(a) Hutchins v. Bd. of Trustees of Michigan State Univ. No. G79-87 (W.D. Mich. 1979), which involved a Title IX complaint brought by the women's basketball team from the Michigan State East Lansing campus against Michigan State University and the Board of Trustees, alleging the men's team was receiving better treatment. The alleged better treatment included more money for traveling and better facilities. The court held for the plaintiffs and issued a temporary restraining order barring the better treatment of the men's team.

(b) Peterson v. Oregon State Univ. (settled 1980), which involved two student-athletes who filed a complaint with the Board of Education of the State of Oregon which alleged Oregon State Univ. (OSU) offered athletic programs of lesser quality to female student-athletes than were offered to their male counterparts. A settlement was reached, OSU Conciliation Agreement for Sex Equality in Intercollegiate Athletics, in July, 1980, that implemented a five-year plan at OSU designed to put the men's and women's athletic programs on an equal competitive basis.

163. *See* the following cases.

(a) Michigan Dep't of Civil Rights, *ex rel.* Forton v. Waterford Township Dep't of Parks and Recreation, 355 N.W.2d 305 (Mich. Ct. App. 1983), in which a plaintiff brought a Civil Rights Act claim based on defendant's policy of maintaining a gender-based elementary level basketball program. The appeals court reversed the district court's decision and ruled in favor of the plaintiff. The court reasoned that: (1) separate leagues involved were not equal and could not withstand equal protection analysis, and consequently violated the Civil Rights Act, and (2) subsequent modification of policy to allow up to two girls to participate on each boys' basketball team and two boys on each girls' basketball team did not cure the statutory violation.

(b) Ritacco v. Norwin School Dist., 361 F. Supp. 930 (W.D. Pa. 1973), in which the plaintiff, a high school graduate, brought a class action suit against The Pennsylvania Interscholastic Athletic Association for its rule which in effect required separate girls' and boys' teams in contact sports. The court noted plaintiff no longer belonged to the class and was not a proper party. It also noted the rule did not unfairly discriminate against females and had in fact caused a "virtual mushrooming of girls' interscholastic sports teams."

(c) Ruman v. Eskew, 343 N.E.2d 806 (Ind. Ct. App. 1976), in which plaintiff, Ruman, wanted to play on the high school boys' tennis team, even though there was a girls' team at her school. The Indiana High School Athletic Association prohibited girls from playing on boys' teams if there were girls' teams in the same sport. The court upheld the defendant's rule since it was reasonably related to the objective of providing athletic opportunities for both males and females. It further stated that "until girls' programs comparable to those established for boys exist, the rule cannot be justified." However, in this case, since the trial court had already decided the issue of "whether the tennis program for girls at Munster High School during the school year 1974-75 was and is comparable to that for boys," the appellate court believed it was in no position to "review the evidentiary basis upon which the facts rest."

pation when only one team is sponsored and athletic opportunities for the excluded sex have previously been limited.

G. *Same Sport, Different Rules*

Cases and issues in this section have traditionally arisen in basketball because, in that sport, women's playing rules are sometimes different. As evidenced by the *Bucha v. Illinois High School Association*,[164] cases have also evolved from generally disparate treatment of female student-athletes rather than from different rules of a sport. In cases where there are different playing rules for women's and men's teams in contact sports, there is a split in decisions whether the women's rules should be changed to conform with the men's. The plaintiff-females in these cases generally have alleged sex discrimination based on the rule differences with men's sports and also the reduced opportunity to compete against other women (who had the advantage of playing under men's rules) for college scholarships. In *Dodson v. Arkansas Activities Association*,[165] the court ruled for the plaintiff-women student-athletes,

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164. 351 F. Supp. 69 (N.D. Ill. 1972), in which plaintiff female-students brought a class action against the Illinois High School Association (IHSA) because of its bylaws that placed limitations on girls' athletic contests that were not applied to boys' athletics. The district court held for the association reasoning the traditional equal protection standard "requires this court to defer to the judgment of the physical educators of the IHSA once a rational relationship has been shown to exist. . ." *Id.* at 75. The court found a factual basis for the IHSA's claim that physical and psychological differences existed to warrant the different standards.

