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An Overview of Sex Discrimination in Amateur Athletics

by JEFFREY K. RIFFER*

I
Introduction

Amateur athletic rules which discriminate on the basis of sex have primarily occurred in four major areas: (1) females who have been excluded from the male team, both when there was or was not a comparable female team; (2) males who have been excluded from the female team when there was no comparable male team; (3) disparate rules of the sport depending on whether the participants were male or female; and (4) different seasons for male and female teams in the same sport. Not surprisingly, athletes who have been adversely affected by these rules have challenged them under the federal Constitution's equal protection clause,¹ state constitutions,² Title IX of the Education Amendments of 1972,³ and miscellaneous state statutory provisions.⁴ This article reviews the relevant constitutional and statutory provisions and then analyzes and criticizes the recent decisions in these four identified areas of sex discrimination in amateur athletics.

* B.S., Indiana University, 1975; J.D., Indiana University, 1978; Attorney, Kadison, Pfalzner, Woodard, Quinn & Rossi; Adjunct Professor of Sports Law, Pepperdine University.

¹ U.S. Const. amend. XIV, § 1.
II
Synopsis of Relevant Constitutional and Statutory Provisions

A. Federal Constitution's Equal Protection Clause

The fourteenth amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." This clause has been interpreted to mean that gender-based discrimination must serve important governmental objectives and the discriminatory means must be substantially related to the achievement of those objectives.

B. State Constitutions

State constitutional provisions which mandate equal protection of the laws and equal rights have provided support for athletes challenging amateur eligibility rules which precluded members of one sex from participation in athletic events. Several courts have held that rules precluding girls from competing against boys in high school athletic contests violate state constitutional requirements.

C. Title IX

1. The Statute

Title IX of the Education Amendments of 1972, enacted on June 23, 1972, states:

5. U.S. Const. amend. XIV, § 1. Of course, if a "state" does not deprive one of equal protection of the laws, this amendment does not apply. See, e.g., McDonald v. New Palestine Youth Baseball League, Inc., 561 F. Supp. 1167 (S.D. Ind. 1983) (a private baseball league can prohibit a girl from playing on a boys' "hardball" team even when the only female team available to her only plays "softball").


7. See, e.g., MASS. CONST. pt. 1, art. 1; PA. CONST. art. 1, § 28; WASH. CONST. art. 1, § 12.


9. This statute was adopted in conference without formal hearings or a committee report. Some legislative history is given in Comment, Title IX's Promise of Equality of Opportunity in Athletics: Does It Cover the Bases?, 64 Ky. L.J. 432, 450-53 (1975). Sports were only mentioned twice in the congressional debate. See Note, Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle On Title IX, 88 YALE L.J. 1254, 1255 n.11 (1979).

Title IX's power rests on Congress' spending power. Congress can attach conditions
No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance [except for nine stated exceptions].

Although this statute does not explicitly provide for a private cause of action, the Supreme Court, in Cannon v. University of Chicago, held that a woman's allegations that she was denied admission to medical schools at two private universities on the basis of her sex stated a claim for relief since Congress impliedly authorized a private cause of action. The Court also held that a plaintiff does not have to exhaust administrative remedies prior to initiating a suit.

However, even after Cannon, one court did not allow a private cause of action for damages when a woman sued a private school claiming she was denied admission to its medical school because of sex discrimination; the court concluded that plaintiff's remedy was limited to injunctive relief. Furthermore, one federal circuit court held that a defendant's behavior is actionable only when it involves an intentionally discriminatory act.

2. Assistance to "Programs or Activities"

In North Haven Board of Education v. Bell, the Supreme Court held that Title IX applies only to the specific programs of an institution that receive federal funding, not to the institution as a whole. The Court reached this conclusion after reviewing the language of the statute, the legislative history to the receipt of federal aid provided it does not dictate unconstitutional practices. See Todd, Title IX of the 1972 Education Amendments, 53 Tex. L. Rev. 103, 123 n.143 (1974) (citing cases).

A history of the Title IX regulations is given in Comment, Title IX's Promise of Equality of Opportunity in Athletics, supra, at 453-57.

12. See id. at 706 n.41.
16. See, e.g., Title IX, § 902 (termination of funds shall be limited "in its effect to the particular program;" each federal agency which is empowered to extend financial assistance to an "educational program" is authorized to effectuate the provisions of Title IX, § 901 by issuing regulations with respect to "such program or activity"). 20 U.S.C. § 1682 (1976).
17. See, e.g., 118 Cong. Rec. 5807 (1972) (statement of Senator Bayh) ("[t]he effect
and the construction given similar language in an analogous statute. The Court, however, explicitly refused to define "program" and remanded the case to the district court to determine that matter.

Two years later, in Grove City College v. Bell, the Supreme Court partially answered the question left open in North Haven and held that when an educational institution does not directly receive federal financial assistance, but its students receive federal financial assistance, the only "program" receiving federal assistance under Title IX is the institution's financial aid program.

The Court rejected, for two reasons, the argument that the whole school is a "program" because the federal funds received by the students ultimately free up the institution's own resources to be used elsewhere. First, there was no factual showing that the aid received by students resulted in the institution's funds being transferred to other areas within the institution. Second, even if such a transfer had been made most financial assistance has economic ripple effects and it would be very difficult, if not impossible, to determine the other areas which are affected.

A broad reading of the Grove City decision allows a private educational institution to discriminate in athletics on the basis of sex as long as its athletic department does not directly receive federal financial assistance (a rather common occurrence) and there is no state law to the contrary. However, there is important language in Grove City which indicates that the ruling may be given a narrower focus. The Court held that student financial aid programs are sui generis and are not analogous to non-earmarked financial aid to educational insti-

\[\text{References:}\]
18. See Board of Public Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969) (holding that Title VI, §§ 601-602 (codified at 42 U.S.C. §§ 2000d, 2000d-1 (1976), which are virtually identical to Title IX, §§ 901-902, are program-specific).
20. Id. at 1221-22.
21. Id. at 1221.
22. Id.
23. Id. It is not clear why the Court dealt with these arguments as questions of law, rather than as questions of fact to be decided by the trial court.
Therefore, the Court's opinion does not address whether an institution or an athletic program, which receives federal financial aid other than aid directly received by its students, converts the institution or the athletic program into a "program" covered by Title IX. Accordingly, where the federal government pays the wages of employees of an institution's athletic program through the federally funded college work-study program and the athletic program uses buildings financed with federal funds, Title IX may indeed apply to the athletic program.

3. Proscribed Discrimination

Although Title IX is a broadly worded statute which, with the exception of certain specially stated activities, appears to outlaw all sexual discrimination in programs receiving federal financial assistance, the regulations promulgated under that statute allow discrimination in two instances. First, in contact sports a school can sponsor a team which only allows members of one sex to participate. Second, in noncontact sports, if a school sponsors a team for members of one sex and fails to sponsor a team in that sport for members of the excluded sex, the school must allow members of the excluded sex to try out for the one team offered, if athletic opportunities for members of the excluded sex have previously been limited.

There is some question whether the Title IX regulations which allow schools to prohibit one sex, usually females, from participating in contact sports on a team composed solely of members of the other sex are constitutional. In Yellow Springs Exempted Village School District Board of Education v. Ohio

25. 104 S. Ct. at 1221.
26. Id. at 1232 n.9 (Brennan, J., concurring in part and dissenting in part).
28. 45 C.F.R. § 86.41(b) (1983). The Title IX regulations classify boxing, wrestling, rugby, ice hockey, football and basketball as contact sports, but they do not exclude others. The regulations define contact sports as those "the purpose of [sic] major activity of which involves bodily contact." Id.
29. 45 C.F.R. § 86.41(b) (1983).
High School Athletic Association,\textsuperscript{30} the district court held that those regulations unconstitutionally violated female athletes' liberty without due process of law: female athletes must be given the opportunity to compete on male teams, even in contact sports. Although this ruling was later reversed by the Sixth Circuit, the reversal was not on the merits.\textsuperscript{31}

The meaning of the phrase "athletic opportunities . . . [which] have previously been limited" in the Title IX regulations\textsuperscript{32} is unclear. It could refer to opportunities in that one sport at that one school, overall athletic opportunities at that one school, or overall athletic opportunities in general. The courts have reached different conclusions.\textsuperscript{33}

D. State Statutes and Regulations

Some states have passed legislation which allows females to participate on male athletic teams even when there is a female team.\textsuperscript{34} Other statutes allow teams to be restricted by sex if the teams are provided with substantially equal budgets, exclusive of revenues generated by that sport, and are treated in

\begin{footnotesize}
\begin{enumerate}
\item[30.] 443 F. Supp. 753, 759 (S.D. Ohio 1978), rev'd on procedural grounds, 647 F.2d 651 (6th Cir. 1981); see also Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978) (it is "doubtful" that any legitimate governmental objective justifies providing boys with the opportunity to participate in varsity interscholastic competition in contact sports while denying absolutely the same opportunity to girls).
\item[31.] The ruling was reversed because: (1) neither party argued this issue; (2) no evidence was offered on this point; and (3) the federal department which promulgated the rule was not made a party. See 647 F.2d 651, 658 (6th Cir. 1981); see also id. at 669 (Jones, J., dissenting).
\item[32.] 45 C.F.R. § 86.41(b) (1983).
\item[33.] Compare Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659 (D.R.I. 1979) (phrase applies to that specific sport at that specific school), vacated, 604 F.2d 733 (1st Cir. 1979) with Mularadelis v. Haldane Central School Bd., 74 A.D.2d 248, 427 N.Y.S.2d 458 (1980) (phrase applies to overall athletic opportunities at that specific school).
\end{enumerate}
\end{footnotesize}
a substantially equal manner, or if the opportunity to participate on teams is substantially equal for both sexes.

Some state statutes prohibit sex discrimination in educational or recreational programs receiving state aid in language which closely tracks that of Title IX or the Title IX regulations.

III

Excluded Females

Female athletes have repeatedly challenged rules barring them from participation in “male” athletic events. These challenges have centered around the different treatment of women in contact and noncontact sports and have focused on whether or not the male team was the only team sponsored by the school.

A. No Female Team

Female athletes who were barred from participating on the male team when there was no female team have been relatively successful in challenging the rules effecting such a bar. Indeed, in recent years, with only one exception, the courts have allowed females to participate on the male team when there was no female team.

The amateur athletic provisions banning female participation on a male team derive from six rationales. The courts and commentators, however, have usually found these proffered justifications lacking.

38. See Minn. Stat. § 126.21(3) (Supp. 1982).
39. See cases cited infra notes 41-42, 64-72, 79, 84, 92, 103, 106-07.
40. See id.
1. The Six Rationales

The first rationale is that females in general are incapable of competing with men in interscholastic athletics. However, as some courts have noted, coordination, concentration, agility, timing and technique contribute as much to athletic prowess as size, especially in noncontact sports, and these factors are not a function of gender. Even if females were less athletically talented, high school and college athletic programs which are part of an educational experience have, at least theoretically, goals other than performance. It can be argued that the educational benefits an individual gains by athletic participation are more important than the team's ultimate performance. Therefore, it is irrelevant whether females can compete on the same level as males.

The second justification for the exclusion of females is that female participation would have an adverse effect on the future development of female teams. This argument has been labeled "too speculative to have merit." Where there is no female team in a particular sport, prohibiting female athletes from participating on the male team cannot logically improve the quality of the nonexistent female team. Further, it will not necessarily increase the talent on other female teams that involve a different sport since there is no assurance that female athletes excluded from the male team will participate on the other teams or that their talents are transferable. In short, the

43. See Brenden v. Independent School Dist., 477 F.2d at 1300; Hoover v. Meiklejohn, 430 F. Supp. at 169 ("[a]ny notion that young women are so inherently weak, delicate or physically inadequate that the state must protect them from the folly of participation in vigorous athletics is a cultural anachronism unrelated to reality"). But see Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982), cert. denied, 104 S. Ct. 79 (1983) ("due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team").

Moreover, this rationale for exclusion is without merit where schools had a "no-cut" policy which allowed all males, no matter how untalented, to participate. See Brenden v. Independent School Dist., 477 F.2d at 1300; Fortin v. Darlington Little League, Inc., 514 F.2d at 350.


45. See Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. at 52, 334 A.2d at 843 (even if females as a class are less athletically skilled, sex is an impermissible classification under the Pennsylvania constitution).

46. See Brenden v. Independent School Dist., 477 F.2d at 1302; Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. at 1243.
state is placing an unjustifiable burden on the female athlete by only permitting her to participate in another sport or not at all. There is no similar Hobson's choice for male athletes.\footnote{47} The third rationale is that there is a greater risk of injury to females who play on male teams. No empirical evidence has ever been introduced to prove the greater risk of injury.\footnote{48} Additionally, a blanket prohibition of female participation is both overbroad and underinclusive since it bars females whose physical fitness would make their risk of injury less likely but allows injury-prone males to participate.\footnote{49} Nonetheless, in light of the relatively limited experience of allowing females to participate on male teams, this is an area where further empirical studies may be useful in proving or disproving the accuracy of this rationale for exclusion.

The fourth reason is related to financial savings. Some school boards have asserted that allowing females to participate would increase their costs because: (1) there would have to be separate dressing room supervision necessitating coaches of each sex for each team;\footnote{50} or (2) a separate, additional female team would have to be funded, thereby apparently increasing the costs for coaching and sporting equipment.\footnote{51} The courts have rejected these reasons primarily on the grounds that the marginal increase in costs incurred by allowing females to participate was insignificant.\footnote{52}

The fifth ground is that there are limited future opportunities for females to participate; after a certain age female participation in sports wanes and therefore it is reasonable to expend financial resources solely on boys, who will use the training to develop permanent skills. In National Organization for Women v. Little League Baseball, Inc.\footnote{53} the court rejected this

\footnote{47. See Brenden v. Independent School Dist., 477 F.2d at 1302; Carnes v. Tennessee Secondary School Athletic Ass'n, 415 F. Supp. 569, 571-72 (E.D. Tenn. 1976); Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. at 1243.}
\footnote{48. See Fortin v. Darlington Little League, Inc., 514 F.2d at 350.}
\footnote{50. Haas v. South Bend Community School Corp., 259 Ind. at 525, 289 N.E.2d at 500.}
\footnote{51. See Reed v. Nebraska School Activities Ass'n, 341 F. Supp. at 262-63.}
\footnote{52. See id.; Haas v. South Bend Community School Corp., 259 Ind. at 525-26, 289 N.E.2d at 500 ("this increased expense, which would not appear to be substantial when one considers the cost of administering the entire system of interscholastic athletics . . . cannot be considered a justifiable reason for denying approximately one-half of the . . . students . . . the opportunity to participate").}
reasoning and held that it was unreasonable to deprive girls aged eight to twelve who wish to play little league baseball of the only available means for enjoyment of this activity merely because they may not play baseball in the future.

The final argument, which is based on psychological theories, has two prongs: (1) males would lose the challenge to win and would be deprived of the full measure of their achievement if they competed against females; and (2) females would be discouraged when they consistently lost to males or, in the event they won, uncomfortable because of cultural stereotypes of their roles. An empirical study performed on this topic, researched 100 schools over six months and concluded that these fears were unfounded.\(^5\)

2. **Title IX Regulations**

The Title IX regulations allow a school to sponsor a team in a particular sport for members of one sex, even if the school does not sponsor a team in that sport for members of the opposite sex, if the sport involved is a contact sport.\(^5\) In noncontact sports, if a school sponsors a team for members of one sex and fails to sponsor a team in that sport for members of the opposite sex, the school must allow members of the excluded sex to try out for the one team offered if athletic opportunities for members of the excluded sex have previously been limited.\(^5\)

Several commentators have noted that the justification for treating contact sports differently than noncontact sports is weak.\(^5\) If the distinction between contact and noncontact sports is based on the perceived greater injury rate to women in contact sports, which it appears to have been,\(^5\) the justifica-

\(^5\)  See N.Y. STATE DEP’T OF EDUC., DIV’N OF HEALTH, PHYSICAL EDUCATION AND RECREATION, REPORT ON EXPERIMENT: GIRLS ON BOYS INTERSCHOLASTIC ATHLETIC TEAMS 69 (1972).

\(^5\)  45 C.F.R. § 86.41 (1983).

\(^5\)  Id. The phrase “athletic opportunities . . . [which] have previously been limited” is ambiguous. Compare Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659 (D.R.I. 1979), vacated, 604 F.2d 733 (1st Cir. 1979) with Mularadelis v. Haldane Central School Bd., 74 A.D.2d 248, 427 N.Y.S.2d 458 (1980), both of which are discussed infra notes 110-23 and accompanying text.

\(^5\)  See Note, Sex Discrimination in High School Athletics: An Examination of Applicable Legal Doctrine, 66 MINN. L. REV. 1115, 1134 (1982); Todd, supra note 9, at 118 (1974); Note, Sex Discrimination and Intercollegiate Athletics, supra note 9, at 1269-70; Cox, supra note 44, at 44 (statistics regarding relative size, weight and likelihood of injury between the sexes are irrelevant because neither the average man nor the average woman could play many intercollegiate sports).

\(^5\)  See Note, Sex Discrimination in High School Athletics, supra note 57, at 1134.
tion is arbitrary because it incorrectly assumes that all females have a higher injury rate than all males.\textsuperscript{59} Moreover, this sanctioning of sex discrimination in post-secondary school athletics appears to be overly paternalistic. Individual female athletes are capable of making their own decisions whether to participate and risk injury on teams with both sexes or to forego intercollegiate athletics.\textsuperscript{60}

One commentator has argued that an irrebuttable presumption analysis should be used to invalidate rules which prohibit females from participating on a male team in a contact sport for two major reasons.\textsuperscript{61} First, there are no administrative or safety advantages which inure to the state in having an irrebuttable presumption that females are unqualified in contact sports. Individual objective determinations of a male's athletic qualifications are made for each team; such determination could also be made for females. Second, whatever interest the state has in protecting females, it should have a similar interest in protecting males.

At one time, the Supreme Court appeared to hold that the irrebuttable presumption analysis was improper;\textsuperscript{62} nevertheless, this analysis was later used by the Court in another case.\textsuperscript{63} It has not been used in recent Supreme Court decisions, which probably indicates that it is no longer the preferred analytical tool.

3. Noncontact Sports

The Indiana Supreme Court in \textit{Haas v. South Bend Community School Corp.},\textsuperscript{64} struck down a rule which barred girls from participating on the boys' golf team when the school provided no girls' golf team. It held that when only one program is sponsored, any purported justification for exclusion based on differences in athletic abilities is impermissible.\textsuperscript{65} Similarly,
females have successfully challenged rules which barred their participation in cross-country skiing and running, tennis, track, baseball, and soccer when there was no female team offered in these sports.

It is clear that rules which prohibit female athletes from participating on the male team when there is no female team so severely curtail female athletic participation in that sport that no court should uphold such rules in non-contact sports. Accordingly, it is not surprising that every decision in this area in recent years has allowed the female athlete to participate on the male team.

4. Contact Sports

Several courts have ruled that females cannot be prohibited from participating on the male team in contact sports. In both Force v. Pierce City R-VI School District and Darrin v. Gould, the courts invalidated rules which barred high school girls from participating on the only football teams their schools sponsored, a male team. The Force and Darrin courts ruled against the schools on three grounds. First, both courts rejected the schools' argument that this rule protected females from being injured, finding such putative concern for one sex inappropriate where injury-prone boys were allowed to participate. This is precisely the type of sex discrimination which has been struck down as unconstitutional since it perpetuates stereotypical notions regarding the proper roles for women.

66. See Brenden v. Independent School Dist., 477 F.2d 1292 (8th Cir. 1973).
67. See Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973) (striking down rule prohibiting females from participating on male teams in all noncontact sports); Brenden v. Independent School Dist., 477 F.2d 1292 (8th Cir. 1973).
71. See supra notes 64-70.
74. 85 Wash. 2d 859, 540 P.2d 882 (1975).
75. Force v. Pierce City R-VI School Dist., 570 F. Supp. at 1028; Darrin v. Gould, 85 Wash. 2d at 876, 540 P.2d at 892. Moreover, there were no significant risks of injury to the female body; the lower court in Darrin found that the breasts could be adequately protected and there was no substantial risk to the procreative organs. Id.
76. See, e.g., Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973) (plurality opinion)
Second, one school argued that the rule threatened future female participation in athletics. It theorized that if females could play football on the male team, then males would have to be allowed to play on the female volleyball team, and since males are, on the average, better athletes, they would dominate the volleyball team and female athletic participation would decline. The Force court rejected this analysis by noting that there was no evidence that males even wanted to play on the female volleyball team, and if males ever did threaten to dominate that sport, a separate female team could be organized. Third, the argument that "the average female" did not have the ability to play football was flatly dismissed as being irrelevant; the court held that the only relevant issue was the ability of the one individual who wished to participate.

In Leffel v. Wisconsin Interscholastic Athletic Association, the court also held that when a school sponsors only one team, members of either sex must be allowed to participate. The court struck down an association rule which barred all forms of interscholastic athletics between members of both sexes. It rejected the athletic association's claim that the rule was justified by the increased risk of injury to girls because of differences in anatomy and physiology. The court held that even if there were a greater risk of injury—a contention which was not proved—a total ban on female participation is not fairly or substantially related to a justifiable governmental objective. The Leffel court noted, however, that equal protection does not necessarily require that females be allowed to play on the male team; other alternatives available to the school were to drop all programs in that sport or to establish separate teams for each gender.

However, when the practical requirements of female participation would significantly alter the rules of the sport, it is more

78. Darrin v. Gould, 85 Wash. 2d at 876, 540 P.2d at 892.
80. The challenged provision read: "The Board of Control shall prohibit all types of interscholastic activity involving boys and girls competing with or against each other except (a) as prescribed by state and federal law and (b) as determined by Board of Control interpretations of such law." Id. at 1120.
81. Id. at 1122.
82. Id.
83. Id.
likely that females will not be allowed to participate. In *Lafler v. Athletic Board of Control*, the court did not issue a preliminary injunction prohibiting the sponsors of the Golden Gloves boxing tournament from disqualifying a female entrant, even though there was no other competition available to her. The court held that the plaintiff was not entitled to a preliminary injunction because, among other things, she failed to prove: (1) a substantial likelihood of success on the merits, and (2) irreparable injury if she was not allowed to compete in the boxing tournament. The court ruled that the plaintiff probably would not succeed at trial because the physical differences between the sexes justified the boxing prohibition against female entrants. The female boxer wore a protective covering for her breasts which apparently violated a boxing rule against such clothing. In essence, the court ruled that the female's exclusion was permissible because the only socially acceptable form of her participation, a protective covering for her breasts, would change the rules of the sport.

The *Lafler* court further held that since boxing is a dangerous sport under the best of circumstances, it would be irresponsible to allow Ms. Lafler and other women to box against men without “consideration of all of the factors involved,” an ambiguous phrase presumably meaning that a trial on the merits was required. This portion of the court's reasoning may be overly paternalistic. The female athlete was nineteen years old, old enough to make her own choice regarding the dangers of competition.

Finally, the court held that the plaintiff failed to show how she was irreparably harmed. The court explained that even if

85. The court also held that the amateur boxing organizations which prohibited female boxers probably did not involve state action. *Id.* at 105-06. This conclusion appears even more supportable after several recent Supreme Court decisions in this area. *See* Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982). *See also* McDonald v. New Palestine Youth Baseball League, Inc., 561 F. Supp. 1167 (S.D. Ind. 1983) (the fourteenth amendment does not apply to a private baseball league).
86. 536 F. Supp. at 106. The court also noted that the rules require the contestants to wear a protective cup, an unnecessary requirement for females. *Id.* Since this is purely a safety rule, it is difficult to see why a female's refusal of this "protection" would detrimentally affect the sport.
87. *Id.* at 107. This may not be an insurmountable obstacle. At least one state athletic commission (California) has allowed women boxers to fight men boxers. *See* L.A. Times, Nov. 7, 1982, pt. III, at 2, col. 1.
88. 536 F. Supp. at 107.
she ultimately succeeded on the merits, it could order: (1) the implementation of a women's competition or (2) her participation in the next annual Golden Gloves tournament.\(^8\) Both of these arguments are based on the assumption that the timing of the competition is immaterial, i.e., participation in a tournament next year would be just as valuable as participation in this year's tournament. The accuracy of this assumption is questionable since an athlete's amateur 'career' is usually relatively short and it would be impossible to compensate, in money or otherwise, for the lost opportunity of competing in a major event which occurs only once a year.\(^9\)

**B. An Available Female Team**

Several courts have stated in dicta that a female precluded from participating on the male team is not denied equal protection if there is a comparable female team.\(^1\) The factual predicate necessary to reach that conclusion was analyzed in *O'Connor v. Board of Education*,\(^2\) in which a very talented female junior high school basketball player wanted to play on the male team even though a female basketball team existed. The *O'Connor* court noted that the school's policy of offering separate teams is based on a generalization about the relative basketball skills of high school males and females. The evidence presented to the court supported the validity of the generalization and the plaintiff produced no evidence that the male and female teams were, in fact, treated unequally.\(^3\)

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\(^8\) Id. at 108.


\(^2\) 545 F. Supp. 376 (N.D. Ill. 1982). The case had a complicated history. After the complaint was filed, the district court granted a preliminary injunction requiring the school board to allow the plaintiff to try out for the male team. Id. at 384-387. The district court denied defendant's motion to stay this ruling pending appeal. A divided panel of the Seventh Circuit granted the stay, but did not state its reasons. See id. at 378. The Seventh Circuit en banc, also in a divided vote, continued the stay. See id. Plaintiff unsuccessfully applied to Justice Stevens to vacate the stay. O'Connor v. Board of Educ., 449 U.S. 1301 (1980). The Seventh Circuit then reversed entry of the preliminary injunction. O'Connor v. Board of Educ., 645 F.2d 578 (7th Cir.), cert. denied, 454 U.S. 1084 (1981).

\(^3\) The court noted that the female athlete failed to challenge the association's position that the male and female teams were equal in funding, facilities and other
The court also noted that the policy of separate teams for each sex was designed to maximize the participation of both sexes in interscholastic sports. It reasoned that since males, on the whole, are substantially better basketball players than are females, there would be a substantial risk, absent a gender-based classification, that males would dominate the females' program. Plaintiff conceded that the policy of separate teams substantially related to the goal of maximum overall participation.

Plaintiff's failure to challenge the putative equality of the two teams and her concession that separate teams maximized the participation of both sexes doomed the plaintiff's position. First, when a classification is reasonable in substantially all of its applications, it is not unconstitutional because it appears arbitrary in an individual case. By failing to introduce evidence that the female team was not equal to the male team, the plaintiff committed a fatal error; if the teams are equal, there is no harm in having female athletes play on the female team.

There is, however, a serious question whether separate female teams can ever be equal to male teams. Even if the teams, viewed objectively, are equal, the male team may be perceived to be more prestigious. If so, the talented female athlete may legitimately feel she should be entitled to play on the more prestigious team.

Second, it is not obvious why the plaintiff conceded that separate teams benefitted the females' program. Allowing talented females to participate on the male team does not necessarily mean that males could, or should, participate on the female team. It is possible to have one team open to members of both sexes and another team composed only of fe-

objective criteria. Further, there is no mention that the female athlete challenged the rule on nonobjective factors. 545 F. Supp. at 379 n.4.

94. Id. at 379.
95. Id.
96. Id.
98. See generally Kirstein v. Rector's and Visitors, 309 F. Supp. 184 (E.D. Va. 1970) (all-male school possessed unequalled prestige and therefore other institutions were not equal); Sweatt v. Painter, 339 U.S. 629 (1950) (intangible factors such as reputation must be considered in determining whether schools are equal).

males. If males are not allowed to play on the female team, they could not dominate it and the reason for banning females from the male team vanishes.

The O'Connor court also rejected the athlete's claim that her Title IX rights were violated because her exclusion from the male team did not effectively accommodate her interests and abilities. The court noted that the Title IX regulation that was allegedly violated, regarding the accommodation of interests and abilities of the athletes, only requires educational institutions to make that accommodation when deciding which sports to offer; providing separate but equal teams is a method which the regulations clearly state is acceptable.

However, other courts have held that providing a separate female team is not sufficient. In Commonwealth v. Pennsylvania Interscholastic Athletic Association, the state court ruled that an association rule barring females from participating on male teams in both noncontact and contact sports was unconstitutional under the Pennsylvania Equal Rights Amendment even when there is a female team in that sport. The court reasoned that it was impermissible to deny a female "the right to play at the level of competition which [her] ability might otherwise permit." Such reasoning probably indicates the court's belief that the level of competition on the female team was not equal to that on the male team, although it also seems to disclose the court's sub rosa holding that separate is inherently unequal in sex classifications, as well as in race classifications. This decision effectively supplanted a federal court decision in Pennsylvania, Ritacco v. Norwin School District, which was handed down only months before the complaint in the Pennsylvania Commonwealth case was filed and which held that separate teams were acceptable. Several other cases in this area which were decided before the mid-1970's are now questionable as precedent because of the heightened


101. 545 F. Supp. at 383.


104. Id. at 49, 334 A.2d at 843; see also Darrin v. Gould, 85 Wash. 2d at 87, 540 P.2d at 893 (1975).

105. 18 Pa. Commw. at 48, 334 A.2d at 842.

scrutiny now given to sex-based classifications.\textsuperscript{107}

One state allows sexually segregated wrestling teams as long as members of each sex who have a demonstrated interest in wrestling are provided programs or events which accommodate that interest.\textsuperscript{108}

IV

Excluded Males

Recently some schools have sponsored interscholastic sports which are available only to female participants. Not surprisingly, males who were excluded from participating in those programs have challenged their exclusion under federal and state statutes and constitutions.\textsuperscript{109}

A. Title IX

In \textit{Gomes v. Rhode Island Interscholastic League},\textsuperscript{110} the court preliminarily enjoined a school from barring a male athlete from participation on a female volleyball team when there was no male volleyball team. It held that Title IX allowed a

\textsuperscript{107} See, e.g., Bucha v. Illinois High School Ass'n, 351 F. Supp. 69 (N.D. Ill. 1972) (ruling that female swimmers were not deprived of their equal protection rights even though (1) they were barred from swimming on the male team, and (2) there were different nonathletic restrictions on the female team).

This case is now questionable authority for two reasons. First, it did not give a heightened scrutiny to this sex-based classification; it used the out-dated test of whether the rule was rational. Second, it implied that a different result might occur if there was legislative action. The subsequent passage of Title IX certainly appears to qualify as a legislative response.


\textsuperscript{108} See MINN. STAT. § 126.21(3)(5) (Supp. 1982); See also Comment, \textit{Sex Discrimination in Interscholastic High School Athletics, supra} note 107, at 566 n.185 (state could prohibit some coeducational sports, e.g., wrestling, on the basis of the state's power to police morals).


\textsuperscript{110} 469 F. Supp. 659 (D.R.I. 1979), \textit{vacated}, 604 F.2d 733 (1st Cir. 1979).
school to have one team in a sport which was composed solely of members of one sex only when there had been, and presumably continues to be, adequate opportunities for participation in that sport for members of the excluded sex. Therefore, even though over-all athletic opportunities for males were not limited, because their opportunities were limited in some sports, including volleyball, this male volleyball player was allowed to play on the female team.

The First Circuit stayed implementation of this preliminary injunction because its issuance would have disrupted the remainder of the volleyball season and because, the court stated, the defendants would probably have succeeded on the merits. However, the court did not explicate its reasoning regarding the merits of the litigation. The appellate court later vacated the district court's judgment and remanded the case for dismissal as moot since the season was over and the plaintiff was about to graduate. Neither the trial court opinion nor the appellate court stay in Gomes should be heavily relied on. The trial court opinion, although providing a reasoned analysis of the problem, was stayed in part on the merits and the appellate court stay order provided no explanation of its reasoning regarding the merits of the litigation.

In Mularadelis v. Haldane Central School Board, the court upheld a school board's refusal to allow a male high school student to participate on the female tennis team, the only team the school sponsored in that sport. The court construed the relevant language in the Title IX regulations to mean that males can be barred from participating on the female team, even if the female team is the only school team in that sport, as

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111. 469 F. Supp. at 665. This interpretation does not necessarily follow from the wording of the regulation. Indeed, in a footnote the court hinted that it might be unnecessary. It reasoned:

Perhaps, in a sport long dominated by males, a school could even create only a female team without making any provisions for male participation; such a hypothetical situation might be constitutionally permissible because Congress could find that sufficient athletic opportunities existed in the private sector for males to play the particular sport.

Id. at 665 n.3.

112. Id. at 664. The court felt this interpretation was compelled by the fourteenth amendment's equal protection clause. Id. at 664-65.

113. 604 F.2d 733, 735 (1st. Cir. 1979). The court gave no reason for its conclusion regarding which party would probably succeed on merits of the litigation. The Supreme Court refused to vacate the stay. 441 U.S. 958 (1979).

114. 604 F.2d at 736.

long as over-all athletic opportunities for males at that school have not been limited. In this case, since there were almost twice the number of male teams as female teams, opportunities for males were not limited, and the prohibition against male athletes on the female team was upheld.

The Mularadelis court's interpretation of the Title IX regulations was grounded on the following two-step analysis. First, the initial substantive sentence in this section of the regulations restricts its applicability to situations “where a recipient . . . sponsors a team in a particular sport for members of one sex [but fails to sponsor a team for members of the excluded sex].”

Second, the criterion for determining whether members of the excluded sex can participate depends on the broad, general language of whether “athletic opportunities for members of [the excluded] sex have previously been limited.”

The court concluded that had Congress intended the limitation to refer only to a particular sport, it would have chosen words with that more limited meaning. Notwithstanding the Mularadelis court's analysis, Congress cannot be blamed for the ambiguity; these regulations were drafted by the Department of Health, Education and Welfare.

The Mularadelis court's analysis can be criticized in three areas. First, an interpretation which is not tied to the particular sport at issue will, in virtually all cases, result in a complete bar of the male athlete's participation in that sport. It is self-evident that males have traditionally had greater athletic opportunities at school. However, it seems fundamentally unfair to tell a male athlete that because female athletes were previously not allowed to play baseball or football, he cannot now play tennis. Second, it is unlikely that males will dominate the female team. Indeed, in none of the reported cases were males in general, or the particular male plaintiff, dominating the female team. Further, it is not necessarily true that males

116. Id. at 253, 427 N.Y.S.2d at 463. See also Hoover v. Meiklejohn, 430 F. Supp. at 170; Cox, supra note 44, at 50.
117. 74 A.D.2d at 253, 427 N.Y.S.2d at 463.
118. Id. (quoting 45 C.F.R. § 86.41(b) (1983) (emphasis added)).
119. Id. (quoting 45 C.F.R. § 86.41(b) (1983) (emphasis added)).
120. Id. at 253, 427 N.Y.S.2d at 462.
are better athletes than females.\textsuperscript{122} Third, if the number or quality of male athletes does in fact dominate the female team, the school should sponsor a male team. The Title IX regulations require that a school’s selection of sports and levels of competition must accommodate the interests and abilities of members of both sexes.\textsuperscript{123} A total ban on male participation would represent the state’s maximum intrusion in this area and is a result which should be avoided if possible.

A third possible interpretation of this section of the Title IX regulations, an interpretation ignored by both the Gomes and Mularadelis courts, is that it refers to athletic opportunities in general, and is not limited to the opportunities available at the recipient school. Under this interpretation, the phrase “athletic opportunities for members of \( \text{the excluded sex which were previously limited} \)” would be referring to the female experience in general.

**B. State Statutes**

In \textit{Forte v. Board of Education}\textsuperscript{124} the court upheld an athletic association’s policy which barred males from participating on the female interscholastic power volleyball team. It ruled that this policy did not violate either a state statute regarding discrimination in sports\textsuperscript{125} or the regulations promulgated thereunder.\textsuperscript{126} The athlete failed to challenge the policy on the fourteenth amendment’s equal protection clause or Title IX.

\textsuperscript{122} Although “males as a class tend to have an advantage in strength and speed over females as a class, the range of differences among individuals in both sexes is greater than the average differences between the sexes.” \textit{Hoover v. Meiklejohn}, 430 F. Supp. at 166. \textit{See also} \textit{LeMaire}, \textit{supra} note 44, at 126. Although men in general have larger muscle mass, [a] higher proportion of lean body tissue, greater cardiovascular capacity, and greater height, [women in general] have an edge in sports that test balance, since their average lower center of gravity augments stability. They retain heat longer and enjoy greater buoyancy than men—both advantages in swimming . . . . There is also evidence of higher endurance levels, and lower injury rates, for females.

\textit{Attorney General v. Massachusetts Interscholastic Athletic Ass’n}, 378 Mass. at 358 & n.34, 393 N.E.2d at 293 & n.34.

\textsuperscript{123} \textit{45 C.F.R. § 86.41(c)(1) (1983)}.

\textsuperscript{124} \textit{105 Misc. 2d 36, 431 N.Y.S.2d 321 (Sup. Ct. 1980)}.

\textsuperscript{125} “No person shall be disqualified from state public and high school athletic teams, by reason of that person’s sex, except pursuant to regulations promulgated by the state commissioner of education.” \textit{N.Y. EDUC. LAW § 3201-A} (McKinney 1981).

\textsuperscript{126} Section 135.4(c)(7)(ii)(c) of the regulations of the Commissioner of Education. The regulations seemingly require a decision by a review panel to determine whether a member of one sex can play on a team otherwise composed of members of the other sex.
Therefore, the court's ruling was appropriately limited to an interpretation of state law.

One state statute, consistent with Title IX regulations, allows membership on a team to be restricted to members of one sex if overall athletic opportunities for that sex have previously been limited. According to state constitutional equal protection guaranties, if Title IX is applicable and the Title IX regulations are held to be beyond the scope of the Title IX statute, and (3) the federal constitution's equal protection clause.

C. State and Federal Constitutions

In Attorney General v. Massachusetts Interscholastic Athletic Association, the Massachusetts Supreme Judicial Court struck down an athletic association's blanket rule that "[n]o boy may play on a girls' team." This rule was applied to prohibit males from participating on female volleyball and field hockey teams, although there were no male teams offered in those sports. The court rejected the association's three attempts to justify the rule. First, it held that gender, standing alone, is so imperfect as a measuring tool for athletic ability that it cannot be used as a "proxy." There are obvious biological differences between the sexes. However, coordination, concentration, strategic acumen and technique are capabilities of both sexes, and those qualities intermix with strength and speed, where males as a class have an advantage. Therefore, unless there are references to actual skill differentials in particular sports, the prohibition of male athletes on female teams cannot stand.

Second, the court held that the rule does not legitimately promote the safety of females. A female is no less exposed to injury as a member of a male team, than as a member of a fe-

127. See Minn. Stat. § 126.21(3) (Supp. 1982).
129. U.S. Const. art. VI, cl. 2.
130. U.S. Const. amend. XIV, § 1.
132. Id. at 346-47, 393 N.E.2d at 287.
133. Id. at 357, 393 N.E.2d at 293.
134. Id. at 358, 393 N.E.2d at 293.
135. Id.
male team with some male players. Additionally, the association offered no evidence that females would suffer greater injuries when playing on a team with male members than when playing on a team without them.137

Third, the court concluded that the rule cannot be justified because it allegedly protects female participation in sports.138 In light of the fact that there was no evidence to support this rationale, the court held that the total ban on male participation was too sweeping.139 Further, even if this justification were based in fact, it would not support a total bar on male participation; less restrictive alternatives must be used.140

This analysis was substantially rejected in *Clark v. Arizona Interscholastic Association.*141 The *Clark* court held that an athletic association's rule which precluded males from playing on female interscholastic volleyball teams did not violate the fourteenth amendment's equal protection clause.142 The court held that "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes" were important governmental objectives.143 It further held that because of physiological differences between the sexes, males would displace females if they were allowed to compete for positions on the same team.144 The court concluded that the policy of excluding males was substantially related to important governmental objectives and, therefore, the association's rule did not offend the Constitution.145

The *Clark* opinion focused on prior limited athletic opportunities for females *in general.*146 The court did not analyze whether opportunities in volleyball or in volleyball at this specific high school were limited. Indeed, the opinion does not even mention whether female athletic opportunities in general *in Arizona* were previously limited.

In *Petrie v. Illinois High School Association,*147 the court up-

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136. *Id.* at 359, 393 N.E.2d at 294.
137. *Id.*
138. *Id.* at 359, 393 N.E.2d at 294-95.
139. *Id.*
140. *Id.*
141. 695 F.2d 1126 (9th Cir. 1982), *cert. denied,* 104 S. Ct. 79 (1983).
142. 695 F.2d at 1131-32.
143. *Id.* at 1131.
144. *Id.*
145. *Id.*
146. *Id.*
held, over state and federal constitutional challenges, an association rule which barred a male athlete from playing on the female volleyball team, even though there was no other school team in this sport. It held that sex is a legitimate classifying factor for athletic ability.\textsuperscript{148} A system of measurement based on height and strength (and presumably other characteristics as well) would be too difficult to devise.\textsuperscript{149} Further, even if a handicapping system could be devised, it would be undesirable because it is too subjective to use in team sports, and would "[place] a premium on prior poor performance and is inconsistent with a system of full competition."\textsuperscript{150}

The \textit{Petrie} court also held that rules requiring exclusive female participation in a sport promote female participation in athletics,\textsuperscript{151} male participation on female teams would reduce the total number of females who could participate.\textsuperscript{152} The court took judicial notice that many school districts are in a difficult financial position and concluded that this placed a practical limit on the number of additional teams a school could sponsor.\textsuperscript{153}

Finally, the court held that because of past disparity of athletic opportunity, innate physical differences, and the overlapping of the female volleyball season with the football season, boys and girls are not similarly situated. Therefore, a rule excluding all males from participating in a sport is an acceptable form of affirmative action.\textsuperscript{154}

The affirmative action analysis of both the \textit{Clark} and \textit{Petrie} courts seems flawed. The key issue in determining the legality of affirmative action programs is whether the focus should be on athletics in general or the particular sport from which males are excluded. \textit{Clark} and \textit{Petrie} assumed, virtually without discussion, that the focus should be on athletics in general.\textsuperscript{155} This assumption is highly questionable because the athletic skills necessary for playing different sports vary markedly. It is self-evident that the strength and agility necessary to football linemen bear little similarity to the coordination and flexi-

\textsuperscript{148} \textit{Id.} at 988-89, 394 N.E.2d at 862.
\textsuperscript{149} \textit{Id.}
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.} at 989, 394 N.E.2d at 862.
\textsuperscript{152} \textit{Id.} at 991-92, 394 N.E.2d at 864.
\textsuperscript{153} \textit{Id.} at 989, 394 N.E.2d at 862.
\textsuperscript{154} \textit{Id.} at 991-92, 394 N.E.2d at 864.
\textsuperscript{155} \textit{Id.} at 988-89, 394 N.E.2d at 862; 695 F.2d at 1130-31.
bility required of a gymnast. Indeed, the athletic talents required to succeed in different positions in the same team sport vary significantly; many athletes are incapable of successfully mastering more than one position in a team sport. Therefore, an absolute prohibition of males from one school program, e.g., volleyball, may effectively preclude male athletes with talent in that sport from participating in any interscholastic athletic competition.

Similarly, in employment discrimination cases, the courts have not held that the proper test is whether there is discrimination in employment in general; rather, they have looked at the specific type of job at issue.\(^{156}\) If the focus is on the particular sport, it is clear that the programs in \textit{Clark} and \textit{Petrie} are unconstitutional for three reasons. First, there was no finding, judicial or otherwise,\(^{157}\) of past discrimination against females in interscholastic volleyball in Arizona or Illinois. There must be some determination of past discrimination to show that the affirmative action program is legitimate.\(^{158}\) Otherwise, new discrimination could be countenanced in the guise of remedying past discrimination.\(^{159}\) Additionally, it is impossible to devise an acceptable remedial program unless the extent of past discrimination is known.\(^{160}\)

Second, those affirmative action programs unnecessarily trammel the interests of males.\(^{161}\) The programs have the maximum intrusive effect on males since they absolutely ban male participation in interscholastic volleyball. Further, the discrimination against males in volleyball which was countenanced in \textit{Clark} will be perpetual since there was never an interscholastic volleyball program available to them. No legal affirmative action program should limit opportunities this severely.

\(^{156}\) See, e.g., United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979) (the affirmative action program was limited to craft employees); La Riviere v. EEOC, 682 F.2d 1273 (9th Cir. 1982) (limited to traffic officers); Valentine v. Smith, 654 F.2d 503 (8th Cir.) (limited to faculty), \textit{cert. denied}, 454 U.S. 1124 (1981).


\(^{159}\) Valentine v. Smith, 654 F.2d at 508.

\(^{160}\) Id.

\(^{161}\) Cf. id. at 510 ("cannot completely bar whites"); Stotts v. Memphis Fire Dep't, 679 F.2d 541, 553 (6th Cir. 1982).
Third, the affirmative action programs are of an indefinite duration. A *sine qua non* of a legal affirmative action program is that it endures only as long as reasonably necessary to achieve its legitimate goals.\(^{162}\) If it lasts longer than that, the program creates its own pernicious discrimination.\(^{163}\) The Arizona and Illinois plans are of an infinite duration. There is no explicit ending date\(^{164}\) or a mechanism for determining when the effects of past discrimination are remedied.\(^{165}\) Therefore, by their very terms, the plans are not substantially related to remedying only past discrimination. This problem is exacerbated because the turnover of high school athletes is virtually 100% every four years. Therefore, once a school adopts a nondiscriminatory program, the current effects of prior discrimination should quickly dissipate.

V

Game Rules

Some jurisdictions have used different game rules for male and female athletic teams. For example, female basketball rules sometimes allow more players and have additional restrictions on the offense in contrast to male basketball rules.\(^{166}\) Similarly, some female volleyball teams play with a shorter net than the male team.\(^{167}\)

In *Cape v. Tennessee Secondary School Athletic Association*,\(^{168}\) a female athlete challenged the female basketball team rules under the federal Constitution’s equal protection clause. She claimed that being deprived of the opportunity to play a

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163. Id.
164. Id.
165. See United Steelworkers of Am. v. Weber, 443 U.S. at 208-09 (preferential selection of craft trainees at one plant will end as soon as the percentage of black skilled craft workers in that plant approximates the percentage of blacks in the local labor force); Williams v. City of New Orleans, 543 F. Supp. 662, 681 (E.D. La. 1982).
166. See, e.g., Cape v. Tennessee Secondary School Athletic Ass’n, 563 F.2d 793, 795-96 (6th Cir. 1977); Dodson v. Arkansas Activities Ass’n, 468 F. Supp. 394, 396 (E.D. Ark. 1979); Jones v. Oklahoma Secondary School Activities Ass’n, 453 F. Supp. 150, 152 (W.D. Okla. 1977). Apparently the only places where female basketball rules differ from male rules are the public high schools in Iowa and Oklahoma. Comment, *Half-Court Girls’ Basketball Rules: An Application of the Equal Protection Clause and Title IX*, 65 Iowa L. Rev. 766, 767 n.5 (1980). Different rules for female basketball were originally instituted to prevent “stars” from dominating the game and because more aggressive play was not considered feminine. See LeMaire, *supra* note 44, at 129.
167. See Gomes v. Rhode Island Interscholastic League, 604 F.2d at 735 n.2.
168. 563 F.2d 793 (6th Cir. 1977).
full-court game or to follow traditional offensive rules would make it virtually impossible for her to sufficiently hone her skills to obtain a college athletic scholarship. The court noted that there are differences in physical characteristics and capabilities between the sexes and therefore summarily concluded that rules can be tailored to accommodate those differences.

The Cape court made no attempt to tie its findings about the physical differences between the sexes to the reasons for the different female rules. Indeed, three of the proffered justifications for the rules were that (1) they provide a more interesting game for the fans, (2) they ensure continued crowd support because of the fans' familiarity with these rules, and (3) they allow more students to participate. These have no connection with physical differences between the sexes. Additionally, the other purported justification, the protection of weaker and more awkward students, was seemingly based on a stereotypical view of female athletes. Indeed, this becomes self-evident when it is noted that the only places in the United States where the basketball rules still differ depending on sex are the public high schools in two states.

In light of current equal protection analysis, the opinion seems flawed. None of those four justifications appears to be an important governmental objective. Even if they were, one could argue that the rules cannot be justified since they do not closely relate to those objectives. The first two justifications are not important governmental objectives which should sanction any type of sex discrimination. Indeed, most fans of female basketball are probably already cognizant of the rules of male basketball and therefore will not have to learn new rules. The third justification for disparate rules is totally unsupportable since there is no indication that fewer students will participate if the female team follows the rules of the male team. The final justification also bears no true relationship to the rea-

169. Id. at 794.
170. Id. at 795.
171. Id.
173. