Separate But Unequal
Educational Sports Programs:
The Need for a New Theory of Equality
Karen L. Tokarz†

INTRODUCTION

Sports are a dominant force in contemporary culture. The impact of sports extends into education, employment, art, literature, media, domestic politics, and international relations. The powerful appeal of sports in our culture derives, in part, from the fact that sports dramatize the archetypal human experiences: failure and success, youth and aging, physical fitness and physical disability, brutality and beauty, work and play, individualism and collectivism, superiority and inferiority, domination and submission.  

† Assistant Professor of Law and Director of Clinical Education, Washington University, St. Louis, Missouri. B.A., 1970, Webster College; J.D., 1976, St. Louis University; LL.M., 1985, University of California, Berkeley. This Article was prepared as part of the LL.M. thesis requirement at the University of California, Berkeley. I am grateful to Susan Appleton, Barbara Brenner, Donna Brorby, Robert Cole, Mary Dunlap, Donna Hitchens, Susan Lampert, Jo Anne LaSala, Ronald Levin and in particular Herma Hill Kay, my LL.M. advisor, and Kelly Owen, Donna Peizer, and Ann VandePol, my editors, for reading this paper and offering suggestions for its improvement. The views expressed here are my own.

Regarding the importance of sport in American life, one commentator has stated, “Involvement in sport, either directly as a participant, or indirectly as a spectator, is almost considered a public duty by many Americans. It has been observed that if there is a religion in America today, it is sport.” Sage, Sport in American Society: Its Pervasiveness and Its Study, in SPORT AND AMERICAN SOCIETY: SELECTED READINGS 5 (G. Sage, ed. 1974). Sports in America experienced staggering increases in participants, spectators, salaries, and revenue in the recent quarter century. Professional baseball, for example, expanded from 16 to 26 major league teams and from two to four divisions in 1969. In 1984, every team had at least one player earning a million dollars per year or more, while first-year professional baseball players were guaranteed a minimum wage of $40,000. R. WURMAN, BASEBALL ACCESS 48 (1984). The average annual player salary for 1984 was $329,408—over six times the average annual salary in 1976 of $50,000. Maisel, Ball Park Figures? Better Believe It, SPORTS ILLUSTRATED, Mar. 4, 1985, at 22; What Inflation Is Doing to the World of Sports, U.S. NEWS & WORLD REP., May 16, 1977, at 53. Minor league baseball experienced a “coast-to-coast renaissance” in the 1980s. The American Association’s Louisville Redbirds (AAA) drew over a million spectators in 1983, averaging 16,191 fans per game. R. WURMAN, supra, at 54. The popularity of college baseball also increased dramatically in the 1980s. The University of Miami holds the box office record, drawing 163,261 fans in 1981. Id. at 50. Miami sold 3200 season tickets in 1985 and grossed over half a million dollars. San Francisco Chron., June 7, 1985, at 81, col. 1.

Sports are identified in our culture as quintessentially masculine and are among the activities which most divide men's cultural experience from that of women. Whereas sports are seen as training for males in the appropriate male sex role, participation in sports by females remains a social anomaly. This cultural phenomenon is reflected institutionally

3 Williams, The Equality Crisis: Some Reflections on Culture, Courts, and Feminism, 7 WOMEN'S RIGHTS L. REP. 175, 183 (1982) [hereinafter cited as Williams, Equality Crisis]. The stereotypic masculine experience in sports is likely to be public, aggressive, instrumental, elitist, formal, rigorous in character, and dominated by either business or traditional amateur value systems. See Holland & Oglesby, Women in Sport: The Synthesis Begins, 445 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 81, 84 (1979). The stereotypic feminine sports experience, in contrast to the masculine one, is more likely to be private, natural, cooperative, inclusive, expressive, unregimented, and educational in orientation.

4 Sex roles are a series of attitudes, feelings, behaviors, and expectations determined by cultural processes to be appropriate for each sex. Sex-role stereotyping varies from culture to culture. "Gender identity and a sense of self emerge together and reflect the prevailing culture and pattern of parenting." L. Eichenbaum & S. Orbach, Understanding Women: A Feminist Psychoanalytic Approach 24-25 (1982). Because of the stereotyping or coding of sex roles, girls and boys feel uncomfortable, awkward, and out of place if they are involved in activities that have been presented to them as inappropriate for their gender. J. Money & E. Erhardt, Man and Woman, Boy and Girl: The Differentiation and Dimorphism of Gender Identity from Conception to Maturity 19 (1972).

The appropriate role of the female in sports throughout history has been that of spectator-supporter, not performer. K. Blanchard & A. Cheska, The Anthropology of Sport 233-48 (1985). Female athletes frequently deny the importance of their athletic activity and document their femininity with inordinate emphasis on the importance of appearance and their desire to marry and raise children. This apologetic posture "affirms the feminine mystique and legitimates the female's role in sports by minimizing the anomaly." Felshin, The Triple Option . . . For Women in Sport, in SPORT IN THE SOCIOCULTURAL PROCESS 487, 488 (M. Hart & S. Birrell, 3d ed. 1981). Tackling in football, checking in ice hockey, and pinning in wrestling are cited by one author as sports activities considered appropriate for males, but not for females. The author points out that American women are not socialized to physically overpower or dominate. To do so would violate the culturally defined feminine role. "For a woman to subdue another woman through physical force and bodily contact is categorically unacceptable, the innuendo sexual, and the act considered unnatural." Lemaire, Women and Athletics: Toward a Physicality Perspective, 5 HARV. WOMEN'S L.J. 121, 138 n.65 (1982) (citing Hall, Sport, Sex Roles and Sex Identity, paper presented at the First Annual Conference of the North American Society for the Sociology of Sport, Denver, Colorado (October 16-19, 1980), at 4).

This norm derives from and reinforces the historic sexual division of labor: the female role is a private one, revolving around home and child care; the male role is a public one, revolving around economic and religious responsibilities. K. Blanchard & A. Cheska, supra note 4, at 234. Certain assumptions of hierarchy, power, and prestige, as well as certain legal realities, emerge from this private/public split as it occurs in sports and in other areas of life. See generally Taub & Schneider, Perspectives on Women's Subordination and the Role of Law, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 117 (D. Kairys ed. 1982).

The critique of sex discrimination in modern sports emanates from two camps: radical and feminist. See generally Theberge, A Critique of Critiques: Radical and Feminist Writings on Sport, 60 SOC. FORCES 340 (1981). The radical critique holds that sports are militaristic, excessively competitive, classist, racist, and sexist. See, e.g., D. Sabo & R. Runfola, Jock: Sports and Male Identity (1980); R. Yaege, Seasons of Shame: The New Violence in Sports (1979); T. Tutko & W. Bruns, Winning is Everything and Other American Myths (1976); P. Hoch, Rip Off the Big Game (1972); J. Scott, The Athletic Revolution (1971); D. Meggysey, Out of Their League (1970); H. Edwards, The Revolt of the Black Athlete (1969). The feminist critique argues that sports are exclusionary, male-dominated, and masculine in orientation. See, e.g., Lemaire, supra note 4; Holland & Oglesby, supra note 3; Felshin, supra note 4. The critiques converge in their emphases on social inequalities and advocacy of fundamental changes in the value and organization of sports in society. Implicit in both critiques is a prescription, albeit vague, for what
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in educational sports programs.

Most American schools and colleges offer educational sports programs which include physical education classes and extracurricular athletic teams. Almost all states have laws requiring students to participate in physical education classes through high school, with athletic games as the basic component of the curriculum. Many schools also provide an organized program of extracurricular athletics beginning in junior high school and continuing through college.

After elementary school, physical education classes and athletic teams are usually sex segregated, and different curricula and activities are offered for females and males. Interscholastic or intercollegiate athletic associations often bar participation by females in certain sports or prohibit co-ed extracurricular athletic competition.

Sex-based classifications in educational sports programs are purportedly justified by physical differences between the sexes and are sanctioned by state and Congressional legislative enactments. State and federal non-sex discriminatory sports would look like. In general terms, the basic components are gender equality and a shift away from a masculine orientation. The institutional and cultural representation of sports would be redefined as less exclusionary, less instrumental, less aggressive. The design of the revised model, and more importantly the contours of sexual equality within the institution of sports, are yet to be clearly articulated by either critique. Therberge, supra, at 344, 348.

Many feminists approach the prospect of female participation in sports with ambivalence similar to that engendered by the prospect of female participation in military combat. Feminists face a theoretical and practical dilemma: to seek equal opportunity through redistribution of resources within the existing, troubled, male-defined institution of sports, or to pursue a redesigned or revised version of sports. Therberge, supra, at 348. The risks of the former option are co-optation, attention on the talented elite, and de-emphasis of the feminine/expressive elements of sports. The problems with the latter are inferiority, second-class citizenship, and the difficulty of changing a major cultural institution.

6 Sage, supra note 1, at 5.

7 For example, Colorado High School Activities Association rules provided that “participation in [the sport of soccer] shall be limited to members of the male sex . . . because inordinate injury risk jeopardizes the health and safety of the female athlete.” Hoover v. Meiklejohn, 430 F. Supp. 164, 166 (D. Colo. 1977). According to Wisconsin interscholastic athletic regulations, “The Board of Control shall prohibit all types of interscholastic activity involving boys and girls competing with or against each other.” Leffel v. Wisconsin Interscholastic Athletic Ass’n, 444 F. Supp. 1117, 1120 (E.D. Wis. 1978).

Several states have enacted legislation or adopted regulations allowing sex-segregated physical education classes and athletic teams. Florida schools may sponsor two totally sex-segregated teams in contact sports or sports in which team selection is based upon "competitive skills." However, Florida law allows females to try out for a school’s single team in a sport only if that sport is a noncontact sport. FLA. STAT. ANN. § 228.2001(3)(b) (West Supp. 1985). Florida physical education classes may be segregated for bodily contact sports. Id. § 228.2001(2)(d).

Washington State requires equality of opportunity to participate in athletics, but permits sex-segregated teams if there is substantial equality between the programs. WASH. REV. CODE ANN. § 28A.85.020(3) (1982), WASH. ADMIN. CODE R § 392-190-025 (1983). If there is only one team for a sport, it must be open to both sexes. WASH. REV. CODE ANN. § 29A.85.020(3) (1982), WASH. ADMIN. CODE R § 392-190-025 (1983). Alaska requires equal opportunity in athletics for males and females, but permits separate teams if they are administered without disparities in facilities, funding and training. ALASKA STAT. § 14.18.040 (1992).

Physical education classes in Alaska may be sex-segregated for activities that involve bodily contact. ALASKA STAT. § 14.18.050 (1982). South Dakota prohibits sexual discrimination in education, but permits separate sports activities if the opportunity to participate is "substantially equal for both sexes." S.D. CODIFIED LAWS ANN. § 20-13-22 (Supp. 1984). Michigan,
courts generally uphold such programs by relying on the "separate but equal" doctrine,\(^9\) despite the Supreme Court's rejection of the doctrine in race-segregated education over three decades ago\(^{10}\) and despite the Supreme Court's heightened standard of judicial review for sex-based classifications under the equal protection clause of the fourteenth amendment.\(^{12}\) Because the physical differences between females and males are average, and not absolute, sex-segregated programs deny rights and opportunities to individual females and discriminate against those females capable of competing with males.\(^{13}\)

This Article will examine the use of the separate but equal doctrine to justify sex segregation in educational sports programs. Although the focus on education is a narrow one, the equal protection analysis is generally applicable to sex discrimination in amateur and professional sports, as well as other spheres where classifications are made on the basis of average, as opposed to absolute, physical differences.

The Article will analyze the asserted governmental interests for, and however, requires that females "be permitted to participate in all noncontact" sports, and if there are separate male and female teams, that females be allowed to try out for the male team. \(\text{Mich. Stat. Ann. } \S 15.41289\) (Callaghan 1979). Michigan makes no reference to males trying out for female teams. Minnesota requires equal opportunity for both sexes to participate on an athletic team if there is only one team for a sport, with the exception of wrestling. \(\text{Minn. Stat. Ann. } \S 126.21\) subd. 3(4) & 3(5) (West Supp. 1985). A school must provide a second, single sex team for "members of a sex whose overall athletic opportunities have been previously limited" if there is "demonstrated interest." \(\text{Id. at }\) subd. 4 and 3(4) (emphasis added). New York, until recently, prohibited "mixed competition" in contact sports. \(\text{N.Y. Admin. CODE, tit. 8, } \S 135.4(c)(7)(ii)(c)\) (1985). In response to repeated litigation, the State Board of Regents revised education department regulations to allow females to play on teams with males in the contact sports of football, basketball, boxing, ice hockey, rugby, and wrestling. Vecsey, \textit{Reviewing the Regents' Decision}, \textit{N.Y. Times}, Nov. 17, 1985, at 22, col. 1. See Lantz v. Ambach, No. 85 Civ. 7735 (S.D.N.Y. Oct. 30, 1985) (available on WESTLAW, DCT database).