165. 468 F. Supp. 394 (E.D. Ark. 1979), in which plaintiff, a junior high school basketball player, brought a suit challenging the constitutionality of different playing rules for boys and girls. The court held for the plaintiff, citing the Arkansas' rules for six-on-six girls' basketball that put female basketball players at a tremendous physical and psychological disadvantage in the transition from high school to college basketball since only three other states in the country played half-court basketball at the secondary school level, and all intercollegiate and international competition followed full-court rules. The court found that, "none of the reasons proffered (for the rule differentiation) is at all relevant to a gender-based classification." *Id.* at 397. Defendant stated that "no physiological differences between males and females . . . prohibit females from playing five-on-five basketball," *Id.* and the primary justification given for the sex-based distinction between rules was simply that of tradition. The court noted that:

> The point here is that Arkansas boys are in a position to compete on an equal footing with boys elsewhere, while Arkansas girls, merely because they are girls, are not. . . . Arkansas schools have chosen to offer basketball. Having taken that step, they may not limit the game's full benefits to one sex without substantial justification.

Id. at 398.

while in *Jones v. Oklahoma Secondary School Activities Association,*[166] and *Cape v. Tennessee Secondary School Athletic Association,*[167] the courts ruled for the defendant-athletic associations.[168]

A different aspect of the season-of-play type lawsuit is illustrated in *Striebel v. Minnesota State High School League,*[169] where the plaintiff-females brought litigation to move the girls' interscholastic swimming season. The defendant athletic association scheduled men's swimming in a different season (e.g., fall) than the women's season (e.g., winter), and was challenged on their scheduling decision based on sex discrimination grounds. The plaintiffs wanted both the girls' and boys' swim season to be in the fall. The athletic association's decision was upheld. The court held the lack of available pool time for both women's and men's teams to practice and compete during the same time of the year provided a reasonable basis for the decision.

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166. Jones v. Oklahoma Secondary School Activities Ass'n, 453 F. Supp. 150 (W.D. Okla. 1977), where plaintiff Jones sought an injunction to suspend the association's split-court basketball rules, arguing they created an arbitrary and unreasonable distinction between boys and girls that violated her right to equal protection. The court held for the defendant. Plaintiff's Title IX arguments were dismissed because she did not follow administrative procedures. Her fourteenth amendment argument was seen as faulty because her allegations concerning her reduced opportunity to compete in the future and a reduced likelihood for college scholarships did not rise to the level of an equal protection interests. Her claims such rules interfered with her enjoyment of the game as well as her physical development also did not establish a cognizable equal protection claim.

167. Cape v. Tennessee Secondary School Athletic Ass'n, 424 F. Supp. 732 (E.D. Tenn., N.D. 1976), *rev'd per curiam,* 563 F.2d 793 (6th Cir. 1977), involved plaintiff Cape, a high school student, who challenged the "split-court" rules used in women's basketball. These rules, she claimed, denied her the full benefits of the game, as well as an athletic scholarship to college. The court held for the defendant and dismissed the plaintiff's agruments that were based on a private right of action under Title IX and the fourteenth amendment. The court held the plaintiff who sought to challenge regulations must first exhaust all administrative remedies within the Dep't of Health, Educ. and Welfare before her suit could be addressed in federal court.

168. *See also,* Russell, Wolf and Enslav v. Iowa Girls High School Athletic Union (pending), involving three Iowa girls who brought a class action charging the state's six-on-six half-court rules violated their rights under the Equal Protection Clause. Noting that intercollegiate and international competition for women is conducted under five-on-five rules, the plaintiffs argued they were being discriminated against because half-court basketball does not offer the same benefits and experience as the game of basketball available to the boys of Iowa. *See* for further information, Comment, *supra* note 99.

169. 321 N.W.2d 400 (Minn. 1982).

