Gender Equity in Athletics: Coming of Age in the 90's

T. Jesse Wilde
GENDER EQUITY IN ATHLETICS:
COMING OF AGE IN THE 90's

T. JESSE WILDE*

Every college or university athletic director dreams of having ample funds to provide sports programs that would satisfy every imaginable interest. The harsh economic realities of college athletics in the 90's, however, are driving athletic administrators in two seemingly irreconcilable directions. On one hand, athletic budgets at many institutions are rapidly shrinking (as part of campus-wide cost cutting measures) leaving athletic administrators with little recourse but to streamline their programs, and ultimately eliminate some sport offerings. On the other hand, there is a growing momentum in favor of enhancing women's athletic programs and eliminating sex discrimination in college sports. As a result of a multitude of factors discussed in this article, public sentiment and attention has finally been focused on equal treatment of the sexes in college athletics, mandating that colleges and universities provide athletic opportunities for male and female students in numbers proportionate to their respective student body enrollments. This equity movement, however, comes at a time when athletic departments can ill afford to pay for new programs. The conflict, therefore, between fiscal restraint and enhancing female athletic opportunities in the name of gender equity is stretching many athletic budgets to the breaking point.

Even though the current gender equity movement in college athletics encompasses a broad spectrum of issues, including equal opportunities for female athletic administrators and equal pay for coaches, this article

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1. Bill Byrne, Funding New Women's Sports Will Stretch Budgets to Breaking Point, USA TODAY, June 9, 1992, at 10C.
2. Gary Roberts, Colleges Must Decide on Revenue Questions, USA TODAY, June 9, 1992, at 10C.
3. Gene Corrigan, Reaching Gender Equity No Easy Task, USA TODAY, May 14, 1992, at 14C.
5. Byrne, supra note 1, at 10C.
6. Equal pay for female coaches, for example, has become a hot issue recently, as a number of women's varsity coaches have commenced actions seeking compensation comparable to what men's coaches receive. In June 1993, Howard University basketball coach, Sanya Tyler, was awarded $1.1 million in her discrimination suit against the university. In August
will focus on the enduring quest for an equitable division of opportunities between male and female students to participate in intercollegiate athletics. Part I will review legal principles relevant to gender equity in athletics. Herein, the article will examine the history and evolution of Title IX\(^7\) and its specific application to college athletics. Thereafter, relevant equal protection principles embodied in federal and state constitutions will be briefly outlined. Part II will consider the impact of Title IX on college athletics. Particular emphasis will be devoted to reviewing recent efforts of student-athletes to litigiously preserve and promote female athletic opportunities, and to examine gender equity initiatives proposed or adopted by colleges and universities and various governing athletic organizations. Part III will consider the future prospects for this gender equity struggle and outline the author's "Three-for-One" gender equity proposal, designed to provide an athletic administrator with an achievable and realistic plan for satisfying the athletic interests and abilities of both sexes on campus.

I. LEGAL PRINCIPLES

A. Title IX

1. History

More than twenty years ago, Congress enacted Title IX of the Education Amendments of 1972, which provides in part that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."\(^8\) Even though athletics and athletic programs were not specifically mentioned in Title IX when it first became law, the Act has become the cornerstone\(^9\) of federal statutory protection for female athletes and

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8. Id.
9. See Diane Heckman, Women & Athletics: A Twenty Year Retrospective on Title IX, 9 U. MIAMI ENT. & SPORTS L. REV. 1, at 2 (1992). Since the enactment of Title IX in 1972, the number of high schools in the country offering girls' basketball increased from 4000 to 17,000
prospective female athletes in the United States, prohibiting discrimination on the basis of sex in educational programs and activities receiving federal financial assistance, including interscholastic and intercollegiate athletic programs.

2. Scope and Application

The legislative history of Title IX suggests that the Act was originally intended to have limited scope, covering only those educational programs receiving federal financial assistance, and was not directed at imposing gender equity requirements on specific programs, like athletic departments of educational institutions, that received no direct federal funding. The Department of Health, Education and Welfare (HEW), charged with the responsibility of developing regulations and enforcing Title IX requirements, however, broadly construed Title IX as applying to all activities, including athletic programs of educational institutions or agencies, if the institution or agency was in receipt of any federal assistance.

In 1975, HEW issued its first set of proposed regulations designed to implement Title IX, specifically incorporating interscholastic and intercollegiate athletics within the scope of Title IX coverage. Notwithstanding HEW's broad interpretation of Title IX, the threshold issue remained; whether, in law, Title IX applied only to the specific departments receiving direct federal funding (commonly referred to as the "programmatic approach") or extended to any department within an institution that benefits from federal assistance (commonly referred

in 1987. Women's participation in college athletics grew from 66,000 to over 150,000 during that same period.

10. Since female athletes have been historically underrepresented in interscholastic and intercollegiate sports, many associate Title IX with enhancing female athletic opportunities. Title IX, however, has also been successful in creating athletic opportunities for men. See Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659 (D.R.I. 1979), vacated as moot, 604 F.2d 733 (1st Cir. 1979) (where the district court required a high school to provide a male student with the chance to play volleyball on the girls' team or to form a boys' team).

11. Wong & Ensor, supra note 6, at 359.


15. Heckman, supra note 9, at 29.
to as the "institutional approach").

The resolution of this issue had tremendous significance since few athletic departments or athletic associations receive federal funds. If the statute was interpreted in accordance with the "programmatic approach," to require only the specific programs that receive direct federal assistance to comply with its provisions, Title IX would provide no remedy to redress sex discrimination in most athletic programs. The issue was ultimately decided by the Supreme Court in Grove City College v. Bell, wherein the Court favored the programmatic approach, concluding that only those specific programs within an institution receiving direct financial assistance from the federal government should be subject to Title IX requirements and sanctions.

What momentum the gender-equity movement had mustered seemed lost. In 1972, before the enactment of Title IX, only 15% of intercollegiate athletic participants were women. By 1984, that percentage had

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16. Wong & Ensor, supra note 6, at 368. For further discussion of this issue, see Gaal, supra note 12 Id. at 345; Villalobos, supra note 13; Comment, The Reform of Women's Intercollegiate Athletics: Title IX, Equal Protection, and SupPLEMENTAL Methods, 20 CAP. U. L. REV. 691 (1991); Heckman, supra note 9; and, Note, Compensatory Damages are Available in Intentional Sexual Discrimination Cases—Franklin v. Gwinnett County Public Schools, 3 SETON HALL J. OF SPORT LAW 197 (1993).

17. Heckman, supra note 9, at 3.


19. Id. at 564-577. Grove City College is a private liberal arts college located in Pennsylvania. Id. at 559. To maintain its autonomy, the college continually declined to take part in federally and state sponsored direct institutional aid programs, as well as numerous federal student aid programs. Id. The school did accept a substantial number of students who received Basic Educational Opportunity Grants (BEOGs) from the Alternate Disbursement System of the Department of Education. Id. In these circumstances, the Department of Education found that the college was a recipient of federal funding requiring the institution to file an Assurance of Compliance with Title IX. Id. at 560. When Grove City did not sign the Assurance of Compliance, the college and four of its students filed suit in the District Court of Western Pennsylvania to invalidate the Department of Education's termination of the BEOGs. The district court found that BEOGs received by the students constituted federal aid but that the Department of Education could not terminate the students' aid simply because the school failed to file the Assurance of Compliance. Grove City College v. Harris, 500 F. Supp. 253 (W.D. Pa. 1980).

On appeal, the United States Court of Appeals for the Third Circuit reversed, holding that the Department of Education could terminate aid for failure of the college to execute an Assurance of Compliance. The court also found that indirect as well as direct aid triggered coverage under Title IX, and, although Title IX's language should be given a program-specific interpretation, funds flowing to Grove City through its students were similar to non-earmarked aid, and that in such cases the school itself was the program. Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982).

doubled to 30.8%. In the wake of Grove City, however, it appeared that the growth period had ceased since Title IX could no longer be enforced against athletic programs not receiving direct federal financial assistance. As a direct result of Grove City, the Department of Education’s Office of Civil Rights (OCR), the administering agency for Title IX, suspended all current and pending Title IX compliance investigations of high school and college athletic departments until it could be established that the programs directly received federal funds.

On the heels of Grove City, a number of amendments were introduced to legislatively reverse the Supreme Court’s programmatic interpretation of Title IX. Such amending legislation failed to gain support until March 1988, when, after overriding a veto by President Ronald Reagan, Congress enacted the Civil Rights Restoration Act of 1987. The Act clarified that entire institutions and agencies are covered by Title IX, and other federal anti-discrimination laws if any program or activity within the organization receives federal aid.

3. Title IX Athletics Requirements

Following the passage of the Civil Rights Restoration Act of 1987, athletic administrators could no longer hide behind the programmatic interpretation to shield their programs from the requirements of Title IX. As such, administrators were compelled to assess departmental compliance under the substantive requirements of the law.

To assist athletic administrators in understanding the requirements of the Title IX and its regulations, and to aid in assessing Title IX compliance, the Department of Education, through the OCR, issued a Title IX Policy Interpretation in December 1979. While the Policy Interpretation does not have the force of law, the document provides the guide-
In accordance with its Policy Interpretation, examines three areas in assessing an athletic department's compliance with Title IX: (1) athletic financial assistance; (2) other nonfinancial program areas; and, (3) the accommodation of athletic interests and abilities of students.

First, Title IX regulations and the Policy Interpretation require institutions to allocate athletic financial assistance in proportion to the number of male and female participants in its athletic program. If the proportion of total scholarship aid given to male and female athletes is substantially equal to the ratio of male and female athletes, or if a disparity is explained by certain nondiscriminatory factors, the institution may be considered in compliance with this requirement. The Policy Interpretation lists two examples of nondiscriminatory factors which would permit disproportionality in favor of one sex: The higher cost of tuition for students from out-of-state and the discretion of an institution to make reasonable professional decisions concerning the scholarship awards most appropriate for team or program development.

Second, for all other nonfinancial athletic program components, Title IX regulations require an institution to provide its athletes with equivalent treatment, benefits and opportunities in ten enumerated areas. Equal athletic expenditures are not required, but an athletics pro-

32. While the Policy Interpretation does not have the force and effect of law, it does have considerable practical significance since it sets forth the standards by which the Department of Education assesses compliance with Title IX and its regulations. See Villalobos, supra note 13, at 155.
34. Id. See also, Gaal, supra note 12, at 346-347.
36. 45 C.F.R. Part 86.41(c) (1975) (codified at 34 C.F.R. § 106.41(c) (1991)). This subsection provides: (c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity 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 accommodate the interests and abilities of members of both sexes;
(2) The provision of equipment and supplies;
(3) Scheduling of games and practice time;
gram must exhibit equivalent treatment and distribution of benefits and opportunities in terms of equipment and supplies, games and practice schedules, travel and per diem allowances, coaches and tutors, medical and training services, housing and dining facilities and services, locker rooms, practice and competitive facilities, publicity, support services, and the recruitment of athletes. Identical treatment, benefits, and opportunities, are not required, provided the overall effect of any differences is negligible, or the disparities are the result of recognized nondiscriminatory factors. Examples of such factors outlined in the Policy Interpretation include: the unique aspects of particular sports, such as football, where the rules of play, equipment requirements, rates of participant injury, and facilities requirement for competition may result in an imbalance in favor of men; special circumstances of a temporary nature; spectator management requirements at more popular athletic events; and, differences that have not been remedied but which an institution is voluntarily working to correct.