\(9\) In 1972, Congress enacted Title IX, legislation designed to insure equal educational opportunity. \textit{Education Amendments of 1972}, Pub. L. No. 92-318, Title IX, 86 Stat. 235, 373 (1972) (codified as amended at 20 U.S.C. \S\S 1681-1686 (1982) [hereinafter cited as Title IX]. Title IX regulations "permit" separate but equal physical education classes and teams when segregation is based upon ability or competitive skill or where the activity involves bodily contact. \(\text{See 34 C.F.R. } \S\S 106.34(a), (b), (c); 106.41(b)\) (1984). Only in the case of noncontact athletic teams must a school permit members of the excluded sex to compete for positions on teams determined by skill, and only if the school previously limited athletic opportunities for the excluded sex. \(\text{Id. } \S 106.41(b)\). The regulations can be read to allow schools to deny girls and women the opportunity to compete for a position on a contact sport team, even if a female team in the sport is not provided. \(\text{See 44 Fed. Reg. 71,418 (1979); 40 Fed. Reg. 24,134 (1975).}\)

\(10\) \textit{See infra} notes 58-102 and accompanying text.


\(12\) In \textit{Reed v. Reed}, 404 U.S. 71, 77 (1971), the Supreme Court held, for the first time, that women and men were "similarly situated" and invalidated a statute on the ground it denied equal protection to women. In \textit{Craig v. Boren}, 420 U.S. 190, 197 (1976), the Court employed an "intermediate" level of judicial review for sex-based classifications: "[T]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." The Court articulated a more stringent test in Mississippi Univ. for Women \textit{v. Hogan}, 458 U.S. 718, 725-26, 728-29 (1982), closely scrutinizing the \textit{actual} governmental objective and requiring a tight fit between the purpose and the classification.

\(13\) \textit{See Brown & Freedman, Sex Averaging and the Equal Rights Amendment, 2 Women's Rights L. REP 35 (June 1975).}
the challengers' interests against, sex segregation and will argue that the rationale which prompted the Supreme Court to reject the separate but equal doctrine as a principle of equality in race-segregated education suggests the same result in sex-segregated educational programs. The central thesis of the Article is that segregation in educational sports programs, based on average or stereotyped physical sex differences, is constitutionally impermissible under the equal protection clause. Without the separate but equal doctrine as its foundation, sex segregation in

14 See infra notes 33-41 and accompanying text. The use of the separate but equal doctrine to justify sex segregation causes functional problems similar to those which occur with racial segregation. The doctrine presupposes an ability to distinguish definitively between the races or the sexes. During the era when the doctrine was used to legitimate race segregation, the question of who was black and who was white created considerable litigation by whites who were mistaken for blacks and required to ride in segregated railroad cars. D. BELL, RACE, RACISM AND AMERICAN LAW 84 (1980). See Chicago R.I. & P. Ry. Co. v. Allison, 120 Ark. 54, 178 S.W. 401 (1915) (award of $875 was found excessive when white woman was forced to ride in black coach for 15 minutes); Louisville and N.R.R. Co. v. Ritchel, 148 Ky. 701, 147 S.W. 411 (1912) (white woman awarded $3750 when a rude conductor pushed her into the "colored" car); Norfolk and W. Ry. v. Stone, 111 Va. 730, 69 S.E. 927 (1911) (white woman awarded $400 damages when she was compelled to ride 10-15 minutes in a segregated car with two blacks); Missouri K. & T. Ry. v. Ball, 25 Tex. Civ. App. 500, 61 S.W. 327 (1901) (an award of $1000 was found excessive when a white woman was forced to ride sixty miles in the coach reserved for blacks). Most recently, the question was raised by a Florida school superintendent seeking to avoid desegregation by arguing an inability to define a "Negro." The Fifth Circuit rejected the argument. United States v. Flagler Co. School Dist. 457 F.2d 1402 (5th Cir. 1972).

A similar issue regarding who is female and who is male arises when the separate but equal doctrine is used to justify sex segregation in athletics. Sexual ambiguity can occur because female and male sexes are not discrete phenomena, but rather a mosaic of factors. The various factors which can determine the sex of an individual include gonadal sex, hormonal pattern, internal genitalia, external genitalia, primary and secondary sex characteristics (phenotype test), sex assignment, psychological gender identity, and sex chromosome constitution (Barr-body test). Bassis, The Psychological Test of Sex and the Transsexual: A Legal Response, 1979 J. PSYCHIATRY & L. 211, 214 (1979). Legal and medical commentators debate the relative significance of the various factors. Id. at 213, 222. See also Comment, Transsexualism, Sex Reassignment Surgery and the Law, 56 CORNELL L. REV. 966, 968 (1971); Moore, The Sexual Identity of Athletes, 205 JAMA 787, 788 (1968). Sex differences are not static. Just How the Sexes Differ, NEWSWEEK, May 18, 1981, at 83 [hereinafter cited as Sexes Differ]. In some instances, females and males have unknowingly competed against each other in athletic competitions. Although there is some documentation of women intentionally posing as women, more often the misclassified "female" or "male" athlete is an individual with abnormal genitalia or a conflicting sexual identity. See C. KLAPS & M. J. LYON, THE FEMALE ATHLETE: A COACH'S GUIDE TO CONDITIONING AND TRAINING 41 (2nd ed. 1978).

Dr. Renee Richards, formerly Dr. Richard Raskind, a low-ranked male professional tennis player, successfully challenged the attempts of the United States Tennis Association (USTA) and the Women's Tennis Association (WTA) to prohibit her from participating in women's professional tennis competition after she underwent a sex change operation in the mid-1970s. See Richards v. United States Tennis Ass'n, 93 Misc. 2d 713, 400 N.Y.S.2d 267 (1977); see also She'd Rather Switch—and Fight, SPORTS ILLUSTRATED, Sept. 16, 1976, at 16. The court in Richards carefully examined evidence regarding various sex factors, including the phenotype test (visual observation of primary and secondary sex characteristics), the psychological test, and the Barr-body test (sex chromosome examination). The court concluded that the Barr-body test, which has been adopted by the USTA and WTA as a condition for competition in the U.S. Open Tournament in Forest Hills, New York, although more scientific, could not be relied upon as the sole criterion for determining sex. 93 Misc. 2d at 716, 400 N.Y.S.2d at 269. The court used the phenotype and psychological tests, accepted the plaintiff's assertion that she was a female, and permitted her to participate in women's professional competition. Id. at 722, 400 N.Y.S.2d at 273.
educational sports programs cannot survive the intermediate standard of judicial review for sex-based classifications. Students, male and female, must be provided the opportunity to compete in educational sports on the basis of their individual athletic abilities.\textsuperscript{15}

Although this article will not focus on whether sex-based affirmative action programs for females (e.g., all-female teams maintained parallel to programs open on a competitive bases to both sexes) would be permissible, modern equal protection analysis does not foreclose this possibility.\textsuperscript{16} At a minimum, however, the equality doctrine requires respect for both the similarities and differences between females and males which ensures equality of educational opportunity for both sexes.\textsuperscript{17}

I. DEVELOPMENT OF THE SEPARATE BUT EQUAL DOCTRINE

A. Historical Development

"Separate but equal" refers to a policy of separating the races or sexes and providing the separated classes with presumably equal services. This can be contrasted with a policy of complete denial of rights or services to the group in question.\textsuperscript{18} The use of the concept as a legal doctrine to justify sex, as well as race, segregation gained currency in the United States during the changing times of the post-Civil War era.\textsuperscript{19}

In the thinking of the majority of the Congress in 1866, the fourteenth amendment mandate of "equal protection of the laws" reflected

\textsuperscript{15} See infra notes 242-252 and accompanying text.

\textsuperscript{16} This question will be addressed in a forthcoming article by the author.


\textsuperscript{18} See Comment, Plessy Revived: The Separate But Equal Doctrine and Sex Segregated Education 12 HARV. C.R.-C.L. L. REV. 585, 591 (1977) [hereinafter cited as Comment, Plessy Revived].

\textsuperscript{19} State segregation statutes, known as "Jim Crow" laws, were enacted in the period from the late 1880s to 1910. D. BELL supra note 14, at 83 (citing C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1955)). While Jim Crow laws were enacted primarily to legitimize racial segregation, some early Jim Crow laws also sanctioned sex segregation, e.g., women were provided separate railroad coaches to spare them the company of men who wished to smoke, drink, or socialize with other men. See Civil Rights Cases, 109 U.S. 3 (1883) (complaint of black man and his wife that she was excluded from the ladies' car); Bass v. Chicago & Nw. Ry. Co., 36 Wis. 450 (1874) (complaint of man ejected from the ladies' car).
an assimilationist view of racial equality. In 1873, the Supreme Court held that the policy of segregating black and white passengers into separate but identical railroad cars constituted "an ingenious attempt to evade a compliance with the obvious meaning" of the congressional grant of power to the railroad which provided that "no person should be excluded from cars of the company on account of color." A few years later, as the dominant social, moral, and political spirit in the country began to shift, the Supreme Court accepted the emerging legal concept of formal equality based on the provision of separate accommodations, facilities, and services which were assumed to be equal.

In 1883, the Court rendered a highly restrictive interpretation of the fourteenth amendment, striking down provisions of the federal Civil Rights Act in The Civil Rights Cases. In 1896, in the noted case of Plessy v. Ferguson, the Court formally legitimized the separate but equal doctrine, upholding a state statute that required "separate but equal" passenger coach accommodations for blacks and whites. Justice Brown, writing for the majority, relied heavily on a pre-fourteenth amendment Massachusetts decision approving racially segregated public schools in Boston.

In Plessy v. Ferguson, the Supreme Court accepted the argument that innate racial differences necessitated differential treatment of the races. According to the Court, "Legislation is powerless to eradicate racial instincts or to abolish distinctions based on physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation." The Court's adoption of the separate but equal doctrine implicitly rejected the assimilationist view and institutionalized racial segregation based on perceived racial differences.

Courts labored under the separate but equal doctrine for over half a century after Plessy and extended its application to other areas of life, including education. By the early twentieth century, the separate but
equal doctrine was widely accepted as a legal justification for segregation in this country. The doctrine provided a refined circumvention of the intent of the Civil War Amendments that all should be entitled to equal protection. According to one commentator, "The concept of segregation, separate-but-equal style, was an intellectual wrinkle to escape the simple command of equality."

The National Association for the Advancement of Colored People (NAACP) led the attack on legally sanctioned racial segregation, initially focussing its aim on the equality prong of the separate but equal doctrine. The Supreme Court undertook a series of NAACP cases involving segregated graduate and professional school education; in each instance the Court found inequalities but upheld the doctrine of separate but equal. Starting with *Sipuel v. Regents of the University of Oklahoma Law School* in 1934, the NAACP shifted gears and turned to expert testimony to demonstrate that a segregated school could not provide equal educational opportunities. The Supreme Court finally conceded the vulnerability of the doctrine in the epochal decision of *Brown v. Board of Education*, concluding that separate educational facilities are inherently unequal. The Court determined "that in the field of public education the doctrine of 'separate but equal' has no place."

The Court in *Brown* did not openly contradict the argument of innate differences between the races. *Brown*’s disapproval of the separate but equal doctrine was based upon a recognition of the stigma, feelings of inferiority, and other intangible negative effects on black students forcibly separated from white students. One may also read *Brown*’s prohibition against the use of race as a basis for classification as premised on the tenet that, whether or not there are differences between the races, it is unconstitutional to use race as the basis for legislative classifications.

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32 Id.
33 G. GUNTHER, CONSTITUTIONAL LAW 756 (10th ed. 1980).
37 347 U.S. 483.
38 Id. See D. BELL, supra, note 14, at 92.
39 347 U.S. at 494 (citing risk of psychological damage). See Comment Plessy Revived, supra note 18, at 593.
The Court later extended the equality principle thus established in the educational context of *Brown* to other contexts, such as recreational and athletic facilities, via *per curiam* orders which often simply cited *Brown*.41

**B. The Separate But Equal Doctrine as Applied to Sex**

Improvements in the legal status of women in the early part of the twentieth century led to the provision of public education for women, primarily on a sex-segregated basis.42 Sex segregation in education, like racial segregation, developed not to guarantee equality, but rather as a means of avoiding integration.43 Arguments against co-education were grounded in stereotypic views regarding women's intellectual capacities and social roles. Co-education would destroy "feminine sensibilities," affect morals, and lower educational standards because of women's intellectual inferiority and weaker physical constitution.44

Legal challenges to the use of the separate but equal doctrine to justify sex-segregated education surfaced in the post-*Brown* era. Prior to the Supreme Court's development of the intermediate level of scrutiny for sex discrimination beginning with *Reed v. Reed*45 in 1971, such challenges were frequently dismissed outright under the deferential rational basis test.46 Since the development of the elevated standard of review for sex-based classifications, the Supreme Court has not ruled affirmatively on the vitality of the separate but equal doctrine as it applies to sex segregation. However, in 1977 in *Vorchheimer v. School District of Philadelphia*,47 the Court affirmed without opinion the Third Circuit's denial of the female plaintiff's request to attend the all-male public high school for academically gifted students. The circuit court had refused to find discrimination under the equal protection clause of the fourteenth amendment because an "essentially equal" all-female school was available to

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43 See Comment, *Plessy Revived*, supra note 18, at 599.