VI. Sex Discrimination in Athletic Employment

This section focuses on sex discrimination in the area of athletic employment. In these cases the plaintiff is generally an employee retained as a coach or physical education teacher. Two separate statutes specifically pertain to discrimination in employment. The first is the Equal Pay Act,[170] which was passed in 1963 and went into effect in 1964. The second is Title VII of the Civil Rights Act of 1964.[171] While the Equal Pay Act deals solely with wages paid to women and men within the same company, Title VII focuses on discriminatory hiring/firing practices and advancement policies within companies. Neither is specific to the issue of sex discrimination, however, as they both encompass discrimination on the basis of race, religion, or national origin.

The remedies of both injunctive and affirmative relief are available to the winning party in an employment discrimination suit. The prevailing party may be awarded back pay and attorney's fees as well as an injunction prohibiting the employer's unlawful action.

The Equal Pay Act stipulates that an employer must pay equal salaries to men and women holding jobs that require equal skill, effort, and responsibility and are performed under similar working conditions. The jobs done need not be identical; they must only be substantially equal. The employer must still pay equal wages if the variations between jobs are minor. Different salaries are permissible, however, when they are based not on the sex of the employees but on a bona fide seniority system or on merit increases. Consequently, the Equal Pay Act addresses only the most overt wage discrimination cases and does not apply to problems created by prior discrimination in the workplace. The Labor Department's Division of Wages and Hours was initially responsible for enforcement of the Act, but in 1979 enforcement was moved to the Equal Employment Opportunity Commission (EEOC).[172] Enforcement procedures consist of routine checks as well as investigations in response to specific complaints. If a claim is substantiated

170. *Supra* note 48.

171. Civil Rights Act of 1964, § 42 U.S.C. 2000(e) (1976).

172. Under the Fair Labor Standards Act, 29 U.S.C. § 201-219 (1982), enforcement was placed in the EEOC.

and a violation found, the complaining party may receive the difference between wages paid to men and women for a maximum two-year period.

Title VII was enacted as a more comprehensive prohibition on private acts of employment discrimination. It forbids discriminatory employment practices based on the race, color, religion, sex, or national origin of the applicant. These categories may, however, be used to differentiate between applicants when sex, religion, or national origin is a bona fide occupational qualification (BFOQ). A BFOQ is very narrowly defined as an actual job requirement, not merely a customer or employer preference. For example, race is never considered a BFOQ. Title VII is applicable to all employers of more than fifteen persons and it specifically covers almost all state and local government employees as well as employees of most educational institutions. It is enforced by the EEOC, which has the authority to process and investigate any complaints. The EEOC may also bring suits in federal court if necessary. Enforcement of Title VII is not limited to EEOC actions, however, because the legislation also has individual and class causes of action.

Both of these approaches have limitations. Even taken together, they are not always sufficient to enforce a prohibition against sex discrimination. Although the Equal Pay Act applies to all employers, Title VII has been limited to employers of more than fifteen people. Thus, many smaller businesses are not under the jurisdiction of Title VII. The Equal Pay Act is limited in other ways. For example, it is directed only to discrepancies in pay levels once on a job. It does not address the problem of discriminatory hiring or advancement policies. The basic weakness of these acts is that neither is all-encompassing. They do not address the overall problems of sex discrimination that exist outside of the workplace. Thus, very few of the problems of discrimination encountered in athletics are addressed by either act. However, this legislation does provide potential relief in the area of athletic employment.

The cost involved in pursuing litigation under these statutes poses another major problem. Neither statute provides any guaranteed basis for the eventual recovery of attorneys fees and/or double or triple damages. Thus, litigation is not an option for many of those who might wish to file claims. Cases may not be pursued, and the effectiveness of the legislation diminishes as the chances that

the employer will be punished decreases. One last problem is that until recently, courts have been reluctant to interpret the statutes broadly because hiring and salary decisions are well within the area of management prerogatives allotted to employers. The courts have been reluctant in the past to interfere in any discretionary decision unless there has been a clear abuse of that discretion. Thus, it is very difficult to establish a case based on a complaint regarding practices in either of these areas. Usually, the evidence is open to a variety of interpretations. Such circumstances can make it difficult or even impossible for a plaintiff to prevail in a sex discrimination case under application of the aforementioned statutes.[173]

