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Equal Pay for Coaches of Female Teams: Finding a Cause of Action Under Federal Law

I. Introduction

A school board, which requires an equivalent input of time and effort from the coaches of both its male and female sports teams, but pays the coaches of the female teams less, practices an atypical form of sex discrimination. Such discrimination is atypical for these coaches are paid less, not because they are female, but because they coach females. Yet this manifestation of sex discrimination is no less severe or tolerable than other forms of sex discrimination. By paying the coach of a female team less than the coach of the corresponding male team, despite the fact that their duties are equivalent, a school board is declaring essentially that the athletic development of their female students is a less valuable objective than the athletic development of their male students. By making coaching positions with female teams less attractive financially, a school board discourages coaches from seeking these positions, and consequently deprives female students of exposure to the best coaching talent. Well-qualified coaches who want to coach females and who are not dissuaded by the lower salaries must suffer the injustice of receiving less pay than coaches of male teams for equivalent work.

Although the atypical nature of such discriminatory conduct does not detract from its status as genuine sex discrimination, it has been an obstacle to obtaining judicial relief. To date, only three compensation discrimination claims have been brought in federal court by coaches of female teams. Two actions were based on Title VII of the Civil Rights Act of 1964; both were dismissed because the court found that the Act prohibited only discrimination which was based on the sex of the employee. The presence of male coaches of female teams receiving the same pay as the litigants precluded finding such discrimination.¹ The third claim was based on the Equal Pay Act; although successfully brought, the uniqueness of that case diminished its precedential value.² This note will examine and evaluate the federal causes of action available to coaches of female teams subjected to compensation discrimination. In addition to the Equal Pay Act and Title VII, this note will consider two

1 *Kenneweg v. Hampton Township School Dist.*, 438 F. Supp. 575 (W.D. Pa. 1977); *Jackson v. Armstrong School Dist.*, 430 F. Supp. 1050 (W.D. Pa. 1977). Cf. *Hill v. Nettleton*, 455 F. Supp. 514 (D. Col. 1978) (concerning unequal treatment of a female coach). The plaintiff in *Hill* was successful. Ms. Hill was actively involved in trying to expand the women's athletic program at Colorado State University (CSU). The court concluded that these activities were seen as a threat to the funding of male teams and were the true reason for the non-renewal of her contract, not her failure to complete her Ph.D. within a specified time as asserted by the school. There is some dictum in the case suggesting that Title VII is designed to cover cases in which discrimination is based on the sex of the team:

Counsel for CSU asserted that the athletic programs for males and females were so different that the less favorable conditions of the plaintiff's employment were justified by the lack of comparability of the position of coaches and administrators in the two programs. They contend that there was no evidence of a difference between the treatment given to the plaintiff and any male coaches of women's athletic teams. That argument is reflective of the very kind of gender classifications and double standards which have been outlawed by Title VII. 455 F. Supp. at 519.

2 See note 5 *infra*.

alternate bases of relief, Title IX of the Education Amendments of 1972 and the fourteenth amendment of the United States Constitution.³

II. The Equal Pay Act

The Equal Pay Act of 1963⁴ (the "Act") seems the appropriate place to begin the search for legal relief from wage discrimination based on sex. The Act amended the Fair Labor Standards Act of 1938 by inserting a new subsection prohibiting sex-based wage differentials for jobs which required equal skill, effort and responsibility. In *Brennan v. Woodbridge High School District*,⁵ the coach of a female team successfully brought suit under the Equal Pay Act for compensation discrimination. That decision's precedential value in future cases of wage discrimination against coaches of female teams, however, is questionable for two reasons. First, the decision is based on a unique factual situation. Secondly, the Equal Pay Act is inherently unsuitable as a remedy for coaches of female teams subjected to wage discrimination.

A. Brennan v. Woodbridge High School District

In *Woodbridge*, Mary J. Adams, a high school girls' softball coach, sued the school district for paying her less than the boys' hardball coach. The district court judge found that the jobs performed by the two coaches were substantially equal⁶ and that a distinction in wages constituted a violation of the Equal Pay Act. Accordingly, the court ordered the school district to pay Ms. Adams back wages with interest and permanently enjoined any future wage differential.⁷ Although the court reached a just result, an examination of the specific factual context of the case reveals potential problems in using the case as precedent.

First, the precedential value of *Woodbridge* might be diminished in cases in which the unequal treatment is less apparent. The facts in *Woodbridge* obviously warranted recovery. Although the Equal Pay Act requires only that the jobs be substantially equal rather than identical, the jobs in this case were identical. The duties of both coaches were exactly the same and included recruiting, supervising and instructing practice, traveling with the team, supervising and

³ U.S. CONST. amend XIV.

⁴ The Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963) amended the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 1-219 (1976) by adding subsection (d) to § 206 which states:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

⁵ 74 LAB. CAS. ¶ 33,121 (1974).

⁶ *Id.* at 46,628. The Act has been interpreted to require only that jobs be substantially similar not that they be identical. See *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir.), cert. denied, 398 U.S. 905 (1970).

⁷ 74 LAB. CAS. at 46,629.

accounting for equipment and uniforms, and scheduling practice, games and transportation. Both teams had the same number of players, the same equipment and identical schedules. Not only did both teams play the same schools, but they shared a bus to and from away games. Both teams played according to the same rules and the time and length of practice were set by the State of Delaware Department of Public Instruction. The court found only two "inconsequential" differences: the girls played with bases somewhat closer together than the boys and the girls began practice a week earlier than the boys.⁸ Although the injustice of a wage differential in the *Woodbridge* type of factual context is blatant, compensation discrepancies in less obvious cases are no more justifiable. Yet it may be difficult to rely on *Woodbridge* when the discrimination is less obvious.

Another aspect of the *Woodbridge* case which reduces its precedential value is the fact that the only softball coach at Woodbridge High School was female. This fact had the effect of obscuring the true issue raised by cases of this nature. In the majority of the cases like *Woodbridge*, the underlying reason for the wage differential is the belief that coaching a female team is either a less demanding or a less valuable job than coaching a male team, rather than the belief that female coaches do not warrant the same compensation as male coaches. Arguably, the same reasoning was the basis for the wage differential in *Woodbridge*. Had there been a male softball coach who, like Ms. Adams, received less pay than the coach of the hardball team, the resolution of the true controversy in that case would have been unavoidable.

The factual context of *Woodbridge*, therefore, considerably reduces its precedential value because factual distinction in future decisions is inevitable, and because the true issue in the case was obscured. In addition to its factual uniqueness, another factor which severely diminishes the precedential value of *Woodbridge* is its reliance on the Equal Pay Act as the basis for relief.

B. Problems with the Equal Pay Act as a Remedy

The Equal Pay Act is not well suited to serve as a basis for complaints such as that involved in *Woodbridge*. Sole reliance on that Act for relief could result in the failure of a meritorious claim due to an improper choice of remedy. Use of the Equal Pay Act as a remedy for coaches of female teams receiving unequal pay is unwise for two reasons. First, and most importantly, the language and the legislative history of the Act indicate that its coverage is limited to discrimination based on the sex of the employee. Secondly, the constitutionality of applying the Equal Pay Act to state schools has not been firmly established.

1. The Intended Coverage of the Equal Pay Act

The Equal Pay Act was designed to combat a specific type of sex discrimination, wage differentials based on the sex of the employee. The Act clearly states: "No employer . . . shall discriminate . . . between employees on

8 *Id.* at 46,627.

the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions. . . ."⁹ The statement of purpose included in the Act is too broad to serve as an interpretational aid.¹⁰ The legislative history of the Act, however, confirms that the language is to be interpreted literally.

The House report states that the Equal Pay Act "amends the Fair Labor Standards Act to provide that payment of a discriminatory wage rate, *where the discrimination is based on the sex of the employee*, shall in the future be a violation of the Fair Labor Standards Act."¹¹ The House debate reveals a similar understanding of the type of conduct the Act is intended to prohibit. As one Congressman said about the bill: "Its aim is simple, few will argue about the desirability of what it seeks to achieve. Under its provisions, the women of America will be assured of equal pay when they perform equal work."¹² According to both the language of the statute and its legislative history, therefore, the Equal Pay Act is clearly designed only to insure that wage differentials are never based on the sex of the employees. The Act is not designed to eliminate wage differentials based on factors other than the sex of the employee.¹³ Including wage discrimination against coaches based on the sex of the team within the intended coverage would necessitate distorting both the language and the legislative intent of the statute.

In *Woodbridge*, it was difficult for the school to show, in the absence of a male softball coach, that they were not violating the Act since they were not discriminating against Ms. Adams because of her sex. In many cases, however, male coaches of female teams will receive the same pay as female coaches of female teams, thus negating a claim that the Act has been violated. Use of the Equal Pay Act in such cases undoubtedly will result in dismissal. The limited scope of the statute alone is sufficient reason to avoid using the Equal Pay Act in cases of compensation discrimination against coaches of female teams.

⁹ 29 U.S.C. § 206(d)(1) (1976).

¹⁰ The declaration of purpose of the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963) states:

(a) The Congress hereby finds that the existence in industries engaged in commerce or in the productions of goods for commerce of wage differentials based on sex—

- (1) depresses wages and living standards for employees necessary for their health and efficiency;
- (2) prevents the maximum utilization of the available labor resources;
- (3) tends to cause labor disputes, thereby burdening, affecting and obstructing commerce;
- (4) burdens commerce and the free flow of goods in commerce; and
- (5) constitutes an unfair method of competition.

(b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in such industries.

¹¹ H.R. REP. No. 309, 88th Cong., 1st Sess. 2 (1963), *reprinted in* [1963] U.S. CODE CONG. & AD. NEWS 687, 688 (emphasis added).

¹² 109 CONG. REC. 9195 (1963) (remarks of Rep. Frelonghuysen).

¹³ In fact, the Act explicitly allows wage differentials based on any factor other than sex. See 29 U.S.C. § 206(d)(iv) (1976); note 4 *supra*. Although it might be argued that wage discrimination against coaches based on the sex of the team they coach is not a differential based on a factor other than sex, all other indicators, as discussed in the text, point to the conclusion that the sex referred to in the catchall exception is, again, the sex of the employee.

2. The Applicability of the Equal Pay Act to State Schools

Another problem with using the Equal Pay Act as a remedy in these cases is the unresolved question of the constitutionality of applying the Equal Pay Act to state schools. The Fair Labor Standards Act did not originally cover employees of states or political subdivisions. In 1974 the coverage of the Act was extended to include such employees. Two years later, the Supreme Court held in *National League of Cities v. Usery*¹⁴ that the application of the minimum wage and overtime provisions of the Fair Labor Standards Act to state and local fire protection and law enforcement agencies was unconstitutional. The Court reasoned that assertions of Congressional power which "operate to directly displace the state's freedom to structure integral operations in areas of traditional governmental functions,"¹⁵ violate the tenth amendment.¹⁶

National League of Cities thus left unanswered the question of whether the Equal Pay Act, as part of the Fair Labor Standards Act, could constitutionally be applied to state school employees. Although not explicitly mentioned in *National League of Cities*, the running of schools is considered a "traditional government function."¹⁷ Because the provisions of the Fair Labor Standards Act are explicitly severable,¹⁸ however, courts have had no problem finding that, although the minimum wage and overtime provisions of the Fair Labor Standards Act cannot constitutionally be applied to the states, the equal pay provision can. Every federal court of appeals which has decided the tenth amendment issue has reached the conclusion that the equal pay provision of the Fair Labor Standards Act can be applied to state employees. The reasoning of these courts, however, has differed. Of the five circuits that have decided the question, three have determined that the Equal Pay Act can stand as a valid exercise of the Congressional power to enforce the equal protection clause of the fourteenth amendment.¹⁹ The other two circuits have held that the Equal Pay Act is a valid exercise of the commerce power because, unlike the determination of minimum wages and maximum hours, the ability to discriminate against women in the payment of wages is not among the "functions essential to [the] separate and independent existence of the states,"²⁰ and there is no legitimate reason for failing to comply with the equal pay provision.²¹

14 426 U.S. 833 (1976).

15 *Id.* at 852.

16 The tenth amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

17 See Comment, *Applying the Equal Pay Act to State and Local Governments: The Effect of National League of Cities v. Usery*, 125 U. PENN. L. REV. 665, 674 (1977). As the author points out, the Court overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968) which had applied the FLSA to schools and hospitals, thus indicating that schools are considered "traditional governmental functions."

18 29 U.S.C. § 219 (1976) states: "If any provision of the chapter or the application of such provision to any person or circumstance is held invalid, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby."

19 See *Marshall v. Kent State Univ.*, 589 F.2d 255 (6th Cir. 1978); *Marshall v. Owensboro-Daviess County Hosp.*, 581 F.2d 116 (6th Cir. 1978); *Usery v. Charleston County School Dist.*, 558 F.2d 1169 (4th Cir. 1977); *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977).

20 *Marshall v. A&M Consol. Independent School*, 605 F.2d 186, 188 (5th Cir. 1979); *Pearce v. Wichita County*, 590 F.2d 128, 132 (5th Cir. 1979); *Marshall v. City of Sheboygan*, 577 F.2d 1, 6 (7th Cir. 1978).

21 577 F.2d at 6.

The tenth amendment issue thus seems fairly well settled among the circuits. Until the issue is addressed finally by the Supreme Court, however, it represents a potential obstacle to application of the Equal Pay Act to state schools, especially in those circuits which have not decided the issue.

Considering the two major problems inherent in using the Equal Pay Act in compensation discrimination cases involving coaches of female teams, it should never be relied on as the sole basis of a cause of action. There are other legal theories which afford a better opportunity for recovery.

III. Title VII of the Civil Rights Act of 1964

The successful use of Title VII of the Civil Rights Act of 1964²² in compensation cases involving coaches of female teams requires the confrontation of at least two distinct problems. The first concerns the interrelationship between Title VII and the Equal Pay Act. The second involves a reluctance on the part of the Supreme Court to interpret Title VII as broadly in sex discrimination cases as it has in race discrimination cases.

A. *The Interrelationship of Title VII and the Equal Pay Act*

Title VII was designed to eliminate discrimination in the area of employment.²³ Within Title VII's prohibition against a wide variety of discriminatory employment practices based upon race, sex, religion or national origin lies a proscription against sex-based differentials in compensation which overlaps with the proscription of the Equal Pay Act. That Congress was aware of this overlap is demonstrated by section 2(h) of Title VII, "the Bennett amendment,"²⁴ which provides that sex-based wage differentials authorized by the Equal Pay Act are also lawful under Title VII. A precise understanding of the Bennett amendment is essential to a determination of the interrelationship of the Equal Pay Act and Title VII.

1. Interpreting the Bennett Amendment

As noted by the Ninth Circuit in *Gunther v. County of Washington*,²⁵ the Bennett amendment can be interpreted in two ways. The amendment can be inter-

22 42 U.S.C. §§ 2000e (1976).

23 42 U.S.C. § 2000e-2(a) (1976) states:

(a) Employer practices. It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

24 42 U.S.C. § 2000e-2(h) (1976) states in part:

It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

25 602 F.2d 882 (9th Cir. 1979).

preted as incorporating the Equal Pay Act standards into Title VII, thereby limiting any sex-based compensation discrimination claim under Title VII to only those situations which would also violate the Equal Pay Act. Alternatively, the amendment can be interpreted as incorporating into Title VII only the four affirmative defenses of the Equal Pay Act²⁶ and not its standards, thereby expanding the scope of sex-based compensation discrimination claims available under Title VII beyond those available under the Equal Pay Act. Despite the presence of district court opinions to the contrary,²⁷ the Ninth Circuit determined that the latter interpretation is the proper one. Specifically, the court held in *Gunther* that Title VII prohibits discrepancies in pay for comparable jobs based in part on the sex of the employees, and is not limited to cases involving substantially equal jobs as is the Equal Pay Act. The court based its conclusion that Title VII is broader than the Equal Pay Act on the legislative history of the Bennett amendment and the broad remedial policy underlying Title VII.

Despite the fact that many courts have assumed or implied that the Title VII compensation discrimination prohibition and the Equal Pay Act coincide,²⁸ the Ninth Circuit's position can be easily substantiated. The language of the Bennett amendment itself clearly supports that position. As stated by the Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing Title VII, the Equal Pay Act could not "authorize" something not within its coverage.²⁹ Additionally, two commentators have presented a persuasive argument in support of the broad interpretation of Title VII.³⁰ In presenting that argument, these commentators relied primarily on the broad purpose and language of Title VII. Further, they argue that because Title VII covers discrimination based on sex, race, religion or national origin, while the Equal Pay Act applies only to sex-based discrimination, the restrictive effect of incorporating Equal Pay Act standards into the Title VII compensation discrimination prohibition would adversely affect only women, and thus deny them equal protection from compensation discrimination vis-a-vis other minorities.³¹ Two important consequences flow from a recognition that the scope of Title VII in compensation discrimination cases is broader than that of the Equal Pay Act: (1) an increase in the cases in which relief will be available

26 29 U.S.C. § 206(d) (1976). See note 4 *supra*.

27 The *Gunther* court cited the following as contrary district court authority: *IUE v. Westinghouse Electric Corp.*, 19 Fair Empl. Prac. Cas. 450 (D.N.J. 1979); *Wetzel v. Liberty Mutual Ins. Co.*, 449 F. Supp. 397 (W.D. Pa. 1978); *Molthan v. Temple Univ.*, 442 F. Supp. 448 (E.D. Pa. 1977). Observing that only *IUE* gave substantial consideration to the issue of the interrelationship of the Equal Pay Act and Title VII, the court rejected that decision because it was based largely on a series of cases which held that Title VII claims alleging equal work for unequal pay should be judged under Equal Pay Act standards and did not address the issue whether Title VII prohibits conduct outside the scope of the Equal Pay Act. However, accepting the use of Equal Pay Act standards even in Title VII claims which allege equal work for unequal pay may result in improper analysis of those claims. See notes 32-43 and accompanying text *infra*.

28 See, e.g., *Orr v. Frank MacNeill & Son, Inc.*, 511 F.2d 166 (5th Cir.), cert. denied, 423 U.S. 865 (1975); *Ammons v. Zia Co.*, 448 F.2d 117 (10th Cir. 1971); *Chrapliw v. Uniroyal, Inc.*, 458 F. Supp. 252 (N.D. Ind. 1977); *Howard v. Ward City*, 418 F. Supp. 494 (D.N.D. 1976); *Erickson v. Lustra Lighting Div. of IT&T*, 12 FEP Cases 372 (N.D. Cal. 1974). See also cases in note 27 *supra*. But see *Ridgway v. United Hosp.*, 14 FEP Cases 286 (1976) (finding a Title VII violation where a male urology assistant was paid more than a female ophthalmology technician).

29 CCH EEOC DECISIONS (1973) ¶ 6300.

30 Gitt & Gelb, *Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII*, 8 LOY. CHI. L.J. 723 (1977).

31 *Id.* at 758.

and (2) an elimination of the danger of the courts improperly analyzing Title VII claims.

2. The Importance of Interpreting the Bennett Amendment Properly

Persuading a court that Title VII is not restricted to Equal Pay Act standards in compensation discrimination cases would create an opportunity for relief when the jobs involved are not substantially equal, but the difference in duties is not commensurate with the difference in pay. Such an opportunity would aid coaches of female teams significantly because the societal deemphasis of female sports has often resulted in female coaching positions which do, in fact, involve less work. For example, coaches of female teams may have fewer students to train than the coaches of the corresponding male teams because females have been discouraged from participating in athletics. Likewise, female teams may compete in fewer games per season than their male counterparts because it is not uncommon for schools to have only a male team in a particular sport, thereby reducing the number of available opposing teams. Fewer games, like fewer team members, reduce the coach's duties. Paying one coach less than another solely because the former has fewer duties is legitimate and legal. Discrepancies in pay which are not commensurate with the discrepancy in duties, but which are based partly on the sex of the team members, however, are not legitimate. The broader interpretation of Title VII would make such discrepancies illegal.

Recognition of the broader scope of Title VII in the area of compensation discrimination also insures that courts will not shift to Equal Pay Act analysis in Title VII compensation cases. Although Title VII, like the Equal Pay Act, requires that the discrimination be based on the sex of the employee, only Title VII's broader language provides a method of circumventing this obstacle in cases involving compensation discrimination against female coaches because they coach females. The Equal Pay Act prohibits an employer from discriminating "by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex."³² Title VII, on the other hand, contains a general prohibition of discrimination against an employee in a wide variety of employment practices based on such individual's sex.³³ The variation in specificity of coverage apparently explains the different analysis under the Equal Pay Act and Title VII. The Supreme Court has stated that a finding of discrimination under Title VII does not require proof of disparate treatment between male and female employees, but, alternatively, can be shown by demonstrating that a neutral policy disproportionately affects members of one sex or race.³⁴ Proof of disparate impact would not be sufficient in Equal Pay Act cases because the specificity of that act's language requires disparate treatment between male and female employees.

The particular significance of such an analytical distinction with regard to claims by coaches of female teams lies in the fact that almost all female coaches coach female teams. An examination of the disparate impact theory reveals its

³² See note 4 *supra*.

³³ See note 23 *supra*.

³⁴ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

potential for obtaining relief for female coaches who are discriminated against because they coach females. The disparate impact theory originated in the Supreme Court decision of *Griggs v. Duke Power Co.*,³⁵ which held that, regardless of the employer's intent, Title VII prohibits employment practices which have a discriminatory effect and cannot be justified by business necessity. Obtaining relief under the disparate impact theory is a three-step process.³⁶ First, the plaintiff must show that the practice in question adversely affects, in a significantly disproportionate manner, members of one sex or race. Often statistics are used to demonstrate the disproportionate effect. Generalized national statistics are acceptable if no reason exists to suppose that the actual potential applicant pool differs markedly.³⁷ Demonstration of a disparate impact establishes a *prima facie* violation of Title VII.

The second step toward obtaining relief is the employer's opportunity to justify the discriminatory practice on the grounds of business necessity. If the employer offers justifications, the third step is the plaintiff's opportunity to demonstrate that the practices are a pretext for discrimination by offering evidence of alternative practices which lack the discriminatory effect and serve the employer's legitimate interest.

Applying the disparate impact theory to the problem of unequal pay for coaches of female teams should result in relief for female coaches. Two statistical approaches exist for proving that compensation discrimination against coaches of female teams has a disparate impact on females. First, the percentage of coaches of female teams who are female could be ascertained. Although no such national statistics presently³⁸ exist, there is evidence that the majority of coaches of female basketball teams are male.³⁹ Consequently, a claim based on the disparate impact theory using this statistical approach will fail in cases involving basketball coaches, at least when the court confines its examination to the particular sport involved. The court may be persuaded to expand its examination when a school has a general policy of discriminating against coaches of female teams in all sports. The plaintiff may then be able to show a disparate impact on females resulting from such a policy. In the absence of national statistics indicating that more females coach female sports teams generally, however, it is impossible to predict whether a disparate impact on females could ever be shown in this manner.

The second possible statistical approach to proving compensation discrimination against coaches of female teams has a disparate impact on females is more promising. This approach involves ascertaining the percentage of female coaches who coach females and the percentage of male coaches who coach females. Clearly, almost all female coaches coach female teams while the minority of male coaches coach female teams.⁴⁰ Therefore, a general policy of discriminating against coaches of female teams has a disparate impact on females who choose a career in coaching.

35 *Id.*

36 *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

37 *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

38 The National Association for Girls and Women in Sports (NAGWS) has made plans to compile such statistics. Telephone interview with Carol Thompson, Executive Director of NAGWS (Mar. 3, 1980).

39 *Id.*

40 *Id.*

After statistically establishing a disparate impact on females and, therefore, a prima facie violation of Title VII, the burden shifts to the employer to prove the pay differential is justified by a business necessity. In situations such as *Woodbridge*, in which the duties of a coach of a female team are identical to those of the coach of a male team, or in cases in which the duties of both are substantially equal, no apparent business necessity justification would be forthcoming. School administrators would hardly be able to prove that coaching males is more demanding than coaching females. In fact, one court has recognized that coaching females indeed may be the more difficult job because females have been discouraged from developing their athletic abilities.⁴¹ In addition, although the argument that male sports produce more revenue than female sports may satisfy the business necessity requirement,⁴² such a defense will be available in only a very limited number of cases for two reasons. First, male sports produce significant revenue only at the college level. Secondly, no more than ten percent of college sports programs produce enough revenue to cover costs.⁴³ Therefore, that justification will not exist in the average case. Absent a justification for disparities in pay between coaches of male teams and coaches of female teams, the latter clearly seem to have a remedy under Title VII. Whereas this approach has not been tested, however, assessing the probability of its success is difficult.

A proper interpretation of the Bennett amendment, therefore, is essential to successful use of Title VII by female coaches of female teams. The sole impact of the Bennett amendment on Title VII's broad prohibition against compensation discrimination is the availability of the Equal Pay Act defenses in Title VII cases. Recognizing the limited impact of the Bennett amendment on Title VII allows claims involving comparable jobs to be brought under the statute and insures that the disparate impact theory will be available to female coaches of female teams. The actual effect of the availability of the disparate impact theory to coaches of female teams, however, is questioned by a recent Supreme Court decision which suggests a reluctance by the Court to apply the disparate impact theory with the same force in sex discrimination cases as it has in race discrimination cases.

B. *The Supreme Court's Treatment of Title VII Sex Discrimination Cases*

In 1976 the Supreme Court held in *Gilbert v. General Electric Co.*⁴⁴ that a

41 In *Jackson v. Armstrong School Dist.*, 430 F. Supp. 1050, 1052 (W.D. Pa. 1977), the court stated:

In reality, considering the disparities in natural ability long nurtured by tradition with the misguided notion—now being repressed—that the game was meant to be played only by males, a good argument could be made that schooling the feminine gender in such rudiments as dribbling and jump shooting is indeed more difficult.

42 Judicial authority for such an argument does exist. See *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589 (3d Cir.), cert. denied, 414 U.S. 866 (1973), in which the court held that the defendant company could pay the sales clerks in its male clothing department, who were by necessity all male, a higher base salary than the sales clerks in the female clothing department, who were all female, because the male clothing department was more profitable. Paying coaches of male teams more than coaches of female teams, however, is likely to result in better-trained male athletes and consequently contributes to the ability of the male teams to produce revenue. When revenue-producing sports entail more duties for the coaches (e.g., publicity appearances), some increase in salary is justified.

43 Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254, 1277 n.161 (1979).

44 429 U.S. 125 (1976).

company disability plan which provided benefits for all temporary disabilities except pregnancy did not violate Title VII. *Gilbert* was displaced two years later by a congressional amendment to Title VII providing that discrimination against pregnancy in disability plans is sex discrimination within the meaning of that statute.⁴⁵ Nonetheless, as the Supreme Court has decided relatively few Title VII sex discrimination cases, the *Gilbert* decision suggests a possible reluctance on the part of the Court to find sex discrimination as freely as race discrimination under the disparate impact theory.⁴⁶ Application of that theory to a disability plan which discriminates against pregnancy apparently should result in a Title VII violation. Statistics are not even necessary to demonstrate the disparate impact, for while every male employee receives total protection from uncompensated unemployment caused by physical disability, only the small number of women who are unable to conceive receive such total protection.⁴⁷ Nevertheless, the Court reasoned that because there was no risk from which the men were protected and the women were not, the female employees received the same aggregate risk protection as the man.

In *Nashville Gas Co. v. Satty*,⁴⁸ which was decided before the Congressional overruling of *Gilbert*, the Supreme Court seemed to retreat from its position in *Gilbert* by finding a Title VII violation in the denial of accumulated seniority to women returning from pregnancy leaves when no such consequence resulted from other disability leaves. The Court distinguished *Gilbert* on the ground that the plaintiffs in that case were being denied an extra benefit, whereas the plaintiffs in *Satty* were being given an extra burden.⁴⁹ Although the Court denied that that difference was merely semantic, *Satty* did seem to indicate a change in the Court's attitude. Hopefully, both *Satty* and the strong indication from Congress that the meaning of sex discrimination under Title VII should not be narrowly interpreted, as evidenced by the amendment displacing *Gilbert*, suggest that the disparate impact theory will be applied consistently in both sex and race discrimination cases in the future.⁵⁰

Because *Satty* appears to be a retreat from the Supreme Court's previous reluctance to find sex discrimination under the disparate impact theory, the

45 Act of Oct. 15, 1978, Pub. L. No. 95-555, § 2(k), 92 Stat. 2076 (1978). See also [1978] U.S. CODE CONG. & AD. NEWS 4749.

46 The only Supreme Court Title VII disparate impact decision concerning sex discrimination, besides *Gilbert* and *Satty*, see text accompanying notes 44-45 *supra* & notes 47-50 *infra*, is *Dothard v. Rawlinson*, 433 U.S. 321 (1977). In that case, the Court found that the height and weight requirements for an Alabama prison guard position had a disparate impact on women and were not job-related. The Court held, however, that the state could require that the guards be male since the Court determined that the gender requirement was a bona fide occupational qualification.

47 429 U.S. at 161-62 n.5 (Stevens, J., dissenting).

48 434 U.S. 136 (1977).

49 *Id.* at 142.

50 Sex discrimination and race discrimination are treated differently under fourteenth amendment analysis. Race discrimination requires a closer scrutiny than sex discrimination. The fourteenth amendment says nothing explicitly about sex and race discrimination; the varying treatment is the result of judicial interpretation. See notes 110-15 and accompanying text *infra*. Title VII, on the other hand, explicitly prohibits employment discrimination based on sex or race, without distinguishing between the two kinds of discrimination. Judicial distinctions, therefore, seem unwarranted. In *Gilbert*, however, the Supreme Court used a fourteenth amendment case, *Geduldig v. Aiello*, 417 U.S. 484 (1974), ostensibly for the limited purpose of determining the existence of sex discrimination. Yet the lesser degree of scrutiny accorded claims of sex discrimination under the fourteenth amendment arguably resulted in a finding of no discrimination in *Geduldig* when discrimination would have been found in an analogous race discrimination case (e.g., a benefit plan excluding sickle-cell anemia).

more serious problem for coaches of female teams using Title VII is the unresolved question of the statute's interrelationship with the Equal Pay Act. The persuasive arguments for reading Title VII's compensation discrimination prohibition more broadly than that of the Equal Pay Act, and the precedent set by the Ninth Circuit, provide cogent reasons with which to convince a court to interpret Title VII broadly. A broad interpretation of Title VII guarantees the availability of the disparate impact theory and use of the statute when the jobs involved are comparable rather than substantially equal.

Nevertheless, a major problem with using Title VII remains. Success under the statute requires avoiding the true issue in cases of compensation discrimination against coaches of female teams. The only route to success for the coaches under Title VII is the disparate impact approach. That approach, however, focuses on the effect of the pay differential on female coaches, thereby eliminating the opportunity to attack the injustice of discriminating against both male and female coaches who coach females. An alternative remedy for coaches of female teams which does provide an opportunity to confront this issue and obtain relief for male coaches is Title IX of the Education Amendments of 1972.⁵¹

IV. Title IX of the Education Amendments of 1972

Although the boundaries of the coverage of Title IX of the Education Amendments of 1972⁵² have not been clearly defined by the courts, the statute provides a potential avenue of relief for compensation discrimination against coaches of female teams. Title IX prohibits discrimination on the basis of sex "under any education program or activity receiving Federal financial assistance." Only in May of 1979 did the Supreme Court find that an implicit private right of action existed under the statute in addition to the explicit administrative remedy of termination of federal funds.⁵³ To date, therefore, Title IX has not been used to obtain relief for compensation discrimination against coaches of female teams.

With the existence of a private right of action under Title IX now firmly established, coaches suing under this statute need to focus on two unresolved issues concerning the meaning of Title IX which may result in dismissal of their claims. The first is the dispute concerning Title IX's applicability to athletic programs. The second is the question of Title IX's applicability to employment practices of educational institutions which involve discrimination

51 Applying Title VII to state schools also raises the tenth amendment issue discussed with regard to the Equal Pay Act. See notes 14-21 and accompanying text *supra*. However, the Supreme Court found in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), that the 1972 Amendments to Title VII, which extended its coverage to state employees, were based on section five of the fourteenth amendment. This determination raises yet another question: when a Title VII claim is based on the disparate impact theory, must a discriminatory intent be proved as is required in fourteenth amendment cases? The circuits deciding the question agree it does not. See *Scott v. City of Anniston*, 597 F.2d 897 (5th Cir. 1979); *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979); *United States v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978).

52 20 U.S.C. §§ 1681-1686 (1976). The basic provision of the title reads: "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. . . ."

53 *Cannon v. University of Chicago*, 99 S.Ct. 1946 (1979). The administrative remedy is found in 20 U.S.C. § 1682 (1976).

against the students.⁵⁴ Clearly, a determination that Title IX does not cover either athletics or any employment practices would be fatal to a compensation discrimination claim brought by a coach of a female team. Parties to litigation under Title IX, therefore, must be prepared to present the persuasive arguments that exist for a broad interpretation of the statute.

A. Does Title IX Cover Athletic Programs?

The question of Title IX's applicability to athletic programs centers around the meaning of a key phrase in the statute: "education program or activity receiving Federal financial assistance." The Department of Health, Education and Welfare (HEW) has interpreted that phrase to include any education program operated by an entity which receives or benefits from "Federal financial assistance."⁵⁵ Commentators⁵⁶ and one appellate court⁵⁷ have attacked this broad reading of the statute asserting that Title IX's discrimination prohibition applies only to those specific programs or activities receiving financial assistance directly from the federal government. Such a restrictive reading of the statute would leave all athletic programs unaffected by Title IX, since no federal grant statute specifically provides for aid to athletics.⁵⁸ Such a limited reading, however, cannot be reconciled with Congressional activity since the passage of Title IX, and is inconsistent with the broad reading which should be, and generally is, given to civil rights statutes.

1. Post-enactment Congressional Activity

Congressional statements or reports made prior to or contemporaneously with the passage of a law are undoubtedly the best sources of interpretation for ambiguous statutory phrases. The legislative history of Title IX,⁵⁹ however, provides no clear indication of the intended meaning of the phrase "education program or activity receiving Federal financial assistance." Accordingly, subsequent Congressional activity, which is logically consistent with only one interpretation of Title IX, should not be ignored.

As part of the Education Amendments of 1974, Congress passed the Javits amendment requiring HEW to publish regulations implementing Title IX which were to "include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports."⁶⁰ According to HEW, the Javits amendment was a Congressional confirmation that Title

54 Both disputes arose from the regulations issued by the Department of Health, Education and Welfare under Title IX, which contain provisions setting down the standards for compliance with regard to athletic programs and employment practices at federally funded educational institutions. See 45 C.F.R. § 86.11 (1979). Commentators and courts have attacked the validity of these particular regulations as relating to matters outside the scope of the Act.

55 45 C.F.R. § 86.11 (1979).

56 Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 GEO. L.J. 49 (1976) [hereinafter cited as Kuhn]; Comment, *HEW's Regulations Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges*, 1976 B.Y.U.L. REV. 133.

57 *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir. 1979).

58 Kuhn, *supra* note 56, at 63.

59 For the legislative history of Title IX, see [1972] U.S. CODE CONG. & AD. NEWS 2462; 117 CONG. REC. 30403, 39098, 39248 (1971); 118 CONG. REC. 5803 (1972).

60 Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974).

IX was intended to cover athletics.⁶¹ Although HEW's interpretation is the only one logically consistent with the language of the amendment, HEW has been attacked as misinterpreting the bill's purpose.⁶² An examination of the history of the Javits amendment is necessary both to understand this attack on HEW's position and to demonstrate the deficiencies in that attack.

The Javits amendment arose in response to a proposal by Senator Tower made during the debate on the Education Amendments of 1974.⁶³ Initially, Senator Tower proposed the inclusion of a provision exempting revenue-producing intercollegiate athletics from Title IX.⁶⁴ Modifications suggested by other Senators produced the final form of the amendment.⁶⁵ Because the Javits amendment originated with Senator Tower's proposal, the underlying purpose of the bill is arguably found in remarks made by Tower when he offered the proposal.⁶⁶ At that time, Senator Tower stated that he did not think Congress intended Title IX to cover athletics, but he believed a precaution should be taken against a judicial interpretation that HEW had authority to regulate athletics.⁶⁷

That Congress believed there was a need to restrict Hew's regulation of athletics seems inconsistent with the argument that Congress never intended Title IX to cover athletics. Senator Tower's proposal was a response to an unofficial draft of athletic regulations by HEW which had been circulated in Congress.⁶⁸ If Congress viewed HEW's draft as indicating a misunderstanding by that department about the coverage of Title IX, it seems more likely that they would have passed a bill clarifying the meaning of "education program or activity receiving Federal financial assistance" so as to insure that athletics would not be covered at all. Congress responded with a clarifying bill to the Supreme Court's misinterpretation of Title VII regarding whether discrimination against pregnancy in disability benefits was sex discrimination within the meaning of that statute.⁶⁹ That Congress would have reacted similarly to a misinterpretation of Title IX, if one had existed, seems likely. Additionally, the fact that the Javits amendment required the Department to issue regulations, including those concerning athletics within thirty days of the bill, advances HEW's position that Title IX applies to athletics. That order was not designed to become operative only upon a judicial misinterpretation of HEW's authority under Title IX. In light of these considerations, one Senator's remark that he did not believe Title IX was intended to cover intercollegiate athletics sheds little light either on the original Congressional intent regarding Title IX's coverage, or on the meaning of the subsequent bill.

61 40 Fed. Reg. 24134 (1975).

62 Kuhn, *supra* note 56, at 75-76.

63 120 CONG. REC. 15322 (1974).

64 *Id.*

65 On the suggestion of Senator Mondale, Senator Tower modified his amendment to compel HEW to issue regulations within 30 days. That amendment passed on a voice vote. See 120 CONG. REC. 15323 (1974). During the House-Senate conference, Senator Javits suggested that a clause be added to the amendment directing HEW to make reasonable regulations regarding athletics considering the nature of particular sports. See Kuhn, *supra* note 56, at 76 n.167, S. REP. NO. 93-1026, 93rd Cong. 2d Sess., 5 reprinted in [1974] U.S. CODE CONG. & AD. NEWS 4206, 4271.

66 Kuhn, *supra* note 56, at 75-76.

67 120 CONG. REC. 15322 (1974).

68 Kuhn, *supra* note 56, at 75.

69 See notes 44-45 and accompanying text *supra*.

Congress' failure to disapprove HEW's final athletic regulations,⁷⁰ and its defeat of seven different pieces of legislation concerning the exemption of all or part of intercollegiate athletics from agency regulation⁷¹ also lends support to HEW's position. Although the statute providing for Congressional disapproval of HEW's regulations states that failure to disapprove is not evidence of approval,⁷² Congressional inaction with respect to HEW's regulations under Title IX, combined with the Javits amendment, may reasonably be viewed as an indication that Congress' understanding of the phrase "education program or activity receiving Federal financial assistance" does not conflict with HEW's interpretation.

2. Title IX Should Be Broadly Interpreted

To restrict Title IX's coverage to only those educational programs and activities which receive federal funds directly under a federal grant statute would be inconsistent with the widely accepted policy of broadly construing civil rights acts "in order that their beneficent objectives may be realized to the fullest extent possible."⁷³ Indeed, a restrictive reading of Title IX would severely diminish effective achievement of its objectives, *i.e.*, to avoid use of federal resources for the support of discriminatory practices and to provide citizens with effective protection against such practices.⁷⁴ HEW has been accused of expanding the meaning of the phrase "program and activity receiving Federal financial assistance" beyond its intended scope.⁷⁵ Yet the Department's interpretation merely reflects the policy of broadly construing civil rights statutes and does not distort the intended meaning of Title IX.

(i) "Federal Financial Assistance" Includes Student Aid Programs

HEW had defined "Federal financial assistance" to include federal scholarships and loan funds which are extended to universities or to students for payment to universities.⁷⁶ HEW's definition brings athletic programs within the scope of Title IX because federal scholarships and loan funds are used for tuition, which, in turn, is used for virtually all school programs.⁷⁷

70 20 U.S.C. § 1232(d)(1) (1976) states:

Concurrently with the publication in the Federal Register of any final regulation as required in subsection (b) of this section, such final regulation shall be transmitted to the Speaker of the House of Representatives and the President of the Senate. Such final regulation shall become effective not less than forty-five days after such transmission unless the Congress shall, by concurrent resolution, find that the final regulation is inconsistent with the Act from which it derives its authority, and disapprove such final regulation. Failure of the Congress to adopt such a concurrent resolution with respect to any such final regulation prescribed under any such Act, shall not represent with respect to such final regulation, an approval or finding of consistency with the Act from which it derives its authority for any purpose, not [sic] shall such failure to adopt a concurrent resolution be construed as evidence of an approval or findings of consistency necessary to establish a prima facie case, or an inference or presumption in any judicial proceeding.

71 Note, *Title IX of the Education Amendments of 1972: Issues Reach the Courts*, 18 WASHBURN L.J. 310, 316 n.68 (1979).

72 See note 70 *infra*.

73 C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 72.05, at 392 (4th ed. 1974).

74 99 S.Ct. at 1961.

75 Kuhn, *supra* note 56, at 62-74.

76 45 C.F.R. § 86.2(g)(1)(ii) (1979).

77 Note, *supra* note 71, at 314.

HEW's interpretation is supported by the United States District Court for South Carolina in *Bob Jones University v. Johnson*.⁷⁸ Although that case was decided under Title VI of the Civil Rights Act of 1964,⁷⁹ the Supreme Court has recognized that Title IX was closely patterned after Title VI and that its drafters assumed it would be interpreted and applied as Title VI had been.⁸⁰

In *Bob Jones University*, the court upheld the Veterans Administration's (VA) interpretation of "a program or activity receiving Federal financial assistance" as including educational programs in which veterans receiving benefits participated.⁸¹ Accordingly, the court authorized the Administration's termination of benefits to veterans enrolled in a school which was violating Title VI. The court based its conclusion on several factors. First, educational programs at Bob Jones University were deemed programs receiving "Federal financial assistance" because the participating veterans' benefits were contingent on their remaining in those or other approved educational programs. Secondly, the veterans benefits were deemed "Federal financial assistance" to the school because they defrayed the costs of the programs thereby releasing institutional funds which would otherwise be spent on the student. The court emphasized, in regard to this second factor, that a university need not reap a financial gain in the sense of a net increment in its assets to come within Title VI. The court also found assistance to the school in the fact that the benefits increased the pool of applicants upon which the school could draw for its educational program. Additionally, the court relied on the historical development of federal educational benefits for veterans and the Congressional intent underlying Title VI.⁸²

The reasoning of the court in *Bob Jones University* is even clearer when applied to the HEW-administered National Defense Student Loan program (NDSL).⁸³ Under NDSL, HEW deposits money into a revolving fund, administered by the university, to be used for low interest loans to needy students. The college must contribute one-ninth of the fund, either from its own assets or money borrowed from the federal government. The court in *Bob Jones University* noted the analogy between NDSL funds and VA educational benefits for Title VI purposes and rejected the argument that different consequences flowed from the fact that the veteran received his benefits directly from the federal government, rather than through the school. The court based this conclusion on the wording of the statute which requires only "assistance," not payment, to the school.⁸⁴ Although the court correctly determined that the method of payment was irrelevant for Title VI purposes, the fact that NDSL funds are paid directly to the school strengthens the conclusion that such funds

78 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

79 Title VI, 42 U.S.C. § 2000d (1976) states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

80 99 S.Ct. at 1956-57.

81 Any federal agency which provides assistance to programs, thereby bringing those programs within the coverage of Title VI or Title IX, has both the authority to promulgate regulations for compliance with the statute and the power to enforce those regulations by terminating funds.

82 396 F. Supp. at 602-04.

83 20 U.S.C. §§ 421-429 (1976) (corresponds to National Defense Education Act of 1958, Title II, as amended).

84 396 F. Supp. at 602.

constitute "Federal financial assistance" to participating schools. That tuition is subtracted from the loan money before the student has access to it for other school-related expenses underscores that conclusion. To say that a program receiving such funds is not a program "receiving Federal financial assistance" would appear to be such an overly restrictive reading as to constitute a distortion of the literal words of the Act.

(ii) *HEW's Institution-Wide Approach*

HEW's interpretation of "program or activity receiving Federal financial assistance" as allowing regulation of any program at any institution receiving federal funding,⁸⁵ on the other hand, is difficult to justify. The Department based that interpretation on the infection theory as advanced in dicta in *Board of Public Instruction of Taylor Co. v. Finch*,⁸⁶ a Title VI case. In *Finch*, however, the Fifth Circuit condemned a general institution-wide approach by HEW.⁸⁷ The court did suggest that in some cases discrimination in programs not receiving federal funds might create a discriminatory environment which would justify terminating federal funding of other programs infected by that environment.⁸⁸ The infection theory, as advanced in *Finch*, can be used to argue that a particular athletic program is covered by Title IX. This approach is preferable to defending HEW's questionable assertion of general institution-wide coverage.

The infection theory is especially relevant to cases involving athletic programs. Athletics is the only area in which segregation by sex is still condoned; consequently, athletic programs provide the setting for the most blatant and widely accepted sex discrimination in schools. Although equalization of athletic opportunity for males and females is now being discussed, this goal is far from being achieved. Clearly, blatant sex discrimination in athletic programs may perpetuate in other programs the more subtle and less easily provable forms of discrimination, such as the expression, in the classroom and the guidance office, of the attitude that women should not seek particular careers. The infection theory would be particularly useful in cases involving high schools and elementary schools. Unlike universities, these schools do not participate in federal student loan programs and often only receive federal funds designated for a particular purpose.⁸⁹ The infection theory is most convincing in small schools where considerable interaction occurs among the different programs.

Whereas the infection theory is viable only in those cases in which a discriminatory environment can be found, the enforcement section of Title IX⁹⁰ provides a basis for arguing in all private actions under Title IX that the phrase "program or activity receiving Federal financial assistance" should be given a broad interpretation. The language of the enforcement section suggests

85 45 C.F.R. § 86.11 (1979).

86 414 F.2d 1068 (5th Cir. 1969).

87 *Id.* at 1077-78.

88 *Id.* at 1079.

89 Because there are no federal loan programs for high school and elementary school students, the only federal funding these schools could receive which is not designated for a particular purpose is impact aid under 20 U.S.C. §§ 236-41 (1976). This aid is available only to school districts which lose tax revenues because of the presence of federal installations.

90 20 U.S.C. § 1682 (1976).

that a restrictive reading of that phrase is appropriate only when HEW, or another federal agency, seeks to terminate federal funding. Title IX's enforcement section provides in substance that compliance with agency regulations made pursuant to the statute can be effected by termination of funds or "by any other means authorized by law."⁹¹ That section states that termination of funding "shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found." No such limiting language is used regarding effecting compliance by other means. The fact that Congress found it necessary to place this limiting language in the enforcement section, and only with reference to termination of funding, suggests that the basic provision of Title IX was intended to have a broader meaning for private actions such as the kind contemplated by this note.⁹²

The argument that a restrictive reading of Title IX is proper only when HEW sues seeking termination of funds should always be used to persuade a court that Title IX covers athletics, because this position is strongly supported by the language of the statute itself. Additionally, university coaches should argue for the expanded definition of "Federal financial assistance" while elementary and high school coaches should rely on the infection theory. In this way, most athletic programs will be subjected to Title IX's prohibition against sex discrimination. Convincing a court that Title IX covers a particular athletic program, however, is only the first step to success in compensation discrimination claims by coaches of female teams. The coaches must also persuade the court that Title IX is applicable to certain employment practices.

B. Does Title IX Apply to Employment?

The courts which have considered the question unanimously agree that Title IX is inapplicable to the employment practices of educational institutions.⁹³ Until recently, HEW maintained that its regulatory power under Title IX extended to employment practices.⁹⁴ HEW, however, has now suspended its regulations concerning employment in recognition of the judicial authority against their validity.⁹⁵ Nonetheless, the Department continues to assert regulatory power over the compensation of coaches as a component of its authority to insure equal athletic opportunity for students of both sexes.⁹⁶

⁹¹ *Id.*

⁹² Note, *Sex Discrimination and Intercollegiate Athletics*, 61 IOWA L. REV. 420, 467-68 (1975); 18 WASHBURN L.J., *supra* note 71, at 315-16.

⁹³ See *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir.), *cert. denied*, 48 U.S.L.W. 3356 (Nov. 27, 1979) (U.S. No. 79-442); *Junior College Dist. v. Califano*, 597 F.2d 119 (8th Cir. 1979), *cert. denied sub nom. Junior College Dist. v. Harris*, 48 U.S.L.W. 3356 (Nov. 27, 1979) (U.S. No. 79-201); *Islesboro School Comm. v. Califano*, 593 F.2d 424 (1st Cir.), *cert. denied sub nom. Islesboro School Comm. v. Harris*, 48 U.S.L.W. 3356 (Nov. 27, 1979) (U.S. No. 79-200); *Leake v. University of Cincinnati*, 20 Empl. Prac. Dec. ¶ 30,249 (6th Cir. 1979); *University of Toledo v. HEW*, 464 F. Supp. 693 (N.D. Ohio 1979); *Sobel v. Yeshiva Univ.*, 21 Empl. Prac. Dec. ¶ 30,360 (S.D.N.Y. 1979); *Board of Educ. v. HEW*, 19 Fair Empl. Prac. Cas. 457 (N.D. Ohio 1979); *Auburn School Dist. v. HEW*, 19 Fair Empl. Prac. Cas. 1504 (D.N.H. 1979).

⁹⁴ The regulations issued under Title IX by HEW include a subpart which sets down guidelines for complying with the statute in regard to employment practices of educational institutions receiving federal financial assistance. 45 C.F.R. §§ 86.51-.61 (1979).

⁹⁵ 44 Fed. Reg. 71413, 71416 n.6 (1979).

⁹⁶ *Id.*; 45 C.F.R. § 86.41(c)(6) (1979) lists compensation of coaches as a factor to be considered in determining the existence of equal athletic opportunity for students of both sexes. The HEW regulations list

HEW's present position is consistent with the cases holding Title IX inapplicable to employment generally, since those decisions were based primarily on the belief that Title IX was designed to protect only the beneficiaries of federally funded programs, *i.e.*, the students.⁹⁷ Compensation discrimination against coaches of female teams is discrimination against female students. Higher salaries for coaches of male teams undoubtedly attract a large number of the more experienced and better-qualified coaches to such positions. Consequently, female teams generally are likely to receive inferior coaching. At present many well-qualified female coaches might not seek positions coaching male teams, in part, because of anticipated negative reactions. Even so, the number of well-qualified women coaches is arguably lower than the number of well-qualified male coaches because of the inferior coaching and the general discrimination in the area of female sports which existed when present female coaches were developing their athletic talents. In addition, as more women move into traditionally male jobs, female coaches are likely to seek the higher-paying coaching positions with male teams. Female teams would then be deprived of virtually all the best talent in the field of coaching. Discrimination against coaches of female teams with regard to compensation, therefore, results in the denial to female students of equal opportunity in an educational program. That denial of equal opportunity on the basis of sex clearly falls within the scope of Title IX.

HEW's position that it has authority to regulate compensation of coaches is supported by a recent decision of the United States District Court for the Eastern District of New York. In *Caulfield v. Board of Education*,⁹⁸ that Court upheld HEW's jurisdiction, under both Title VI and Title IX,⁹⁹ over employ-

coaches' compensation as only one factor to be considered in evaluating equal athletic opportunity, to determine if an institution's federal funds should be terminated. The Supreme Court found in *Cannon*, however, that a private right of action under Title IX was necessary to provide a remedy for wrongs the statute sought to prohibit without requiring the injured party to show such pervasive discrimination as to justify fund termination. 99 S.Ct. at 1962.

97 See note 93 *supra*.

98 21 EPD ¶ 30,389 (1979). The plaintiffs in this case sought to set aside a negotiated agreement between HEW and the Board of Education which required the Board to alter its faculty hiring, promotion, and assignment practices in order to continue receiving funds from the Department. The plaintiffs argued that the agreement was invalid for two reasons. First, HEW had no authority to regulate the Board's employment practices. Secondly, the agreement violated Title VI, Title IX and the equal protection and due process clauses by requiring the Board to hire, assign and promote teachers with reference to their race and sex.

99 Title VI contains an explicit provision exempting employment practices from the Act. 42 U.S.C. § 2000d-3 (1976) states: "Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer . . . except where a primary objective of the Federal financial assistance is to provide employment."

The regulations under Title VI, however, provide in part:

Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient . . . tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient . . . to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

45 C.F.R. § 80.3(c)(3) (1979).

Title IX, on the other hand, contains no explicit employment exclusion. As noted in *Board of Educ.*, the courts have implied such an exclusion for several reasons: (1) Title IX was modeled after Title VI; (2) Title IX was originally considered as an amendment to Title VI by simply including sex discrimination in its prohibition; (3) Title IX was part of a legislative package which included amendments to Title VII and the Equal Pay Act extending the kinds of employers and employees covered; (4) all of Title IX's coverage exceptions, *see* 20 U.S.C. § 1681(a)(1)-(9) (1976), relate to discrimination against students.

ment practices of an educational institution which resulted in discrimination against students. The alleged Title VI violation in that case was the school board's faculty hiring and assignment practices which resulted in schools with a large percentage of minority students receiving the greater number of minority teachers, who were both less experienced and lower salaried. The court found that "[d]iscrimination by race in the hiring and assignment of teachers or supervisors, as a matter of law and of fact, constitute[d] discrimination against students."¹⁰⁰ For this reason, the court held that HEW had jurisdiction to investigate and enforce compliance with Title VI.

The alleged Title IX violation in *Caulfield* was the school board's denial of equal access for females to positions as principal and assistant principal.¹⁰¹ Although a less clear case of mixed faculty-student discrimination, the court found HEW could "reasonably proceed" under Title IX on the theory that school employment practices involving systematic discrimination against women in access to supervisory positions had, or would have, a deleterious impact on students.¹⁰² In making this determination, the court relied on dicta in the Title IX cases rejecting HEW's authority over pure employment discrimination, which indicated that HEW's jurisdiction might extend to employment practices adversely affecting students.¹⁰³ HEW's initial letter to the school, setting out the violations of Titles VI and IX that the Department had found, contained an allegation that the school system had violated Title IX by "provid[ing] a lower level of financial support for female athletic coaching programs."¹⁰⁴ This type of employment discrimination was clearly analogous to the assignment of lower-salaried, less experienced minority teachers to schools with a majority of minority students. For some reason this claim was not pursued. Had it been pursued, however, the court undoubtedly would have more emphatically validated HEW's authority to correct such a violation.¹⁰⁵

Assuming that Title IX is inapplicable to pure employment discrimination raises the question of whether coaches have standing in cases of mixed employee-student discrimination.

C. Do Coaches Have Standing Under Title IX?

The private right of action under Title IX is implied; no criteria for standing are set out in the statute. There are two basic requirements for standing to vindicate a statutory right.¹⁰⁶ First, there must be injury in fact. Secondly, the

100 21 Empl. Prac. Dec. ¶ 30,389 at 13,174. The court based that conclusion, in part, on *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied sub nom. Caddo Parish School Bd. v. United States*, 389 U.S. 840 (1967), in which the court authorized action by HEW with regard to teacher hiring and assignment practices for this reason.

101 21 Empl. Prac. Dec. ¶ 30,389 at 13,175.

102 *Id.* at 13,177.

103 See note 93 *supra*. More specifically, see, e.g., 593 F.2d at 430; 464 F. Supp. at 696.

104 21 Empl. Prac. Dec. ¶ 30,389 at 13,161.

105 Students at Boalt Hall Law School have recently filed a complaint with the U.S. Department of Labor under Executive Order 11246 as amended by Executive Order 11375, see note 3 *supra*, alleging that current employment practices at Boalt Hall and the related Jurisprudence and Social Policy programs select an overwhelmingly white male faculty and result in denial of educational benefits to students. The students, who have joined together under the name of Coalition for a Diversified Faculty, state in their complaint that they are also filing complaints with HEW under Title VI and Title IX.

106 *Data Processing Serv. v. Camp*, 397 U.S. 150 (1970).

interest sought to be protected must be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."¹⁰⁷ Clearly the coaches of female teams can claim an injury in fact which is economic in nature. As to the second criterion, if HEW is given authority to regulate employment practices which result in discrimination against students, then the employees involved have an interest which is regulated by the statute. The fact that the ultimate concern is the elimination of discrimination against students should not limit standing to students.

In *Trafficante v. Metropolitan Life Insurance*,¹⁰⁸ the Supreme Court found standing under the fair housing provision of the Civil Rights Act of 1968, for a white person who claimed that he was injured by the lack of integration in his neighborhood caused by violations of that act. Although that statute explicitly grants standing, the standing language is broad and includes "any person who claims to be injured . . . or who believes he will be irrevocably injured by a discriminatory housing practice."¹⁰⁹ Certainly, the ultimate concern of the fair housing provision is the elimination of discrimination against persons seeking housing. Nonetheless, the court found standing for someone claiming that he was injured by discrimination directed against others. Likewise, coaches of female teams injured by discrimination against students should have standing under Title IX, especially if HEW is given regulatory power over their interests.

Unlike a cause of action under Title VII, the use of Title IX allows for a full consideration of the injustice of paying coaches less because they coach females, thereby requiring confrontation of the true issue in cases of the kind contemplated by this note. Sole reliance on Title IX is risky, however, because of the unresolved questions concerning the extent of its applicability. Still Title IX should be used as an alternative theory because there are persuasive arguments supporting its applicability to compensation discrimination cases involving coaches of female teams, and only through use of Title IX will the disputes concerning the statute be resolved.

IV. The Fourteenth Amendment

Another remedy for coaches of female teams, which provides an opportunity to confront directly the injustice of paying these coaches less because they coach females, is the fourteenth amendment.

The fourteenth amendment prohibits the states from denying any person equal protection of the laws.¹¹⁰ A literal interpretation of this amendment

¹⁰⁷ *Id.* at 153.

¹⁰⁸ 409 U.S. 205 (1972).

¹⁰⁹ *Id.* at 206 n.1.

¹¹⁰ The equal protection clause of the fourteenth amendment states, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." A suit based on a fourteenth-amendment violation is brought under 42 U.S.C. § 1983 (1976), which states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The fourteenth amendment prohibits discrimination by the states, not private citizens. Under certain cir-

would prohibit any classification which results in similarly situated persons receiving different treatment. As a practical necessity, however, states must make some classifications which create a discriminatory effect. Accordingly, courts will not strike down governmental classifications unless they are arbitrary, *i.e.*, lacking any rational basis.¹¹¹

Over the years, the Supreme Court has developed the policy of requiring a greater justification than a rational basis for certain government classifications. Classifications impacting on fundamental rights and those labelled "suspect" (*e.g.*, those involving racial minorities) are now strictly scrutinized.¹¹² Such classifications are constitutional only if they serve a compelling governmental interest.¹¹³ More recently, the Supreme Court has found that certain classifications require more than a rational basis justification, but less than the compelling governmental interest justification mandated for suspect classifications. The degree of scrutiny accorded classifications in this intermediate category is not fixed, but varies depending on how closely the interest involved is tied to a specific constitutional guarantee.¹¹⁴ Gender-based classifications have been placed in this category and must be justified by an important governmental objective substantially related to the means used.¹¹⁵

The development of different degrees of scrutiny for different categories of classifications has increased the importance of the label placed on a particular classification. Because a classification which cannot be placed in either the strict or intermediate scrutiny categories needs only a rational basis, invalidating such classifications is extremely difficult. Categorization of a classification as requiring only this minimum scrutiny, therefore, is effectively outcome determinative.

Clearly, the equal protection clause of the fourteenth amendment is implicated when a state school classifies female team coach positions as a lower-paying job category than male team coach positions which entail substantially the same duties. The important question is the category in which this classification should be placed. Persuading a court that such a classification is gender-based is essential to the coaches' success under the fourteenth amendment.

A. Classification of Coaches Based on the Sex of the Team Is Gender-Based

Although sex is a decisive factor underlying the classification of coaches of female teams, it is not a typical gender-based classification. As under the Equal

cumstances, the actions of private parties may be considered state action for purposes of the fourteenth amendment. For arguments that a private school should be subject to the fourteenth amendment, *see* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 672-77 (1974).

111 *New York Transit Auth. v. Beazer*, 440 U.S. 568 (1979); *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972); *Richardson v. Belcher*, 404 U.S. 78, 81 (1971); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); *Fleming v. Nestor*, 363 U.S. 603, 611 (1960).

112 *See, e.g.*, *Graham v. Richardson*, 403 U.S. 365 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Oyama v. California*, 332 U.S. 633 (1948); *Hirabayashi v. U.S.*, 320 U.S. 81 (1943) (suspect classifications); *Police Dept. v. Mosley*, 408 U.S. 92 (1979); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1968); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (fundamental rights).

113 *Id.*

114 *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 109 (1973) (Marshall, J., dissenting).

115 *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971).

Pay Act and Title VII, a problem arises from the fact that the person who is arbitrarily classified is not the person whose sex is the determining factor in the classification. Unlike those statutes, which explicitly refer to discrimination based on the sex of the employee, the equal protection clause says nothing specifically about sex discrimination. The different degrees of scrutiny applied to different classifications are the product of a judicial interpretation of the fourteenth amendment. In deciding if the classification of one person based on the sex of another is gender-based under the equal protection clause, therefore, one is not restricted by the inflexibility of any specific language. Instead, the reason for requiring a greater justification for gender-based classifications supplies guidance for determining whether a particular classification should be labelled gender-based for fourteenth amendment purposes.

The rationale for required greater justification than a rational basis in certain cases was first articulated in the famous *United States v. Carolene Products Co.* footnote.¹¹⁶ There, Justice Stone suggested that although a presumption in favor of legislation was justified by the potential for repeal by popular will through the political process, a "more exacting judicial scrutiny" may be necessary when legislation operates to restrict the very use of the political process itself. Justice Stone specifically mentioned "prejudice against discrete and insular minorities" as an example of legislation which may require closer scrutiny. In *Frontiero v. Richardson*,¹¹⁷ the Supreme Court expressed a similar concern regarding the degree of scrutiny for classifications based on sex. In *Frontiero*, the Court noted that the long history of sex discrimination had relegated an entire class to an inferior legal status because of an immutable characteristic determined solely by accident of birth and without regard to the actual capabilities of its individual members.¹¹⁸ Discrimination against minorities, and to a somewhat lesser extent women, prevents them from participating fully in the political process. The result is that such groups not only are adversely affected by discrimination at the present, but they effectively are prevented from doing anything about it in the future.

As discussed earlier, inferior salaries for coaches of female teams express a value judgment that the athletic development of females is a less important objective than the athletic development of males. Sexual stereotyping, which lies at the heart of sex discrimination is perpetuated by such attitudes. Any classification which has the effect of perpetuating past discrimination against women must be considered a gender-based classification for purposes of the fourteenth amendment. Whether the sex of those people who are being classified determines the classification is not relevant. What is important is that sex is the criterion for classification. Discriminating against persons who choose to associate or help members of groups historically subjected to discrimination, has the same ultimate effect as discrimination against those groups.

Clear support for defining gender-based classification in this manner is found in the Supreme Court's decision in *Loving v. Virginia*.¹¹⁹ The dispute in

116 304 U.S. 144, 152-53 n.4 (1938).

117 411 U.S. 677 (1973).

118 *Id.* at 684-87.

119 388 U.S. 1 (1967).

Loving involved the constitutionality of Virginia's miscegenation statute which prohibited interracial marriages. Miscegenation statutes are based on a classification of persons who marry a member of another race as criminals. In *Loving*, the state argued that its miscegenation statute did not violate the fourteenth amendment because it punished equally members of both races. The Court rejected that argument holding that equal application of a statute containing racial classifications did not immunize the statute from the heavy burden of justification required under the fourteenth amendment for statutes drawn according to race. Analogously, equal application to both male and female coaches of a compensation policy which discriminates against those who coach females, and therefore contains a sexual classification, should not be immunized from the heavy burden of justification required under the fourteenth amendment for classifications drawn according to sex.

Both a miscegenation statute and a compensation policy which discriminates against coaches of female teams use race or sex to determine in which classification a person should be placed, notwithstanding that in both situations it is the sex or race of someone other than the person classified that determines the proper classification. Both situations involve punishing people for associating with victims of past discrimination, and the resulting entrenchment of that discrimination. Accordingly, logic requires that courts demand a greater justification than a rational basis in cases of unequally paid coaches of female teams as the Supreme Court did in *Loving*.

Once the classification of coaches of female teams as a lower-paying job category is labelled gender-based, a school with such a policy will have difficulty showing an important governmental interest served by such a classification, especially in light of the repeated assertions by the Supreme Court that classifications based on stereotypic characterizations of the sexes are impermissible.¹²⁰ Due to novelty of the argument that classifications of coaches of female teams are gender-based, however, this theory should be used in conjunction with a claim by the coaches of third-party standing to assert the students' rights.¹²¹

B. *Jus Tertii*

Jus tertii, or third-party standing, involves asserting the violation of another's rights as the basis of one's own claim. Proceeding under this theory would insure that the classification was labelled gender-based. The team members are classified according to their sex; this is a classic gender-based classification.

120 See, e.g. *Personnel Adm'r v. Feeney*, 99 S.Ct. 2282 (1979); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Califano v. Webster*, 430 U.S. 313 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975).

121 Discrimination may also be shown by a disparate impact under the fourteenth amendment. That approach would not work here, however, because unlike an action based on Title VII, success under the fourteenth amendment requires proof of a discriminatory intent. See *Personnel Adm'r v. Feeney*, 99 S.Ct. 2282, 2296 (1979). In *Feeney*, the Supreme Court required proof that the action was taken because of, not in spite of, the discriminatory effect. It would be impossible to show intent if one were arguing that compensation discrimination against coaches of female teams has a disparate impact on female coaches, because the intent is to discriminate against the team members, not the coaches.

The law surrounding the concept of *jus tertii* is confused.¹²² Nevertheless, three factors have been identified as potential justifications for allowing third-party standing: (1) a substantial relationship between the plaintiff and the third parties; (2) the impossibility of the rightholders asserting their own rights; and (3) the need to avoid a dilution of third parties' rights that would result if third-party standing were denied.¹²³ Consideration of these factors reveals the propriety of allowing third-party standing for coaches of female teams. The existence of the teacher-student relationship, the fact that the students are often minors, less likely to know the law and without access to faculty salary information, and the fact that the coaches' injury is the cause of the violation of the students' rights, all point to the conclusion that third-party standing should be granted.

Categorizing compensation discrimination against coaches of female teams as gender-based discrimination is both theoretically sound and consistent with the *Loving* decision. Because this approach has not yet been tried, however, a claim by a coach of a female team based on the fourteenth amendment should contain an alternative argument asserting third-party standing.

VI. Conclusion

Admittedly, social deemphasis of female sports has resulted in many coaching positions with female teams which do, in fact, involve less work than the corresponding positions with male teams. A difference in the amount of work required clearly justifies some difference in salary. This fact does not detract, however, from the claim that coaches of female teams performing substantially the same duties as coaches of male teams should receive equal compensation, and that the salary differential between coaches of female teams and coaches of male teams always should be commensurate with the difference in duties. Rather than detract from this claim, the effects of the social deemphasis of female sports strengthen the argument that discrimination against coaches of female teams must be eliminated now so females can receive better athletic training and thereby begin to develop fully their athletic talents.

Despite the obvious merit of a claim of equal pay for coaches of female sports teams, the obstacles to judicial relief are great in number and complexity. None of the laws discussed above adequately meets the problem. The flaws in the Equal Pay Act are insurmountable. That act was designed to cover only discrimination based on the sex of the employee. Title VII contains the same flaw; however, the broad wording of that statute provides a method of circumventing that problem through use of the disparate impact theory. Yet use of that theory, by its focus on the impact on female coaches, requires avoiding the issue of the injustice of setting coaches' salaries according to the sex of the students they coach and provides no relief for male coaches. Both Title IX and the fourteenth amendment allow a plaintiff to address this injustice directly. Nevertheless, these remedies are not without problems. The questions of Title IX's applicability to athletics and any employment practices are presently

¹²² See Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

¹²³ *Id.* at 425.

unresolved. The classification of coaches of female teams as a lower-paying job category is not a typical gender-based classification under the fourteenth amendment. Proceeding under this amendment, therefore, involves the risk that a court will require merely a rational basis justification for such a classification, a burden that the state rarely fails to meet.

The best solution to the problem of discrimination against coaches of female teams would be legislation closing this loophole in our civil rights laws; perhaps another amendment to Title VII expanding the traditional meaning of sex discrimination or a clarification or extension of Title IX. Until then, however, a brief supporting a claim for equal pay for coaches of female teams should contain all of the arguments presented above to insure the best chance of relief.

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