Third, and perhaps most relevant to the focus of this article, Title IX regulations and the Policy Interpretation require institutions to effectively accommodate the athletic interests and abilities of all students. More specifically, the Policy Interpretation mandates that institutions accommodate effectively the athletic interests and abilities of its female and male students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes. In selecting sports offerings, institutions are not required to integrate their teams, nor provide the same choice of sports to men and women. However, where an institution sponsors a team in a par-

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(4) Travel and per diem allowance;
(5) Opportunity to receive coaching and academic tutoring;
(6) Assignment and compensation of coaches and tutors;
(7) Provision of locker rooms, practice and competitive facilities;
(8) Provision of medical and training facilities and services;
(9) Provision of housing and dining facilities and services;
(10) Publicity.

The accommodation of student interests and abilities (34 C.F.R. § 106.41(c) (1991)) is given specific and separate attention in the Policy Interpretation (44 Fed. Reg. 71,418 (1979)). In addition to the remaining nine enumerated areas, subsection 106.41(c) also permits the OCR to consider two other factors in the determination of equal opportunity: the recruitment of athletes and provision of support services.

37. Id. See also, Gaal, supra note 12, at 347.
38. Id.
39. Id.
ticular sport for members of one sex, it may be required either to permit the excluded sex to try out for the team or to sponsor a separate team for the previously excluded sex.\textsuperscript{42} In providing athletes of each sex with levels of competition, which equally reflect their interests and abilities, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for these athletes to have competitive team schedules which equally reflect their abilities. Compliance with this two-fold requirement can be satisfied by any one of the following three tests:

(1) whether the institution’s intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

(2) where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion, whether it can be demonstrated that the interests and abilities\textsuperscript{43} of the members of that sex have been fully and effectively accommodated by the present program.\textsuperscript{44}

The assessment of whether an institution has satisfied the requirements of Title IX is made on a program-wide basis, focusing on the overall provision of equivalent opportunities in the athletic program in terms of athletic financial assistance, equivalence in other athletic benefits and opportunities, and effective accommodation of student interests and abilities. An investigation may, however, be limited to less than all three

\begin{itemize}
\item \textsuperscript{42} Id.
\item \textsuperscript{43} The Policy Interpretation provides that institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:
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\item (a) The processes take into account the nationally increasing levels of women’s interests and abilities;
\item (b) The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;
\item (c) The methods of determining ability take into account team performance records; and
\item (d) The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex. 44 Fed. Reg. 71,417 (1979).
\end{itemize}
\item \textsuperscript{44} 44 Fed. Reg. 71,418 (1979).
\end{itemize}
of these major areas where unique circumstances justify limiting a particular investigation to one or two of the compliance criteria.\textsuperscript{45}

It should also be emphasized that comparisons to determine Title IX compliance are not made on a sport-specific basis, comparing particular sport offerings or specific classes of sports (such as revenue-producing versus non-revenue-producing).\textsuperscript{46} The revenue-producing sport of football, for example, is given no separate or special treatment under Title IX.\textsuperscript{47} The large number of athletes required for football, however, increases the number of male participants in the overall program, thus increasing the amount of financial aid to be allocated to men under the proportionality test. With respect to other program components, certain special requirements of football are recognized as nondiscriminatory differences justifying departures from equivalency in such areas as medical services, equipment, facilities required for competition, maintenance of those facilities, special event management needs related to crowd size and special publicity requirements.\textsuperscript{48} The accommodation of the interests and abilities of both men and women at an institution becomes more problematic when football’s large roster size is factored into the equation. Since women do not have a corresponding sport requiring such a large number of athletes, the athletic participation ratio between men and women at most institutions is dramatically skewed in favor of male opportunities. Many argue that when football is factored into the proportional opportunity equation, it becomes practically and economically impossible for an institution to achieve a male to female athletics participation ratio that even closely resembles its student body ratio.\textsuperscript{49}

4. Title IX Enforcement

As mentioned above, the Department of Education, through the OCR, is responsible for enforcing compliance with Title IX.\textsuperscript{50} The OCR

45. \textit{TITLE IX ATHLETICS INVESTIGATOR'S MANUAL} (April 1990). The Manual was issued by the OCR to assist its personnel in conducting Title IX athletic investigations.


48. See \textit{supra} notes 38-39 and accompanying text.

49. Roberts, \textit{supra} note 2. \textit{See also} Tom Weir, \textit{All Must Face Cold Facts of Title IX}, \textit{USA TODAY}, March 13, 1992, at 3C; and, discussion \textit{infra} at notes 175-177 and accompanying text.

conducts Title IX reviews of schools based on complaints brought by individuals and can also select schools at random for compliance reviews.\textsuperscript{51} If the OCR investigation finds the institution in compliance, that finding will be published and the case closed.\textsuperscript{52} If violations are found, the OCR may still find the institution in compliance with Title IX if the institution has or agrees to formulate and implement a corrective plan.\textsuperscript{53} In this instance, the OCR monitors the progress of the institutional plan; if the institution subsequently fails to implement its plan, it will be found in noncompliance.\textsuperscript{54} When an institution is found in noncompliance, and voluntary compliance attempts are unsuccessful, the Department of Education may begin the formal process leading to termination of the institution's federal financial assistance.\textsuperscript{55}

In addition to this administrative process, an individual may commence a federal Title IX lawsuit. Even though Title IX does not expressly create a right of action in favor of an individual, courts have held that such a right is implicit in the legislation.\textsuperscript{56} It appears that a prospective plaintiff need not first pursue the OCR administrative remedy before commencing an action in a federal district court, since district courts have granted preliminary injunctions without the plaintiff first filing with the OCR.\textsuperscript{57} In addition to posing the threat of terminating federal funding, individual plaintiffs may be entitled under Title IX to other remedies against a non-complying institution, including injunctive\textsuperscript{58} and

\textsuperscript{51} For further discussion of OCR compliance reviews, see infra notes 172-173 and accompanying text. See also Heckman, supra note 9, at 18-20.

\textsuperscript{52} 44 Fed. Reg. 71,419 (1979).

\textsuperscript{53} Id.

\textsuperscript{54} Id.

\textsuperscript{55} Id. In the area of athletics, the Department of Education rarely applies the formal administrative process to terminate funds to enforce Title IX. The formal enforcement process is usually avoided because institutions have typically developed voluntary compliance plans acceptable to the OCR. Robert C. Berry and Glenn M. Wong, 2 LAW AND BUSINESS OF THE SPORTS INDUSTRIES (2d ed.) 272 (1993).


\textsuperscript{57} See Heckman, supra note 9, at 20.

declaratory relief, attorneys fees and, in some instances, compensatory damages.

B. Equal Protection

The enactment of Title IX did not remove the issue of sexual discrimination from constitutional concern. In addition to recourse under Title IX, aggrieved individuals may also have a remedy based on the provisions of federal or state constitutions.

1. Federal Constitutional Claims

The equal protection clause of the Fourteenth Amendment guarantees equal protection of the law to all persons found within the United States. This amendment guarantees, in part, that no person be singled out from similarly situated people, or have different benefits bestowed or burdens imposed, unless a constitutionally permissible reason exists for so doing.

The constitution does not bar state actors from creating classifications, or treating groups differently, as long as the differential treatment is constitutionally justifiable under equal protection analysis. When considering the constitutionality of a classification, the court utilizes three different standards of review depending upon the nature of the classification. A "suspect" classification based on race, alienage and national origin, or fundamental rights abridgement, attracts strict scrutiny. Under this standard, the classification or infringement will be held unconstitutional unless the state can discharge the heavy burden of establishing that the classification or infringement is supported by a compelling state interest, and there is no less intrusive means by which the same end may

60. Heckman, supra note 9, at 21.
61. Franklin v. Gwinnett County Public Schools, 112 S.Ct. 1028 (1992) (compensatory damages may be awarded in a Title IX action when the plaintiff is the victim of the defendant's intentional discrimination). See infra notes 83-90 and accompanying text for further discussion of Franklin.
63. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides that no state shall "deny any person within its jurisdiction the equal protection of the laws." The federal government is held to similar standards under the due process clause of the Fifth Amendment. See Berry & Wong, supra note 55, at 97.
64. Berry & Wong, supra note 55, at 98.
be achieved.65 The constitutionality of all other non-suspect classifications have historically been assessed on the rational basis standard. Here, the state need only demonstrate that the classification bears some rational relationship to a legitimate state interest. This is a far simpler onus to discharge. More recently, a third test has been espoused by some courts, set between the two extremes of strict scrutiny and rational basis. Under this intermediate test, "quasi-suspect" classifications may only be justified if the state can demonstrate that the classification is supported by some "important" state interest and there is no less intrusive means by which the same end may be achieved. The difference between "important" under the intermediate test and "compelling" under strict scrutiny is unclear. However, the onus on the state under the intermediate test would certainly be heavier than under the rational basis standard.66

Under traditional equal protection analysis, gender-based discrimination was considered a non-suspect classification, and, on the rational basis standard, could be sustained by the state unless the discrimination was found patentlly arbitrary or bore no rational relationship to a legitimate governmental interest. Under this light burden, it was relatively easy to justify gender-based rules, or, conversely, difficult for the aggrieved plaintiff to challenge the sex discrimination.67 More recently, however, gender-based classifications have been considered "quasi-suspect" by some courts, requiring the state to discharge a heavier burden of exhibiting that the classification is supported by some "important" state interest and there is no less intrusive means by which the same end may be achieved.68 As such, this intermediate standard of review enhances the prospects for successfully challenging gender-based classifications, such as a state actor disproportionately accommodating the athletic interests and abilities of men over those of women.

65. Id.
66. For further discussion of equal protection analysis, see Berry & Wong, supra note 55, at 97-102; Wong & Ensor, supra note 6, at 354-358; and, Heckman, supra note 9, at 7-8 and accompanying notes.
67. Wong & Ensor, supra note 6, at 355, 358. For example, health and safety of women have been used as justifications for denying women the opportunity to participate with men in contact sports. See, e.g., Clinton v. Nagy, 411 F. Supp. 1396 (N.D. Ohio 1974).
68. See Craig v. Boren, 429 U.S. 190 (1976); see also Clark v. Ariz. Interscholastic Assn., 695 F.2d 1126 (9th Cir. 1982).
2. State Constitutional Claims

In addition to federal and state equal protection claims, some states provide aggrieved plaintiffs with an additional cause of action based on an Equal Rights Amendment (ERA). Depending on the jurisdiction, a plaintiff may be able to take advantage of a heightened level of scrutiny given to gender-based classifications. This may render the discrimination unconstitutional unless the state can discharge the heavy burden of establishing that the classification or infringement is supported by a compelling state interest and there is no less intrusive means by which the same end may be achieved. The imposition of this strict scrutiny standard greatly enhances a plaintiff's prospects for success. This remedy, while effective, is limited because all states do not have an ERA.69 Furthermore, of those that do have an ERA, not all impose the strict scrutiny standard to a gender-based classification.70

It is obvious that in order to ensure the greatest chance for success in a gender discrimination suit, the wise plaintiff would base the claim on all possible grounds, including Title IX, equal protection, and, if applicable, a state equal rights amendment.

II. Impact of Title IX

A. The First Two Decades

Title IX has been the primary catalyst for the growth of women's intercollegiate athletics since its passage in 1972. Before Title IX, only 15% of the total number of intercollegiate athletic participants were women. By 1984 that percentage had doubled to 30.8%.71 Additionally, before Title IX, colleges offered an average of 2.5 intercollegiate sports

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70. Colorado, Hawaii, Illinois, Maryland, Massachusetts, Pennsylvania and Washington apply the strict scrutiny standard of review to their state equal rights amendments. Heckman, supra note 9, at 7 n.23.

Some commentators suggest that in non-ERA states, the plaintiff could recharacterize the claim as a violation of the state's due process clause. See Comment, supra note 16 at 703; and Comment, Haffer v. Temple University: A Reawakening of Gender Discrimination in Intercollegiate Athletics, 16 J.C. & U.L. 137, at 143 (1989).

71. Supra note 24.
by 1977, that number had risen to approximately 5.61, and to 6.9 by 1984.73

After Grove City, women continued to find their place in college athletics even though Title IX no longer posed a threat to college athletic administrators. Between 1984 and 1988 approximately 450 new NCAA women’s teams were created, raising the average number of women’s teams offered by colleges to 7.31 in 1988.74 While this statistic evidences that college administrators were willing to voluntarily fund women’s sports,75 a more careful examination reveals that the number of female athletes, as a percentage of total intercollegiate athletic participants, remained constant throughout this same period. Even though women accounted for approximately half of all college students, they continued to represent less than one-third of the athletes.76 In addition, a 1989 NCAA study found that while women comprised approximately 30% of all athletes, women’s athletic programs received on average only 18% of athletic department budgets.77 Clearly, the division of athletic opportunities and resources between the sexes in college athletics was not equitable.

It was expected that the passage of the Civil Rights Restoration Act in 198778 would breath new life into Title IX and revitalize the gender equity movement. This, however, was not immediately the case. In fact, figures released by the NCAA in March 1992, as a result of its gender-equity study, revealed that in 1991 women accounted for only 30.9% of the total number of intercollegiate athletic participants, virtually identical to the 1984 percentage of 30.8.79 Further, the NCAA study exposed that Division I women’s athletic programs received on average only 23.9% of athletic department budgets, only modestly better than the 18% they received in 1984.80 After almost twenty years under Title IX, the full assimilation of women in athletics had not been realized.81

More recently, however, new and unmistakable momentum has been rekindled in favor of ensuring women an equitable division of college

73. Wong & Ensor, supra note 6, at 347.
74. Comment, supra note 16, at 704.
75. Villalobos, supra note 13, at 151.
77. Id. at 707.
78. See supra notes 23-27 and accompanying text.
79. GENDER-EQUITY STUDY, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (March 1992).
80. Id.
81. Heckman, supra note 9, at 63.
athletic opportunities and resources. The mere publication by the NCAA of statistical information showing that female varsity athletes were no better off in 1991 than in 1984, revealed that some real work had to be done to ensure gender equity. Shortly after the release of the results of its gender-equity study, the NCAA commissioned a Gender Equity Task Force to thoroughly review the issue and provide recommendations. Almost coincidentally with these events, the Supreme Court issued its decision in Franklin v. Gwinnett County Public Schools. Although not an athletics case, many have argued that no decision has done more to foster Title IX athletics lawsuits and reprioritize an institution's agenda for gender equity in athletics than Franklin.

In Franklin, a female high school student brought a Title IX sexual harassment suit against a Georgia school district, alleging that school officials had failed to stop a teacher from forcing unwanted sexual attention on her for more than a year. The Court was presented with the

82. PRESS RELEASE, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (March 11, 1992). See also supra notes 157-162 and accompanying text for a review of NCAA gender-equity task force recommendations.

83. 112 S. Ct. 1028 (1992)


85. Franklin, 112 S.Ct. 1028, at 1031. Christine Franklin was a student at North Gwinnett High School in Gwinnett County, Georgia between September 1985 and August 1989. Id. According to the complaint, Franklin was subjected to continual sexual harassment beginning in the autumn of her tenth grade year (1986) from Hill, a sports coach and teacher employed by the district. Id. The complaint further alleges that though teachers and administrators in the district became aware of and investigated Hill's sexual harassment of Franklin and other female students, they took no action to halt it and discouraged Franklin from pressing charges against Hill. Id. Faced with mounting pressure, Hill resigned in 1988 on the condition that all matters pending against him be dropped. Id.

Prior to bringing her lawsuit, Franklin filed a complaint with the OCR. After investigating these charges for several months, the OCR concluded that the school district had violated Franklin's rights by subjecting her to physical and verbal sexual harassment and by interfering with her right to complain about conduct proscribed by Title IX. The OCR determined, however, that because of Hill's resignation and the school's implementation of a grievance procedure, the district had come into compliance with Title IX. It then terminated its investigation. Id. at 1031 n.3.

Thereafter, Franklin commenced a Title IX action in the United States District Court for the Northern District of Georgia, alleging that the school district had intentionally discriminated against her on the basis of sex. The district court dismissed Franklin's complaint on the basis that compensatory damages were not authorized under Title IX. The Court of Appeals for the Eleventh Circuit affirmed. Franklin, 911 F.2d 617 (1990).

Approximately six weeks later in Pfeiffer v. Marion Ctr. Area Sch. Dist., the Court of Appeals for the Third Circuit held that compensatory damages were available for certain violations of Title IX. Pfeiffer, 917 F.2d 779 (3rd Cir. 1990). As a result of the conflict of opinion between the Third and Eleventh Circuits on this issue, the Supreme Court granted certiorari. Franklin, 111 S.Ct. 2795 (1991).
issue of whether compensatory damages may be available under a Title IX cause of action in intentional gender-based discrimination. Overturning an Eleventh Circuit Court of Appeals decision, the Supreme Court unanimously concluded that compensatory damages is an available remedy for victims of deliberate Title IX discrimination.

Franklin expands the remedies for redressing the inequities in athletic programs for women and provides a strong financial incentive for institutions to eradicate discrimination. Previously, the danger in failing to comply with Title IX was the potential loss of federal funding. While significant, this remedy has historically proven to be more of a threat than a reality. Franklin has added to this threat, the specter of a monetary damage award for noncompliance, making it more expensive to discriminate than to progress toward equity. Many commentators have predicted that Franklin will have considerable impact in advancing the cause of gender equity in college athletics.

B. Post-Franklin Progress

Whether specifically sparked by the result in Franklin or not, student-athletes have recently become more disposed to litigiously pursue the preservation and promotion of female athletic opportunities. At the same time, colleges, universities and their governing athletic organizations have become more amenable to considering or adopting gender equity initiatives.

1. Recent Title IX case law

In Roberts v. Colorado State University, members of the women's softball team brought an action against CSU, claiming the university violated Title IX when it eliminated their softball program and, thereby, denied women an equivalent opportunity to participate in varsity athletics. The plaintiffs sought injunctive relief to reinstate their varsity softball team and compensation for damages suffered as a result of the cut.

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86. Franklin, 112 S.Ct. 1028, at 1032.
87. Id. at 1038. Justice White delivered the opinion of the Court and was joined by Justices Blackmun, Stevens, O'Connor, Kennedy and Souter. Justice Scalia filed a concurring opinion, joined by Chief Justice Rehnquist and Justice Thomas.
88. Heckman, supra note 9, at 25.
89. Kellers, supra note 84, at 6.
90. See Heckman, supra note 9, at 25; and Kellers, supra note 84, at 6.
92. Roberts, 814 F. Supp 1507 at 1509.
The university argued, in defense, that it had not violated Title IX because men's baseball was also eliminated, and that the cuts had, in fact, disproportionately affected males. Prior to the cuts, women accounted for 35.2% of CSU's varsity athletes, and 47.9% of its undergraduate population. After the cuts, the ratio of women participating in athletics improved slightly to 37.7% of all CSU athletes.

The U.S. District Court for the District of Colorado granted the plaintiffs a permanent injunction requiring the university to reinstate the women's softball team. In doing so, the court applied the OCR's three-pronged test set forth in the Title IX Policy Interpretation for assessing an institution's performance in effectively accommodating the athletic interests and abilities of members of both sexes. The court concluded the decision to terminate the softball program violated Title IX when viewed in the context of the university's disproportionate athletic participation rate for women, its failure to demonstrate a history of program expansion for women, and its further failure to satisfy the court that the university was effectively accommodating the athletic interests and abilities of female students.

On appeal, the U.S. Court of Appeals for the Tenth Circuit affirmed, emphasizing that the proportional cutting of men's and women's teams from an already inequitable program was unfair to the
underrepresented gender and violative of Title IX. The university sought a further appeal to the United States Supreme Court, but its application was denied without comment.

In Cohen v. Brown University, student members of the women's gymnastics and volleyball teams were demoted by the university from full varsity status to intercollegiate club status. They brought a class action suit against the university seeking injunctive relief to restore the two women's teams to varsity status, and to prevent the reduction or elimination of any other women's varsity teams at Brown.

In early 1991, Brown announced that it planned to drop four sports from its intercollegiate varsity athletic roster as an athletics cost-cutting measure: women's volleyball and gymnastics, and men's golf and water polo. The university permitted the teams to continue playing as club teams, a status that allowed them to compete against varsity teams from other colleges, but cut off financial subsidies and support services normally available to varsity teams.

Prior to the cuts, the Brown athletic department supported 31 varsity sports, 16 for men and 15 for women. Women accounted for 36.7% of Brown varsity athletes, and 47.6% of its undergraduate population. As a result of the cuts, Brown's sponsorship of varsity sports was reduced to 27 sports, 14 for men and 13 for women, while the athletic participation ratio remained virtually unchanged with women accounting for 36.6% of Brown varsity athletes.

The plaintiffs contended that the reduction in status of the two women's varsity programs violated Title IX by denying women an equivalent opportunity to participate in varsity athletics. In defense, Brown claimed that it was proportionally accommodating the athletic interests and abilities of both sexes on campus, and that the reduction to

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101. Id. at 830. Interestingly, the court noted that Title IX does not require financially strapped institutions to expand women's programs to comply with Title IX's effective accommodation requirement. "Expansion" may not be twisted to find compliance under this prong when schools have increased the relative percentages of women participating in athletics by making cuts in both men's and women's sports programs. An institution, however, may bring itself into compliance with this prong by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender (or reducing them to a much lesser extent). Id. at 830 n.4.


104. Cohen, 991 F.2d 888, at 892.

105. Id.

106. Id. at 892.
club status of the women's volleyball and gymnastics teams was offset by similar treatment of the men's golf and water polo teams.\textsuperscript{107}

The federal district court granted the plaintiffs a preliminary injunction mandating the reinstatement of varsity women's gymnastics and volleyball at Brown, and prohibiting the elimination or reduction in status of any existing women's intercollegiate varsity team, pending a full trial on the merits. Following the three-pronged test enunciated in the Title IX Policy Interpretation, the court concluded that Brown, in eliminating the two women's varsity programs, violated Title IX in failing to effectively accommodate the interest and abilities of members of both sexes.\textsuperscript{108} Brown gained a stay of the District Court order pending appeal to the First Circuit Court of Appeals.\textsuperscript{109}

The district court's order in \textit{Cohen} was affirmed on appeal.\textsuperscript{110} In assessing the university's effective accommodation of the athletic interests and abilities of its students, the First Circuit, like the district court, utilized the three-pronged test provided in the Policy Interpretation.\textsuperscript{111} In affirming, the court noted first that at no time in Brown's history had athletic participation opportunities between men and women been substantially equivalent, when comparing the percentage of women participating in intercollegiate athletics at Brown to the percentage of women undergraduates.\textsuperscript{112} Second, Brown failed to provide any evidence of recent program expansion to demonstrate that the institution was responsive to the developing athletic interests and abilities of women. In fact,

\begin{footnotesize}
\begin{enumerate}
\item[107.] \textit{Id.} at 899. Brown argued that the OCR Policy Interpretation does not comport with Title IX and its regulations. Brown suggested that, to the extent student's interests in athletics are disproportionate by gender, colleges should be allowed to meet those interests incompletely as long as the school's response is in direct proportion to the comparative levels of interest. It contended that an institution satisfactorily accommodates female athletes if it allocates athletic opportunities to women in accordance with the ratio of interested and able women to interested and able men, regardless of the number of unserved women or the percentage of the student body that they comprise. \textit{Id.}
\item[108.] \textit{Cohen}, 809 F. Supp. at 1001.
\item[109.] \textit{Cohen}, 991 F.2d at 893.
\item[110.] \textit{Id.} at 891.
\item[111.] \textit{Id.} at 897. The court characterized the Policy Interpretation as "a proper, permissible rendition of the statute (Title IX)." \textit{Id.} at 900.
\item[112.] \textit{Id.} at 903. The court held that a disparity of 10.5\% between female students and female athletes did not even closely approach substantial proportionality. \textit{Id.} at 903.
\end{enumerate}
\end{footnotesize}
Brown had not added a single women’s varsity sport since 1982. And third, the court concluded that Brown was not fully and effectively accommodating the athletic interests and abilities of women at the varsity level, since here, the plaintiffs themselves were examples of specific athletic interest and ability and were seeking to forestall the elimination of two healthy varsity teams. Retaining the two women’s teams at the club level was, in the court’s opinion, insufficient to satisfy the third prong of the test.

The federal district court for the Western District of Pennsylvania was presented with circumstances similar to Cohen, in Favia v. Indiana University of Pennsylvania. Indiana University of Pennsylvania (IUP) had eliminated school funding for four varsity athletic teams, (women’s gymnastics and field hockey, and men’s soccer and tennis), and reduced each to club status. As in Cohen, the program cuts were made by the athletic department in response to a directive by the university to reduce its departmental budget. The plaintiff class, members of the women’s gymnastics and field hockey teams, claimed that the elimination of the two women’s varsity programs violated both Title IX and the Fourteenth Amendment by denying women an equivalent opportunity to participate in varsity athletics, and sought a preliminary injunction to restore the two women’s teams to varsity status and to prevent the reduction or elimination of any other women’s varsity teams at IUP.

The district court in Favia granted the preliminary injunction reinstating the two women’s teams and prohibited the university from eliminating further women’s teams. They applied the three-pronged test outlined in the Title IX Policy Interpretation for assessing an institution’s performance in effectively accommodating the athletic interests and abilities of members of both sexes. The court concluded that participation opportunities between the sexes were not substantially proportionate to enrollment and that the university had not met its burden of establishing, under these circumstances, a history and continuing practice of program expansion for female student-athletes, or that the interests and abilities

113. Id. at 903. See also Cohen, 809 F. Supp., at 991.
114. Id. at 903-904.
115. Id. at 904.
117. Favia, 812 F. Supp. 578, at 579. Prior to the cuts, the IUP athletic department supported 18 sports, 9 for men and 9 for women. Women accounted for 37.8% of varsity athletes, and 55.6% of its undergraduate population. As a result of the cuts, IUP’s sponsorship of varsity sports was reduced to 14 sports, 7 for men and 7 for women, while the athletic participation ratio for women dropped slightly to 36.5% of IUP varsity athletes. Id. at 580.
of females had been fully and effectively accommodated.\textsuperscript{118} Like Cohen, the Favia court emphasized that cutting men's and women's teams proportionally from an already inequitable program was unfair and violative of Title IX.

IUP initially elected not to appeal the district court order, but later asked the court for modification of the injunction in order to permit the school to add women's soccer instead of reinstating gymnastics. In denying the IUP application, the district court concluded that the motion was in essence a request for reconsideration of a preliminary injunction that had not been timely appealed. IUP appealed to the U.S. Court of Appeals for the Third Circuit but was unsuccessful. The Third Circuit concluded that, while the proposed substitution of soccer for gymnastics would increase women's participation in athletics at IUP, and thus improve the school's athletics participation ratio, IUP had failed to meet the burden required in a motion to modify a preliminary injunction: demonstrating a significant change in facts from the time the injunction was issued, which would render inequitable the continuation of the order.\textsuperscript{119}

Roberts, Cohen, and Favia represent significant victories for the gender equity movement. A clear message has been sent to college athletic departments mandating that they either provide opportunities for both sexes in proportion to their enrollment, evidence a history and continuing practice of program expansion responsive to the interest and abilities of the members of the underrepresented sex, or demonstrate that the interests and abilities of the underrepresented sex are being fully and effectively accommodated. The central finding of each court reaffirmed the plaintiffs' argument in each case that the proportional cutting of men's and women's teams from an already inequitable program was unfair to women and violative of Title IX. Since many college athletics programs would fail the rigors of the three-pronged test for accommodating the athletic interests and abilities of its students, the result in Roberts, Cohen, and Favia make it virtually impossible for a college to drop any women's sport as part of a general cutback in athletic funding.\textsuperscript{120}

\textsuperscript{118} Id. at 584-585.

\textsuperscript{119} Favia, 7 F.3d 332 (3rd Cir. 1993).

\textsuperscript{120} See Cohen, 991 F.2d at 905. The Cohen court emphasized that the pruning of athletic budgets cannot take place isolated from the legislative and regulatory imperatives of Title IX. See also Robert Thomas, Jr., Ruling for Brown Women to Be Far-Reaching, New York Times, April 20, 1993, at B14 column 2.
Ultimately, Title IX requires that women receive "a larger slice of a shrinking athletic-opportunity pie" in times of fiscal restraint.121

Unlike the three previous cases cited, *Cook v. Colgate University*122 does not involve an attempt to reinstate a previously eliminated athletic program. The plaintiffs were all former members of the Colgate women's club ice hockey team. They sought an order directing Colgate to grant varsity status to women's ice hockey, contending that Colgate had violated Title IX in failing to fully and effectively accommodate the athletic interests and abilities of its women's club ice hockey players by repeatedly denying their applications for varsity status.123

In 1990, the year the action was commenced, Colgate offered 23 varsity sports, 12 for men and 11 for women. Women accounted for 31% of all varsity athletes and 46.7% of the undergraduate student body. Varsity ice hockey was among the 12 varsity sports offered for men, and the plaintiffs contended that Colgate's failure to provide women with a comparable varsity ice hockey opportunity was violative of Title IX.124

In defense, Colgate argued that Title IX only prohibits discrimination in an athletic program as a whole, and that the complaint did not allege, nor did the evidence create a question of fact, that there had been any gender discrimination in the overall athletic opportunities afforded women at Colgate. According to Colgate, Title IX compliance ought to be assessed on a program-wide, rather than sport-specific, basis.125 The district court, however, did not agree.

In finding for the plaintiffs, the district court ordered Colgate to elevate the women's club ice hockey team to varsity status for the 1993-94

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121. *Id.* at 906.
123. A varsity sport team is the official representative of a school with full-time coaches and specifically designated schedules for competition. Varsity teams are also provided with equipment, practice facilities and travel accommodations. Club teams, on the other hand, are principally run by students, have informal schedules, practices and competitions. Their equipment, facilities and travel are of a make-shift nature. See Mel Narol, *The New Title IX Game: Women 2, Colleges 0*, 11 THE SPORTS LAWYER 6, at 6, (Mar.-Apr. 1993).
124. Specifically, the complaint, in comparing men's varsity to women's club ice hockey opportunities, alleged discrimination on the basis of financial support, equipment, locker room facilities, travel, practice time and coaching. *Cook*, 802 F. Supp. 737 at 740.
125. *Id.* at 742.
season, and concluded that the university had violated Title IX by failing to provide women's club ice hockey participants with an athletic opportunity equivalent to their male counterparts. After briefly considering the athletic opportunities available to men and women at Colgate, the court embarked on a sport-specific comparison of women's club and men's varsity ice hockey programs. Unlike Roberts, Cohen, and Favia, in which each court examined Title IX compliance in terms of the total number of athletic opportunities in relation to the percentage of men and women in the undergraduate population, the district court, in Cook, conducted a sport-specific comparison of a club and a varsity team, which revealed expected inequities.\(^{126}\) In the court's opinion, none of Colgate's proffered reasons for refusing to provide women with a varsity ice hockey opportunity provided the university with a justifiable excuse.\(^{127}\)

Colgate appealed. On appeal, the Second Circuit Court of Appeals side-stepped the issue, concluding that the graduation of all named plaintiffs prior to the 1993-94 school year rendered the action moot.\(^{128}\) Since the plaintiffs were seeking relief in their personal capacities, and not as representatives of a class, the action became moot since none of the plaintiffs could personally benefit from an order requiring equal athletic opportunities for women ice hockey players to take effect after their respective graduations.\(^{129}\)

In reaction to the Second Circuit's decision, a second lawsuit has been filed against Colgate by five female athletes, seeking the same relief as in the Cook action.\(^{130}\) The issue, therefore, will likely be revisited on appeal to determine whether the district court in Cook properly interpreted Title IX in comparing Colgate's treatment of male and female athletes on a sport-by-sport rather than program-wide basis, and by specifically requiring the university to add women's ice hockey. The law seems clear that Title IX and its regulations do not require that women be provided with a replication of men's programs, or that educational

126. Id. at 744.
127. Id. at 740. To justify its refusal to promote the team to varsity status, Colgate argued that women's ice hockey was rarely played in public high schools and only at some prep schools, that there was insufficient competition from other schools in the region, that there was no NCAA championship in women's ice hockey, that the sport lacked general student interest, that the women's team lacked the ability to play at the varsity level, and that the school was financially unable to fund a varsity program. Id. at 740.
128. Cook, 992 F.2d 17, at 20.
129. Id. at 20.
130. Sportsline, USA TODAY, August 12, 1993, at 1C.
institutions allocate equal expenditures to each program offering. Rather, the focus of the law is on the equitable treatment of both sexes in the overall program. In the circumstances of this case, however, it may be argued that the result is correct even though the district court's analysis seems misguided, because participation opportunities between the sexes at Colgate were not substantially proportional to enrollment. Additionally, under these circumstances, the university could not establish a history and continuing practice of program expansion for female student-athletes, or that the interests and abilities of females in ice hockey, for example, had been fully and effectively accommodated.

Even though recent Title IX suits commenced by women have largely been successful in restoring previously cut programs, actions commenced on behalf of male athletes seeking to reinstate programs have not produced similar results. In May 1993, eight members of the University of Illinois men's swim team filed a federal lawsuit to enjoin the school from dropping their program. The plaintiffs claimed they were victims of sex discrimination since the women's team was not also being eliminated. As part of a university-wide cost cutting effort, the athletic department was eliminating men's swimming and diving, fencing and women's diving. A federal district court judge refused to grant the desired relief, ruling that the elimination of men's swimming had not violated Title IX. In similar circumstances, a federal district court judge ruled that Drake University had not violated Title IX when it dropped its wrestling program and denied the request for a temporary injunction by five members of the team who complained that their rights under Title IX were being violated.

2. Title IX Settlements

During the post-Franklin period a number of institutions, in reaction to a filed or threatened student-athlete complaint, settled pending Title IX issues by voluntarily adding women's sports, reinstating previously eliminated offerings, or, in one case, eliminating the entire sports program for both men and women.  

131. See supra discussion at notes 45-48 and accompanying text.
132. Heckman, supra note 9, at 26.
134. Id. at 243-44.
136. Even though this article focuses on post-Franklin settlements, institutions involved in noteworthy pre-Franklin settlements include: the University of Oklahoma, where the school announced the cut of its women's basketball program, but voluntarily reinstated the program
For example, in June 1993, nine female athletes filed a federal Title IX complaint against Cornell University after the women's gymnastics and fencing teams were eliminated in a cost-savings move. The action came after the plaintiffs had attempted unsuccessfully to reach a compromise with the university to keep their sports, even as club programs. The university had reportedly received legal advice that the cuts would not violate Title IX requirements, because they were cutting more from their men's athletics program than from the women's. However, in December 1993, in light of the U.S. Court of Appeals rulings in Roberts, Cohen, and Favia, Cornell concluded that the interests of the university and its students would be best served by settling the claim, and reinstating the women's gymnastics and fencing teams, rather than expending its limited resources on a costly court battle.

In August 1993, members of the University of California at Los Angeles (UCLA) women's gymnastics team threatened to file a Title IX lawsuit if the university did not reinstate its program. In early August, UCLA had announced the cancellation of both men's and women's gymnastics due to athletic department financial problems. By late August, UCLA agreed to reinstate the women's program when threatened with legal action.

As part of a university-wide budget reduction, the University of New Hampshire athletic department announced the cancellation of its men's wrestling and women's tennis programs for the 1992-93 academic year. The two sports were selected in part because the participation and funding ratios between men's and women's athletics, after the cuts, would be held constant. Members of the women's tennis team threatened a lawsuit seeking the reinstatement of their sport, contending that since UNH was not providing athletic opportunities for females in numbers substan-
tially proportional to female representation in the student body, the university could not eliminate any women's teams consistent with the dictates of Title IX, (even if a proportional share of men's participation opportunities were concurrently eliminated). In March 1992, prior to the implementation of the cuts, UNH settled the pending claim by reinstating the women's tennis program and assuring full Title IX compliance within five years. In August 1993, a formal plan was adopted by UNH to ensure continued Title IX compliance in athletics. The university committed to increase the athletic opportunities available to female students to ensure that, by the 1997-98 academic year, either the athletic interests and abilities of female students will be fully and effectively accommodated or participation opportunities will be provided in numbers substantially proportionate to the enrollment of male and female students. The plan envisions increasing squad sizes on current women's teams, as well as adding women's golf, crew, volleyball and softball.

In July 1993, the University of Texas at Austin entered into an agreement to settle a class-action lawsuit which alleged that the university had violated Title IX and the Equal Protection Clause of the Fourteenth Amendment by denying varsity intercollegiate athletic opportunities to female students. By agreement, the university committed to increase female participation in varsity sports to 44% by the end of the 1995-96 academic year, to increase to 42% the percentage of athletic scholarships going to women, and to institute women's varsity soccer in the 1993-94 academic year and women's varsity softball not later than the 1995-96 academic year.

In February 1993, members of the women's club soccer team at Auburn University filed an OCR complaint seeking the promotion of their club team to varsity status. This complaint was followed by the filing of a Title IX class-action lawsuit against the university in April 1993 on

142. The author thanks Ronald R. Rodgers, UNH General Counsel, for providing information relevant to the UNH gender equity dispute and subsequent settlement, including copies of the MEMORANDUM OF AGREEMENT (between UNH and members of the 1992 women's tennis team, dated March 6, 1992) and the PLAN TO ENSURE CONTINUED COMPLIANCE WITH TITLE IX IN ATHLETICS AT THE UNIVERSITY OF NEW HAMPSHIRE (dated July 15, 1993 and formally adopted by the university on August 18, 1993).

143. Sanders v. Univ. of Tex. at Austin, Case No. A-92-CA-405 (W.D. Tex. 1993). The action, similar to Cook in some respects, was filed by members of four women's club sports (softball, soccer, crew, and gymnastics) seeking to elevate their programs to varsity status. At the time the action was filed, women accounted for 47% of UT's undergraduate student body, but only 23% of its varsity athletes.

144. Id. The author thanks Patricia C. Ohlendorf, Vice Provost of the University of Texas at Austin, for providing information relevant to the UT gender equity dispute and subsequent settlement, including a copy of the court order settling the Sanders action.
behalf of all current and future female student-athletes. The plaintiffs sought increased funding for all women's sports. In July 1993, the school entered into a settlement agreement concerning the soccer-related claims filed against Auburn University both with the OCR and in federal district court, wherein the university agreed to elevate women's soccer from club to varsity status, and to support and maintain that program for at least five years, beginning in the fall of 1993. In addition, the university agreed to pay the Kiechel plaintiffs $60,000 in compensatory damages, and $80,000 in legal fees.

At the University of Massachusetts, as a component of university-wide budget cuts, the UMass athletic department eliminated five varsity sports over a two-year period between 1990 and 1991, including women's lacrosse, tennis, and volleyball and men's tennis and volleyball. (Men's soccer was also dropped and then brought back as a result of a private cash donation). Prior to the cuts, UMass sponsored 26 sports, 13 for men and 13 for women. Women accounted for 34.5% of UMass varsity athletes, and 51.5% of its undergraduate population. After the elimination of the five varsity sports, the women's participation ratio was slightly reduced to 32.7% of UMass varsity athletes. A Title IX suit was threatened by members of the eliminated women's lacrosse and tennis teams. Ultimately, an October 1992 settlement provided for the immediate reinstatement of the women's tennis, lacrosse, and volleyball teams. UMass also committed to a goal of full Title IX compliance within five years, including the doubling of athletic scholarships available for women.

In January 1992, California State University at Fullerton (CSUF) eliminated school funding for women's volleyball and men's gymnastics. Members of the women's volleyball team commenced an action in California Superior Court against CSUF and the California State University

146. Id.
147. Id.
148. Id. The author thanks Lee F. Armstrong, Auburn University General Counsel, for providing information relevant to the university's gender equity dispute and subsequent settlement, including copies of relevant court documents in the Kiechel action (Settlement Agreement and Final Order Approving Class Action Settlement).
150. The author thanks Glenn M. Wong and Carol Barr for providing information relevant to the UMass gender equity dispute and subsequent settlement. At the time of the settlement, Wong served as the UMass Interim Director of Athletics, and Barr as an Assistant Director of Athletics. The author, at the time of the settlement, was an assistant professor in the UMass Sport Management Program.
system, seeking injunctive relief to reinstate their program. They claimed that the elimination of women's varsity volleyball was discriminatory and violated the California Education Code as well as the equal protection guarantee under the California Constitution.\textsuperscript{151} Prior to the cuts, CSUF sponsored 17 varsity athletic programs, nine for men and eight for women. Women accounted for only 26.6% of CSUF's varsity athletes, but represented 55.6% of its undergraduate population. As a result of the cuts, the ratio of women participating in athletics fell slightly to 24.9% of all CSUF athletes. A temporary restraining order was granted by the California Superior Court in February 1992, followed by the issuance of a preliminary injunction prohibiting CSUF from cutting the women's volleyball program and altering its budget in March. Under the threat of an additional federal lawsuit, alleging CSUF violations of Title IX and the Equal Protection Clause of the Fourteenth Amendment, the university settled the dispute by entering into a consent decree wherein CSUF, in addition to reinstating women's volleyball, agreed to establish a varsity women's soccer program for the 1992-93 season. CSUF pledged to increase the participation ratio of women to 31% in 1992-93, to 40% by 1997-98, and to a number equivalent to the student body ratio by 2002-03 (allowing for a 5% variance in any given year), as well as providing an equivalent percentage allocation of budgetary support. The university also agreed to form a committee which would conduct annual gender equity assessments and survey the athletic interests of female students every three years.\textsuperscript{152}

In a further settlement of a class action suit, filed in February 1993 against the entire 20-campus California State University system, university administrators committed to work toward providing male and female students with athletic opportunities and budgetary allocations in amounts proportional to their respective campus enrollments. The settlement requires reasonable progress with a final deadline for compliance by the 1998-99 academic year.\textsuperscript{153}

Finally, Brooklyn College announced that it was dropping its entire sports program as part of a college-wide $5.4 million budget cutback in a surprising move in June 1992. A Title IX complaint had been filed with the OCR in 1990 by two Physical Education professors at Brooklyn College, resulting in an OCR finding that the school was not providing male


\textsuperscript{152} Id.

\textsuperscript{153} Carol Herwig, \textit{Gender-Equity Suits Settled, Could Have Far-Reaching Effect}, \textit{USA Today}, October 22, 1993, at 10C.
and female athletes with equal opportunities to participate in intercollegiate sports. In response to the findings, the college pledged full compliance by September 1992, but announced the dismantling of its entire athletics program a few months prior to that deadline.\textsuperscript{154}

These are but a few of the more publicized settlements that, in addition to the results in \textit{Roberts, Cohen,} and \textit{Favia,} have fueled the advance of gender equity in college athletics. They indicate a realization among some college athletic administrators that their programs must inevitably begin to accommodate the athletic interests and abilities of both sexes on campus.

3. Current Gender Equity Initiatives

In spite of recent developments, many institutions continue to turn a blind eye to Title IX non-compliance. Based on recent case law, however, the issue seems unavoidable for most institutions, either through a complaint-initiated process or, more preferably, a self-directed analysis and self-imposed plan for future compliance. Failing any meaningful progress, Congress has also threatened to impose Title IX-related reporting requirements subjecting institutional performance to public scrutiny.\textsuperscript{155} Under these circumstances, some institutions and their governing athletic organizations have taken a proactive lead in embracing the cause of gender equity by proposing or establishing plans designed to proportionately increase female participation in college athletics.

Immediately following the release of the results of its gender-equity study in March 1992, revealing that women were indeed second-class citizens in intercollegiate athletics,\textsuperscript{156} the NCAA appointed a 16 member task force of men and women with divergent views to thoroughly review the gender equity issue and provide recommendations regarding how the NCAA can better assure that opportunities to participate in athletics are offered without regard to gender.\textsuperscript{157} In July 1993, the task force issued

\textsuperscript{154} Carol Herwig, \textit{Questions Linger in Wake of Brooklyn's Troubles}, USA TODAY, June 10, 1992, at 2C.

\textsuperscript{155} In February 1993, U.S. Representative Cardiss Collins, D-Ill., unveiled a bill entitled the "Equity in Athletics Disclosure Act." If passed, the bill would require all colleges receiving federal financial assistance to reveal their male and female varsity athletic participation ratios and their total expenditures for men's and women's athletics. See Carol Herwig, \textit{Compliance with Title IX is Aim of Pending Legislation}, USA TODAY, February 18, 1993, at 13C.

\textsuperscript{156} NCAA GENDER-EQUITY STUDY, supra note 79. While women accounted for approximately 50% of the student body enrollment at Division I institutions, they represented only 30.9% of varsity athletic participants, and received only 30.4% of scholarship revenue, 22.6% of athletic department operating budgets, and 17.2% of recruiting budgets.

\textsuperscript{157} See supra note 82.
its final report in accordance with its charge, wherein it defined gender equity, outlined key principles of gender equity, provided guidelines to attain that goal, endorsed "proportionality" as a measure of equity, identified emerging sports for women, and recommended rule changes to expand scholarship support and participation opportunities for female athletes.

Acting on the recommendations of its Gender-Equity Task Force, the NCAA membership adopted a proposition at the 1994 NCAA Convention designed to add gender equity to the Association's principles for the conduct of intercollegiate athletics and another to establish maximum financial aid limits in emerging sports for women and permit institutions to utilize the emerging sports in order to meet the Association's minimum sports-sponsorship and financial aid award criteria. The legislation, while supportive of Title IX and creating new opportunities for women, fails to identify any penalties for Title IX noncompliance. Perhaps specific penalty provisions will follow at ensuing Conventions. For now, however, gender equity noncompliance may only be penalized by the Association through its new certification program, passed at the 1993 Convention. The certification program requires each member institution to complete an institutional self-study, verified and evaluated through an external peer-review process administered by the Association at least every five years, demonstrating the institution's adherence to prescribed standards, including a commitment to fair and equitable treatment of both men and women in intercollegiate athletics, and the development of a gender equity plan to ensure future adherence to

158. Final Report of the NCAA Gender-Equity Task Force, National Collegiate Athletic Association, July 26, 1993, at 2. According to the task force report, an "athletics program can be considered gender equitable when the participants in both the men's and women's sports programs would accept as fair and equitable the overall program of the other gender. No individual should be discriminated against on the basis of gender, institutionally or nationally, in intercollegiate athletics."

159. Id. at 3. The task force suggested that institutions "should support intercollegiate athletics participation opportunities for males and females in an equitable manner. The ultimate goal for each institution should be that the numbers of male and female athletes are substantially proportionate to their numbers in the institution's undergraduate student population."

160. Id. at 2-6.


162. Id. The emerging sports identified by the legislation include: archery, badminton, bowling, crew, ice hockey, squash, synchronized swimming, team handball and water polo. See 1994 NCAA Convention Official Notice, Legislative Proposal No. 12.

evolving Association standards. Gender equity noncompliance is, therefore, one cause for non-certification, and non-certified schools become ineligible for NCAA championships and related revenue distribution. While these are certainly significant penalties, some may argue that the threat of future non-certification may do little to encourage immediate gender equity compliance. However, the threat of non-certification is not so distant that athletic administrators can afford to delay in devising a gender equity plan and implement measures demonstrating the institution's commitment to fair and equitable treatment of both men and women in intercollegiate athletics.

Certainly, some will be left disappointed with the NCAA's current efforts to promote gender equity. Yet, perhaps the Association's purposes, as a national organization, are best served by establishing general principles and avoiding the temptation to micromanage the issue. Given the heterogeneity of NCAA membership, specific gender equity requirements and resulting penalties for non-compliance may best be left to the conferences. Some conferences, in fact, have already taken the lead in this regard.

In May 1992, for example, the Big Ten became the first college conference to adopt a gender equity plan when conference members voted 10-1 to require that women comprise at least 40% of the participants in intercollegiate athletics at member institutions within five years. When the plan was adopted, women accounted for 30.5% of Big Ten varsity athletes, and approximately 49% of the undergraduate population at Big Ten schools. While praised by some as the first policy of its kind adopted by a college conference, the measure is not without critics who argue that a 60:40 male to female participation ratio over a five-year period is too little over too much time, and that the policy does not outline specific procedures to reach the goal prior to the deadline.

164. Id. at Bylaw 23.2.4.
165. Id. at Bylaw 23.2.3.
166. Carol Herwig, Big Ten Gives Women's Sports a Boost, USA TODAY, May 13, 1992, at 1C.
167. See Moran, supra note 4, at S8. See also Evon Asforis, Big Ten Moves Toward Gender Equity, THE WOMEN'S SPORTS EXPERIENCE (July-August 1992), at 9 (where Donna Lopiano, executive director of the Women's Sports Foundation is quoted: "The Big Ten should be commended for being the only conference to grapple with gender equity. Its effort, however, falls far short of the requirements of law and common sense.").
168. Even though not officially adopted by the Big Ten Conference, its commissioner, Jim Delaney, has offered some suggestions to achieve the mandated 60:40 male to female participation ratio, including:

• Conducting campaigns to encourage women to join athletic teams even if they do not receive an athletic scholarship.
The University of Iowa, a Big Ten institution, has gone one step further than its conference office, in committing to provide women, by August 1997, with athletic opportunities in proportion to their representation in the undergraduate student body.169

In June 1993, the Southeastern Conference adopted a gender equity proposal requiring its member institutions to provide at least two more women's sports programs than the number of men's sports offered.170 The proposal, which becomes effective August 1, 1995, requires each conference member to submit a report, based on a Title IX self-evaluation, to the conference office by June 1, 1994, and commits the conference office and member institutions to act affirmatively to increase the quantity and quality of women's athletic opportunities. Specifically, the proposal mandates an equitable distribution of scholarship funding, access to support services, compensation for coaches, and opportunities to participate, coach and administer.171

- Identifying women's sports on each campus that can be upgraded from club status to varsity competition.
- Creating junior varsity teams in the sports that hold the greatest appeal for female athletes, such as basketball and volleyball.
- Establishing limits on the sizes of men’s teams, with reductions of 10 percent or more, depending on the size required by the needs of each sport.

See Moran, supra note 4, at S8 p.1.

169. PRESS RELEASE, UNIVERSITY OF IOWA SPORTS INFORMATION DEPARTMENT, April 21, 1992.

Christine Grant, women's athletic director and associate professor at the University of Iowa, has offered the following suggestions to assist universities in enhancing female athletic opportunities without necessarily cutting men's programs:

- Putting caps on squad sizes in men’s sports. Some sports carry many more participants than are necessary to practice or compete.
- Encouraging the NCAA to increase scholarships (and therefore participation) in existing women's sports. For example, field hockey needs 22 players to scrimmage, but has a scholarship limit of 11.
- Allowing scholarships to be divided in all women's sports to attract more participants.
- Adding one or two women's sports. Almost all universities now offer more sports for men.
- Reforming the system at the national level so expensive and nonessential practices are eliminated.

See Christine Grant, Universities Must Commit to Achieve Parity, USA TODAY, May 14, 1992, at 14C.

170. The author thanks Mark Whitworth, of the Southeastern Conference (SEC), for providing a copy of SOUTHEASTERN CONFERENCE PRINCIPLES OF GENDER EQUITY, adopted on June 3, 1993, to be effective after August 1, 1995.

The SEC's current minimum sports offering requirement is seven men's and seven women's programs. This new proposal will increase the women's minimum to nine.

171. Id.
As the administrative agency for Title IX compliance, the OCR has long been criticized for investigating potential Title IX violations only after it receives a complaint, rather than taking a more proactive, aggressive approach to enforcing the law. The complaint process has even been described as an ineffective means of forcing equity.\textsuperscript{172} In March 1993, the OCR announced its plans to increase the number of Title IX compliance reviews of intercollegiate athletic programs at randomly selected universities in apparent response to this criticism. During 1993, fourteen programs were targeted for review.\textsuperscript{173}

III. The Future?

For institutions that have been dodging the requirements of Title IX for more than twenty years, it appears the day of reckoning has finally arrived. We can only expect the floodgates of Title IX athletics litigation to burst unless universities and their governing organizations take active steps toward gender equity, including providing women with equitable opportunities to participate in intercollegiate athletics. Unfortunately, this day of reckoning has come when institutions and athletic departments around the country can least afford it. In a time of cost-containment, the course many schools will take to improve their female varsity participation ratios will be to cut men’s programs, usually non-revenue producing sports, rather than add sports for women.\textsuperscript{174} Thus, true or not, the perception is that men’s athletic opportunities have become the sacrificial lamb for gender equity. It is not surprising, therefore, that this has become such a heated and polarizing issue.

The key “sticking point” in distributing athletic opportunities proportionally between male and female college athletes is clearly the high-scholarship, high-cost sport of football. In its current big-time form, with 100-man teams and high operating costs, football makes it virtually impossible to balance male and female athletic opportunities. Women quite simply do not have a similar large roster, injury-riddled sport of their own, made up of offensive, defensive and special-team units.\textsuperscript{175} The fact that, on average, there are almost as many football players at

\begin{footnotesize}
\footnotesize
\begin{enumerate}
\item \textsuperscript{172}\ Kellers, \textit{supra} note 84, at 6.
\item \textsuperscript{173}\ \textit{Sportsline}, \textit{USA TODAY}, March 24, 1993, at 1C. Included among the schools selected for compliance reviews in 1993 were: Colorado State, Fresno State, Iowa State, Jackson State, Northern Michigan and San Jose State.
\item \textsuperscript{174}\ See Tom Weir, \textit{All Must Face Cold Facts of Title IX}, \textit{USA TODAY}, March 13, 1992, at 3C.
\item \textsuperscript{175}\ \textit{Id.}
\end{enumerate}
\end{footnotesize}
Division I institutions as there are female athletes, would lead one to reasonably conclude that male participants are always going to outnumber females purely because of football.

It becomes readily apparent under current methods of Title IX analysis, it becomes readily apparent that gender-equity will be difficult to achieve if football is not somehow affected. Yet, even the thought of down-sizing football creates a battle cry among coaches and alumni, arguing that football is the cash cow that supports all college athletic programs, whose profitability will be jeopardized by further budget cuts. Although statistics vary, football unquestionably contributes revenues that provide a financial nucleus for men’s and women’s intercollegiate programs. That money, along with the revenue earned from the NCAA Division I men's basketball tournament, assists in supporting all of the non-revenue sports, including women’s programs.

A gender equity plan that offers practical solutions acceptable to all involved in this polarizing debate becomes almost impossible to formulate. Devising a proposal guaranteeing athletic opportunities for female students based on their proportional representation in the undergraduate student body may be economically unattainable without significantly altering men’s sports as we now know them. This attracts predictable opposition from administrators, coaches and participants involved in men’s athletics. On the other hand, any plan falling short of a proportional distribution of athletic opportunities between the sexes attracts the wrath of gender equity activists. Can an equitable division of college athletic opportunities between the sexes be realized without significantly

176. According to the NCAA’s 1992 Gender-Equity Study, of all Division I athletes, 29.9% are football players and 30.9% are female athletes. The remaining 39.2% represents non-football playing male athletes. See NCAA GENDER-EQUITY STUDY, supra note 79, at Table 1.

177. Statistical information examining the financial health of college athletics vary quite remarkably, however, one is lead to the conclusion that the number of Division I sports programs that bring in more revenue than they spend are relatively few, perhaps less than 30%. Even many Division I-A football programs operate at a deficit, however football unquestionably generates more revenue than any other sport, nearly half the revenue in fact, as Division I-A schools. Officials at schools with prominent football traditions fear the wrath of the alumni, boosters and fans if they tamper with what is perceived as the goose that lays the golden egg. See, Ben Brown, Law Gives Women Their Fair Share, USA TODAY, June 9, 1992, at 2C.

An NCAA study released in August 1994 revealed that men’s sports programs under the flagship sport of football, generate an average of 69% of Division I-A athletic department revenue. Women’s programs produce an average of 4% of total revenues, with the remaining 27% generated from non-gender specific sources. The study also revealed that 67% of Division I-A football programs are operating in the black, at an average profit in 1993 of $3.9 million. Eighty-five of the 107 Division I-A schools responded to the survey. See, NCAA News, August 31, 1994, at 5.
affecting programs currently offered to men? In an attempt to respond positively to this question, the author has developed a proposal, the “Three-for-One” plan. It is premised on compromise, seeking some common ground between those interested in promoting female athletic opportunities; and those interested in preserving the quality of programs for men. The plan is formulated in accordance with the three general areas for assessing Title IX compliance, although addressed in reverse order, requiring that: (1) institutions accommodate effectively the athletic interests and abilities of female and male students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes; 178 (2) all benefits, opportunities and treatment afforded participants of each sex be equivalent; 179 and (3) scholarship assistance be allocated in proportion to the numbers of male and female participants in intercollegiate athletics. 180

To effectively accommodate the athletic interests and abilities of both sexes on campus, the “Three-for-One” plan creates two sports program pools: Pool A, comprised of football and a group of sports offered for women only; and, Pool B, encompassing all other varsity sports offerings at the institution. The Pool A grouping is designed to achieve an equitable balance between preserving the flagship sport of football, and enhancing athletic opportunities for women. Since women do not have a high scholarship sport similar to football, the “Three-for-One” plan, in a sense, creates one by grouping together three sports offered by the institution for women only (three-for-one). To qualify as a Pool A for-women-only (FWO) sport, the FWO program must not be offered to men at the institution, and must afford at least twelve participation opportunities. In addition, at least two of the three FWO programs must be team sports. FWO program possibilities will naturally vary regionally and from school to school, but may include such sports as field hockey, volleyball, lacrosse, soccer, or other “emerging sports” recently identified by the NCAA in 1994 Convention legislation. 181 The plan intends that these FWO sports be either added as a new sport offering or identi-

178. See supra notes 40-44 and accompanying text.
179. See supra notes 36-39 and accompanying text.
180. See supra notes 32-35 and accompanying text.
181. See supra note 162. Proposal No. 12 passed at the 1994 NCAA Convention established maximum financial aid limits in emerging sports for women and permits institutions to utilize the emerging sports in order to meet the Association’s minimum sports sponsorship and financial aid award criteria. The emerging sports identified by the legislation include: archery, badminton, bowling, crew, ice hockey, squash, synchronized swimming, team handball and water polo.
fied from current sports offered only to women at an institution, without affecting sports offered to men. In some circumstances, however, economic necessity may require that a FWO sport be created by dropping a matching sport from the men's side. While the distribution of athletics participation opportunities for both sexes in Pool A sports will not necessarily be proportional to the student body ratio, such a grouping is a realistic and practical proposal designed to improve an institution's female athletics participation ratio and comply with the requirements of Title IX, and reaffirm the unique status of football in collegiate athletics. 182

The Pool B grouping encompasses all other varsity sports not included in Pool A. The plan requires that institutions provide athletic participation opportunities to both sexes in Pool B sports in proportion to their respective undergraduate enrollments or demonstrate that the

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For purposes of the "Three-for-One" plan, women's softball is considered the equivalent of men's baseball, and is, therefore, ineligible as a FWO program, unless baseball is not offered to men at the particular institution.

182. The following is a representation of the "Three-for-One" plan's implementation at hypothetical university (HU), an NCAA Division I institution. Statistics used are derived from the 1992 NCAA GENDER-EQUITY STUDY, supra note 79. The example is intended to depict the average Division I institution, and will describe HU athletics program offerings for men and women both before and after the implementation of the "Three-for-One" plan.

<table>
<thead>
<tr>
<th>Men's sports:</th>
<th>8</th>
</tr>
</thead>
<tbody>
<tr>
<td>Women's sports:</td>
<td>7</td>
</tr>
<tr>
<td>UGrad student body ratio (M/W):</td>
<td>50/50</td>
</tr>
<tr>
<td>Athletics participation ratio (M/W)</td>
<td>69.4/30.6</td>
</tr>
</tbody>
</table>

### Men's sports (participants) | Women's sports (participants)
--- | ---
Football | 109 | Volleyball | 12
Baseball | 33 | Softball | 17
Basketball | 15 | Basketball | 13
Cross country | 13 | Cross country | 11
Swimming | 25 | Swimming | 22
Tennis | 10 | Tennis | 10
Track | 38 | Track | 26
Golf | 11 |
| 252 | 111 |

2. HU Athletics - After "Three-for-One" Plan

EXAMPLE #1.

Implementation of "Three-for-One" plan WITHOUT cutting a men's sport. Changes highlighted in bold.

<table>
<thead>
<tr>
<th>Men's sports</th>
<th>8</th>
</tr>
</thead>
<tbody>
<tr>
<td>Women's sports:</td>
<td>10</td>
</tr>
<tr>
<td>UGrad student body ratio (M/W):</td>
<td>50/50</td>
</tr>
<tr>
<td>Athletics participation ratio (M/W):</td>
<td>56/44</td>
</tr>
<tr>
<td>Pool A participation ratio (M/W):</td>
<td>63/37</td>
</tr>
<tr>
<td>Pool B participation ratio (M/W):</td>
<td>54/46</td>
</tr>
<tr>
<td>Men's sports (participants)</td>
<td>Women's sports (participants)</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>-----------------------------</td>
</tr>
<tr>
<td><strong>POOL A</strong></td>
<td><strong>POOL A</strong></td>
</tr>
<tr>
<td>Football*</td>
<td>Volleyball**</td>
</tr>
<tr>
<td></td>
<td>Soccer</td>
</tr>
<tr>
<td></td>
<td>Crew</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>97</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>24</td>
</tr>
<tr>
<td></td>
<td>20</td>
</tr>
<tr>
<td><strong>POOL B</strong></td>
<td><strong>POOL B</strong></td>
</tr>
<tr>
<td>Baseball*</td>
<td>Softball**</td>
</tr>
<tr>
<td>Basketball*</td>
<td>Basketball**</td>
</tr>
<tr>
<td>Cross country*</td>
<td>Cross country**</td>
</tr>
<tr>
<td>Swimming*</td>
<td>Swimming**</td>
</tr>
<tr>
<td>Tennis*</td>
<td>Tennis**</td>
</tr>
<tr>
<td>Track*</td>
<td>Track**</td>
</tr>
<tr>
<td>Golf*</td>
<td>Golf</td>
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<tr>
<td></td>
<td></td>
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<tr>
<td>28</td>
<td>18</td>
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<tr>
<td>13</td>
<td>14</td>
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<td>11</td>
<td>12</td>
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<td>22</td>
<td>24</td>
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<td>9</td>
<td>11</td>
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<tr>
<td>34</td>
<td>28</td>
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<tr>
<td>10</td>
<td>11</td>
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<tr>
<td>**</td>
<td></td>
</tr>
<tr>
<td>142</td>
<td>118</td>
</tr>
<tr>
<td><strong>POOLS A+B</strong></td>
<td><strong>POOLS A+B</strong></td>
</tr>
<tr>
<td></td>
<td></td>
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<tr>
<td>224</td>
<td>175</td>
</tr>
</tbody>
</table>

* denotes a 10% reduction in men's roster sizes

** denotes a 10% increase in women's roster sizes

Example #1 adds 64 female athletic opportunities, by creating three new sports (soccer, crew and golf), and increasing preexisting women's roster sizes by 10%. The women's athletic program enhancement is accomplished in part by a 10% reduction in men's roster sizes. Overall athletics opportunities offered by HU have increased, after the implementation of the plan, from 363 to 399.

**EXAMPLE #2**

<table>
<thead>
<tr>
<th>Men's sports (participants)</th>
<th>Women's sports (participants)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>POOL A</strong></td>
<td><strong>POOL A</strong></td>
</tr>
<tr>
<td>Football*</td>
<td>Volleyball**</td>
</tr>
<tr>
<td></td>
<td>Soccer</td>
</tr>
<tr>
<td></td>
<td>Swimming**</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>97</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>24</td>
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<tr>
<td></td>
<td>24</td>
</tr>
<tr>
<td><strong>POOL B</strong></td>
<td><strong>POOL B</strong></td>
</tr>
<tr>
<td>Baseball*</td>
<td>Softball**</td>
</tr>
<tr>
<td>Basketball*</td>
<td>Basketball**</td>
</tr>
<tr>
<td>Cross country*</td>
<td>Cross country**</td>
</tr>
<tr>
<td>Tennis*</td>
<td>Tennis**</td>
</tr>
<tr>
<td>Track*</td>
<td>Track**</td>
</tr>
<tr>
<td>Golf*</td>
<td>Golf</td>
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<td></td>
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<tr>
<td>28</td>
<td>18</td>
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<td>13</td>
<td>14</td>
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<td>11</td>
<td>12</td>
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<td>11</td>
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<td>34</td>
<td>28</td>
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<tr>
<td>10</td>
<td>11</td>
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<tr>
<td>**</td>
<td></td>
</tr>
<tr>
<td>105</td>
<td>94</td>
</tr>
<tr>
<td><strong>POOLS A+B</strong></td>
<td><strong>POOLS A+B</strong></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>202</td>
<td>155</td>
</tr>
</tbody>
</table>

* denotes a 10% reduction in men's roster sizes

** denotes a 10% increase in women's roster sizes
interests and abilities of members of the underrepresented sex have been fully and effectively accommodated by the overall athletics program. If an institution does not offer football, all sports would be considered Pool B sports, dictating compliance with the above stated test. Here again, the plan intends that women's sports be added to bring the institution into compliance with Pool B's proportionality requirement. However, economic necessity may dictate that compliance be achieved by dropping one or more Pool B sports offered to men.

Under the "Three-for-One" plan, the division of participation opportunities between the sexes will be considered equitable if the institution has complied with the composition requirements of Pools A and B. The overall athletics participation ratio under the plan may favor men's opportunities. Participation ratios will naturally vary depending on the total number of opportunities provided and the FWO sports, selected, yet, on average, institutions following the plan will divide their athletic opportunities 55% to men and 45% to women. While for some, such a ratio may not strictly satisfy the popular proportionality benchmark, the author argues that it will withstand muster under Title IX. The institution will be able to establish that its overall athletics participation ratio is substantially proportional to its undergraduate student body ratio, or exhibit a history and continuing practice of program expansion responsive to the developing interests and abilities of the underrepresented sex, or demonstrate that the athletic interests and abilities of its students of the underrepresented sex have been fully and effectively accommodated. In addition, an athletics program, developed in accordance with the "Three-for-One" plan, might better satisfy the definition for gender equity proffered by the NCAA Gender Equity Task Force. They provide that "an athletics program can be considered gender equitable when the participants in both the men's and women's sports program would accept as fair and equitable the overall program of the other gender." After defining an equitable division of athletic opportunities between men and women, the "Three-for-One" plan proposes to address the re-

Example #2 adds 44 female athletic opportunities, by creating two new sports (soccer and golf), and increasing preexisting women's roster sizes by 10%. The women's athletic program enhancement is accomplished in part by a 10% reduction in men's roster sizes, and the elimination of the men's swimming program. Since swimming becomes a women's-only sport at HU, it is now eligible for inclusion in Pool A. Overall athletics opportunities offered by HU have actually decreased from 363 to 357.

183. See discussion and examples infra note 182.
184. See supra notes 32-44 and accompanying text.
185. See supra note 158, at 2.
GENDER EQUITY IN ATHLETICS

remaining two Title IX compliance requirements in accordance with current practices. Institutions would be required to afford their male and female athletes equivalent treatment, benefits and opportunities in the eleven program areas enumerated in the Title IX Regulations. Equal athletic expenditures would not be required, but an athletics program must exhibit equivalent treatment and distribution of benefits and opportunities in terms of equipment and supplies, games and practice schedules, travel and per diem allowances, coaches and tutors, medical and training services, housing and dining facilities and services, locker rooms, practice and competitive facilities, and publicity. The division of athletic expenditures, excluding scholarships, would be globally assessed for the entire athletic department with women’s programs, under the “Three-for-One” plan guaranteed a proportioned share. Furthermore, in accordance with Title IX requirements, scholarship assistance would be allocated in proportion to the number of male and female participants in the entire athletic department.

Since the “Three-for-One” plan envisions the creation of new programs for women, the obvious question is: how will institutions, bent on cost-containment, pay for these new programs? First, to avoid the easy alternative of cutting men’s programs to comply with Pool A and B requirements, the plan’s success, or indeed any gender equity initiative, requires the involvement and support of the president’s office. This involvement would be formulating the institution’s plan for compliance and securing adequate university resources for its implementation. The entire institution must internalize and economically commit to the philosophy that the cost of a well-balanced athletic program is worth the positive public perception emanating from a university devoted to providing educational and athletic opportunities to all students regardless of sex.

Second, athletic departments must begin to do a better job of turning their women’s sports into revenue producers. Women’s athletics is an underrated and undeveloped market. It is generating more spectator interest and is considered by many to be the next frontier for women’s intercollegiate athletics. The skill level of female competition has improved tremendously in recent years with better coaching and more girls participating in athletics at younger ages. As a result, women’s intercollegiate athletics is developing into a less expensive, entertaining alterna-

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186. See supra notes 36-39 and accompanying text.
187. See supra notes 32-35 and accompanying text.
188. Comment, supra note 16, at 715.
tive to men’s sports as well as one on which athletic departments would do well to focus additional marketing efforts. Women’s sports offer the excitement of quality competition, yet currently remain small enough to capitalize on the marketing appeal of direct fan involvement where spectators pay less and sit closer to the action. Additionally, sponsorship might be attracted from various corporations that would like to be associated with and financially support the popular institutional philosophy. As such, the cost of a well-balanced athletic program is worth the positive public perception derived from a university committed to providing educational and athletic opportunities to all students regardless of sex.

Third, since many men’s sports in peril of elimination under any gender equity plan are non-revenue producing, Olympics-related programs, the United States Olympic Committee and related national sports governing bodies should become more involved in providing financial support to college athletic programs. Even though the USOC and national sport governing bodies are also suffering from revenue shortages, they do benefit from the collegiate development of Olympic athletes. The cost to develop these same athletes, should colleges continue to cut these non-revenue, Olympics-related programs, would certainly be more than infusing financial support now to help keep them afloat. This extra revenue would allow the current revenue devoted to these programs to be redistributed to existing or new programs for women.

Fourth, while the “Three-for-One” plan does not mandate the reduction of men’s sports roster sizes, such a voluntary limitation would allow an athletic department to redistribute cost savings to women’s sports, without significantly affecting the quality of programs offered to men. Other cost savings might be achieved through altering current practices, such as further limiting roster or travel squad sizes. Ultimately, how-

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189. For further discussion of marketing women’s sports see Comment, supra note 16, at 715-718.

190. The NCAA Gender-Equity Task Force, in its Final Report, recommended that the NCAA develop collaborative efforts with, and examine the possibility of obtaining grants and other assistance from, the USOC. See Final Report of the NCAA Gender-Equity Task Force, supra note 158, at 8.

191. At its 1991 Convention, the NCAA reduced athletic scholarships available for Division I-A football from 95 to 92 for the 1992-93 academic year, to 88 during the 1993-94 academic year, and to 85 for the 1994-95 academic year and thereafter. Athletic scholarships for men’s basketball were also reduced from 15 to 14 for the 1992-93 academic year, and to 13 for the 1993-94 academic year and thereafter. See 1991-92 NCAA Manual, Bylaws 15.5.4 and 15.5.5.

The voluntary limiting of men’s roster sizes, in addition to football and basketball, and/or elimination of one or more men’s squads, may be necessary to achieve compliance under the “Three-for-One” plan. See supra notes 182-183 and accompanying text.
ever, in the absence of other revenue sources, the elimination of some men’s sports may be economically necessary and inevitable.

Finally, in consideration of football’s special Pool A classification under the “Three-for-One” plan, the proposal also supports the implementation of a Division I-A football playoff to provide an additional revenue source to indirectly assist in funding women’s sports opportunities. This idea has been debated among college football fans for years, but has gained recent support within the decision-making ranks of the NCAA. At the 1993 NCAA Convention, Dick Schultz, then NCAA Executive Director, urged the Association to take a hard look at a playoff in his “State of the NCAA Address.”\(^\text{192}\) Schultz emphasized that a Division I-A football playoff would be a source of tremendous revenue to sustain existing athletic programs and to support gender equity reforms.

Even though the playoff concept makes sense to college football fans, it will not become a reality until the real power-brokers of college sports - college presidents and chancellors - are serious about such an alternative. Recently, however, college presidents showed some real signs of warming to the idea. A significant step in this direction was taken in December 1993. The powerful NCAA President’s Commission appointed a fact-finding task force to consider the pros and cons of a Division I-A football playoff, and to make recommendations to the Commission, the NCAA Council and the Executive Committee.\(^\text{193}\) If acted upon, implementing legislation could be put to a membership vote as early as the 1995 convention with playoffs in place for the conclusion of the 1995 college football season.\(^\text{194}\) The playoff would answer the college football fan's argument of who is number one, while generating much needed revenue for athletic program enhancement. Proponents of a playoff estimate that a Division I-A championship game could gener-

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\(^{193}\) Steve Wieberg, NCAA Task Force to Look at Playoff, USA Today, December 8, 1993, at 1C.

\(^{194}\) Numerous two, four, and eight-team playoffs have been proposed, some incorporating the current New Year's Day bowls, others to be played after the bowls. A number of corporations have recently made pitches to the NCAA to promote and sponsor a football playoff, the most noteworthy, perhaps, being Nike and Disney. See Steve Wieberg, Presidents Inch Toward Considering I-A Football Playoff, USA Today, December 8, 1993, at 14C.

The playoff formats currently being preliminarily considered would envision a maximum 14 game schedule, with some combination of 11 regular season games, and three post-season games. This schedule would then equal the 14 game schedule currently being played by Division I-AA, II and III champions. See Bryan Burwell, Playoff Task Force a Small First Step, USA Today, December 8, 1993, at 3C.
ate revenue as great as $100 million. Based on conservative estimates alone, however, revenues would be sufficient to ease the financial crunch that already has at least two-thirds of Division I programs in the red and scrambling for some way to pay for the additional demands of gender equity. As such, football, long the sticking point in the gender equity debate, may ironically be the revenue generating answer.

IV. Conclusion

The cause of gender equity in athletics is about fairness. Certainly, many have and will continue to argue that women will never be able to raise their games to the quality of men's competition, and will never be able to attract the spectators or revenue that men's sports do. These are not the real issues here. Athletic competition at our colleges and universities should, first and foremost, serve an educational purpose, as we teach and instill in these young participants the values of teamwork, courage, commitment and fair play. Do not our young women deserve this educational opportunity as much as our young men?

Through a multitude of factors outlined herein, attitudes toward this issue are changing and legal imperatives are emerging, producing a social consciousness that will no longer tolerate an inequitable division of athletics opportunities favoring one sex over another. Athletic administrators, facing a certain confrontation with gender equity, must act now to determine how their limited financial resources can be fairly apportioned in order to ensure that athletics opportunities are equitably divided and sex discrimination eliminated in intercollegiate sports.

195. Wieberg, supra note 194, at 14C.
196. Id.