CHANGES INFLUENCED BY LITIGATION IN WOMEN'S INTERCOLLEGIATE ATHLETICS

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I. INTRODUCTION

Prior to 1967 there was very little opportunity for women in organized intercollegiate sporting activities. In 1967 the Division for Girls and Women Sports (DGWS) established the Commission on Intercollegiate Athletics for Women (CIAW) whose purpose was to establish intercollegiate athletic programs for women that would lead to national championships. The first national championship in women's sports was in gymnastics and it was held in 1969.[1]

Replacing the CIAW, the Association for Intercollegiate Athletics for Women (AIAW) was formed in 1971. During its first year of existence, the AIAW offered a program of seven national championships.[2] By 1980-81 the AIAW's membership had grown from 280 junior colleges and universities to almost 1,000 active member institutions and it was affiliated with the American Alliance for Health, Physical Education, Recreation, and Dance.[3]

The National Collegiate Athletic Association (NCAA) had expanded their participation in college athletics and included national championships in women's athletics in all three divisions, I, II, and III by 1984.[4] The NCAA reports that the women's varsity sports programs, which averaged 5.6 per NCAA collegiate institution in 1977, had increased to 6.9 by 1984. In similar

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1. G. SCHUBERT, R. SMITH & J. TRENTADUE, SPORTS LAW 5 (1986).
2. *Id.* These sports included basketball, gymnastics, track, swimming and field hockey. *Id.*
3. *Id.*
4. *Id.*

fashion, the money spent on women's programs dramatically increased.[5] During the 1989-90 academic year, more than 10,000 women received collegiate grant-in-aid at a total value of more than $51 million dollars.[6] In 1980 there were 16 NCAA intercollegiate sports for women athletes. These include championships in the twelve original sports: fencing, golf, gymnastics, basketball, cross country, field hockey, softball, swimming, tennis, volleyball, outdoor track, and lacrosse. Two years later, in 1982, rifle, soccer, and skiing were added. The NCAA will celebrate the 10th anniversary of women's programs throughout 1990-91 culminating in a multimedia salute at the NCAA Annual Convention in Nashville in January 1991.[7]

In 1972 the predicament of the female student-athlete was beginning to surface publicly. Women student-athletes were not receiving the same benefits as the male student-athletes and spokespersons for the female student-athlete were identifying these inequalities. Legal actions were filed in several districts in an attempt to provide equal opportunities in athletic programs. Legislators took note of the persuasive arguments made by the spokespersons. Title IX of the Educational Amendments of 1972 was an attempt to alter the federal law to protect women from unequal gender-based discrimination. Title IX directed the athletic administrators of athletic programs to examine their existing athletic programs and make necessary changes.

Those who opposed Title IX, argued that once women's programs were added, the money spent on the men's programs would decrease. Thus, both programs would be less effective.[8] However, the financial results did not prove this argument correct. Both programs have been effective. Nevertheless, leaders of the NCAA have commented on the necessity for women athletes and women administrators to "sell" women's sports to the public.[9]

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

6. *See After 10 Years in NCAA - Women's Athletics Come of Age,* The NCAA News, Oct. 8, 1990 at 1, col. 1.

7. *See NCAA To Observe Women's 10th Year,* The NCAA News, Sept. 10, 1990, at 1, col. 3.

8. Gaal & DeLorenzo, *The Legality and Requirements of HEW's Proposed "Policy Interpretation" of Title IX and Intercollegiate Athletics,* 6 J.C. & U.L. 161 (1979-1980). In the fall of 1978 Health, Education, and Welfare Secretary Joseph A. Califano Jr. proposed an interpretation of Title IX which prompted outrage and opposition from institutions that fielded expensive major football teams. *Id.*

9. Wong & Ensor, *Sex Discrimination in Athletics: A Review of Five Decades of Accomplishments and Defeats,* 21 GONZAGO L. R. 345 (1985-86). Wong and Ensor stated:
"It seems to many who are responsible for generating the dollars to pay intercollegiate athletic costs that there must be some correlation between added program costs and increased revenue to support those costs." *Id.* 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. John Toner, Pres. NCAA. Supra note 13. The AIAW estimated that for the 1973-74 academic year, NCAA Division I schools spent an average of $1.2 million on men's athletic programs, but only $27,000 on women's programs. By the 1981-82 academic year, institutions expended an average of $1.7 million on men and $400,000 on women. The average women's athletic budget for a Big Ten

Merrily Dean Baker, a former women's Athletic Director at the University of Minnesota and now NCAA Assistant Executive Director for Administration, noted that with increased competition among collegiate women student-athletes, there will be the same pressures for women, as there have been for men, to succeed and to market their skills. With these pressures there will be the potential for corruption. Baker firmly believed that one of the greatest challenges for women's athletics would be to avoid the pitfalls of the men.[10]

Even though women's sports were increasing in numbers, the separation from AIAW to the NCAA was difficult; a law suit resulted.[11] The AIAW sued the NCAA for alleged violations of the Sherman Anti-Trust Act. The court determined that the market for women's athletics was open to competition and that the NCAA could compete for the membership of collegiate institutions sponsoring women's sports.[12] The AIAW was not satisfied with the decision of the district court so the Association appealed. The appellate court upheld the district court's holding and noted that there were no anti-trust violations.[13]

In 1985, the delegates from 105 Division I-A major football playing institutions passed an amendment which required that each of those 105 universities sponsor a minimum of eight women's and eight men's sports programs by the beginning of the 1986-87 academic year.[14] Of historical significance is the fact that at the Fifth Special NCAA convention during the summer of 1985, the Division 1-A membership reduced the eight sport requirement to six women's sports for 1986-87, and seven women's sports in 1987-88:[15]

There have been additional set-backs for women's athletics. Where women once relied on Title IX and the fourteenth amendment, those legal options have been significantly affected by legislation and court cases. All states did not ratify the Federal Equal Rights Amendment (ERA) so there is no federal ERA. Some states have enacted their own ERA, but this is only a partial solution to the issue. Also, the United States Supreme Court imposed limitations on Title IX enforcement and, thus, concern exists among

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Conference school in 1974 was $3,500. In 1977-78 that amount had increased on an institution by institution basis to any-where between $250,000 and $750,000 per year. Fields, *Title II and IX*, The Chronicle of Higher Education, June 23, 1982 at 12, col. 2.

10. *See The Fine Art of Recruiting Superstars for Big Time Women's Basketball*, The Chronicle of Higher Education, March 30, 1983, at 21, col. 2.

11. AIAW v. NCAA, 558 F. Supp. 487 (D. Kan. 1983).

12. *Id.*

13. *See* AIAW v. NCAA, 735 F.2d 577 (10th Cir. 1984)(holding that the AIAW's failure to prove the NCAA's dues policy, proceeds distribution formula, or sale of television rights violated the Sherman Act).

14. *See Major Football-Playing Universities Must Field Teams in at Least 8 Women's Sports by 1986, New Rule Says*, The Chronicle of Higher Education, Jan. 30, 1985 at 29, col. 1.

15. *See* 1986-87 NCAA MANUAL, BYLAWS, 11-1(g)(1) at 141.

those people who have promoted women's athletics that women's programs will decline.[16]

Donna De Verona, former President of the Women's Sports Foundation and a 1964 Olympic Gold Medalist and a spokeswoman for Title IX, stated that women's athletics have made tremendous strides.[17] However, after *Grove City College v. Harris* she believed that Title IX was not going to be as effective, and that pressure would not be on athletic administrators to promote and to protect women's athletics. She did not realize that the legislators would enact the Civil Rights Restoration Act in 1988. De Verona suggested that Title IX came with no financial backing; however, it did carry some clout in the form of the threat of losing federal financial support if institutions discriminated.[18] Because Title IX had been severely limited by the courts in their decision in *Grove City College*, De Verona was unsure of what athletic administrators might do. She did not believe that people responsible for women's sports programs would necessarily do the "right things" voluntarily.[19]

In the same tone of angry discontent, Judith Halland, Associate Athletic Director at UCLA, 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."[20]

The judicial system played a vital role in facilitating the changes in women's athletics. Gender-based discrimination was frequently litigated in the courts and Title IX and state ERA statutes were generated by various case holdings. The history and development of women's athletics can be traced through court decisions over the years.

II. Fourteenth Amendment

Historically, legislators have attempted to exclude women from particular work areas and career choices because the legislators believed that women were less able than men to perform particular tasks. For example, in 1873 the Supreme Court of the United States agreed that the Illinois' law preventing women from practicing law was constitutional in *Bradwell v. Illinois*.[21] Similarly in *Goesaert v. Cleary*,[22] the Supreme Court of the United States upheld the legislature's right to preclude women from bartending because the legislature could devise preventive measures against "moral and

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

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

18. *Id.*

19. *See id.*

20. *Id.*

21. 16 Wall. 130 (1873).

22. 334 U.S. 464 (1948).

social problems" that result when women, but apparently not men, tend bar.[23]

The fourteenth amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process-of-law; . . . ." The fourteenth amendment seeks to protect against injustice and against the unequal treatment of those who should be treated alike. It is not at issue whether one has the right to participate; what is at issue is that no one is treated differently in an activity provided by the state. The only time one can be treated differently is if there is a substantial basis for the disparate treatment.

In order for a party to prevail in an action based upon the violation of the fourteenth amendment due process, that party must allege and prove a property interest.[24] The concept of a property interest has been examined in several instances and the courts have determined that property interests are not created by the Constitution.[25] Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state laws which secure certain benefits and which support claims of entitlement to those benefits.[26]

When a student-athlete, either male or female, raises the issue of a property interest, courts have determined that the party is dealing with the issue of athletics which is only one component of the educational package and not the entire or total educational package. If a state, as part of its educational program, elects to provide athletic opportunities for its students, courts may decide that there is a property right. However, that property right generally extends only to the high schools within that state because the state law provides entitlement to a high school education whereas there is no entitlement to a college education.[27]

During the 1970's there were many cases alleging equal rights discrimination because women (girls) were denied the opportunity to participate in interscholastic athletics.[28] Courts, insisted that merely alleging discrimination based upon gender was insufficient.[29] When dealing with an alleged de-

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23. *Id.* at 468.