A. *Coaching*

Allegations of discrimination based on sex have often been made in the area of coaching. Many of the claims are based on a lack of parity in pay between the coaches of male and female teams. Often, women coaches of women's teams are paid less than coaches of men's teams. The justification most often made by school districts for the pay differential is that coaches of men's teams and coaches of women's teams do not do equivalent work. In order to redress the inequality in salary, women must prove they perform substantially equivalent work. Some factors courts consider in making determinations are the nature of the game, the number of players being supervised, the length of the playing sea-

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173. *See* for cases involving the Equal Pay Act and Title VII in relation to athletics. Caulfield v. Bd. of Educ. of City of New York, 632 F.2d 999 (2nd Cir. 1980) *aff'g* 486 F.Supp. (E.D.N.Y. 1979), in which a court upheld a decision that Title IX applies to athletic hiring practices because discrimination against women's access to supervisory positions has a discriminating effect on the institution's students, the direct beneficiaries of federal financial aid. Coaching and other supervisory positions in athletic programs must be assigned without discrimination, even if the program receives no direct federal aid for funding the position; Kunda v. Muhlenberg College, 621 F.2d 532 (3rd Cir. 1980) *aff'g* 463 F.Supp. 294 (E.D. Pa. 1978), was an employment gender discrimination case where plaintiff was a female physical education instructor at a private college. She was denied tenure because she lacked a master's degree, whereas three male members of the physical education department who lacked master's degrees were promoted. The court issued an injunction requiring defendant to promote plaintiff with tenure and back pay. The court of appeals affirmed the decision, finding academic institutions' decisions not *ipso facto* entitled to special treatment under federal laws prohibiting discrimination. The court noted that although the educational institution's interest in academic freedom are important, academic freedom is not implicated in every academic employment decision.

son, the time taken up in the practices, the amount of travel required, and any other responsibilities undertaken by the coach — for example — recruiting, scouting, academic counseling, and so forth.[174]

In cases in which it is difficult for the coach of a women's team to meet the standard of "equivalent work," it has been argued the work is more difficult.[175] Plaintiff coaches of women's teams have

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174. For further information, *see also*, Appenzeller, *Employment of Coaches: Is The Right To Hire The Right To Fire?*, Sports & Law—Contemporary Issues (Charlottesville, Va. 1985).

175. For cases which involved the Equal Pay Act and Title VII in relation to coaching, *see* the following:

a) Textor v. Bd. of Regents of Northern Illinois Univ., 87 F.R.D. 751 (N.D. Ill. 1980), 711 F.2d 1387 (7th Cir. 1983), where female women's athletic director and coach, Alice Textor, appealed the district court's denial of her motion to amend her complaint alleging the Mid-America Conference had practiced sex discrimination in its operation of the intercollegiate athletic conference. The appeals court remanded the case to the district court to allow the plaintiff to file an amended complaint.

b) Burkey v. Marshall Country Bd. of Educ., 513 F. Supp. 1084 (N.D. W. Va. 1981), which involved plaintiff coach who had instituted a girl's junior high school basketball program in 1971 and then posted a 31-5 record in the next four years. In keeping with school board policies she was paid one half the amount the boy's team coach received. Plaintiff filed complaints with state and federal authorities alleging sex discrimination. In 1977, HEW found a Title IX violation for the plaintiff and the EEOC also found reasonable cause to believe the board's policies constituted unlawful sex discrimination.

Plaintiff was then removed as coach and transferred to an elementary school. Plaintiff brought suit against the school board based on Title VII, the Civil Rights Act of 1971, and the Equal Pay Act. The court found for Burkey, awarded her $1,260 back pay and the next available teaching position at either junior or senior high school.

c) California Women's Coaches Academy v. California Interscholastic Fed'n, No. 77-1270 LEW (C.D. Cal. 1980), (settled), involved the California Women's Coaches Academy which in 1977, filed a class action with three individual members alleging unlawful sex discrimination against the league and the California Department of Education. The suit was settled in 1980 and the settlement provisions included more sports for girls, longer seasons, and more and better paid women's officials for girls' interscholastic contests.

d) Jackson v. Armstrong School Dist., 430 F. Supp. 1050 (W.D. Pa. 1977), involved an action brought by plaintiffs Jackson and Pollick, who were women's basketball coaches. They claimed the school district had violated Title VII and the Pennsylvania Human Relations Act by paying them significantly less than the male coaches of the men's basketball team. Four men and four women within the districts coaching women's basketball were all paid equally. The court ruled in favor of the defendant, finding it lacked jurisdiction under the State Human Relations Act and the plaintiffs' claim was not valid.

e) Kenneweg v. Hampton Township School Dist., 438 F. Supp. 575 (W.D. Pa. 1977), in which plaintiffs, coaches Kenneweg and Love sued the Armstrong School Dist. on grounds of sex discrimination. They claimed they were paid less because of their sex. The court held that because the charge filed with the Equal Employment Opportunity Commission had dealt only with the question of pay, the complaint could not be amended to allege discrimination with respect to working conditions. The court also held the actions of the school

argued girls have not been exposed to sports as boys; therefore, coaches of women's teams often spend more time actually teaching their players. They do not have the luxury of merely improving on the skills of a player who has participated in that sport for a number of years. Instead, they often coach women who have had no experience in the particular sport at all. However, as women's sports programs proliferate at the youth levels, this argument is becoming less effective.[176]

B. Other Sports-Related Employment Discrimination

While Title IX has been available as a basis to contest sex discrimination in coaching, attacks on perceived inequalities in other sports-related employment have consisted largely of allegations of the denial of equal protection rights. Cases regarding discrimination in officiating, refereeing, and media coverage have

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district in paying female coaches of female sports less than male coaches of male sports did not constitute discrimination based on sex. In deciding for the defendant, the court stated the claim was based on a Title VII argument and "disparity in treatment not based on plaintiff's sex is not a valid claim under Title VII."

f) State Div. of Human Rights v. Syracuse City Teachers Ass'n, 412 N.Y.S.2d 711 (App. Term 1979), involved an action by two female coaches who filed a complaint with the State Division of Human Rights. The women had agreed to coach the junior high girls' basketball team as volunteers and were not paid. The women later found the male basketball coach was receiving $308 to coach the boys' team. The commissioner of the Human Rights Division found the board of education had discriminated against the women and ordered equal payment. The court overturned the commission's decision. It found no discrimination in employment. The court reasoned that both the male and female coaches were treated equally and the unequal pay schedule was reasonable because the job responsibilities and time commitment differed.

g) United Teachers of Seaford v. New York State Human Rights Appeal Bd., 414 N.Y.S.2d 207 (App. Div. 1979), the court held a union has an obligation to represent its member coaches fairly and impartially and may not discriminate on the basis of race or sex. The fundamental purpose of a union is to provide for its members the bargaining power that unity creates; when a union fails to exercise that power in the bargaining process and permits an employer to discriminate against union members, it discriminates against them as surely as if it proposed the inequitable agreement. Evidence proved the union was aware of the unduly low salaries and had settled for an agreement that grossly discriminated against female coaches.

h) Kings Park Central School Dist. No. 5 v. State Div. of Human Rights, 424 N.Y.S.2d 293 (1980), petitioners asked the court to review a decision of the State Division of Human Rights finding unlawful discrimination by the petitioner in paying coaches of boys' teams more than girls' teams. The court granted the petition and found no discrimination by the school district. Although the skill, effort, and responsibility were equal, coaches boys' teams required greater coaching time and travel.

176. For further information, *See Equal Pay or Coaches of Female Teams: Finding a Cause of Action Under Federal Law*, 55 NOTRE DAME LAW. 751 (June 1980).

stemmed from charges that employment practices, and specifically exclusionary rules, are arbitrary, related to no legitimate purpose, and are therefore violations of the plaintiffs' constitutional rights.[177]

Arbitrary height and weight requirements for umpires and referees may act unlawfully to discriminate against women. When such requirements are not sufficiently related to the job, they may be deemed arbitrary and thus impose unconstitutional restrictions.[178]

One area in particular, women athletes who wish to compete in professional wrestling,[179] has produced a series of decisions in which state athletic commissions were named defendants. The courts, in most cases, have granted the commissions great latitude in granting licenses and have generally upheld their decisions.[180]

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177. For further information, *see Employment and Athletics Are Outside HEW's Jurisdiction*, 65 GEO. L.J. 49 (October 1976).

178. *See, e.g.*, New York State Div. of Human Rights v. New York-Pennsylvania Professional Baseball League, 36 App. Div. 2d 364, 320 N.Y.S.2d 788 (1971), *aff'd* 29 N.Y.2d 921, 279 N.E.2d 856, 329 N.Y.S.2d 920 (1972), a sex discrimination case in which the plaintiff, acting upon a complaint of female umpire Bernice Gera, charged the defendant with a violation of a state statute (Sec. 296, Executive Law) prohibiting employment discrimination. The New York Supreme Court, Appellate Division, held that league rules requiring an umpire to stand at least 5'10" tall and weigh at least 170 pounds "were not justified by the claim that umpires must command respect of big men or by factors relating to increased size of professional catchers, physical strain, travel conditions and length of games, and that the standard were inherently discriminatory against women." The league was ordered to cease and desist such discrimination.

179. *See* Hesseltine v. State Athletic Comm'n, 126 N.E.2d 631 (Ill. 1955), involving an action in which plaintiff Hesseltine (also known as Rose Roman) applied through normal procedures for a permit to wrestle. The Illinois State Athletic Commission rejected her application. She appealed to the circuit court and won. The commission appealed. The appeals court affirmed the lower court decision. The defendant's adoption of a rule excluding women from wrestling within the state was seen as arbitrary and therefore invalid; State v. Hunter, 208 Ore. 282, 300 P.2d 455 (1956), involving an action in which defendant Hunter, a female wrestler, was prosecuted by the state for competing in a wrestling match held in violation of a statutory ban on women's wrestling. The court ruled in favor of the state, holding the ban on women's participation in wrestling was not unconstitutional; Whitehead v. Krulewitch, 25 A.D.2d 956, 271 N.Y.S.2d 565 (1966), involving an action in which plaintiff Whitehead appealed from a ruling of the New York Special Term Court denying her a professional wrestling license. The New York Supreme Court, Appellate Division affirmed the decision.

180. *See* Calzadilla v. Dooley, 29 A.D.2d 152, 286 N.Y.S.2d 510 (1968), which involved an action brought by a women wrestler, who alleged the refusal by the state's athletic commission to grant her a professional wrestling license constituted a violation of the fourteenth amendment's equal protection clause. In arguing that "a great deal of latitude and discretion must be accorded the State Athletic Commission," the court held the commission's rule

C. *The News Media*

The barring of news media members from locker rooms has been an area of concern for many sports organizations. If a barred reporter is female,[181] and male members of the news media are not similarly restricted, she may allege a violation of equal protection of the laws under the fourteenth amendment.[182] In all fourteenth amendment cases, the plaintiff must demonstrate state action is involved before relief can be considered. The court in *Ludtke v. Kuhn* found such state action because the New York Yankees had leased their stadium from the city of New York, a subdivision of the state.[183] Private universities that lease stadiums from the state, municipal, or local governments could face a similar result. When public institutions such as state universities are involved,[184] a court is likely to find state action without the need for such a relationship with a facility. A court is likely to have difficulty finding state action when a private institution (for example, the Boston Red Sox) does not lease from a governmental entity but instead owns its playing facility.

The *Ludtke* decision is the only reported case involving a rule

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against granting wrestling licenses to women was not "unjust and unconstitutional discrimination against women." The court reasoned that no one had an inherent right to participate in public wrestling exhibitions.

181. *See,* for instance, Ludtke v. Kuhn, 461 F. Supp. 86 (S.D.N.Y. 1978).

182. Counsel for Kuhn and Major League Baseball decided not to appeal Ludtke v. Kuhn, since they believed the decision was not a damaging precedent. *See* NCAA Public Relations Manual, NCAA publication, (Mission, Kansas, July, 1983, Appendix C), letter to David E. Canwood, Director of Public Relations, NCAA, from George H. Gangwere, Esg., Swanson, Midgley, Gangwere, Thurlo & Clarke, Kansas City, Mo., July 11, 1979. *See also* NCAA Public Relations Manual, NCAA publication, Mission, Kansas, July, 1985, Appendix A), Postgame Interviews, Equal Access, Bench Area, Memorandum, which notes: "Dressing rooms from NCAA Championship events are open to all reporters . . . the association has encountered few difficulities administering this policy because most arenas utilized also have a designated interview room. . . This arrangement provides equality for male and female reporters, yet maintains privacy in the dressing rooms."

183. Most major league sports teams routinely allow female sports writers into their locker rooms. A few leagues—for example, the National Basketball Association and the United States Football League—have written policies that give women equal access with men to the locker room. Other leagues allow individual teams to set locker-room policies. For further information, *see Women Sports Writers Gaining in Struggle for Equality, Respect,* NCAA News, December 28, 1983, at 3, col. 5.

184. The NCAA requires its championship teams to open locker rooms to all certified members of the media after a 10-minute cooling-off period. *See,* for instance, 1983 Men's and Women's Soccer National Collegiate Championships Handbook, NCAA publication, at 49 (Mission, Kansas, 1983).

barring female reporters from a male locker room. One important issue—the players' right to privacy—remains unanswered after *Ludtke*. In *Ludtke*, the court found the players' right to privacy had been negated by the presence of television cameras in the locker room.[185] If the right of privacy is not negated in a future case, the court will have to strike a balance between the players' right to privacy and the female reporters' right not to be discriminated against.[186]

VII. CONCLUSION

While there is little doubt that women's intercollegiate athletics is well established in this nation's colleges and universities, and will remain so, it is equally likely that any continued growth will hinge on a number of differing factors. These include political and societal attitudes, future court decisions, and the development of a power base within intercollegiate athletic governance associations by women athletic administrators.

Politically, a change in the executive branch's decision not to pursue OCR investigations of inequities involving women's athletic programs could alter the current status quo concerning sex discrimination in athletics.[187] Similarly, passage of a national Equal Rights Amendment or enactment of additional state ERAs could lead to further advancement.[188] Enactment of any legislation designed to blunt the effect of the *Grove City College* decision could also prove important.[189]

Judicially, post *Grove City College* decisions will be important to women's athletics because they will indicate whether that decision will prove to be a strong or weak precedent. Any decision by

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185. In March 1985, Major League Baseball Commissioner Peter Ueberroth issued a directive to all clubs, "Club/Media Procedures—1985," in which he noted that in the past MLB has had excellent cooperation with the media, but, "an exception has been in the area of access permitted accredited women reporters. We now are saying that clubhouses will be open and all accredited members of the media will be given the same access." For further information, *see Baseball Adopts Open-Door Policy*, N.Y. Times, Mar. 22, 1985, at A23, col. 1.

186. For further information on media access to locker rooms, *See Civil Rights in the Locker Room*, 2 J. COM. & ENTERTAINMENT L. 645 (Summer 1980).

187. *Supra* note 43.

188. *Supra* note 6.

189. *Supra* note 26.

the courts to raise sex discrimination to the higher standard of strict judicial scrutiny in equal protection cases could also lead to a change in the attitude of this nation's courts to any alleged sex discrimination in athletics.[190]

Finally, if women athletic administrators can become more influential in sports governing bodies, especially the NCAA, they might be better situated to effectuate change in those organizations' attitudes towards women in sports. Donna Lopiano, director of women's athletics at the University of Texas, has noted that, "As long as women had control of the rules system, (in the AIAW) they were in control over what happened."[191] It may be then that through the slow process of gaining positions on governing bodies, women athletic administrators may be able to improve what they view as their stalled progress in advancing women's athletic programs and eliminating sex discrimination in sports.

190. *See* notes 59-62 and accompanying text.
191. *Supra* note 38.