44 Id. at 599-602.


the plaintiff.48

The Third Circuit's constitutional analysis in Vorchheimer rested on its characterization of the plaintiff's claim of deprivation as one of personal preference, not of unequal educational opportunity.49 The circuit court cited various educational views holding that diverse educational opportunities, including sex-segregated education, were beneficial.50 The court also noted that the choice to attend an academic high school was voluntary.51 The circuit court distinguished Brown on the ground that race, unlike sex, is a suspect classification.52

The dissent attacked the majority decision as a resurrection of the separate but equal doctrine of Plessy.53 This view found support in a subsequent lawsuit in which a lower state court ruled that the sex-based exclusion of female students from Philadelphia's all-male academic public high school violated both the fourteenth amendment and the state equal rights amendment. The court permanently enjoined the defendants from refusing to admit female students to the formerly all-male high school.54

In the most recent case before the Supreme Court dealing with sex-segregated education, Mississippi University for Women v. Hogan,55 the Supreme Court disapproved separate but equal education and upheld the challenge of a male plaintiff to attend an all-female nursing school in a state university system which included co-ed and single-sex nursing schools.56 The Court rejected the state's alleged objective of affirmative action for women, in light of the traditional dominance of nursing by women. The Court reserved the question of whether states could provide separate but equal undergraduate institutions for males and females, if the objective was actually one of affirmative action.57 To date, the Supreme Court has not decided this question.

48 Id. at 881, 886.
49 Id. at 886. Yet, as one commentator has noted, the court could have found discrimination because the boys' school had a better equipped science department. See Finding of Fact No. 26, Vorchheimer v. School Dist., 400 F. Supp. 326, 329 (E.D. Pa. 1975), reprinted in Note, Toward a Redefinition, supra note 17, at 505.
50 532 F.2d at 882.
51 Id. at 881.
52 Id. at 886.
56 Id. at 733.
57 Id. at 720 n.1.
C. Overview of the Separate But Equal Doctrine in Educational Sports Programs

Although no case has reached the Supreme Court,\(^6\) the weight of authority in the lower courts supports the constitutionality of "separate but equal" sports teams.\(^5\) Four federal circuit courts,\(^6\) several district courts,\(^6\) and five state courts of last resort\(^6\) have considered challenges to sex segregation in educational sports programs. When schools provide comparable opportunities in particular sports for both sexes, most courts have approved sex-segregated teams under the fourteenth amendment.\(^6\)

Most courts have invalidated exclusionary policies based on sex when separate athletic opportunities are not offered for females. These courts frequently note approval in \textit{dicta} for the separate but equal doctrine or reserve the question of the doctrine's constitutionality if comparable athletic opportunities were available for females.\(^6\)

\(^{58}\) \textit{But cf.} O'Connor v. Board of Educ. of School Dist. No. 23, \textit{application to vacate stay denied with opin.}, 449 U.S. 1301 (Stevens, Circuit Justice, 1980), 645 F.2d 578 (7th Cir. 1981), \textit{cert. denied}, 454 U.S. 1084 (1981), in which the federal district court granted a preliminary injunction allowing a female student to try out for the male junior high basketball team even though the school provided separate teams for each sex. The Seventh Circuit stayed the preliminary injunction and Justice Stevens, Supreme Court Justice for that circuit, upheld the appellate court's stay of the injunction.

\(^{59}\) \textit{But see infra} notes 254-282 and accompanying text.


\(^{63}\) See \textit{infra} notes 65-74 and accompanying text. \textit{But see infra} notes 85-90 and accompanying text (discussing cases decided under state equal rights amendments).

\(^{64}\) See \textit{infra} notes 77-81 and accompanying text.
1. The Separate But Equal Doctrine When Challenged By Female Plaintiffs

When separate teams are available for both sexes in a sport, the majority of courts exclude female plaintiffs from male teams when such policies are challenged under equal protection. This position is exemplified by the Seventh Circuit's decision in *O'Connor v. Board of Education of School District No. 23*, in which the court held that sex-segregated basketball teams were constitutionally permissible and that the female plaintiff could be excluded from the male team based on the capabilities of average females and males. Prior to the Seventh Circuit's final ruling, plaintiff's petition to vacate the stay of her initial injunction was denied with opinion by Mr. Justice Stevens, sitting as Circuit Justice. According to Justice Stevens:

> In my opinion, the question whether the discrimination is justified cannot depend entirely on whether the girls' program will offer Karen opportunities that are equal in all respects to the advantages she would gain from the higher level of competition in the boys' program. The answer must depend on whether it is permissible for the defendants to structure their athletic programs by using sex as one criterion for eligibility. If the classification is reasonable in substantially all of its applications, I do not believe that the general rule can be said to be unconstitutional simply because it appears arbitrary in an individual case (footnote omitted) . . . Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events.

When a school offers both male and female teams in a particular sport, the lower federal and state courts also tend to uphold sex-segregated teams under equal protection. The district court in *Bucha v. Illi-

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65 645 F.2d 578.
66 Id. at 581.
67 449 U.S. at 1308.
68 Id. at 1306-07. In the same vein, the Sixth Circuit in *Cape v. Tennessee Secondary School Athletic Ass'n*, 563 F.2d 793, upheld different game rules for girls' and boys' basketball as justified by distinct, but average, physical difference between the sexes.

Lower federal courts have split on the question of whether different game rules for girls' and boys' basketball are constitutionally permissible. In *Jones v. Oklahoma Secondary School Activities Ass'n*, 453 F. Supp. 150 (W.D. Okla. 1977), the court upheld half-court rules for females. Reaching a contrary result, the court in *Dodson v. Arkansas Activities Ass'n*, 468 F. Supp. 394 (1979), held that half-court rules abridged the equal protection rights of females.

69 See, e.g. *Leffel v. Wisconsin Interscholastic Athletic Ass'n*, 444 F. Supp. at 1121-22, in which the court held that it was not discriminatory to prevent talented girls from swimming on the boys' team when both girls' and boys' swimming teams were offered, and explicitly approved the use of separate but equal teams in contact sports; *Striebel v. Minnesota State High School League*, 321 N.W.2d at 402, in which the Minnesota Supreme Court held that separate teams were permissible under the equal protection clause of the fourteenth amendment when limited athletic facilities made it necessary to schedule high school boys' and girls' athletic teams in the same sport in two different seasons and neither season was substantially better than the other. The court did not decide whether separate seasons would be constitutionally permitted if adequate facilities were available. *But see infra* notes 84-93 and accompanying text.
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nois High School Association,\textsuperscript{70} held that there was a “rational basis” for prohibiting competition between the sexes in a high school swimming program and for imposing restrictions applicable only to girls’ contests.\textsuperscript{71} The court took judicial notice that males consistently out perform females in the Olympic Games and noted that physical and psychological differences between female and male athletes warrant segregation in order to avoid male domination and maximize female participation.\textsuperscript{72} In Ritacco v. Norwin School District,\textsuperscript{73} the district court specifically distinguished sex-segregated sports competition from race discrimination, holding that physiological and psychological differences between the sexes provide a “rational basis” for “separate but equal” treatment.\textsuperscript{74}

When females are totally excluded from extracurricular athletic opportunities because no separate team is offered for them, the courts generally disallow such exclusions, often noting approval in \textit{dicta} for the separate but equal doctrine. The Eighth Circuit’s decision in \textit{Brenden v. Independent School District} \textsuperscript{742},\textsuperscript{75} is representative of judicial response in this type of case. The court invalidated an athletic association rule barring girls from participating with boys in cross-country skiing, running, and tennis when no team existed for girls.\textsuperscript{76} The court did not address the questions of contact versus noncontact sports or whether separate but equal sports programs, if available, would violate equal protection.

In \textit{Hoover v. Meiklejohn},\textsuperscript{77} the district court held that a rule barring females from the all-male high school soccer team violated the equal protection clause when no team was provided for girls.\textsuperscript{78} The court noted, however, that separate soccer teams for females and males would be constitutional if the teams were given substantially equal support.\textsuperscript{79} The district court in \textit{Carnes v. Tennessee Secondary School Athletic Association},\textsuperscript{80} invalidated a rule prohibiting girls from playing on the all-male high school baseball team when no team was provided for girls. For the sake of analysis, the court accepted the contention that a state may segregate

\textsuperscript{70} 351 F. Supp. 69.
\textsuperscript{71} Id. at 74.
\textsuperscript{72} Id. at 74-75.
\textsuperscript{73} 361 F. Supp. 930.
\textsuperscript{74} Id. at 932.
\textsuperscript{75} 477 F.2d 1292; \textit{accord} Bednar v. Nebraska School Activities Ass’n, 531 F.2d 922.
\textsuperscript{76} Id. at 1295.
\textsuperscript{77} 430 F. Supp. 164.
\textsuperscript{78} Id. at 172.
\textsuperscript{79} Id. at 170. \textit{See also} Gilpin v. Kansas State High School, 377 F. Supp. at 1243 (unconstitutional to bar a girl from the boys’ cross-country team, when no team was provided for girls); Reed v. Nebraska School Activities Ass’n, 341 F. Supp. at 262 (invalidating a rule prohibiting female golfers from participating on the all-male high school golf team, when no team was provided for females); Haas v. South Bend Community School Corp., 259 Ind. at 523, 289 N.E.2d at 499 (relying on the rational relationship test, holding that a rule prohibiting male and female students from competing on the same teams or against each other in noncontact sports, such as golf, was reasonable on its face, but unconstitutional in its application, when no team was provided for girls).
\textsuperscript{80} 415 F. Supp. 569.
contact sports, but indicated that the classification of baseball as a contact sport was probably not reasonable. 81

Among federal court decisions, the district court's ruling in *Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association* 82 is the major deviation from judicial acceptance of "separate but equal" athletic programs. The district court ruled, under due process analysis, that the use of an irrebuttable presumption that all females are physically weaker than all males violated the plaintiff's substantive due process rights and declared invalid Title IX regulations denying physically qualified girls the right to compete with boys in interscholastic contact sports. 83 While rejecting the district court's analysis, the Sixth Circuit nevertheless upheld issuance of an injunction prohibiting the Association from enforcing a rule which barred from athletic competition those schools which chose to field mixed teams. 84

State courts in Pennsylvania and Washington have upheld challenges to sex-segregated athletic programs, using a strict scrutiny standard of review under their respective state equal rights amendments. In 1975, a lower appellate court in Pennsylvania invalidated an athletic association by-law providing that "[g]irls shall not compete or practice against boys in any athletic contest." 85 The plaintiffs challenged the segregation based on sex as applied to the sports of cross-country, basketball, soccer, baseball, field hockey, lacrosse, gymnastics, swimming, volleyball, golf, tennis, track, softball, archery, and badminton. The court firmly rejected the separate but equal doctrine, stating that "even where separate teams are offered for boys and girls in the same sport, the most talented girls still may be denied the right to play at that level of competition which their ability might otherwise permit them," thus denying equality under the law. 86 Although the state specifically exempted football and wrestling in its complaint, the court held "there can be no valid reason for excepting these two sports from our order in this case." 87

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81 Id. at 572.
82 443 F. Supp. 753.
83 Id. at 759.
84 641 F.2d 651. See also Morris v. Michigan State Bd. of Education, 472 F.2d at 1209, in which the Sixth Circuit affirmed a preliminary injunction striking down a Michigan High School Athletic Association rule prohibiting the exclusion of females from participation on the all-male high school tennis teams pursuant to a recently enacted state statute prohibiting segregation on the basis of sex in noncontact interscholastic activities. The Court noted that the statute was limited to noncontact sports and specifically excluded the question of the constitutionality of separate teams on contact sports from its ruling.
86 Id. at 52, 334 A.2d at 842. The court did not address the issue of whether boys would be allowed to play on girls' teams.
87 Id. at 54, 344 A.2d at 843.
In the same year, the Washington Supreme Court held that a rule prohibiting qualified girls from participating in interscholastic football on boys' teams was unconstitutional under the state equal rights amendment. The court dismissed arguments against participation by females based on the ability of the "majority" of girls, the risk of injury, or possible disruption of the girls' athletic program. The court found no compelling state interest and indicated that its result was required "all the more when the school provides no corresponding girls' football team on which girls may participate as players."

In striking down prohibitions against female participation in sports, the Pennsylvania and Washington courts rejected defendants' arguments about the innate physical inferiority of females and required a closer fit between the state objectives and the sex-based classifications. The Washington court went even farther in its determination that "separate but equal" programs inherently deprive some females of equal opportunity.

In contrast to the Washington and Pennsylvania decisions, the Massachusetts Supreme Judicial Court reserved the question of whether separate but equal female and male teams would be constitutional under its state equal rights amendment. In *Opinion of the Justices to the House of Representatives*, the court ruled that proposed legislation which flatly prohibited participation of girls with boys on contact sports teams under all circumstances would be unconstitutional.

2. The Separate But Equal Doctrine When Challenged By Male Plaintiffs

The issue of separate but equal athletic programs arises in a more limited context and is resolved in a different fashion in cases brought by male plaintiffs. In all of the reported instances, males have brought suit to join all-female teams only when no all-male team exists. Contrary to challenges by female plaintiffs, most federal and state courts uphold the exclusion of males from female teams even when no separate male team exists, if the overall opportunities for males are equal to or better than those for females. Thus, these courts have preserved the separate but equal model to the extent necessary to promote affirmative action goals for the purpose of redressing past disparate treatment against females.

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88 Darrin v. Gould, 85 Wash. 2d at 877, 540 P.2d at 893.
89 Id. at 875-77, 540 P.2d at 892.
90 Id. at 878, 540 P.2d at 893. Because no girls teams existed, the court did not rule definitively on the propriety of separate but equal programs.
92 Id. 836, 371 N.E.2d 426.
93 But see Attorney General v. Massachusetts Interscholastic Athletic Ass'n., 378 Mass. 342, 393 N.E.2d 284 (rule which provided that no boy could play on girls' team, though a girl could play on a boys' team if that sport was not offered for girls, could not be justified).
In *Clark v. Arizona Interscholastic Association* the Ninth Circuit upheld the exclusion of males from the all-female high school volleyball teams despite the lack of an all-male team. In order to promote equal athletic opportunities for both sexes and to redress past discrimination, the court determined that the state may provide separate teams and exclude males from female teams, even while permitting females to play on the male teams. There are several lower state court rulings in accord with *Clark* in upholding the exclusion of males from female teams even when no comparable male team in the sport is provided.

In contrast to *Clark*, the district court in *Gomes v. Rhode Island Interscholastic League* granted a preliminary injunction to a high school male to allow him to participate on the girls' volleyball team at his high school because it did not offer a separate male volleyball team. The court determined that Title IX and the fourteenth amendment both allow separate but equal teams to rectify past discrimination against females, but both sexes must have adequate athletic opportunities to participate in each sport offered. The First Circuit vacated the decision as moot because the season had ended and the plaintiff had graduated.

Echoing *Gomes*, the Massachusetts Supreme Court in *Attorney General v. Massachusetts Interscholastic Athletic Association* ruled that an Association provision that "no boy may play on a girls' team" violated

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94 695 F.2d 1126.
95 In Forte v. Board of Educ., North Babylon Union Free School Dist., 105 Misc. 2d 36, 40, 431 N.Y.S.2d 321, 324 (1980), the court held that redressing disparate treatment was a rational basis for excluding boys from a girls' high school volleyball team under the state education law, even when no male team existed, consistent with the aim of Title IX to prevent a takeover of female teams by males who already have a disproportionate advantage in overall athletic opportunities. The court in Mularadelis v. Haldane Cent. School Bd., 74 A.D.2d 248, 256-57, 467 N.Y.S.2d 458, 464 (1980), appeal dismissed, 57 N.Y.2d 760 (1982), held that the exclusion of males from a high school female tennis team did not violate Title IX or the fourteenth amendment, even when no male team existed, if overall athletic opportunities for males were equal to or better than those for females. In Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 992, 394 N.E.2d 855, 862 (1979), the court held that a high school athletic association may restrict membership on the school's volleyball team to girls, under the fourteenth amendment and the state equal rights amendment, when classification of teams based on sex was "based on innate physical differences between the sexes [rather than on] generalizations that are 'archaic'... 'romantic paternalism.'"
96 469 F. Supp. 659.
97 Id. at 664.
98 Id. at 664-65. On appeal, the United States Department of Justice, speaking on behalf of the Department of Health, Education and Welfare, disagreed with the district court and argued that HEW interpreted the Title IX regulations in the manner urged by the defendants, i.e., that the pivotal question under Title IX regulations is whether overall athletic opportunities for the excluded sex have been previously limited. Id. at 735 n.3. The National Federation of State High School Athletic Associations took a similar position. Id. It should be noted that all of the reported decisions antedate *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), which has been interpreted by one commentator to disallow "benign discrimination" except in those instances in which members of the benefitted sex have suffered disadvantages in the specific sports in question." J. WEISTART & C. LOWELL, THE LAW OF SPORTS 16 (1979) (Supp. 1985).
99 604 F.2d at 735-36.
100 378 Mass. 342, 393 N.E.2d 284.
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the state equal rights amendment and a state statute barring sex discrimination in education when no team was provided for males. The court examined and dismissed arguments against integration of male and female teams based on biological differences, safety, or affirmative action.

Constitutional analysis of educational sports policies challenged under the equal protection clause requires a "three-pronged inquiry": the strength of the governmental interests in denying equal opportunity; the importance of the challenger's interests being burdened or denied; and the nature of the classification in question (in this case, sex). Having considered the nature of the classification in Part I, I will continue the inquiry in the next two sections.

II. JUSTIFICATIONS FOR SEX SEGREGATION IN EDUCATIONAL SPORTS PROGRAMS: GOVERNMENTAL INTERESTS

The concept of "separate but equal" is used to justify rules excluding one sex, usually females, from participating with or against the other in educational sports programs. Rule makers assert that the state's interest in equal educational sports opportunity can be achieved only through sex based classifications because of innate sex differences. Other derivative arguments advanced in support of sex segregation in sports are safety, morality, and tradition. All are remarkably similar to justifications previously advanced in support of race segregation in education.

Since Brown, there has been increasing recognition that history, economy, and culture play significant roles in producing alleged "racial differences" and that integration results in gradual diminution of these so-called differences. A parallel argument can be made with respect to sex. Yet, judges and educators remain willing to recognize a broad range of average or generalized physical differences and to employ freely the separate but equal doctrine to support sex-segregated educational sports programs. The following discussion elaborates the arguments for sex segregation in educational sports and presents counterarguments to them.

101 Id. at 343, 393 N.E.2d at 285.
102 Id. at 357-363, 393 N.E.2d at 293-296.
105 See Comment, Plessy Revived, supra note 18, at 607-20.
106 Id. at 613.
A. Innate Physiological Differences Mandate Sex Segregation in Educational Sports Programs in Order to Provide Equal Opportunity for Both Sexes.

1. Argument

Rule makers assert that because of physiological differences between females as a class and males as a class, separate programs bear a substantial relationship to the school's ability to provide equal sports opportunities for both sexes. Schools argue that separate teams for boys and girls are necessary to protect and promote the participation of females in sports, i.e., if teams were accessible to both sexes, boys would monopolize all of the available positions because of their greater size and strength.

The underlying premise for this argument is based on average, not absolute, sex differences. In *Brenden v. Independent School District 742*, the defendants' expert witnesses testified that men are taller than women, stronger than women by reason of a greater muscle mass, have larger hearts than women and a deeper breathing capacity, enabling them to utilize oxygen more efficiently than women, run faster, based upon the construction of the pelvic area, which when women reach puberty, widens, causing the femur to bend outward, rendering the female incapable of running as efficiently as a male. These physiological differences may, on the average, prevent the great majority of women from competing on an equal level with the great majority of males.

In *Clark v. Arizona Interscholastic Association*, the Ninth Circuit held that the state may legitimately provide separate athletic teams and exclude boys from all-girl volleyball teams, while permitting girls to play on all-boys' teams, because high school males are "generally" taller and stronger than females, males "generally" have the potential to be better hitters and blockers in volleyball than females, and "average" physiological differences would cause males to displace females on co-ed teams. The court concluded that "there is no question that the Supreme Court allows for these average real differences between the sexes to be recognized or that they allow gender to be used as a proxy in this sense of it as an accurate proxy."

In the final ruling in *O'Connor v. Board of Education of School District No. 23*, the district court found separate sex-segregated basketball teams constitutionally permissible, but acknowledged that the policy of separate teams was "bottomed on a generalization about the relative bas-

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108 Id. at 1233 (emphasis added).
109 695 F.2d 1126.
110 Id. at 1127.
111 Id.
112 Id. at 1131.
114 545 F. Supp. 376.
ketball skills of boys and girls." The court recognized that the policy was arbitrary as applied to the plaintiff (an exceptional 11 year-old female athlete), and admitted that only participation on the boys' team, as opposed to the existing girls' team, would provide her with a level of competition sufficient to enable her to develop her skills. According to the court, most boys "on the whole" are better basketball players than girls and separate programs are necessary to provide equal opportunity for both sexes.

2. Counterargument

The average physical differences between males and females do not render all females athletically inferior to all males. From the outset, it must be noted that the only absolute innate differences between all females as a class and all males as a class are the absolute biological differences: women's capacity to menstruate, conceive, give birth, and lactate and men's capacity to produce sperm. While certain incidents of pregnancy per se may affect a woman's ability to perform physical tasks, there is no conclusive research to suggest that the female reproductive capacity, outside of pregnancy, affects athletic performance, or vice versa.

According to current data, the differences between females and males as to physique, one of the principal physiological determinants of an individual's capacity to meet the physical demands of sports, are

115 Id. at 379.
116 Id. at 381.
117 Id. at 379.
119 See Kay, Equality and Difference, supra note 17, at 27.
120 The data on the influence of the menstrual cycle on physical performance is equivocal. See Bunker, Issue 1. Part 2 & 3: Physiological Concerns of Women in Sport, WOMEN'S SPORT FOUNDATION AND U.S. OLYMPIC COMMITTEE ON WOMEN AND SPORTS: THE NEW AGENDA REPORT 1, 8 (D. Harris ed. 1983). Researchers have found no significant difference attributable to menstrual function on test factors such as pulse rate, blood, blood pressure, reaction time, static balance, grip strength, maximum oxygen uptake, carbon dioxide production, respiration, or time to exhaustion—for any exercise intensity. Id. at 3. While some women may experience physiological changes with the menstrual cycle, there is far more individual variation than conformity—and the differences are largely unaffected by exercise. Id. Another approach to the issue has been to survey the physical performance of outstanding athletes in relation to menstrual function. In the 1956 Olympics, six women in their menstrual cycles won gold medals. K. Blanchard & A. Cheska, supra note 4, at 244. Various U.S. female Olympians in 1964 and 1968 won gold medals and established world records during their menstrual cycle. Bunker, supra, at 3. While in the early stage of pregnancy, Evelyn Ashford won a gold medal and set a new world record in the 100 meters in the 1984 Olympics. J. Henderson, RUNNERS WORLD, April, 1985, at 10.
121 E. Gerber, J. Felshin, P. Berlin & W. Wyrick, THE AMERICAN WOMAN IN SPORT 431 (1974) [hereinafter cited as E. Gerber]. Physique can be described by anthropometrics (height, weight, width), body composition (fat, muscle, bone), and somatotyping (muscularity progressing from fatness to leanness). Id.
average, not absolute differences. Some females are superior in physique to some males, and some females outperform some males in tests of strength, endurance, and flexibility. While some females may be unable to perform athletically at the same level as some males, it is an arbitrary and scientifically inaccurate generalization that all girls and women are unable to do so, or that all boys and men are able to do so.

Within either sex at any given age, there is a wide range of individual physiological differences. The average physiological differences among members of the same sex far exceed the average differences between the sexes. Physiological differences between females and males change as boys and girls mature. Physiological determinants are inaccurate predictors of athletic performance, because athletic performance involves a variety of skill factors in addition to strength and size.

The skills needed for athletic performance are influenced by the interplay of psychological, cultural, and social influences. Because of past discrimination, it is impossible to know how much of the differential between female and male athletic performances is attributable solely to physiology. It is an unanswered question what sex differences in athletic performance would remain if nonphysiological factors, such as training, social support, financial aid and competitive opportunities, were equalized.

Recent studies indicate that the difference in athletic performance

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122 On the average, men are taller and heavier. The average adult female body contains only about half the muscle mass of the adult male body, and the average female body is considerably fatter. Females, however, are more buoyant and have lower centers of gravity. Id. at 448-49. When size is held constant, the average woman has only 80% of the strength of a man. Id. at 427-28; C. Klafs & M. J. Lyon, supra note 14, at 15-19; U.S. COMMISSION ON CIVIL RIGHTS, MORE HURDLES TO CLEAR: WOMEN AND GIRLS IN COMPETITIVE ATHLETICS 5 (1980) [hereinafter cited as MORE HURDLES].

123 See Wilmore, Exploding the Myth of Female Inferiority, 2 THE PHYSICIAN & SPORTS MED., May, 1974, at 55; Wilmore, They Told You You Couldn't Compete. . . ., WOMEN'S SPORTS AND FITNESS, June, 1974, at 40; Scott, Closing the Muscle Gap, Ms., Sept., 1974, at 49.

124 Id.

125 Sexes differ, supra note 14, at 83.

126 C. Klafs & M. J. Lyon, supra note 14, at 15-19.

127 Wurman cites examples of men with physiques smaller than those of average women excelling in major league baseball. R. Wurman, supra note 1, at 10. Wurman points out the following: William "Wee Willie" Keeler, who was 5'4-1/2", 135 pounds, referred to himself as the champion drinker of baseball, played until 1910, and amassed a lifetime batting average of .345, one of the ten highest recorded batting averages in baseball; Walter "Rabbit" Maranville, 5'6", 155 pounds, star of the Boston Nationals, lasted 23 years in the National League and still holds the league record for longevity; Phil "Scooter" Rizzuto, 5'6", 145 pounds, played for 15 years for the New York Yankees and was the American League's Most Valuable Player (MVP) in 1950 when he hit .324; Joe "Little Joe" Morgan, 5'7", 145 pounds, was named the National League MVP in 1975 and 1976; Freddie Patek of the California Angels is 5'5" tall; Ron Cey of the Chicago Cubs is 5'8" tall; and Onix Conception of the Kansas City Royals is 5'6" tall. Id.

128 See infra note 273 and accompanying text.

129 Theberge, supra note 5, at 350.

130 Id.

131 Id. The ultimate answer to what sex differences do result from physiological factors would
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between females and males is diminishing in certain sports, particularly those which maximize the benefits of the female's average greater buoyancy and endurance. In swimming and long-distance running, women have come to within ten percent of the best male times. Joan Benoit won the women's marathon in the 1984 Olympics in 2 hours, 24 minutes, 52 seconds, a time that would have captured the gold medal in the men's marathon in 1948, and would have won a silver medal in the men's marathon in 1952. On the other hand, gold medal-winner Don Schollander's world record-setting time in the 400-meter freestyle in the 1964 Olympics would have placed him fifth in the women's event in the 1980 Moscow Games.

The comparative research regarding athletic performance based on sex is just developing. "Perhaps the most arresting implication of the research up to now is not that there are undeniable differences between males and females, but that these differences are so small, relative to the possibilities open to them."