24. Fluitt v. University of Neb., 489 F. Supp. 1194, 1202 (D. Neb. 1980).

25. Board of Regents v. Roth, 408 U.S. 564, 573 (1972); *see*, e.g., Goss v. Lopez, 419 U.S. 565, 571. (1975).

26. Goss at 573 n. 18 (1975). The Court said that based upon state law, the students had legitimate claims of entitlement to a public education. *Id.* State law directed authorities to provide a free education to all residents and there were compulsory attendance laws as well. *Id.* at 574.

27. Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602 (D. Minn. 1972) (holding prior to *Goss* that education is not to be considered as a property right).

28. *See, e.g.*, Bennett v. West Tex. State Univ., 799 F.2d 155 (5th Cir. 1986); Haffer v. Temple Univ., 688 F.2d 14 (3rd Cir. 1982); Blair v. Washington State Univ., 108 Wash. 2d 558, 740 P.2d 1379 (1987).

29. *Bennet*, 799 F.2d at 157.

nial of equal protection, it was necessary to define the nature of the right asserted. Courts hesitated to interfere with the policies of state associations governing the participation in athletics. The courts looked to the arguments of the persons alleging the discrimination to find evidence that the association acted "unreasonably, arbitrarily, or capriciously."[30]

Most of the challenges brought before judges concerned females who were denied the right of the opportunity to participate on "mixed" teams. The Courts in 1970 were quick to point out that there was no constitutional right to participate in interscholastic athletics.[31] The only issue courts wanted to examine was whether a program of interscholastic athletics, after having been provided, had been administered in a manner which denied equal protection to female students as guaranteed by the fourteenth amendment.[32]

Courts carefully examined the interscholastic athletic programs to determine if girls were given the same opportunities as boys.[33] If they found evidence that programs existed for both male and female, then the arguments regarding women's equal protection were insufficient.[34] However, if the courts discovered in their investigation that opportunities were denied to females, the courts found the classification discriminatory.[35] By denying female students the opportunity to participate in established interscholastic competitions, females were in effect denied the right to participate in any interscholastic athletic competition. Courts stated that if there is only one program offered, the difference in athletic ability cannot be a justifiable reason and the program must be found to be discriminatory.[36]

In order to prevail on a constitutional claim of discrimination based on the fourteenth amendment equal protection clause, a claimant must prove that state action is involved in the denial of an application to compete.[37] The claimant must show that differential treatment is involved. Courts stated that to withstand the Constitutional challenge, the classification must be reasonable and must rest on grounds of difference having a fair and substantial relationship to the object of the legislation so that all persons similarly situated shall be treated equally.[38]

Once state action has been established, the claimant must then show that the policy which allegedly discriminated does not have a substantial

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30. *Id.*
31. *Id.*
32. Bucha v. Illinois High School Ass'n, 351 F. Supp. 69 (D. Ill. 1972) (class action by female high school students challenging high school association by-laws placing limitations on girls' athletics that were not applicable to programs available to boys).
33. *Id.*
34. *Id.* at 74.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*

relationship to the governmental objective to which it is directed. This substantial relationship cannot be presumed.[39] The injured party must show that the desired wish is not eccentric nor frivolous.[40]

If the alleged discriminative policy is gender-based, it is not subject to strict scrutiny by the courts; the proper test that should be employed by the courts is whether the state has shown that the gender-based classification is substantially related to an important governmental objective.[41] Sex is not a suspect classification. Therefore differences between the sexes may sometimes justify disparate legal treatment. Sex differential may not be based upon social stereotypes. However, recent courts have stated that gender-based classification will be upheld if based upon real differences between the sexes, rather than sexual stereotypes.[42]

The party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an exceedingly persuasive justification for the classification. This burden is met by showing that the classification serves an important governmental objective and that the discriminatory means employed to meet that goal is substantially related to the achievement of the objective.[43]

In *LaFler v. Athletic Board of Control*,[44] the court held that if allowing men and women to compete against each other would be irresponsible and possibly dangerous to women, the regulation which discriminates on its face can be determined to meet the substantial relationship test even though all of the factors involved are not known.[45] On the other hand, sex-based classification can withstand constitutional challenge under the fourteenth amendment where the actual purpose of the discrimination is to compensate for past injustice.[46] In *B.C. v. Cumberland Regional School District*,[47] the court determined that B.C., a male, was not discriminated against when the rules promulgated by the state Interscholastic Athletic Association prevented him from playing on the girls' field hockey team. The court objected to B.C.'s argument that the females at Cumberland Regional High School had the

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39. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 653 F.2d 222 (5th Cir. 1981), *cert. granted*, 454 U.S. 962 (1981); Reed v. Reed, 404 U.S. 71 (1971); Haas v. South Bend Community School Corp., 472 F.2d 1207 (6th Cir. 1973); Brenden v. Independent School Dist. 742, 477 F.2d 1292 (8th Cir. 1973); Kelly v. Wisconsin Interscholastic Athletic Ass'n, 367 F. Supp. 1388 (E.D. Wis. 1974); Clinton v. Nagy, 411 F. Supp. 1396 (N.D. Ohio 1974).

40. Vorckheimer v. School Dist., 532 F.2d 880 (3rd Cir. 1976), *aff'd*, 430 U.S. 703 (1977).

41. *See, e.g., Haas*, 472 F. 2d at 1211.

42. Michael M. v. Superior Court of Sonoma County, 450 U.S 464 (1981); *see also* Craig v. Boren, 429 U.S. 190 (1976) (holding that Oklahoma's gender-based differential in regard to drinking age was an invidious discrimination in violation of the equal protection clause).

43. *See* Saint v. Nebraska School Activities Ass'n, 684 F. Supp. 626, 629 (D. Neb. 1988).

44. 536 F. Supp. 104 (W.D. Mich. 1982)

45. *Id.*

46. *See* Califano v. Webster, 430 U.S. 313 (1977).

47. 220 N.J. Super. 214, 531 A.2d 1059 (App. Div. 1987).

same opportunities as did the males.[48] The court was convinced that the rules promulgated by the state Interscholastic Athletic Association were advanced to achieve equality of athletic opportunity for both sexes and to rectify the historical denial of athletic opportunities for women.[49] The *B.C.* court said that to them, "[t]he equalization of athletic opportunities for women was an important governmental objective and the Athletic Association's regulation prohibiting males from participating on female teams provides an appropriate and proper means of protecting athletic opportunities for girls in the education system."[50] Thus the Athletic Association rules were substantially related to the achievement of a governmental objective. By excluding males from participation on female high school athletic teams, the regulation prevents males from dominating and displacing females from meaningful participation in available athletic opportunities.[51]

The court in *B.C.* further concluded that in the converse situation where females are excluded from participation in a non-contact sport on a male team, the factors of safety, intimidation, and displacement which render the Athletic Association's regulation substantially related to athletic opportunities for women are not present.[52]

III. Title IX

In recent years, dozens of federal courts have interpreted the equal protection clause of the fourteenth amendment as mandating equal athletic opportunities for high school females. These rulings allowed females to participate in previously all-male sports such as little league baseball,[53] football or high school soccer,[54] cross-country running,[55] and basketball.[56] These court

48. *Id.* at 217, 531 A.2d at 1061.

49. *Id.*

50. *Id.* at 218, 531 A.2d at 1061.

51. *See, e.g.*, Clark v. Arizona Interscholastic Ass'n 695 F.2d 1126, 1129 (9th Cir. 1982), *cert. denied*, 464 U.S. 418 (1983); Mularedelis v. Haldone Central School Bd., 427 N.Y.S.2d 458, 74 A.2d 248, (Sup. Ct. 1980); Petrie v. Illinois High School Ass'n, 75 Ill. App. 975, 394 N.E.2d 855 (1979).

52. *B.C. v. Cumberland*, 220 N.J. Super. at 220, 531 A.2d at 1063.

53. *See* Fortin v. Darlington Little League, Inc., 514 F.2d 344 (1st Cir. 1975) (holding that excluding girls from liitle league baseball was an invidious discrimination in violation of the equal protection clause).

54. *See* Lance by Lance v. Ambach, 620 F. Supp. 663 (S.D.N.Y. 1985); Force v. Pierce City R-IV School Dist., 570 F. Supp. 1020 (W.D. Mo. 1983).

55. Dougherty County School Sys. v. Harris, 622 F.2d 735 (5th Cir. 1980) (stating that Title IX governs the conduct of a program only if that specific program receives federal financial assistance). At the time of the decision in *Dougherty*, and in Bennett v. West Tex. State, 525 F. Supp. 77 (N.D. Tex. 1981), most cases using Title IX were employment cases. *See* Seattle Univ. v. Department of Health, Education and Welfare, 621 F.2d 992 (9th Cir. 1980).

56. *See* Dodson v. Arkansas Activities Ass'n 468 F. Supp. 394 (E.D. Ark. 1979); Cape v. Tennessee Secondary School Athletic Ass'n, 563 F.2d 793 (6th Cir. 1977). *But see* Jones v. Oklahoma Secondary School Activities Ass'n, 453 F. Supp. 150 (W.D. Okla. 1977).

holdings were revolutionary in that courts began to recognize the inequalities of the opportunities offered to females as well as the limited financial assistance provided to female athletes.

Congress further assured athletic equality for females by passing Title IX of the Education Amendments of 1972.[57] This legislation directed the Department of Health, Education, and Welfare (HEW) to promulgate regulations designed to eliminate discrimination on the basis of sex in educational programs and the activities which receive federal financial assistance.[58] Regulations promulgated by the legislature assure that Title IX include such educational activities as athletics and interscholastic athletics at the post high school level.[59] The statute directs agencies awarding most types of assistance to promulgate regulations to ensure that recipients adhere to the statute.[60]

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57. Pub. L. No. 92-318, 86 Stat. 373 (codified at 20 U.S.C. § 1681 (1972)) [hereinafter Title IX]. The statute broadly assures that no person "shall on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance . . . ." *Id.*

58. *Id.* In 1974, an amendment to this statute provided that:

> The Secretary [of Health, Education, and Welfare] shall prepare and publish, not later than 30 days after the date of enactment of this Act (enacted August 21, 1974), proposed regulations implementing the provisions of Title IX of the Educational Amendments of 1972 (20 U.S.C. § 1681 et seq.) relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to interscholastic athletic activities reasonable provisions considering the nature of particular sports.

Pub. L. No. 93-380, 88 Stat. 612, Act of Aug. 21, 1974.

The regulation implementing Title IX was signed by President Gerald Ford on May 27, 1975 and became effective on July 21, 1975. These regulations attempted to set out the rules governing how institutions would implement their programs to bring them into compliance with the legal requirement of equal athletic opportunity. The changes which were necessitated could not be made immediately and the framers of the regulations inserted a rule which allowed the institutions three years as a transition period which would end July 21, 1978. However, by the end of the transition period, the Department of Health, Education and Welfare had received in excess of 100 complaints against 62 institutions. *See* Fields, *What Colleges Must Do To Avoid Sex Bias in Sports,* Chronicle of Higher Education, Dec. 10, 1979 at 13, col. 1. It appeared obvious to those concerned with women's equal athletic opportunities that more guidance would have to come from the Department of Health, Education, and Welfare explaining more clearly and specifically what constituted compliance with the law. *See* 20 U.S.C. § 1681. The final policy interpretation was written by HEW Secretary Patricia Harris and was issued in December, 1979. This interpretation dropped the per-capita standard which had angered the critics of *Califano* and substituted by sections stating that HEW would look for proportional spending on athletic scholarships and "equal in effect" spending in other program areas. Secretary Patricia Harris referred to the final policy as one that was "sensible" and "flexible". Educational Opportunities Guidelines, 44 Fed. Reg. 71, 415 (1979).

59. 45 C.F.R. § 86.41 *et seq.* (1990).

60. *Id.*

Generally, the enactment of Title IX of the Education Amendments of 1972 did not remove the problem of sexual discrimination from constitutional concern.[61] Title IX merely created an administrative remedy and is subject, therefore, to judicial review to enforce the prohibition of sex discrimination in educational programs receiving federal financial assistance.[62] Title IX does not replace the right to enforce the commands of the fourteenth amendment.[63] The fourteenth amendment authorizes the right to relief for a person who has been deprived of any rights, privileges, or immunities secured by the United States Constitution and the laws promulgated thereunder through appropriate action.[64]

Clearly, the United States Supreme Court has held that in most cases of alleged sexual discrimination, it was equal protection which provided the standard for judicial scrutiny prior to 1980. However, following 1980, Title IX and its subsequent rules and regulations have had tremendous impact as they have been applied to sexual discrimination allegations. In 1981 several judges believed that the answer to sexual discrimination was based upon the fourteenth amendment of the Constitution.[65] These judges found it very difficult to decide the sexual discrimination issues by using only Title IX.[66]

The legislative history of Title IX as it applies to athletic programs is scarce. Senator Bayh, the sponsor of the amendment to include the prohibition against sex discrimination, stated in response to a series of questions regarding the Title IX legislation, that his amendment would not require the "desegregation of football fields."[67] In 1974, amendments to Title IX expressly authorized a consideration of the differences between the female and the male intercollegiate athletic programs.[68] The regulations, published shortly after Title IX was amended, permitted separate teams for the different sexes when team members were selected by competitive skill. Congress has not acted at any time to change the Department of Health, Education, and Welfare's interpretation nor has Congress promulgated rules and regulations.

In the early cases involving Title IX, courts were careful to note that individual schools had to comply with the rules and regulations of Title IX and not with the rules of the state athletic associations.[69] However, the state

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61. 20 U.S.C. § 1681 (1972).

62. *Id.*

63. *See* 42 U.S.C. § 1983 (1972)(allowing Congress to make legislation that will be followed by the states).

64. *See* Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117 (E.D. Wis. 1978).

65. *See* Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n, 647 F.2d 657 (6th Cir. 1981).

66. *Id.* at 661.

67. 117 CONG. REC. 30, 407 (1971).

68. *See* Act of August 21, 1974, Pub. L. No. 93-380, 88 Stat. 612 (1974).

69. *See Yellow Springs*, 647 F.2d at 660.

high school rules proscribing co-educational teams in contact sports could not be more restrictive than the regulations under Title IX if the rules operated to prevent compliance with Title IX.[70]

However, limitations were placed upon the changes created by the court findings. The courts held that because the schools had a sufficiently strong interest in safety, they could prohibit co-educational participation in "contact" sports; "separate but equal" sports teams were permissible; and because there was nothing stating a school district had to offer athletic opportunities to students, a school district could avoid constitutional requirements by eliminating its athletic program entirely.[71]

In a 1980 action brought by female students against a university, the Federal District Court of Alaska, in *Pavey v. University of Alaska*,[72] allowed the university to implead the National Collegiate Athletic Association and the Association for Intercollegiate Athletics for Women as defendants.[73] In *Pavey*, the original complaint alleged that the University of Alaska discriminated against female students in its athletic program, thus violating Title IX as well as the equal protection clause of the fourteenth amendment.[74] The school officials responded that if the plaintiffs prevail, then the University of Alaska would be forced to violate the rules of the intercollegiate athletic associations of which it is a member.[75] The court recognized in 1980 that the rules governing the athletic associations conflicted because the rules were inconsistent.[76] Thus, the university sought to have court assistance in the form of an injunction which would enjoin the associations from enforcing the sanctions and rules expelling, disciplining, or sanctioning the university for failure to abide by them.[77]

In *Pavey*, the court emphatically stated that the university had a duty to perform its obligations under federal law.[78] The court concluded that Alaska had, due to the inconsistent rules of the two athletic associations to which they belong, no alternative but to discriminate.[79] Thus, Alaska's Federal District Court allowed the university to implead the two athletic associations and stated in their decision that if the rules of such athletic as-

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70. *Id.* at 661.

71. *See, e.g.*, Hoover v. Merklejohn, 430 F. Supp. 164, 166 (D. Colo. 1977).

72. 490 F. Supp. 1011 (D. Alaska 1980).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *See also* Regents of Univ. of Minn. v. NCAA, 560 F.2d 352, 363 (8th Cir. 1977) (holding that students are not deprived of due process rights when NCAA rules declare certain athletes ineligible to participate in sports programs).

79. *Pavey*, 490 F. Supp. at 1013.

sociations are found violative of federal law, a federal court must void the rules.[80]

By 1981, most courts' understanding of what constituted discrimination based upon the sex of an alleged victim had become more sophisticated because the courts repeatedly scrutinized the charges as they were made. *National Collegiate Athletic Association v. Califano*,[81] a landmark case, involved an interpretation of the necessary standing to challenge the regulations promulgated under 20 U.S.C. §1681.[82] The NCAA brought suit against the Department of Health, Education, and Welfare alleging that the Department exceeded its authority when it promulgated regulations pursuant to Title IX.[83] The NCAA asserted that some of the regulations created a sex-based quota system and thus violated Title IX and the fifth amendment. The NCAA contended that the unlawful regulations promulgated as a result of Title IX would injure the Association and its members.[84] The *Califano* court determined that the NCAA did not have standing in its own right to challenge the Title IX regulations, but it did have standing as a representative of its members, since its constituents were within the zone of interests affected by Title IX.[85]

The *Califano* court held that the NCAA could not sue on its own behalf because it did not fulfill the requirement for standing - injury in fact.[86] Further, the court stated that the injuries the NCAA alleged it would suffer if Title IX regulations were enforced were much too speculative.[87] The NCAA could, however, bring this suit on behalf of its member institutions because these parties had suffered injury in fact.[88] Additionally, the issues did not

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80. *Id.* at 1014.

81. 622 F.2d 1382 (10th Cir. 1982).

82. *Id.*

83. *Id.* at 1384.

84. *Id.*

85. *Id.*

86. *Id.* at 1385. Generally, for a plaintiff to have standing to sue he must have been "injured in fact" by the defendant's conduct. *Id.* (citing Data Processing Service v. Camp, 397 U.S. 150, 152 (1970)). Further, the essence of the standing issue is whether a party has a personal stake in the case. *Id.* at 1386. The NCAA has not shown, as an entity, that it has suffered injury in fact because it has not lost a single member, nor has it had to change any of its rules, nor has it had to make any other type of changes to comply with the Department of Health, Education and Welfare's rules. *Id.* at 1387.

87. *Id.* at 1384. To show injury in fact a "plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." *Id.* (quoting United States v. SCRAP, 412 U.S. 669, 688-89 (1973)).

88. *Id.* at 1389. The court concluded that the member institutions have suffered a legal wrong as a result of the agency's actions and could have brought this suit on their own behalf. *Id.*

require individual participation by the member institutions for the matter to be fully resolved.[89]

The regulations promulgated under Title IX by the Secretary of the Department of Health, Education and Welfare have been the subject of much argument and debate.[90] More than one court has labeled these regulations ambiguous while others have said that they are overbroad. Amicus Curaie briefs filed by the Department of Justice have attempted to interpret these regulations.[91] In *Gomes v. Rhode Island Interscholastic League*,[92] the court refused to adopt the Department of Justice's interpretation and instead, adopted the plaintiff's.[93]

In *Gomes*, a male high school senior sued the Rhode Island Interscholastic League because its rules prohibited him from competing on an all female volleyball team.[94] The dispute focused on an interpretation of a regulation promulgated under Title IX.[95] The defendants (and the Department of Justice) argued that Title IX should be interpreted generally so that it refers to overall athletic opportunities for a particular sex.[96] However, the court rejected this interpretation and held that Title IX applies to previous athletic opportunities for a sex only in regards to a specific sport or a particular team.[97] Additionally, the court held that a "separate and exclusive interscholastic female athletic team may be established only when males pre-

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89. *Id.* at 1392. Since no damages are sought for the individual member institutions and since the NCAA is only seeking declaratory relief, "it can reasonably be supposed that the remedy, if granted, will innure to the benefit of those members of the association actually injured." *Id.* (quoting Warth v. Seldin, 422 U.S. 490, 515 (1975).

90. *See* Note, *Title IX Sex Discrimination Regulations: Impact on Private Education*, 65 KY. L. REV. 656 (1977); Kuhn, *Employment and Athletics*, 65 GEO. L.J. 49 (1976).

91. *See* Kuhn, *supra* note 90, at 54.

92. 469 F. Supp. 659 (D. R.I. 1979), 604 F.2d 733 (1st Cir. 1980) (dismissed by the appellate court because Gomes had played his entire senior season before the appeal was heard, which rendered the case moot).

93. *Id.*

94. *Id.* at 665. The plaintiff tried out for, made and practiced on the all female volleyball team but was not allowed to play for the team during league competition because of the Interscholastic League's rules. *Id.* at 661.

95. *Id.* at 663. Specifically, the dispute focused on the interpretation of the following section of the statute:

> Where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that [excluded] sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport.

Id.(citations omitted).

96. *Id.* at 664. If the defendants interpretation is accepted, more constitutional problems would be created because schools would then be permitted to establish all female teams in any sport without the male equivalent. *Id.* The males would then be deprived of athletic opportunities in that sport. *Id.*

97. *Id.* at 664. The plaintiffs claim that since athletic opportunities have previously been limited for males in field hockey and volleyball, male teams must be established in both of

viously had, and presumably continue to have, adequate opportunities to participate in that sport."[98] Finally, the court ruled that if a male student is prohibited from participation on an all female team and such a team does not, and never has, existed for males, then either the males must be permitted to play on the female team or a separate team must be established for the males.[99]

This "separate but equal" team theory was emphasized in *O'Connor v. Board of Education of School District 23*[100] when it held that female athletes could be denied permission to play on an all male team provided that an equivalent female team existed.[101] The court was faced with a situation where a female athlete was claiming that the all female team was not the equivalent of the all male team.[102] However, the *O'Connor* court held that Title IX does not require the female team to be exactly equal to the male team in terms of playing ability, it "merely require[s] the institution when selecting which teams it will sponsor, to take into account the interests and abilities of both sexes to ensure that equal opportunity is provided."[103] In fact, the court claimed that separate teams for females and males does not violate Title IX but is exactly what it envisioned.[104]

On the other hand, in *Ridgeway v. Montana High School Association*,[105] a federal court ruled that the female teams that had been established by the Montana High School Association (MHSA) and the Montana Office of Public Instruction (MOPI) were not the equivalent of their male counterparts.[106] The court particularly stressed that in the areas of "access

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those sports. *Id.* However, if males have had equal or superior opportunities in that sport no such teams would have to be created. *Id.*

98. *Id.*

99. *Id.*

100. 545 F. Supp. 376 (N.D. Ill. 1982).

101. *Id.* An eleven year old girl, who was an excellent basketball player, requested permission to play on the all boys basketball team because their level of play was more suitable to her talents. *Id.* The court denied this request and observed that Title IX does not require an all female team to be exactly equal to the all male team. *Id.* at 383.

102. *Id.* Specifically, the plaintiff relies on (c)(1) of Title IX which states:

> [A] recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal opportunities for members of both sexes. In determining whether equal opportunities are available, the Director will consider, among other factors: (1) whether the selection of sports and levels of competition effectively accomodate the interests and abilities of members of both sexes.

Id. at 383 (citing 45 C.F.R. § 86.41(c)(1981)). The plaintiff argued that since her athletic ability was so superior to the others in the female league, the only way her interests and abilities could be effectively accomodated would be to allow her to play in the male league. *Id.*

103. *Id.*

104. *Id.* at 383-84.

105. 635 F. Supp. 1564 (D. Mont. 1986).

106. *Id.* at 1582. Action brought by high school girls and their parents seeking relief from alleged sex discrimination, the court held that the females were not given the equivalent sports opportunities that their male counterparts were given. *Id.*

to prime practice time, access to equally desirable facilities, team support, provision of junior varsity and younger level teams for girls' sports and sports offerings," equity was unrealized.[107] This inequity was due to people's attitudes towards female athletics and to Montana's slow start in attempting to provide equal opportunities for female athletes.[108] The court, however, did commend MHSA and MOPI for their efforts in striving to achieve equality and gave them strong advice: "survey and accomodate the interests and abilities of the female students [throughout the state]."[109] If a state concentrates on this, then equity can be achieved.[110]

Before the courts can even determine if a school's athletic program violates Title IX, it must first decide if that program is funded by the federal government. If so, Title IX applies. Prior to 1987, federal courts have held that this financial assistance must be directly received by the program in question.[111] However, in 1987, a Pennsylvania federal court changed all of this when it decided that to invoke Title IX protection, it was sufficient if a university received federal funding because the receipt of these funds in some way benefitted the athletic program in question.[112]

Prior to 1988, *Bennett v. West Texas State University*,[113] was illustrative of the courts' hesitancy to apply Title IX to state university's athletic programs.[114] In *Bennett*, the court determined that Title IX is inapplicable in cases where an institution receives federal assistance but the program itself does not.[115] Further, the court observed that even though the students at West Texas University received veteran's benefits, Basic Educational Op-

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107. *Id.*

108. *Id.* The public's attitude towards female athletes has been slowly changing over the years and should continue to progress with the continued support of state agencies like the MHSA and MOPI. *Id.*

109. *Id.* Specifically, the court noted that there are still quite a few girls who do not participate in any sport and that there are also a growing number of girls who are interested in a sport that is not offered. *Id.* These areas are the ones that the schools must target to achieve equality in athletic opportunities. *Id.*

110. *Id.*

111. *See, e.g.*, Dougherty County School Sys. v. Harris, 622 F.2d 735 (5th Cir. 1980); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982); Bennett v. West Tex. State Univ., 525 F. Supp 77 (N.D. Tex. 1981).

112. *See* Haffer v. Temple Univ., 524 F. Supp 531 (E.D. Pa. 1987).

113. 525 F. Supp. 77 (N.D. Tex. 1981).

114. *Id.* at 79-80. The prevailing view at this time was expressed by the Fifth Circuit Court of Appeals when it stated that "we cannot find sanction in the statute for this conclusion that any discrimination in an entire school system so taints the system to permit termination of all federal aid even though federally assisted programs are administered impeccably." *Id.* at 81 (quoting Dougherty County School Sys. v. Harris, 622 F.2d 735 (5th Cir. 1980)).

115. *Id.* at 80. The court adopted the "programmatic" approach which was asserted by the defendants. *Id.* at 79. This approach interprets the language in Title IX to mean that only the programs that receive federal funding can not discriminate. *Id.* The plaintiffs adopted and the court rejected the "institutional" approach which interprets Title IX to mean that as long as an institution receives any federal funding it cannot discriminate in any of its programs. *Id.*

portunity Grants, federal work-study program benefits and other forms of financial aid, in addition to the university receiving federal aid for dormitories and dining halls, these were indirect benefits conferred on the athletic program and were therefore outside the scope of Title IX protection.[116] Relying on the Fifth Circuit's decision in *Dougherty County School System v. Harris*,[117] the *Bennett* court rejected the plaintiff's argument that if an institution receives any federal funds, it may not discriminate in any of its programs regardless of whether that program or activity itself receives the federal assistance.[118] The court required that either the program itself receive the federal funds or that there be a very close nexus between the athletic programs (which includes athletic scholarships) and the overall financial aid programs established by the state university.[119] According to the court, neither of these existed.[120] There simply was not a sufficient connection between the alleged discrimination and the federally funded programs to invoke Title IX protection.[121]

A federal court in Virginia came to a similar conclusion when it held that Title IX protection was inapplicable in a situation where a state university's athletic program did not directly receive federal aid.[122] The court relied on the Supreme Court's decision in *North Haven Board of Education v. Bell*,[123] when it held that for Title IX regulations to apply, the program or activity itself must receive or benefit from the federal financial assistance.[124] The court observed that in *North Haven*, the Supreme Court "devised no

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116. *Id.* at 80. Plaintiffs tried to argue that the athletic program indirectly benefitted from the receipt of these funds because they received money that "would otherwise have be[en] diverted without the infusion of federal monies." *Id.*

117. 622 F.2d 735 (5th Cir. 1980).

118. *Bennett*, 595 F. Supp. at 79-80. *See also* Junior College Dist. of St. Louis v. Califano, 597 F.2d 119 (8th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979); Romeo Community Schools v. Dep't of Health, Education and Welfare, 438 F. Supp 1021 (Mich. 1977), *aff'd.* 600 F.2d 444 (6th Cir. 1977), *cert. denied*, 444 U.S. 972 (1978).

119. *Bennett*, 595 F. Supp. at 81.

120. *Id.* Further, the court stated that any aid received by the school's athletic program was "general and nonspecific and such aid is indirect by nature." *Id.*

121. *Id.* The court noted that if it adopted the plaintiff's contention then Title IX could apply to all of the programs offered by West Texas University. *Id.*

122. University of Richmond v. Bell, 543 F. Supp 321 (E.D. Va. 1982). The University of Richmond is a private university which has two undergraduate colleges, one for men and one for women. *Id.* at 322. The men and women usually attend classes together but there are separate graduation ceremonies and separate admissions processes. *Id.* Additionally, the athletic department provides intercollegiate and club sports for both men and women. *Id.* at 323. This department is separate from the university and receives no federal financial assistance. *Id.* The Office of Civil Rights (OCR) was attempting to investigate the University's athletic programs. *Id.* OCR claimed that it was entitled to investigate the athletic programs because the university received federal funding in the way of Library Resource Grants. *Id.*

123. 456 U.S. 512 (1982).