B. Sex Segregation in Educational Sports Programs is Necessary to Prevent Physical Injury to Females.

1. Argument

Courts frequently accept the argument that separate programs bear a substantial relationship to the interest of preventing injury to female participants. This argument is the product of a conclusory presumption that females are physically weaker, less athletically proficient, and more in need of protection from injury than males. This argument is posited most frequently in the area of contact sports such as boxing, wrestling, and football, but also occasionally in baseball and soccer.

vary among sports, and within each sport with respect to the position on the team, the rules used, etc.


134 Gelman, supra note 132, at 75.

135 Sexes Differ, supra note 14, at 83. The potential for sex bias exists in the measurement of biophysical aspects of women in general and sports women in particular because of the male sex of most researchers, the cultural expectations of work capacities of women, and the small pool of women athletes. Critical controversies thus remain unresolved and many questions are inadequately answered. E. GERBER, supra note 121, at 404.

The few investigators who have reported data on women have been so heavily quoted and their results so frequently dragged about as cannonade in defense of one or another issue, that one can only cross one's fingers and pray that their every procedure was meticulously completed and their interpretations were blessed with clarity and reason.

Id. at 403.

Lafler v. Athletic Board of Control, a case which arose outside of the educational sports context, is indicative of how courts summarily accept this argument, and in the process confuse the unrelated issues of injury to female reproductive organs and alleged greater female susceptibility to injury due to size and strength differences. In Lafler, the district court determined that it was unsafe for a female to compete against males in a Golden Gloves boxing championship, even though the plaintiff female boxer wore protective covering for her breasts analogous to protective cups worn to protect the anatomy of male boxers. The court used the fact that the plaintiff wore different protective covering from that worn by males to justify different treatment resulting in the total exclusion of females from Golden Gloves boxing. In addition, the court concluded that because boxing regulations use weight divisions as a proxy for strength, and because women generally have less muscle and bone tissue per pound of weight than men, the weight division regulations could not effectively protect women. "Boxing is a dangerous enough sport under the best of circumstances to justify rejecting the summary injection of unknown risks into the sport. . ."  

2. Counterargument

Females as a class are no more susceptible to sports injuries than males, even when playing contact sports. There is no scientific merit to the assertion that strenuous competition will cause reproductive injury to females, and there is no evidence to demonstrate that female athletes who are capable of competing with males are generally more prone to injury than male athletes. With equal medical attention, facilities, equipment, and coaching provided to both sexes, athletic injuries are sports-specific, rather than sex-specific.

Current research indicates that the argument that strenuous sports activity will cause injury to female reproductive organs is invalid. Because of the shock-absorbing fluids of the uterine cavity, female sex organs are far more protected than exposed male sex organs.
breasts are as amenable to protective equipment as male organs. Bruises to female breasts are uncommon, even in rugby or boxing. And contrary to some earlier beliefs, bruises to female breasts are not causal agents of breast cancer.\textsuperscript{146}

Research to date indicates no ill-effects from athletic competition on pregnancy, labor, or the health of women in later life. Women in excellent athletic condition have easier pregnancies, shorter periods of labor, easier deliveries, and fewer childbirth complications than other women. Many women show pronounced improvement in their athletic performance upon re-entry into athletic competition after childbirth.\textsuperscript{147}

Classification on the basis of sex is both over- and under-inclusive. The risk of injury in noncontact sports such as down-hill skiing, in which sex integration is more widely approved, may be greater than in contact sports. Arguably, the risk of injury in any sport might be higher for males than females because of the more violent manner in which males have been socialized to play sports. Moreover, if the risk of injury is too high for females, it may well be too high for students of either sex. Finally, weaker males who are also susceptible to injury are not excluded or "protected" by the sex-based classification.

C. Sex Segregation in Educational Sports Programs is Necessary to Avoid Psychological Injury to Females and Males.

1. Argument

Rulemakers assert that psychological differences between females and males justify sex segregation in educational sports programs. They rarely provide specific illustrations, examples, or data; in many sports cases, the term "psychological differences" is gratuitously added to the phrase "physical differences." In both Bucha v. Illinois High School Association\textsuperscript{148} and Ritacco v. Norwin School District,\textsuperscript{149} for example, the courts cited physiological data regarding height, weight, breathing capacity, and anatomy and concluded that physical and psychological differences justify separate sports programs.

Judges frequently rely upon cultural stereotypes to conclude that integration will create a negative social impact on females and males. Although there is some concern for the impact that losing might have on females, by far the greater concern is for the effect that integrated competition will have on males. Because it is not yet socially acceptable for a female to defeat a male,\textsuperscript{150} it is argued that competing against females

\textsuperscript{146} Id. Selden, supra note 141, at 52.
\textsuperscript{147} C. KLAAS & M. J. LYON, supra note 14, at 39-40.
\textsuperscript{148} 351 F. Supp. 75.
\textsuperscript{149} 361 F. Supp. 932.
\textsuperscript{150} See UNIVERSITY OF THE STATE OF NEW YORK, STATE DEPT. OF EDUCATION, DIVISION OF
will destroy the males' incentive to win. According to the court in *Hollander v. Connecticut Interscholastic Athletic Conference*:

The present generation of our male population has not become so decadent that boys will experience a thrill in defeating girls in running contests. It could well be that many boys would feel compelled to compete with girls on their own teams or adversary teams. In a world of sports, there is ever present a challenge, the psychology to win. With boys vying with girls in cross-country running and indoor track, the challenge to win, and the glory of achievement, at least for many boys, would lose incentive and become nullified.

2. Counterargument

This argument so patently accepts female subordination as a justification for segregation that it needs little refutation. There is no question that the underlying premise is unacceptably over- and under-inclusive. There is no factual evidence that psychological damage results from sex-integrated competition. Susceptibility to psychological damage from defeat is equally likely or unlikely for either sex. Winning and losing are given consequences for all participants in athletic contests, whether those contests are single-sex or mixed. Rulemakers are generally so focused on the possibility of psychological harm to males from competing with or against females that they entirely fail to consider the psychological damage of continued segregation upon both women and men.

D. History and Tradition Dictate Sex Segregation in Educational Sports Programs.

1. Argument


152 *Id.*

153 "The protection of boys from competition with athletically proficient girls who are physically smaller and allegedly have less athletic potential than boys is an anomalous state interest." Brown & Freedman, *supra* note 13, at 37 n.16.

154 In *Plessy v. Ferguson*, the Supreme Court held it was appropriate for the Louisiana legislature to "act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort and the preservation of the public peace and good order." 163 U.S. at 550.

155 The Third Circuit in *Vorchheimer v. School District of Philadelphia*, 532 F.2d at 882,
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lander v. Connecticut Interscholastic Athletic Conference, Inc., for example, the court upheld the exclusion of females from male cross-country running and indoor track teams, while taking judicial notice that important athletic events have always involved segregated competition: "Does this not signify that in the athletic world, by tradition and custom, it was never contemplated as a matter of policy, that males and females be joined together on a team and compete with other teams of similar groups so composed?"'

In Petrie v. Illinois High School Association, the court cited the "long-standing international and national tradition of having separate teams for males and females" to justify the exclusion of a male from a female volleyball team. In Bucha v. Illinois High School Association, the court took judicial notice of the fact that "at the pinnacle of all sporting contests, the Olympic games, the men's times in each event are consistently better than the women's," and upheld sex-segregated swimming teams, as well as restrictions applicable only to female participants, based on historical precedence. These arguments appear in other sports contexts as well. In State v. Hunter, the Oregon Supreme Court upheld criminal legislation excluding females from obtaining licenses for public wrestling by accepting as a proper legislative purpose the prevention of "ever-increasing feminine encroachment upon what for ages had been considered as manly arts and privileges."

2. Counterargument

First, it is untrue that females have never participated in, or are unable to participate in, competitive sports. Second, it is unprincipled to justify present discrimination because discrimination existed in the past. That women have traditionally been excluded from certain sports or prevented from competing against men, is merely an unfortunate reality in the long history of sex discrimination. This is hardly a defensible argu-

upholding sex-segregated public academic high schools reiterated the plaintiff's stipulation that "the practice of educating the sexes separately is a technique that has a long history and world-wide acceptance" and thus constitutes a "time-honored tradition." See also Williams v. McNair, 316 F. Supp. at 137 (the district court acknowledged the "long history" of sex-segregated education).

157 Id.
158 75 Ill. App. 3d 980, 394 N.E.2d 855.
159 Id. at 987, 394 N.E.2d at 861.
160 351 F. Supp. 69.
161 Id. at 74, 75; see also Magill v. Avonworth Baseball Conf., 364 F. Supp. at 1216 (citing Bucha).
162 208 Or. 282, 300 P.2d 455 (1956).
163 Id. at 288, 300 P.2d at 458.
ment for continued exclusion and segregation.164

In the infancy of "men's sports," women actively participated. But as the sports became more commercialized, they became more sex-stratified and exclusionary, and earlier female participation was forgotten. Nevertheless, the long history of female participation in competitive sports refutes the notion that females are incapable of competing.

Newspapers, magazines, radio, television and sports anthologies ignore or disparage women's participation and accomplishments in traditional male sports such as baseball, basketball and football, a history which includes occasional competition against men. For example, the recent baseball digest, The Ultimate Baseball Book, described as the "Rolls Royce of baseball books," traces baseball history in the United States from the first major professional league to the present day, yet there is no mention of any women's accomplishments in professional baseball.165 Women in fact played baseball as early as 1866 when baseball teams were organized at Vassar College.166 Professional baseball for women began in the 1880's with the Female Base Ball Club and reached its heyday in 1943, when Phil Wrigley, the owner of the Chicago Cubs, started the All-American Girls Baseball League.167 The league, intended to provide entertainment during World War II, lasted until 1954.168

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164 Schools also sometimes assert a cost argument against provision of sports for females on the basis that women's sports have no spectator appeal and thus do not produce revenue. This argument, which has questionable merit in the educational context, is beginning to diminish. Modern-day tennis exploded the myth that viewers will not watch women athletes. A crowd of over 30,000 in the Astrodome, as well as millions of television viewers, watched Billie Jean King, age 29, beat Bobby Riggs, age 55, in a $100,000 winner-take-all "Battle of the Sexes" singles tennis match in 1973. E. Gerber, supra note 121, at 218-19. As a direct result of the experience, King developed and successfully marketed the professional World Team Tennis League, in which the teams are sexually integrated. Player drafts indicate that women stars are the most desirable drawing cards. Id. at 219. As part of the 1983 Miller Lite Report on American Attitudes Toward Sports, women's and men's competitive contests were compared according to interest and excitement. Although 22% of all Americans say they are most interested in men's competitions, and only five percent are most interested in women's competitions, a clear majority (70%) say they are interested equally in both. Miller Brewing Company, Miller Lite Report on American Attitudes Toward Sports 184 (1983). While 37% believe men's events are the most exciting and 6% say women's events are, over half (53%) say they find women's and men's competitions equally exciting. Id. Women's gymnastics are the most favored sport in the Olympic Games, according to an American survey conducted in 1984. H. Frommer & M. Frommer, supra note 133, at 149. In response to the question, "If you were limited to one event and one event only, in the Olympics, which would it be," male respondents picked women's gymnastics by a slight margin over all other events; 80.6% of the women polled voted for the sport, giving it an overall plurality of 47.2%. Id.

165 D. Okrent & H. Lewine, The Ultimate Baseball Book (1985); see also R. Wurman, supra note 1, which makes no mention of women in baseball history.

166 E. Gerber, supra note 121, at 51, 56.

167 Id. at 119.

168 Id. See also Barney, Baseball-Babette Ruths, Newsweek, July 29, 1946, at 28. During its tenure, the league included ten clubs. The season included spring training, a regular season of 126 games, post-season playoffs, and all-star appearances. E. Gerber, supra note 121, at 119. Mildred "Babe" Didriksen, three-time gold medal winner in the 1932 Olympics, toured as the only female member of the House of David baseball team and once pitched an inning for the St. Louis Cardinals in an exhibition game against the Philadelphia Athletics. D. Wallachin-
Since that time women have played professional softball in the International Women's Professional Softball League and have attempted to play professional baseball with men in Major League Baseball.169

Women first played competitive basketball at Smith and Mt. Holyoke Colleges in 1892, the year after the sport was invented by Dr. Nesmith in Springfield, Massachusetts. Basketball remained solely a women's sport on the West Coast until 1910.170 The first women's intercollegiate games, in 1896, were played between the University of California, Berkeley and Stanford, and the University of Washington and Ellensburg Normal School.171

The longest-lived professional women's basketball team was the Red Heads, who first played as the All-American World's Champion Girls' Basketball Club in 1936.172 The Red Heads, who wore red wigs as a trademark, were highly skilled players who entertained crowds in matches against local men's teams, much like the Harlem Globetrotters. In 1971 they won 169 games against all-male teams playing by men's rules.173 The Women's Professional Basketball League began in 1978, operated for three years, and has reappeared twice since that time.174 Aside from the one position recently opened for a woman on the Harlem Globetrotters, the only professional opportunity for women basketball players today is in European or other overseas women's leagues.175

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169 E. Gerber, supra note 121, at 51. In the fall of 1984, the Sun Sox, an Atlanta business group, put together a minor-league women's baseball team, but was denied a franchise by the Class A Florida State League. According to the organizers, at least seven of the 55 female players who tried out for the team could play Class A level baseball and one was rated as already having major league baseball potential. Female Club Strikes Out, San Francisco Chron., Sept. 9, 1984, at 68, col. 1.

170 E. Gerber, supra note 121, at 51, 69.

171 Id. at 62. The American Athletic Union (AAU) began offering national championships for women in 1926 and by 1933, there were 45 AAU women's teams, sponsored by businesses, wealthy individuals, and civic organizations. Id. at 94. "Babe" Didriksen played for the Golden Cyclones, a semi-professional team made up of women from the Employers Casualty Company of Dallas. Id. Today the winners of the AAU National Championships represent the U.S. in the Pan-American Games. Id.

172 Id.

173 Id. at 95.


175 See Scarborough, Women's Basketball: No Life After College, San Francisco Chron., Mar. 2, 1985, at 41, col. 1. Two women have been drafted by the National Basketball Association (NBA), the all-male professional basketball league. Iowa's famous Denise Long, who once scored 93 points in a tournament game, averaged 69 points per game, and had a high school career total of 6,250 points, was drafted by the San Francisco Warriors in 1969, but was prohibited from playing in the NBA by Commissioner Walter Kennedy. E. Gerber, supra note 121, at 95. U.C.L.A.'s four-time All American Ann Meyers was drafted and signed by the NBA Indiana Pacers in 1979 for $50,000. She was cut from the roster after three days of tryouts. Wrong League, TIME, Sept. 17, 1979, at 70. In October 1985, Lynette Woodard, captain of the 1984 U.S. gold-medal-winning basketball team and holder of the National Collegiate Athletic Association women's career scoring record in basketball, was selected to be
A small number of women also participated in women’s professional football\textsuperscript{176} and in co-ed professional volleyball.\textsuperscript{177} However, the American women’s football and co-ed volleyball leagues failed after a few years due to financial problems.

III. HARMS RESULTING FROM SEX SEGREGATION IN EDUCATIONAL SPORTS PROGRAMS: CHALLENGERS’ INTERESTS

The Court in \textit{Brown v. Board of Education}\textsuperscript{178} did not openly rely upon history or counterarguments to the alleged state interests in segregation. Rather, the Court based its decision on the harms to the challengers resulting from segregation. According to the Court, “[o]ur decision . . . cannot turn on merely a comparison of . . . tangible factors . . . We must look instead to the effects of segregation itself on public education.”\textsuperscript{179} Educational opportunities for females in sports are limited by laws and regulations allowing unequal sports programs, segregation of physical education classes and athletic teams on the basis of sex, and the exclusion of females from participation with males in certain sports.\textsuperscript{180} The effects of sex-based classification in educational sports programs are felt by females, males, and society as a whole.

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\textsuperscript{176} The first woman ever to play for the professional Harlem Globetrotters. \textit{Globetrotters Hire First Woman Player}, San Francisco Chron., Oct. 8, 1985, at 64, col. 5-7.

\textsuperscript{177} In the early 1970’s, there were professional women’s football teams in Los Angeles, Toledo, Dallas, Detroit, Cleveland, New York, and Buffalo. E. Gerber, \textit{supra} note 121, at 220.

\textsuperscript{178} The International Volleyball League, initiated in 1976, was the first professional co-ed sports league in the U.S., but it failed after five years. September 1985 was the date targeted for the debut of the newly formed National Women’s Volleyball League. Levy, \textit{A Setting for Pro Volleyball}, \textit{WOMEN’S SPORTS & FITNESS}, Jan.-Feb., 1985, at 17.

\textsuperscript{179} 347 U.S. 483.

\textsuperscript{180} Discrimination in sports in schools is reflected in and reinforced by the exclusion of girls from amateur community or club athletic opportunities such as Golden Gloves Boxing; Pop Warner and Pee Wee football; Little League, Pony League, Babe Ruth League and American Legion Baseball; Bitty Basketball; and Pee Wee Hockey. See Martin v. International Olympic Committee, 740 F.2d 670 (denying injunction to force addition of 5,000 and 10,000 meter track events for women in the 1984 Summer Olympic Games under the fourteenth amendment and the Unruh Act, California’s public accommodation law); Lafler v. Athletic Bd. of Control, 536 F. Supp. 104 (denying injunction to permit female to box in the flyweight division of the Golden Gloves Boxing Competition, under the fourteenth amendment, the state equal rights amendment, and the Elliot-Larsen Act, Michigan’s public accommodation statute); Magill v. Avonworth Baseball Conf., 364 F. Supp. 1212 (denying injunction to allow ten-year-old girl to participate in community youth baseball league based on lack of state action); Lincoln v. Mid-Cities Pee Wee Football Ass’n, 576 S.W.2d 922 (Tex. Civ. App. 1979) (denying injunction to permit eight-year-old girl to play on all-male football team based on lack of state action); Junior Football Ass’n of Orange v. Gaudet, 546 S.W.2d 70 (Tex. Civ. App. 1976) (denying injunction to permit girl to play on all-male football team until age of puberty based on lack of state action). But see Clinton v. Nagy, 411 F. Supp. at 1399-1400 (granting an injunction to allow a twelve-year-old girl to play on an all-male football team in city recreation program because there was no showing that the individual plaintiff was unqualified to play nor more susceptible to injury than other, male players); Fortin v. Darlington Little League, 514 F.2d 344 (holding that the district court’s finding that injury will result from the physical differences between boys and girls, ages 8-12, was unsupported and ruling that the blanket exclusion of girls from the boys’ teams violated the fourteenth amendment); National Org. for Women v. Little League Baseball, Inc., 127 N.J. Super. 522, 318 A.2d 33 (holding that the
The significance of this inequality in educational opportunity becomes apparent when one considers the extent of the use of sex-based classifications in educational sports programs and the importance of sports in education and thereafter. Millions of high school and college students participate in extracurricular athletics. Interscholastic sports are the foremost extracurricular activity in most schools in our country. At both the high school and the college levels, athletics promote auspicious relations within the institution, garner alumni loyalty and donations, enhance community identification, promote the school's reputation, and create future employment opportunities for the participants.

Although education is not a fundamental right in the sense of requiring strict scrutiny, a student's interest in public education is subject to constitutional protection. The Court in Brown expressed constitutional concern for equality of educational opportunity, noting that education is an important interest in democratic society and one of the most important functions of government. The relationship between athletics and education is not clearly resolved by case law, but several courts have reached the conclusion that athletics is an integral element of a student's education. The pivotal question under equal protection analysis is not whether the female challengers have an absolute right to participate in interscholastic athletics, but whether the challengers can be denied benefits provided by the state for male students. As the Court noted in Brown, "[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."
A. Sex Segregation in Educational Sports Programs Denies Equal Educational Opportunities

1. Sex Segregation Produces Inequalities in Terms of Tangibles, Such As Funding and Availability of Programs.

Sex segregation in physical education classes and extracurricular athletic teams is predicated on the often fallacious assumption that equality underlies such programs with respect to what the Brown court termed "tangible factors," such as course offerings, facilities, quality of instruction, and funding. An examination of the measurable qualities in separate women's sports programs reveals inequities in variety and number of athletic opportunities available to participants, uniforms, equipment, facilities, recruitment, publicity, travel budgets, coaching, salaries, and scholarships.

According to a Title IX compliance investigation of collegiate athletic programs conducted by the Office for Civil Rights in 1982, seventy-one percent of the institutions examined offered fewer sports for women than for men. The report showed that women received only one-sixth of all athletic funding, although they numbered one-third of all intercollegiate athletes. The Title IX compliance review also showed great disparities in funding for athletic scholarships, publicity, and recruitment for females.

Title IX regulations, which many schools accept as the legal standard for measuring equality of athletic programs, in fact, allow unequal aggregate expenditures for separate male and female educational sports programs. The regulations require only "substantial proportionality" in athletic scholarships based on the percentage of female representation with respect to the total group of athletic participants, and "equivalent" rather than equal treatment of female and male athletes based on the current level of interest. Repeated attempts to amend Title IX specifically to exclude revenue-producing sports (i.e., football and men's basketball) from calculations of parity in athletic funding have failed. But the courts have allowed such exemptions.

Although the percentage of female high school and collegiate athletes has grown considerably over the past decade, the number of females participating in sports still lags far behind the overall number of males.

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190 Id. at 122 n.11; MORE HURDLES, supra note 122, at 18.
191 Seha, supra note 189, at 121-22.
193 See supra note 192. Note that the effect of these regulations is to give schools an incentive not to promote female participation.
largely because very few females participate in football, one of the most frequently offered high school and college extracurricular sports. Football is the extracurricular sport on which the most money is spent and the sport with the largest number of high school and college players. It is played almost solely by males.

Many schools and athletic associations have exclusionary policies that prohibit females from participating with males in contact sports, such as football. Title IX broadly defines contact sports to include basketball, football, ice hockey, rugby, wrestling, and boxing, and permits the exclusion (or segregation) of females in contact sports. Some schools also view baseball and soccer as contact sports and exclude participation by females. As a result of such policies, most high school and college female students participate in individual (noncontact) sports such as golf, tennis, bowling, track, and skiing or on women-only teams in softball, basketball, volleyball, and soccer.

The classification of sports on the basis of sex reserves the mainstream, well-publicized, potentially professional sports for males. While almost all males in physical education classes and on extracurricular teams play baseball, females play softball. Similarly, while most male teams play ice hockey, female teams play field hockey. The National Collegiate Athletic Association sanctions major intercollegiate championships in the most visible sports of football, baseball, ice hockey, wrestling, and water polo for men, but not for women; it offers championships in the less popular sports of field hockey and softball for women, but not

196 More Hurdles, supra note 122, at 12, 15, 23.
197 Id. at 23.
198 See supra note 7.
199 The Title IX regulations define the term "contact sports" to include basketball, football, ice hockey, rugby, wrestling, and boxing and other sports the "major activity of which involves bodily contact." 34 C.F.R. § 106.41(b) (1985).
200 Id.
201 Neither baseball nor soccer was formally classified as a contact sport by Title IX regulations. See contrasting views expressed in Magill v. Avonworth Baseball Conference, 364 F. Supp. at 1216 (court took judicial notice of baseball as a contact sport); Fortin v. Darlington Little League, 376 F. Supp. 479 (district court took judicial notice of baseball as a contact sport); Hoover v. Meikeljohn, 430 F. Supp. at 166 (soccer classified as a contact sport); Carnes v. Tennessee Secondary School Athletic Ass'n, 415 F. Supp. at 572 (baseball not reasonably classified as a contact sport); National Org. for Women v. Little League Baseball, Inc., 127 N.J. Super. at 529, 318 A.2d at 36-37 (baseball not more injurious for females of ages eight to twelve than for males in the same age group). See also 'Contact': Soccer's Red Herring, IN THE RUNNING, Fall, 1978, at 3.
202 More Hurdles, supra note 122, at 12, 15, 38-40. Some of the all-female teams use equipment different than that used by male teams. The U.S. Girls' and Women's Basketball Rules Committee adopted a smaller basketball, 2 ounces lighter and 1-1/2 inches smaller in circumference, for women's college basketball in 1984-85. Advocates of the new ball foresaw slamdunks, fancy passing, nifty ball handling and more fast breaks. Opponents protested that the very thought of a different ball "strips the women's game of dignity." Hingst, The Incredible Shrinking Ball, WOMEN'S SPORTS & FITNESS, Jan.-Feb. 1985, at 76. The name of the "smaller ball" was officially changed to "women's ball." Hutchinson, WOMEN'S BASKETBALL COACHES ASSOCIATION BACKBOARD BULLETIN, June, 1984, at 1.
203 More Hurdles, supra note 122, at 12, 38-40.
for men.\textsuperscript{204}

A more subtle inequality in educational programs exists in the very design of athletic games, which form the basic curriculum of physical education and the core of extracurricular sports activities.\textsuperscript{205} Most athletic games are designed for males and depend on size and strength for proficiency.\textsuperscript{206} This sex bias both precipitates and perpetuates sex segregation in sports and creates a concomitant disincentive for female participation. This bias could be diminished by placing greater emphasis on sex-neutral sports, such as running, swimming, juggling, yoga, dance, weight lifting, and martial arts.

2. Sex Segregation Produces Inequality in Terms of Intangibles, Such as Social and Economic Parity.

Education is one of the primary means of socialization in our culture and is one of the principal ways in which sex role expectancy norms are transmitted.\textsuperscript{207} As the Court noted in Brown, "[Education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."\textsuperscript{208}

The major premise of segregation in sports on the basis of sex is the inherent inferiority of females, as a class. Girls and women internalize the stigma of inferiority projected by sex discriminatory school athletic policies. Segregation and exclusion of females from full participation in educational sports programs on the basis of average sex differences, rather than skill, imposes sex role stereotypes on females, inhibits their learning, denies them socially important status as school athletes, deprives them of opportunities for public exposure and prestige, reduces possibilities for them to obtain financial aid to attend college, and forecloses employment opportunities.\textsuperscript{209}

The "systematic demoralization [of sex role stereotyping] takes its toll on females in many ways, but none is more destructive than its impact on women's decisions about the roles they are to fulfill in society."\textsuperscript{210} Studies reveal that sex role conditioning in American education

\begin{align*}
\textsuperscript{204} & \text{See National Collegiate Athletic Association, Blue Book of College Athletics} \ 494 (1985). \\
\textsuperscript{205} & \text{Sage, supra note 1, at 5.} \\
\textsuperscript{206} & \text{Structural and physiological factors favor the male in sports activities requiring strength; thus, he will generally dominate in traditional athletic games. C. Klafs & M. J. Lyon, supra note 14, at 19, 24.} \\
\textsuperscript{207} & \text{See Bem & Bem, Case Study of a Nonconscious Ideology: Training the Woman to Know Her Place, reprinted in Beliefs, Attitudes and Human Affairs 89 (D. Bem ed. 1970) [hereinafter cited as Bem & Bem].} \\
\textsuperscript{208} & \text{347 U.S. at 493.} \\
\textsuperscript{209} & \text{See Note, Teaching Woman Her Place: The Role of Public Education in the Development of Sex Roles, 24 Hastings L.J. 1191, 1209-11 (1973); Holland & Oglesby, supra note 3, at 85.} \\
\textsuperscript{210} & \text{Karst, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1,} \\
\end{align*}
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directly affects the motivation, achievement, and eventual job choices of students. The imposition of limiting sex roles in educational sports programs contributes to the great disparity in occupational aspirations and adult employment patterns of females and males.

Interscholastic and intercollegiate sports offer opportunities for public success and upward mobility that exist nowhere else in our society. Denying females the public exposure, prestige, and confidence that come to student athletes is a harm in itself, beyond the possible loss of employment opportunities. According to various educators, athletic prowess is the single most important criterion for high status among teenagers. When schools promote the view of females as athletically capable, sex role expectancies are diminished and female athletes participate in greater numbers and with greater social acceptance. In Iowa, where high schools have historically supported female participation in sports, high school female athletes are glorified in the press and idolized on the softball fields and basketball courts. The percentage of girls participating in educational sports is 48.8 percent, higher than in any other state, and girls' sports generate sufficient gate receipts to support the programs.

B. Sex Segregation in Educational Sports Programs Perpetuates the Lack of Equal Employment Opportunities in Amateur and Professional Sports.

The economic interests of students in educational athletic programs has not been accorded clear constitutional protection. Yet, there can be no question that sex segregation in educational sports programs perpetuates sex segregation at the amateur and professional levels and


213 MORE HURDLES, supra note 122, at 6, 15.

214 Id.

215 See supra notes 186-187 and accompanying text.

216 Most amateur and professional sports competitions are sex-segregated, e.g., archery, basketball, bowling, diving, golf, gymnastics, fencing, ice skating, sailing, shooting, skiing, softball, swimming, tennis, and track. Mixed doubles in tennis, ice dancing and figure skating, and occasional co-ed match play in golf are notable exceptions. Women are almost totally excluded from amateur and professional baseball, football, ice hockey, soccer, boxing, and wrestling.

In most of the thirty-one sports in the 1984 winter and summer Olympics, females and males competed in separate events: track and field, archery, basketball, canoeing, cycling, fencing, field hockey, gymnastics, team handball, rowing, shooting, swimming, volleyball, luge, speed skating, alpine skiing, Nordic skiing, and some figure skating events. Ten sports were offered only for males: boxing, judo, modern pentathlon, football (soccer), weight lifting,
forecloses employment opportunities for women in most professional team sports. Interscholastic and intercollegiate teams are the source of most American world class amateur athletes and the pool from which most American professional athletes and coaches are drafted.\textsuperscript{217} Women denied the opportunity to participate in high school or college baseball, ice hockey, or football, and women who participated on women-only basketball or soccer teams, are ill-equipped to compete for jobs as athletes, coaches, officials, administrators, trainers, journalists, or broadcasters in the world of major league professional team sports. Unequal educational opportunities severely compromise the relative competitive position of women in the professional sports marketplace.

Although there are increasing professional opportunities for women in individual sports which can be financially marketed on a sex-segregated basis, such as golf, tennis, bowling, and track, there are virtually no professional opportunities for women in team sports, even on a sex-segregated basis.\textsuperscript{218} Twenty-five years after the enactment of Title VII of the Civil Rights Act of 1964,\textsuperscript{219} the major federal legislation guaranteeing equal employment opportunity, there are no women athletes or coaches and almost no officials participating in America's professional sports leagues: Major League Baseball, the National Basketball Association, the National Hockey League, the National Football League, the United States Football League, the Major Indoor Soccer League, or the North American Soccer League.\textsuperscript{220}

Outdoor professional soccer and minor league baseball provide the

\textsuperscript{217} Most of baseball's top major league players now come off campus diamonds. In 1981, for example, every one of the Houston Astros' 30 draft picks came from a college team. R. \textsc{Wurman}, supra note 1, at 50. Professional football and basketball teams also recruit most of their players directly out of the college ranks. \textit{Moore, Basketball's New Game Plan}, \textsc{Fortune}, Apr. 15, 1985, at 20. \textit{Who's Who in Pro Basketball} cites only two professional basketball players, Darryl Dawkins of the New Jersey Nets and Moses Malone of the Philadelphia Seventy-Sixers, who did not attend college. \textit{Who's Who in Pro Basketball}, \textsc{Sport World}, Apr. 1984, at 42, 53.


\textsuperscript{220} There are no female players, coaches, or officials employed by Major League Baseball, telephone interview with Tracy Freireich, Major League Baseball Players' Association Executive Assistant (Nov. 7, 1985); the National Basketball Association (NBA), telephone interview with Mary Saetela, NBA Public Relations Assistant (Sept. 6, 1985); the National Hockey League (NHL), telephone interview with Gary Meagher, NHL Director of Information (Sept. 6, 1985); the National Football League (NFL), telephone interview with Jesse Batten, NFL Public Relations Assistant (Sept. 6, 1985); the United States Football League (USFL), telephone interview with Bob Rose, USFL Director of Communications (Sept. 6, 1985); or the Major Indoor Soccer League (MISL), telephone interview with Jeremiah F. Wright, MISL Public Relations Assistant (Sept. 6, 1985).
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only exceptions to this overwhelmingly male-dominated scenario. Neither league has any female athletes or coaches. The North American Soccer League, has one junior lineswoman and two off-field female officials (statisticians). And, there is one female umpire among the 233 professional baseball umpires. The sole woman has been umpiring at the minor league level for nine years and has advanced as far as class AAA, still one step from the major leagues.

Female sportswriters and commentators litigated to gain equal access to the locker rooms, press boxes, and sports writers' associations. Despite the removal of legal barriers in this profession, as with umpires, the effects of prior exclusion and segregation in sports result in only a handful of women journalists, broadcasters, or public information directors working in professional sports media.

Segregation in sports also precipitates unequal pay and unequal prize money for women. Courts and legislatures fail to see females and males as similarly situated in sports and fail to recognize the effects of past discrimination in sports. The courts have determined that no discrimination exists under Title VII, when the coaches' pay is based on the sex of the players. The courts have upheld disparate salaries, benefits, and conditions when the work of coaches for female teams (primarily female) is different from that of coaches for male teams (almost exclusively male) because of smaller or underdeveloped athletic programs for women. The sports-minded male drafters of Title VII even envisioned a possible *bona fide* occupational qualification for professional ball players to be male.

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221 Telephone interview with Cynthia Grear, NASL Executive Assistant (Sept. 6, 1985).
222 Wall St. J., April 8, 1985, at 15, col. 4. All but six of the umpires are white males. *Id.*
224 In Ludtke v. Kuhn, 461 F. Supp. 86 (S.D.N.Y. 1978), the court granted an injunction prohibiting the New York Yankees from enforcing the policy of the Major League Baseball Commissioner excluding female sports reporters from clubhouse locker rooms in a city-owned stadium, a public accommodation. Sportswriter Elinor Kaine won an out-of-court settlement after being refused the right to sit in the press box of the Yale Bowl. E. GERBER, supra note 121, at 217. Stephanie Salter, a writer for Sports Illustrated, threatened legal action in order to gain admission to the annual banquet of the New York chapter of the Baseball Writers Association of America. *Id.*
227 During the debate of Title VII by the Senate, Senators Clark and Case offered an interpretive memorandum. According to their memo, the *bona fide* occupational qualification (BFOQ) exception to Title VII creates:

*a limited right to discriminate on the basis of religion, sex or national origin where the...
Discriminatory public regulation of professional sports reflects and reinforces sex segregation in the educational sphere and contributes to employment discrimination. Almost all states have established athletic boards or commissions to regulate competition in public spectator sports, such as horse racing, wrestling, and boxing, in order to protect and promote the public interest in the legal, safe, and "sportsmanlike" conduct of the sport. Just as schools and athletic associations frequently establish policies prohibiting females from participation in contact sports, state athletic boards often promulgate rules excluding or segregating females from public competition in such activities. These boards issue licenses or permits solely to males, thus denying females the right to earn a living in publicly regulated sports.

During the past three decades, women have repeatedly challenged the denial of licenses for employment as jockeys, wrestlers, and boxers under the equal protection clause of the fourteenth amendment, state equal rights amendment, or state public accommodation statutes. Although they have been increasingly successful in these challenges, women are still denied equal opportunities in publicly regulated sports.

Just as racial segregation in educational facilities was accompanied by a reason for the discrimination that was a bona fide occupational qualification. Examples of such legitimate discrimination would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion. (Emphasis added.)

There are no reported federal cases dealing with the application of Title VII to professional athletics. Thus, the Clark/Case interpretation of the BFOQ as it applies to professional sports has not been judicially reviewed in the context of sports. The courts, however, have interpreted the BFOQ exception very narrowly, and such an exemption for professional sports is unlikely under Title VII. Title VII case law and analysis were cited in the female professional umpire case decided under New York state employment practices law. New York State Div. of Human Rights v. New York-Pennsylvania Prof. Baseball League, 36 A.D.2d 364, 367-68, 320 N.Y.S.2d 788, 792-93 (1971).


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229 Id. at 147.
230 See Rubin v. Florida State Racing Comm’n, Civil No. 6819113 (11th Cir. Dade County, Fla., 1968) (upholding claim of female petitioner for an apprentice jockey’s license); Kusner v. Maryland Racing Comm’n, Civil No. 37044 (Maryland Civ. Ct., Prince George’s County, Md., 1968) (upholding claim of female plaintiff for a jockey’s license).
by official segregation in other public facilities, sex segregation in sports extends beyond educational facilities and into the regulation of sports facilities, arenas, athletic clubs, and places of recreation. While public accommodation law requiring that public sports and recreational facilities be made available on a nondiscriminatory basis has developed extensively in the area of race discrimination, the same is not true in the area of sex discrimination.233

Nearly forty states have enacted statutes prohibiting sex discrimination in public accommodations,234 but these statutes are limited in their impact. Several of the states that prohibit sex discrimination allow exemptions for certain forms of discrimination;235 some statutes exempt particular places such as public restrooms, showers, or sleeping quarters;236 some allow establishments to apply to the state civil rights commission for exemptions;237 and some permit unintentional discrimination if justified by business necessity.238 The courts uphold sex-based classifications under state public accommodations laws through narrow interpretations of equality,239 broad interpretations of the private club

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233 Title II of the Civil Rights Act of 1964, Pub. L. No. 88-352, Title II, 78 Stat. 241, 243 (1964) (codified as amended at 42 U.S.C. §§ 2000a-2000a-6 (1982), which prohibits denial of full and equal enjoyment of places of public accommodation, has been a useful tool for blacks and other minorities seeking equal access to athletic and recreational facilities. Title II prohibits disparate treatment or service and bans facilities segregated on the basis of race, creed, color, religion, or national origin under Jim Crow-type statutes or customs. The courts have liberally construed Title II to prohibit the inconvenience, unfairness, and humiliation of discrimination.


238 Id.

239 See, e.g., Martin v. International Olympic Comm., 740 F.2d 670. In Martin, 82 women run-
exemption, and strict interpretations of state action requirements.

C. Sex Segregation In Educational Sports Program Denies Equal Citizenship Opportunities

Sex-based classifications in educational sports programs, based on average differences, violate equal protection and perpetuate distinct and limiting sex roles for females (and males). The fundamental interest underlying anti-discrimination legislation is "the right to be treated as a person... a fundamental right belonging to all human beings. It is also a natural, inalienable and absolute right." Sex-based classifications that treat females as a universal class violate the rights of individual women to realize their potential as human beings, free of sex role stereotyping.

Psychologists Bem and Bem argue that average biological differences should not be used to support sex role stereotyping in education. They illustrate their point with the following analogy:

[Suppose] it could be demonstrated that black Americans, on the average, did possess an innate better sense of rhythm greater than white Americans. Would that argue that a particular black youngster should have his unique
characteristics ignored from the very beginning and that he should be specifically socialized to become a [jazz] musician? We don't think so. Similarly, as long as a woman's socialization does not nurture her uniqueness, but treats her only as a member of a group on the basis of some assumed average characteristic, she will not be prepared to realize her own potential.244

Education is an experience of mind, soul, and body, and each girl or woman is entitled to develop her unique individual potential, including her physical potential. Segregation and exclusion of females in educational sports programs diminish opportunities for the health and physical development of females. Sports participation builds stamina, produces physical fitness, creates mental toughness, fosters good health, and provides bodily enjoyment. Females who become less physically active during their developing years experience deterioration of strength and cardiovascular endurance and an increase in the accumulation of body fat. Their male counterparts, on the other hand, are encouraged to improve their physical well being.245

In addition to depriving individual women of opportunities for physical development, sex segregation in sports adversely affects women economically, socially, and politically. It excludes women from power, fosters the myth of male supremacy, limits occupational choices for women, perpetuates the sex role stereotype of women as passive and weak, and invalidates the expressive/feminine aspect of sports.

As one of the principal vehicles of socialization in our society, public sports are an avenue to power. Females, relegated to cheerleading on the sideline of mainstream public sports, are similarly viewed as outside the mainstream of economic and political power. The universal maleness of mainstream public sports reinforces the myth of overall male supremacy in our culture.246 Women's alleged inability to perform the physical demands of sports is used as a justification to limit women's participation in the physical activities of work as fire fighters, police officers, soldiers, and prison guards.247 The restrictions against women's participation in contact sports reinforces a view of women as unable to run, box, hit, tackle, or wrestle in or outside of the sports context. This portrayal of women as passive, weak, and defenseless increases the risk that women will continue to be the primary victims of personal violence in our society.

244 Bem & Bem, supra note 207, at 93.
245 MORE HURDLES, supra note 122, at 5 (citing Wilmore, Physiological Principles and Practices of the Conditioning Process, in ATHLETIC TRAINING AND PHYSICAL FITNESS 187 (1977)).
246 Males as a class are glorified in our culture for their dominance in sports. Billboards advertising Volvo throughout the San Francisco-Oakland area during Superbowl 1985 simply and unabashedly proclaimed the message, "Volvo and the Superbowl: Symbols of Supremacy!" Femaleness, on the other hand, is a synonym for lack of proficiency in sports. One of the greatest insults to a woman (or a man) is, "You throw like, run like, bat like . . . a girl!"
247 Cf. Kornblum, supra note 118, at 393.
Sex segregation in sports simultaneously harms males by reinforcing an exclusive role for boys and men as aggressive, violent, and combative. Few would deny the masculinism or militaristic parallels of competitive sports. The tradition and history of American sport defines it as a training in masculinity, misogyny, and male supremacy. Sports are one of the last strongholds of the dichotomous traditional sex role definitions of masculine and feminine. Male athletes and nonathletes are harmed by the exaggerated emphasis on the athletic element of the male role. The male athletic participant experiences problems with expressing pain, risking injury, resolving individual versus group needs, and fulfilling expectations. The nonathlete experiences fear of failure and self-dislike because of nonmembership in the elite cultural male peer group. Males, stereotyped as aggressive, combative athletes in an exclusively male domain, are discouraged from more traditionally defined “female” occupations. Because feminine qualities are negatively coded for boys and men, and therefore inappropriate, males must struggle to avoid and deny the feminine aspects of self.

Because of segregation and exclusion, society loses the special contribution individual women could make to the development and performance of sports. Although female participants might well adopt the prevailing male sport ideology or adapt to male expectations to succeed, the influx of women into the world of competitive sports would affect, in some fashion, the institution of sports in our culture. Breaking down the symbols of sex inequality reflected by the use of average or stereotypic sex differences in educational sports programs would contribute to the liberation of females and males from confining images of “woman’s role” and “man’s role.” It may well be that females will never be free to succeed with males until males are free to fail with them.

IV. SEX SEGREGATION IN EDUCATIONAL SPORTS PROGRAMS UNDER MODERN EQUAL PROTECTION ANALYSIS

The Supreme Court to date has not addressed the issue of sex segregation in educational sports. However, modern equal protection analysis suggests that sex segregation in sports, like other forms of discrimination once sustained by the “separate but equal” defense, is unconstitutional. Under equal protection analysis, the importance of the challengers' interests being denied or unequally burdened must be weighed against the

248 See Williams, Equality Crisis, supra note 3, at 183.
249 Stein & Hoffman, Sport and Male Role Strain, 34 J. SOC. ISSUES 136, 137 (1978).
250 Id. at 138-46.
251 Id. at 147-48.
strength of the state's interests served in denying or infringing upon the opportunity. To this end, equal protection analysis employs three levels of judicial review: the "rational relationship" test, intermediate scrutiny, and strict scrutiny.

For over a century after the enactment of the fourteenth amendment, sex-based classifications were subjected to the lowest standard of review, the rational relationship test. In 1971, in Reed v. Reed, the Supreme Court paved the way for more intensive scrutiny when it held for the first time that women and men were "similarly situated" under the fourteenth amendment, invalidating a state statute excluding women from serving as estate administrators.

Craig v. Boren in 1976 introduced the intermediate standard of review: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." Applying this standard, the court invalidated a state law establishing a lower drinking age for females than for males. The Court held that restricting the age at which males could purchase alcoholic beverages was not "substantially related" to the state's interest in traffic safety.

Five years later, the Court heightened the Craig standard in Missis-

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253 Most classifications relating to economic and social welfare legislation are subject to the rational relationship test. To survive this level of review, the classification need only bear a reasonable relationship to a legitimate legislative purpose. See, e.g., City of New Orleans v. Dukes, 427 U.S. 297 (1976) (exclusion of pushcart food vendors except for those with eight years consecutive experience held actionable under equal protection).

254 Classifications made on the basis of sex are subject to intermediate scrutiny. To survive this level of review, the classification must serve an important governmental objective and must be substantially related to the objective. See, e.g., Craig v. Boren, 429 U.S. 190 (invalidating statute that provided a lower drinking age for women than men under equal protection).

255 Classifications made on the basis of race and national origin are suspect and require strict scrutiny. To survive this level of review, the classification must serve a compelling state interest. See, e.g., Loving v. Virginia, 388 U.S. 1, 11 (1967) (invalidating an anti-miscegenation statute under equal protection); Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (applying strict scrutiny to invalidate racial segregation of public schools in the District of Columbia under the due process clause of the fifth amendment); Korematsu v. United States, 323 U.S. 214, 216 (1944) (enunciating, but not applying, the strict scrutiny doctrine to a racial classification).

Classifications that abridge "fundamental rights" explicitly or impliedly guaranteed by the U.S. Constitution are also subject to strict scrutiny. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (right to travel); Reynolds v. Sims, 377 U.S. 533 (1964) (right to vote); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (right to procreate).


256 See, e.g., Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872) (upholding exclusion of women from the legal profession on the basis of sex); Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding statute prohibiting women from bartending except for wives or daughters of male owners).


258 Id. at 77.

259 429 U.S. 190.

260 Id. at 197.

261 Id. at 204.
sippi University for Women v. Hogan.\textsuperscript{262} The Court upheld the challenge of a male student to attend an all-female nursing school as a denial of equal protection. The Court noted the potential harm of stigma to women resulting from sex-based classifications\textsuperscript{263} and cautioned against acceptance of asserted government objectives that reflect archaic and stereotypic notions.\textsuperscript{264} According to Hogan, the government bears the burden of establishing an "exceedingly persuasive justification for the classification."\textsuperscript{265} The test formulated by Justice O'Connor in Hogan demands a close fit\textsuperscript{266} between the actual government objectives\textsuperscript{267} and the sex-based classification.\textsuperscript{268}

Classifications based on average differences are inherently over-inclusive or under-inclusive and thus fail to attain the close fit now required by the intermediate level of scrutiny. The use of average sex differences to justify sex segregation in educational sports programs is constitutionally impermissible because it creates the harm of stigma to women,\textsuperscript{269} ignores the abilities of individual females,\textsuperscript{270} perpetuates societally imposed sex roles,\textsuperscript{271} and reinforces the effects of past oppres-
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Classifications based on sex alone without reference to levels of skill in particular sports reflect the kind of "archaic and overbroad generalizations" which are impermissible under the elevated Craig/Hogan standard. These classifications are particularly inaccurate not only because differences in size and strength are average and not absolute, but also because athletic performance involves other important abilities, such as timing, speed, strategic acumen, and technique, which are not encompassed within the concept of "average physical differences" between the sexes.

Under the Hogan test, because the challengers' interests in equal opportunity in educational sports embody the same kinds of harms which the Court in Brown concluded were impermissible, the challenger's interests outweigh the states' interests in promoting women's participation in sports, in maintaining history and tradition, and in protecting women from injury. When compared to the magnitude of the harms to women, to men, and to society, none of the states' purported interests rise to the level of an "exceedingly persuasive justification" required by Hogan. As the Court in Hogan pointed out, "If the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."273

Equally significant is the absence of a substantial relationship between the asserted governmental objectives and the use of sex-based classifications in sports. Less restrictive alternatives are available that would better promote the government's legitimate interest in providing equal educational sports opportunities for both sexes.274 The Court in

272 See, e.g., Lafler v. Athletic Bd. of Control, 536 F. Supp. at 106-07 (asserting, in dicta, that separate competitions for men and women in boxing were not a violation of equal protection because the rules were not designed to accomodate the participation of women. Because of physical differences between men and women, a new rule would be required in order for women to participate in boxing, i.e., a rule providing for protective covering for women's breasts, in lieu of the prior rule requiring the traditional protective cup designed for the "unique anatomical characteristics of men."). See also Kings Park Cent. School Dist. No. 5 v. State Div. of Human Rights, 74 A.D.2d 570, 424 N.Y.S.2d 293 (applying the New York Human Rights Law, the court justified differential salaries for female coaches of women's teams versus male coaches of men's teams due to the historically underdeveloped status of the women's athletic program and approved pay scales set under a collective bargaining agreement which utilized a code system by which sports activities were graded for compensation, using factors such as number of students on teams, compensation previously paid for position, and practice followed at other schools (emphasis added); accord State Div. of Human Rights v. Syracuse City Teachers Ass'n, Inc., 66 A.D.2d 56, 412 N.Y.S.2d 711.

273 458 U.S. at 725. Compare Rostker v. Goldberg, 453 U.S. 57 (1981) (opinion of Rehnquist, J.) (the Court upheld the male-only draft registration statute, summarily accepting the underlying premises that females as a class are unable to effectively engage in, and should be protected from, combat). See Williams, Equality Crisis, supra note 3, and Kornblum, supra note 118, for cogent criticism of this case.

Hogan did not address the issue of less restrictive alternatives, because it found that the state clearly failed to satisfy either the "important state interest" or the "substantially related" elements of intermediate scrutiny. Under the Hogan mandate, consideration of the alternatives to a sex-based classification would seem to be imperative to assure a substantial relationship between the classification and the state objectives. In its earlier opinion in Orr v. Orr, the Court observed that "even statutes purportedly designed to compensate for and ameliorate effects of past discrimination must be carefully tailored."277

Sex-neutral rules based on factors such as competitive skill and ability or physical attributes such as height, weight, or strength are obvious alternatives to segregation based on sex.278 Such rules would enable schools to group students according to athletic potential, regardless of sex, thus ensuring equal opportunity and equitable competition. Although this model enhances opportunities for more skilled female athletes, it may be detrimental to females as a class. Female athletes may be unable to compete in integrated sports programs in numbers proportionate to males and may be discouraged from participation in integrated sports programs because of lack of role models, cultural attitudes about appropriate sex roles, or disparate employment opportunities.279 Thus, integrated sports programs may result in de facto segregation if few females are willing or able to qualify for the limited numbers of competitive positions available.280

The important and legitimate state's interest in promoting equal opportunity in educational sports programs may best be served by a vigorous program of affirmative action, not by outmoded reliance on the separate but equal doctrine. Under an affirmative action approach, all-female teams could be maintained for a period of time, parallel to teams open on a competitive basis to both sexes. Because of past inequities in funding, training, competitive opportunities, and social support, affirmative action is justified and may be necessary to enable females to realize

275 458 U.S. at 730.
276 See, e.g., Note, Women's Prisons, supra note 274, at 1188 (arguing that "[c]onsideration of less restrictive alternatives is one of the best means of assuring a factor stressed in Hogan: the substantiality of the relationship between the classification and the objective." (Footnote omitted)).
277 440 U.S. at 283.
278 Various structural alternatives to segregation have been suggested, such as establishing teams with equal numbers of male and female members, three teams with one integrated and two segregated, or two teams with one integrated and one for the sex which has been previously subjected to discriminatory and limited opportunities. See, e.g., Clark v. Arizona Interscholastic Ass'n, 695 F.2d at 1131.
279 Brown & Freedman, supra note 13, at 36.
280 See Hitchens, A Litigation Strategy on Behalf of the Outstanding High School Female Athlete, 8 GOLDEN GATE L. REV. 423 (1979) (discusses the dilemma faced by litigators confronted with the rigid integration versus segregation (but not both) approach used by most courts in resolving equality controversies in educational sports programs).
their athletic potential. This notion of affirmative action is not inconsistent with the holding in Hogan. The Court in Hogan rejected the asserted governmental objective of affirmative action in light of the traditional dominance of nursing by women, but left open the possible use of sex-segregated education if the objective was truly one of affirmative action.

**CONCLUSION**

Masculinity and femininity, as traditionally defined and displayed in sport, reflect and reinforce a Janus-faced imperative of male superiority and female inferiority. The imperative is such that every female victory over a male requires an explanation. One way to conform to the imperative is to separate women and men in competition. This solution, while it cures the symptoms, leaves the imperative in place and denies equal opportunity to individual females.

The separate but equal doctrine, widely used to deny females the right to compete with males for positions on the basis of skill and to justify differential treatment of the sexes in educational sports programs, is based on fallacious assumptions. The government's arguments for sex segregation—innate differences, tradition, safety, and morality—are arguments based on average or stereotypic sex differences and closely parallel the arguments formerly used to support race segregation.

*Brown's* rejection of the separate but equal doctrine as an equality principle in racially segregated education suggests the necessity for a closer look at sex-segregated educational programs. Sex-based classifications in educational sports programs that deny females the opportunity to compete on an individual basis are impermissible under the current intermediate level of equal protection scrutiny. Without the underpinning of the separate but equal concept, sex segregation in sports based on average differences cannot survive equal protection analysis. The time is ripe for a new theory of equality, which respects both the similarities and differences of females and males and ensures equal educational sports opportunities for both sexes.

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282 458 U.S. at 720 n.1.