124. *University of Richmond*, 543 F. Supp. at 325 (citing North Haven Bd. of Educ. v. Bell 456 U.S. 512, 517 (1982)).

nexus test for determining when a non-direct recipient program is nevertheless 'benefiting' from federal assistance to bring it within Title IX protection, but in dicta, the Court did indicate that such assistance would have to go either directly to a program or be closely associated with it."[125] The court rejected this argument and relied on criteria established by the Supreme Court in *North Haven*.[126] Finally, the *University of Richmond* court concluded that these criteria had not been met and that the plaintiffs failed to "establish a nexus between federal financial assistance and the athletic program at [Richmond]."[127]

It appears from a review of the aforementioned cases that the program in question must receive some direct assistance from the federal funds before Title IX protection can be invoked. However, in 1987, a federal court in *Haffer v. Temple University*[128] changed this when it determined that an institution that simply receives federal monies must abide by the rules and regulations of Title IX.[129] The court concluded that the university's athletic scholarships were a part of the university's entire financial aid program and were therefore "within the ambit of Title IX."[130] This holding abolished some of the limitations that were previously placed upon the applicability of Title IX. The court had previously interpreted the legislative intent of Congress in enacting Title IX and noted that there was nothing to show that Congress intended to limit the scope of Title IX.[131] Instead, the Court

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125. *Id.* at 326.

126. *Id.* at 331. In *North Haven*, the Court established the following criteria to determine when there is a sufficient nexus between the federal funding and the athletic program: "(1) if any athletic department employee's salary is deferred by federal funds; (2) if the program itself receives assistance; (3) if discrimination affects other federally funded programs; (4) if any athletic facility was built with federal funds; (5) if athletes as such, benefit from any facility that did receive federal funds." *Id.* at 331 (citing *North Haven*, 456 U.S. 512, 523 (1982)).

127. *Id.*

128. 678 F. Supp. 517 (E.D. Pa. 1987).

129. *Id.* at 535. A class action was filed by potential and actual female student athletes at Temple University who claimed that the manner in which Temple distributed its financial aid violated Title IX. *Id.* at 537. The university in turn, argued that pursuant to *Bennett*, its athletic program did not have to follow the rules and regulations promulgated by Title IX because it did not directly receive federal financial assistance. *Id.* The court rejected the defendant's analysis of the applicability of Title IX. *Id.*

130. *Id.* The court rejected the *Bennett* court's distinction between athletic aid and other types of financial aid. *Id.* Further, it noted that Grove City College v. Bell, "expressly rejected the argument that Title IX forbids discrimination only in the administration of the federal financial funds and not in the administration of the entire financial aid program." *Id.* at 537 (quoting Grove City College v. Bell, 465 U.S. 555 (1984)).

131. *Id.* at 533 n.2. Originally, the plaintiff brought a suit based solely on Title IX violations but after *Grove City*, Judge Lord advised the plaintiff to "strike all Title IX claims except those regarding 'athletic scholarships and financial aid programs,' at which time, plaintiff also amended her complaint to include state and federal constitutional claims. *Id.*

In the original suit, the court denied defendant's summary judgment motion because it felt that Temple University's athletic program was subject to the rules and regulations of Title IX, even according to the narrowest interpretation. *Haffer*, 524 F. Supp. at 540. The court reasoned

stressed that Congress "intended Title IX to do to sex discrimination what Title VI was intended to do to discrimination on the basis of race, color and national origin."[132]

As a result of Title IX, the courts have demonstrated a heightened sensitivity to the history of gender discrimination in athletics. They now endorse a policy that maximizes athletic opportunities for females. Occasionally, differential treatment is still permitted when the record reveals that the sport involves a relevant physical difference. However, courts will not tolerate overbroad and unsupported generalizations regarding the relative athletic abilities of males and females. The argument that females are prohibited from a sport for their own protection will no longer be accepted. The primary object of the government in enacting Title IX, in the eyes of the courts, is the equality of athletic opportunities for both sexes.

IV. States' Equal Rights Amendments

To compensate for the inadequacies of the federal protection previously available to plaintiffs who believed they were victims of discrimination due to gender, several states have amended their state constitutions and have enacted statutes which expressly prohibit discrimination based on sex.[133]

Much has been said and written regarding a federal equal rights amendment (ERA) but no reform has yet been enacted. However, there are some distinct advantages to a state statute compared to a constitutional amendment. One of the most important advantages is that states can impose a stricter standard of review than that evaluation which is established under the equal protection clause of the fourteenth amendment.[134] If a strict standard of review is used, then the only way a state can justify gender-based regulations is by first showing that there is a compelling state interest served by the regulation and secondly that there is no less discriminatory method that could be employed which could achieve the same purpose.[135] As

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that there was a close connection between the athletic program and the federal funding in part because the athletic porgrams made direct use of buildings that received federal funds. *Id.*

132. *Haffer*, 524 F. Supp. at 541. Additionally, the court stressed the importance of a broad interpretation of Title IX and in "upholding the validity of the regulations." *Id.*

133. *See* Avner, *Some Observations on State Equal Rights Amendments*, 3 Yale L. & Pol'y Rev. 144 (1984). Since 1970, 14 states have added ERA's to their constitutions. *Id.* Sixteen states have ERA's including but not limited to: Oregon, Pennsylvania, Alaska, Washington, Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, Texas, Utah, Virginia, and Wyoming. *Id.* at 146.

134. *See id.* Of the 16 states which have enacted ERA's seven have a high standard of review, two have a medium standard of review and three have no standard. Of the 16 states, nine are worded like the proposed Federal ERA. *Id.*

135. *Id.* This two pronged analysis is also used in race discrimination cases. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan, J. dissenting).

a result of this two pronged test, courts are more likely to find discriminatory acts in a state action rather than a federal action.[136]

A second advantage of relying upon a state ERA is that the government involvement can be less than at the federal level. In federal actions there must be specific involvement by a government entity; whereas in a state action, the government entity can be less than direct. This is evident in a state court decision that qualified a children's football association as a government entity.[137] It is also illustrated in *Aiken v. Lieuallen,*[138] in which a complaint was filed alleging that the University of Oregon had violated the Oregon ERA.[139] This case is particularly pertinent to discrimination in sports because Oregon's ERA statutes included specific provisions that addressed athletics.[140]

The hearing officer who heard the complaint found that the University of Oregon did discriminate and was in violation of Oregon ERA statute.[141] The hearing officer's findings were reversed by Oregon's Chancellor of Higher Education. The court of appeals reversed and remanded with directions that the chancellor address the allegations raised by the petitioners to determine if the actions of the university had resulted in an unreasonable differentiation of treatment under Oregon ERA statute.[142] The court pointed out that Oregon has a commitment to provide equal opportunities to competitive athletic programs for men and women. One program cannot restrict the other.[143] The totality of the program is the controlling factor and there can be no disparity which appears unreasonable.[144] It was clear that the goal of Oregon's ERA statute was to provide athletic equity. Compliance with the law, however, was secondary to the institution's desire to maintain the large revenue producing sports at any cost.[145]

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136. *See* Avner, *supra* note 133, at 148.

137. Lincoln v. Mid-Cities Pee Wee Football Ass'n, 576 S.W.2d 922 (Tex. 1979).

138. 39 Or. App. 779, 593 P.2d 1243 (Ct. App. 1979).

139. *Id.* at 781, 593 P.2d at 1244. An action was initiated by citizens of Oregon and parents of two daughters who participated in the women's basketball program at the university.

140. *See* OR. REV. STAT. § 580-35. This statute states:

> In assessing the totality of athletic opportunity provided, institutions shall be guided by regulations implementing Title IX of the Educational Amendment of 1972, and shall assess at least the following: a) appropriations 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; i) publicity. Expenditures need not be equal but the pattern of expenditures must not result in a disparate effect on opportunity.

Id.

141. *Aiken,* 39 Ore. App. at 782, 593 P.2d at 1244.

142. *Id.*

143. *Id.*

144. *Id.*

145. *See* Branchfield, Edward, & Grier, *Aiken v. Lieuallen and Peterson v. Oregon State University: Defining Equity in Athletics,* 17 J.C. & U.L. 369 (1981-82).

Courts have held that any rule creating a classification based on sex alone is subject to close examination under the concept of equal protection of the laws. These holdings have been consistently strengthened in states which have passed ERA statutes. In Massachusetts the state Interscholastic Athletic Association adopted a rule prohibiting boys from participating on a girl's team but allowed girls to participate on boy's teams. In *Attorney General v. Massachusetts Athletic Association,*[146] the attorney general brought action against the Massachusetts Interscholastic Athletic Association in order to have that rule declared invalid and violative of state law.[147] The state court in Massachusetts determined that this regulation prohibiting boys from play on girls' teams did violate the Massachusetts ERA and the state statute barring sex discrimination in the educational sphere.[148] The court stated that any rule classifying by sex alone is subject to close examination under the concept of equal protection.[149] The court further declared that the rule in question could not be justified upon the theory that it would preserve emergent girls sports programs from inundation by male athletes nor could it be justified on the theory that gender-based absolute exclusion was necessary for the purpose of protecting a player's safety.[150]

Originally, the protest initiating this litigation came from a complaint by the Massachusetts Division of Girls' and Womens' Sports when a high school allowed two boys to play on the softball team at that high school.[151] The court agreed that the equal protection guaranty and the ERA condemn discrimination on grounds of sex, whether male or female.[152]

The standard to be used in Massachusetts to attempt justification of a classification based upon sex was clearly stated by the Massachusetts's court. That standard of scrutiny is at least as strict as the scrutiny required by the fourteenth amendment for racial classifications.[153] The court noted that such gender classifications are not permissible unless they meet two conditions: 1) they must further a demonstrably compelling interest; and 2) they must limit their impact as narrowly as possible consistent with their legitimate purpose.[154] The court added that if a gender-based classification were to be sustained, it must be "exceedingly persuasive" of the state's compelling need for such categorization.[155]

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146. 378 Mass. 342, 393 N.E.2d 284 (1979).

147. *Id.* at 343, 393 N.E.2d at 286.

148. *Id.*

149. *Id.*

150. *Id.* at 346, 393 N.E.2d at 288.

151. *Id.* In Massachusetts, softball had been listed as a girls' sport and there was no softball for males. The association rule read: No boy could play on a girls' team though a girl could play on a boys' team if that sport was not offered for girls. *Id.*

152. *Id.* at 347, 393 N.E.2d at 289.

153. *Id.* at 348, 393 N.E.2d at 291.

154. *Id.* at 347, 393 N.E.2d at 291.

155. *Id.* at 348, 393 N.E.2d at 292.

Other states have legislated against discriminatory practices and have added statutes prohibiting gender-based discrimination.[156] Upon examination, many states' ERA statutes appear to be similar to the Massachusetts statute.[157] However, it remains an area where case law is being established. Since the ERAs are state amendments and since cases based upon state statutes appear before state tribunals, each state must decide what that state's standard of scrutiny will be. However, it is clear that across the United States, even though states do not expressly establish ERA statutes, legislatures in the individual states intend to provide rules which do not rely upon gender-based classifications.

V. Landmark Cases

Several cases can be scrutinized to demonstrate the legal evolution which has occurred in the movement towards equality in athletics since 1970. The courts have wrestled with this issue in three different contexts. The first avenue to be looked at is the applicability of Title IX to college athletic programs. Next, the interplay between the fourteenth amendment and Title IX will be examined. Lastly, there will be an evaluation of the way in which state courts have interpreted the state equal rights amendments.

A. Bennett v. West Texas State University

The federal court in *Bennett v. West Texas State University*,[158] ruled that a university athletic program must receive direct federal financial aid in order for that program to be subject to Title IX and the regulations pursuant to that legislation.[159] The court characterized the federal funding received by West Texas State University's athletics program as "indirect" funding.[160] The federal court further held that the United States Supreme Court decision in *Grove City College v. Bell*,[161] was the controlling action.

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156. *See, e.g.*, 1979 S.D. Laws 20-13-22; Fla. Stat. Ann. § 288.2001 (West 1979).

157. *See, e.g.*, Alaska Stat. § 14-18.010 (1981); Cal. Civil Rights Code § 51 (West 1979); Minn. Stat. Ann. § 126.20 (West 1979); Wash. Rev. Code Ann. § 28A.85.010 (1979);

158. 799 F.2d 155 (5th Cir. 1986).

159. *Id.*

160. *Id.* The court acknowledged that the financial aid department of West Texas State University was subject to Title IX coverage. However, the court distinguished the athletic department by rationalizing that the "athletic department at West Texas State University receives no earmarked federal funds [citations omitted] and evidence at trial indicated that the benefit derived by the athletics department from federal funds received by the university was merely incidental." *Id.* at 160.

161. 465 U.S. 555 (1982). Grove City College was a private, coeducational, liberal arts college that chose not to accept any direct federal financial assistance. *Id.* The college, because of its non-acceptance of federal financial aid, refused to execute an assurance of compliance pursuant to Title IX provisions. *Id.* at 557. Though the college itself received no direct federal aid, the school did enroll students who received direct federal financial assistance. *Id.* As a

The *Bennett* court determined that the athletics program was not federally assisted within the meaning of the *Grove City* decision.

In *Grove City* the United States Supreme Court rejected the argument that an entire institution was subject to Title IX if one program or activity received federal aid.[162] The Supreme Court reasoned that only the program or activity which received federal aid could be regulated by Title IX.[163]

On appeal the plaintiffs, female student-athletes at West Texas State University, argued that the federal funds received by the university directly benefitted the intercollegiate athletic program. They also argued that the intercollegiate sports program should be covered under Title IX because the discrimination in the women's sports program effected other federally funded programs at West Texas State University.[164]

As evidence to support their arguments, the women student-athletes noted the athletic scholarship component of the intercollegiate athletics program, pointing out that the financial aid office assisted in the administration of those scholarships and the financial aid office clearly received federal funds.[165] The plaintiffs also argued that student-athletes pay a mandatory student service fee which is often paid in part by federal funds. Also pointed out by the plaintiffs was that student athletes receive veteran's benefits, Basic Educational Opportunity Grants, and use the buildings financed by federal aid.[166]

The appellate court reasoned that no federal funds were specifically earmarked as funds for the intercollegiate sports program.[167] In addition, the reviewing court found that any benefit derived by the sports program from federal funds was purely incidental because any funds that the athletic department received had to be first channeled through the university's gen-

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result of Grove City College's non-compliance the Department of Education terminated the assistance that was going directly to the students. *Id.*

The Supreme Court analyzed § 901(a) of Title IX and determined that the phrase, "receiving federal financial assistance," included assistance that a student receives directly. *Id.* "There is no basis in the statute for the view that *only institutions* that themselves apply for federal aid or receive checks from the Federal Government are subject to regulation." *Id.* at 564 (emphasis added).

The Court clarified the effect of Title IX on Grove City College and maintained that the school was not subject to institutionwide coverage. *Id.* The Court recognized the program-specific limitations of §§ 901-902 and declared that only the financial aid department of Grove City College was required to comply with the provisions of Title IX. *Id.*

162. *Id.*

163. *Id.* The Supreme Court rejected the court of appeals' view that under the circumstances Grove City College itself is a "program or activity that may be regulated in its entirety." *Id.* at 600.

164. *Bennett*, 799 F.2d at 160.

165. *Id.*

166. *Id.*

167. *Id.*

eral budget.[168] It was this type of indirect, "trickle down" benefit which *Grove City* explicitly found not to trigger Title IX.

In answer to the argument regarding mandatory student service fees the appellate court declared that ". . . [finding] Title IX coverage of every program which benefited from such fees would be to find coverage over the entire university. . . . While 'indirect' aid received via a student recipient does trigger Title IX coverage, it does not trigger coverage over all *programs* which 'indirectly' benefit from that aid."[169]

The *Bennett* court was persuaded by the Fifth Circuit Court of Appeals' holding in *Dougherty County School System v. Harris*.[170] In *Dougherty*, the Court found that the regulations promulgated by the Secretary of Health, Education, and Welfare were invalid.[171] The regulations were not limited to those employees who were compensated out of federal funds or who worked in programs receiving federal assistance, rather they applied to "all employees of the entire school system so long as any program or activity of the school received federal [financial] assistance."[172]

The appellate court in *Bennett* also rejected the argument that the alleged discrimination "infected" other university programs. The court pointed out that the intercollegiate athletic programs at West Texas State University are discrete programs which do not affect the entire structure of the university.[173]

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168. *Id.*

169. *Id.* at 158 (emphasis in original).

170. 622 F.2d 735 (5th Cir. 1980). The Secretary of the Department of Health, Education and Welfare promulgated broad regulations which prohibited any federally assisted schools from discriminating in employment practices on the basis of sex. *Id.* Pursuant to these regulations, the Secretary informed the Dougherty County School System that funding would be deferred. The Secretary claimed that the school's policy of paying a salary supplement to industrial arts' teachers, and not to teachers of home economics, violated the regulations. *Id.* at 737. The school sued for injunctive and declaratory relief, arguing that the regulations were invalid. *Id.*

171. *Id.*

172. *Id.* at 736. In finding these regulations invalid the appellate court emphasized that it:

> (could not) find sanction in the statute for this conclusion that any discrimination in an entire school system so taints the system as to permit termination of all federal aid even though federally assisted programs are administered impeccably. The regulations attempt to curtail sex discrimination in employment practices generally rather than in connection with specific programs receiving federal funds. The statute itself indicates that such regulations sweep too broadly . . . . Further evidence that the regulations must be keyed to a specific program is found in the enforcement provisions.

Id. at 737.

173. Bennett v. West Tex. State Univ., 799 F.2d 155, 158 (5th Cir. 1986). The court distinguished the case of Iron Arrow Honor Society v. Heckler, 702 F.2d 549 (5th Cir. 1983), *vacated as moot*, 464 U.S. 67 (1983), which dealt with the most prestigious Honor Society on the University of Miami campus that admitted only men. *Id.* The court observed that the visibility of the Honor Society among faculty and students was so great that the discriminatory environment of the Honor Society infected all the programs at the University of Miami. *Id.* The *Iron*

Finally, the Fifth Circuit pointed out that the athletic scholarship award is determined solely by the athletic department and that the financial aid office plays no role in determining the recipient of the award.[174] The court concluded that the only relationship between the federal grants and the athletic scholarships is ministerial and that relationship is insufficient when the holdings of *Grove City* are applied.[175]

B. Haffer v. Temple University

Although *Haffer v. Temple University*[176] was not the first action brought by collegiate female student-athletes alleging violations of Title IX, it was the first case to include allegations of violations and to state a claim of action under the federal equal protection clause.[177]

Originally, Rollin Haffer and seven other female student-athletes brought an action against Temple University alleging that the university discriminated on the basis of sex in its intercollegiate athletic program.[178] The plaintiffs maintained that Temple was not complying with the Department of Education regulations which required institutions to spend money on male and female student-athletes in proportion to the number of males and females engaged in the intercollegiate athletics programs.[179]

The plaintiffs substantiated their allegations by showing evidence that: 1) female student-athletes comprised 42 percent of all intercollegiate athletes at Temple, yet they received only 13 percent of the total dollars spent on intercollegiate athletics at Temple, 2) more money per capita was allocated for men's athletic scholarships than for women's athletic scholarships, 3) Temple did not have the selection of sports and levels of competition for women student-athletes as they did for men, and 4) the equipment, supplies, uniforms, facilities and coaching which was afforded female student-

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Arrow decision anticipated attempts to apply its holding to athletic departments and addressed that issue by discrediting it. *Id.*

174. *Id.*

175. *Id.* The court stressed that "[t]he financial aid office is responsible for *overseeing* the award of athletic scholarships only to be certain that the total amount of funding awarded to any given student does not exceed the maximum allowed by federal or NCAA regulations." *Id.* at 159 (emphasis added).

176. 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3rd Cir. 1982).

177. *Id.* at 533. *See* 42 U.S.C. § 1983.

178. Haffer v. Temple Univ., 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3rd Cir. 1982). Haffer filed prior to the decision of Grove City College v. Bell, 465 U.S. 555 (1984) which changed the criteria that must be examined when one alleges a Title IX violation. *Id.* at 535. The changes which occurred because of *Grove City* are significant, in that prior to *Grove City*, if any federal financial assistance was given to an institution, that institution came under the ambit of Title IX. *Grove City*, 465 U.S. at 563. *Grove City* limited the programs affected under Title IX by forcing the courts to look at purpose and effect of the federal financial assistance. *Id.*

179. *See Haffer*, 688 F.2d at 14 n. 1.

athletes was inadequate compared to that provided to the male student-athletes.[180]

At the original hearing and on appeal, Temple University argued that Title IX did not apply to the athletic program because the athletic program did not receive federal funds directly nor were any federal funds specifically designated for the athletic program.[181] The district court judge held that the Title IX coverage is not limited solely to educational programs and activities that receive earmarked federal dollars.[182] Instead the door was opened for Title IX coverage to extend to educational programs and activities which receive aid indirectly from the large amounts of federal financial assistance furnished to institutions in the form of grants and contracts. The appellate court held that the Temple athletic program did, in fact, receive direct benefits from annual federal aid.[183]

At the time *Haffer* brought suit, four years prior to the *Grove City* decision, courts wrestled with the problem of how much federal assistance was necessary before coverage under Title IX would apply.[184] Though *Haffer* did not offer any hard and fast guidelines to be followed, it did suggest that one must look at the intent of Title IX.[185]

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180. *Id.*

181. *Haffer*, 524 F. Supp. at 535. Temple contended that "to be covered by Title IX, the intercollegiate athletic programs must receive *financial* assistance in the form of actual money, and not simply federal 'benefits'." *Id.* n.12 (emphasis in original).

182. *Id.* In his analysis, Chief Judge Joseph S. Lord, III, realized that rarely do college athletic programs receive direct federal funding and, thus, examined Congress' intent in drafting Title IX. *Id.* at 541. "Congressional consideration of the proposed regulations focused almost exclusively on coverage of athletic programs." *Id.* Chief Judge Lord concluded that if Congress intended athletic departments to be exempt from Title IX coverage, they would have stated the exemption explicitly in the regulations as they did for fraternities and sororities. *Id.*

183. *Haffer*, 688 F.2d at 14. The appellate court upheld the district court's findings that in addition to Temple receiving approximately 10% of its total annual operating budget from the federal government, "Temple students rely on millions of dollars in federal grants and loans to pay tuition." *Id.* at 15-16 n.5. The court also found that the athletic department directly benefits from federal assistance in its work-study program, in the grants and loans that athletes receive, and in the use of federally financed buildings. *Id.*

184. *See* Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir. 1967); United States v. Jefferson County Bd. of Educ., 372 F.2d 836,(8th Cir. 1966); Grove City College v. Harris, 500 F. Supp. 253 (W.D. Pa. 1980); Bob Jones Univ. v. Johnson, 396 F. Supp. 597 (S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975). *But see*, Bennett v. West Tex. State Univ., 525 F. Supp. 77 (N.D. Tex. 1981) (See *supra* notes 113-130 and accompanying text for a detailed discussion of *Bennett*); Dougherty County School Sys. v. Harris, 622 F.2d 735 (5th Cir. 1980); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va 1982); Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981); Board of Public Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969).

185. *Haffer*, 524 F. Supp. at 534. The court in *Haffer* provided an analogy to emphasize their reasoning:

> A university, however, cannot use federal money to support one graduate program, such as the law school, run that program in total compliance with Title VI or Title IX, transfer nonfederal money from the law school budget to a budget of another

Originally, in 1981 the entire case was based upon alleged violations of Title IX. However, as a result of the *Grove City College v. Bell*[186] decision, the court ordered plaintiffs to strike all aspects of their Title IX claim except those regarding the athletic scholarship and financial aid programs and granted plaintiffs leave to amend their complaint.[187] Plaintiffs added both federal and state constitutional claims.

In 1987, Haffer amended her complaint alleging unlawful gender discrimination in Temple University's intercollegiate athletic program in violation of Title IX, the equal protection clause, and the Pennsylvania Equal Rights Amendment.[188] On a motion for reconsideration plaintiffs again alleged: 1) that women student athletes at Temple have fewer opportunities than men student athletes to compete in intercollegiate athletics; 2) that there is a disparity in resources allocated to the men's and women's intercollegiate athletic programs; and 3) that there is a disparity in the allocation of financial aid to male and female student-athletes.[189] Defendants moved for summary judgment.[190]

The federal district court on reconsideration denied the summary judgment motion made by the defendants. The court based its decision on the plaintiffs' evidence that showed that only one-third of the participants in the intercollegiate sports program were women.[191] Thereby, the court held that there were genuine issues of material facts as to the existence of gender discrimination.

In considering each allegation separately the court addressed the Title IX claim first. In deciding the competency of pre-1982 evidence submitted by plaintiffs, the court concluded that the men's and women's intercollegiate athletic programs were currently merged into a common administrative unit. However, this did not preclude the court from considering allegedly discriminatory practices of preceding administrations.[192] The court also determined

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program, such as the medical school, and deny blacks or women admission to the medical school. Such a scheme would violate Title VI or Title IX . . .

Id. at 538.

186. 465 U.S. 555 (1984).

187. Haffer v. Temple Univ., 678 F. Supp. 517, 522 n. 2 (E.D. Pa. 1987).

188. *Id.* The plaintiffs claimed that the treatment of women athletes violated the fourteenth amendment's equal protection clause and Pennsylvania's Equal Rights Amendment. *Id.* Alternatively, the plaintiffs argued that the discriminatory distribution of financial aid violated Title IX. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* The court recognized plaintiffs' evidence which indicated that Temple's student body was 50% female, yet only one-third of the student athletes were female. *Id.* The evidence showed that approximately 450 men participated in Temple's athletic program and only 200 women. *Id.*

192. *Id.* at 538. The court compared the application of Title IX regulations to the application of Title VI regulations. *Id.* The court analogized the Supreme Court's decision of Bazemore v. Friday, 478 U.S. 385 (1986), with the case at hand. *Id. Bazemore* was a Title VI case in which

that the athletic scholarships were part of the university's financial aid program, thereby bringing them "within the ambit of Title IX."[193]

The plaintiffs had a more difficult time supporting their federal claims of discrimination under the fourteenth amendment.[194] The court granted summary judgment for defendants as to plaintiffs' federal claims of unconstitutional discrimination in the scheduling of athletic events, facilities and in tutoring.[195] The court did not find any significant evidence which would show that the plaintiffs had been adversely affected by state action, or that the disparate impact resulted from an invidious intent to discriminate.[196]

Conversely, the court did find factual issues in the university's disposition of: housing and dining services; trainers and training services; opportunities to compete; expenditures; recruiting; coaching; travel; team trips and accommodations; and uniforms, equipment and supplies.[197] The court determined that disparate treatment may be present in the aforementioned areas and it may consequently have an adverse impact on the women's intercollegiate programs. Thus, the court left open an avenue for claims of equal protection by the female athletes.

The court then examined the state constitutional claims. The court determined that Pennsylvania's Equal Rights Amendment was meant to ensure men and women equal treatment, without reliance upon their sexual

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race discrimination in a state program was alleged. *Id.* Although the suit was brought in 1971, the *Haffer* court considered statistics from the pre-Civil Rights Act era. The court believed that the statistics could aid in determining whether or not "the present conditions were a 'mere continuation' of the earlier conditions." *Id.* at 539 (quoting *Bazemore*, 478 U.S. at 390 n. 6). In *Haffer*, the court allowed the pre-1982 figures. *Id.* The court observed that the statistics could constitute relevant background information. *Id.*

193. *Haffer*, 524 F. Supp. at 538. The court supported its holding by citing to 34 C.F.R. § 106.37 which identifies athletic scholarships as a form of financial assistance:

> *Athletic Scholarships.* (1) To the extent that a recipient awards athletic scholarships or grant-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in . . . intercollegiate athletics.

Id. at 538 (quoting 34 C.F.R. § 106.37(c)(1982)).

194. *Id.* at 539. The court recognized that classifications based on gender are subject to a heightened level of judicial scrutiny. *Id.* However, the court was quick to note that "the mere fact of gender specific teams does not violate the fourteenth amendment, the equal protection clause mandates that Temple's programs may not be *operated* in a discriminatory fashion." *Id.* at 540 (emphasis added).

In this case Temple had the opportunity to show that the discriminatory means employed were justified. *Id.* This could be done by a showing that the means employed by the athletic department served important school objectives and the means used were substantially related to those objectives. *Id.*

195. *Id.* at 538.

196. *Id.*

197. *Id.* The court held that the intent necessary for a fourteenth amendment cause of action is "provided by Temple's explicit classification of intercollegiate athletic teams on the basis of gender." *Id.* at 537. Nevertheless, the plaintiffs needed to prove disparate treatment. *Id.*

identity.[198] The district court, in attempting to apply state law, found that the Pennsylvania Supreme Court had not been clear on the precise standard to be used when considering challenges under the state ERA.

Two approaches were found to be used by the Pennsylvania courts. Some cases, the Pennsylvania Supreme Court said, suggested an absolutist or literal approach to the ERA: "[s]ex . . . is no longer a permissible factor in the determination of . . . legal rights and responsibilities."[199] Other cases suggest that a less than absolutist position is proper.[200] The less than absolutist position permits differential treatment based reasonably and genuinely upon physical characteristics unique to one sex.

The court concluded that judicial scrutiny of programs challenged under the state ERA is at least as searching as that used in an equal protection analysis. Temple proffered the argument that the two, the state ERA and the federal equal protection clause, were co-extensive. The court answered the defendants' argument by stating that if the two statutes were co-extensive, there would have been no need for the Pennsylvania Supreme Court to make such an analysis in another case.[201] Accordingly Temple's motion for summary judgment on the state constitutional claim was denied.

It is to be noted that *Haffer* forced the issue of Title IX. *Haffer* gave definition and substance to a charge for a Title IX violation. Plaintiffs can now make it past the summary judgment stage and use *Haffer* as a model to measure possible Title IX violations.

Even though *Grove City* had an impact on *Haffer* and subsequent cases decided under Title IX challenges, the effect of *Grove City* was short-lived. On March 22, 1988 the United States Congress, overriding President Reagan's veto, passed the Civil Rights Restoration Act.[202]

C. Blair v. Washington State University

A final case to be reviewed is the action women student athletes and coaches brought against Washington State University alleging sex discrimi-

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198. *Id.* at 535.

199. Henderson v. Henderson, 458 Pa. 97, 99, 327 A.2d 60, 62 (1974) (holding that statutory provision allowing payment of pendente lite, counsel fees and expenses to the wife-party in a divorce proceeding, but not to the husband, was invalid).

200. *See, e.g.*, Fischer v. Pennsylvania Dept. of Public Welfare, 509 Pa. 293, 502 A.2d 114 (1985) (holding that Pennsylvania's Abortion Control Act was not violative of the state's ERA).

201. *See* Commonwealth, Packel v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. 45, 334 A.2d 839 (1975) (holding that by-law of State Interscholastic Athletic Association, which prohibited girls from competing against boys in athletic contests, violated the state ERA).

202. Pub. L. No. 100-259, 102 Stat. 28 (1988). Congress explicitly intended "to reaffirm pre-*Grove City*" by applying federal anti-discrimination laws and overturning the Supreme Court decision in *Grove City*. *Id.* The Civil Rights Restoration Act of 1987 states that all programs and activities of an institution are now subject to federal antidiscrimination laws if any federal aid is received by the institution in any one of its programs or activities. *Id.*

nation in the operation of the intercollegiate athletic program.[203] The suit was brought under Washington's Equal Rights Amendment and Washington's state law against discrimination.[204]

As early as 1975, female student athletes at Washington State University began to ask for equal use of athletic facilities, equal funding, and the opportunity to administer their own programs.[205] Members of the women's athletic program spoke before campus organizations, administrators and leaders in an attempt to correct the inequalities in the existing women's programs. When the appeals to the university failed to remove the inequalities, the coaches and players filed separate, unsuccessful complaints in federal court. Thus, in 1979 the plaintiffs were forced to file in the Washington state courts.[206]

It was not until eight years later that the plaintiffs received any signs of success. In 1987 the trial court's findings of fact stated that "despite marked improvements since the early 1970's, the women's athletic programs had continued to receive inferior treatment in funding, fund-raising efforts, publicity and promotions, scholarships, facilities, equipment, coaching, uniforms, practice clothing, awards, and administrative staff and support."[207]

At trial the court heard evidence that in the 1980-1981 school year, the total funding available to the men's athletic programs was $3,017,692 whereas the women's athletic program in that same year received only $689,757, roughly twenty-three percent of the men's funding. Most of the revenue for the men's program was derived from football, whereas the women's funding was derived from legislative appropriations.[208]

The court observed the evidence presented and stated in its memorandum opinion that the "non-emphasis on the women's athletic program was demonstrated in many ways, some subtle, some not so subtle. . . . The message came through loud and clear, women's teams were low priority. . . . [T]he net result was an entirely different sort of participation for the athletes."[209] Further, the court declared that the female athletes had suffered

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203. Blair v. Washington State Univ., 108 Wash. 2d 558, 740 P.2d 1379 (1987).

204. *See* WASH. CONST. amend. LXI, § 1 and WASH. REV. CODE § 49.60, respectively.

205. *See* Graff, Meyers, & Tyler, *Blair v. Washington State University: Making State ERA's a Potent Remedy for Sex Discrimination in Athletics*, 14 J.C. & U.L. 575 (1988).

206. *Blair*, 108 Wash. 2d 558, 740 P.2d 1379. Plaintiffs filed a class action under the Washington Equal Rights Amendment. *Id.*

207. *Id.* at 560, 740 P.2d. at 1380-81.

208. *Id.* The funds for the men's programs were largely the result of gate admissions ($985,503) and media rights, conference revenues, and guaranties ($943,629). *Id.* In comparison, the source of funds for the women's program, outside of legislative appropriations, was gate admissions ($10,535). *Id.*

209. *Id.* at 561, 740 P.2d at 1381.

unlawful sex discrimination violative of state statutes and the state equal rights amendment.[210]

The trial court ordered a variety of remedies. The court mandated that the women's athletic programs receive 37.5 percent of the university's financial support and scholarship money given to intercollegiate athletics during the year 1982-1983.[211] The court noted, however, that "the level of support for women's athletics was not required to exceed by more than three percent the actual participation rate of women in intercollegiate athletics at the University."[212] The court order prohibited the total budget for women's athletics to fall below the base budget of $841,145 for the year 1981-82. In addition, the allocation of women's scholarship money could not fall below $236,300, the amount allocated for the year 1982-1983.[213] In reaching these percentages and amounts the court neglected to include the money allocated to the football program.[214] The only way the budget expenditures and scholarship monies could be reduced is if the expenditures for men's athletics were correspondingly reduced.[215]

The court acknowledged the dramatic increase in female participation in recent years and recognized that a parity may be reached soon. The court ordered the university to increase the opportunities for women to participate in athletics until female participation reached a level commensurate with the proportion of female undergraduate students.[216]

The plaintiffs objected to the exclusion of football from calculations for participation opportunities, scholarships, and the distribution of non-revenue funds.[217] The Equal Rights Amendment in Washington states that: "[e]quality of rights and responsibilities under the law shall not be denied or abridged on account of sex."[218] The Washington Supreme Court said that the ERA contains no exception for football, "[t]he exclusion of football would prevent sex equality from ever being achieved since men would al-

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210. *Id.* Based upon the numerous findings of fact detailing the inferior treatment of the women's athletic program, the trial court reasoned that the university had "acted, or failed to act, in the operation of the university's intercollegiate athletics program in a manner that resulted in discriminatory treatment of females. . . ." *Id.*

211. *Id.* at 559, 740 P.2d at 1379. The injunction which the trial court issued specified that "university financial support" shall not include revenue generated by or attributable to any specific sport or program. *Id.* In essence the lower court attempted to exclude the monies generated by the football program. *Id.*

212. *Id.* at 560, 740 P.2d at 1381.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* In addition, the court ordered that the university take steps to promote and develop the fundraising efforts of the women's teams. *Id.*

217. *Id.* at 561, 740 P.2d at 1382. The trial court attempted to distinguish football because of its unique, operated-for-profit characteristics. *Id.* However, the supreme court rejected this approach. *Id.*

218. *Id.* at 562, 740 P.2d at 1382 (quoting WASH. CONST. amend. LXI, § 1).

ways be guaranteed many more participation opportunities than women, despite any efforts by the teams, the sex equity committee, or the program to promote women's athletics under the [court] injunction."[219]

The Supreme Court of Washington declared that the purpose of the ERA was to end special treatment for either sex. Prior to *Blair*, the Washington Supreme Court made initial interpretations of the ERA which provided a strong basis for future decisions.[220] Thus, with the decision in *Blair*, the Washington courts reinstated the absolute prohibitin of sex-based classifications by qualifying sex as an inherently suspect class and advocating a strict standard of review.

The ramifications of *Blair* may appear to be only effective in Washington. However, *Blair* may be the basis for other states who rely upon a state ERA to follow. The scope of federal law definitely does not find gender-based regulations to be a suspect class. *Blair* shows that a state ERA is a viable and powerful basis for a cause of action to fight gender discrimination. Where traditional remedies such as the fourteenth amendment and Title IX have failed, the state ERA's may succeed.

VI. Conclusion

Intercollegiate athletic programs are an integral part of a student athlete's college experience. In the ten years since the NCAA began conducting women's intercollegiate championships, women's programs have developed and prospered at most collegiate institutions. The discrepancies that have existed in the past were so extensive that Congress was required to act in order to protect the equal rights of women and to prevent gender-based discrimination in athletics. Therefore, on March 22, 1988, the Civil Rights Restoration Act was passed.

Prior to the passage of the Civil Rights Restoration Act, women who were victims of gender-based discrimination relied upon the fourteenth amendment, Title IX of the Education Amendments of 1972, and state ERA statutes. It was important that the plaintiff try to include all of the above remedies in order to avoid a summary judgment decision by a judge who was reluctant to interfere in the educational process.

The state ERA, if available, may have been the strongest and most powerful weapon in bringing about equality in women's athletics. However, not all states have an ERA statute and the Constitution has not been

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219. *Id.* at 558, 740 P.2d at 1382-83.

220. *See* Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975); Hanson v. Hutt, 83 Wash. 2d 195, 517 P.2d 599 (1973). In *Darrin* the Washington Supreme Court used the ruling in *Hanson* and combined that with the words of the ERA and declared sex to be a suspect class which required a showing of a compelling state interest to uphold classifications based on sex. *Darrin*, 85 Wash. 2d at 865, 540 P.2d at 882. Further, the court in *Darrin* eliminated permissible sex discrimination if the fourteenth amendment's rational relationship or the state ERA's strict scrutiny tests were met. *Id.*

amended to allow women to rely upon a federal amendment. If a woman was fortunate to be from a state with an ERA, that was her best avenue for relief. Most of the states which have passed ERAs have imposed a strict standard of review. If this strict standard of review is used, then the only way a state can justify gender-based regulations is by first showing there is a compelling state interest served by the regulation and that there is no less discriminatory method which can be used to achieve the same results. Today, the Civil Rights Restoration Act gives women another avenue of relief against gender-based regulations in intercollegiate athletics.

It is impossible to foresee what the next decade holds for women's athletics. Those administrators who have an influence on women's athletic programs want growth, but not at the expense of ethics. The growth will be carefully and closely monitored so that women's athletic programs may avoid the areas where the men's programs have gone awry.

Those persons involved in women's athletic programs hope that the university administrators will provide meaningful leadership opportunities for women during the 1990's. Women's programs advocate a strong mission statement; one which is measurable and one based upon real goals.

NCAA Executive Director Richard Schultz thinks that women's programs can be viable and competitive on a national scale. Schultz remarked, "I've long been an advocate of women's basketball developing on its own merits. Don't piggy-back on the men's program. Do what's right for women's basketball and focus on what will cause women's basketball to grow on its own."[221]

Regardless of what the future holds, women in athletics have been recognized and the women's programs have been strengthened. People have been made aware of past discriminations which have occurred in women's athletic programs. Changes have occurred and these have encouraged more changes. Women's athletics will succeed and survive potential set-backs so long as women continue to participate in organized athletic programs.

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221. *See Steady Growth Expected for Women's Sports in '90's*, The NCAA News, October 22, 1990 at 3, col.1.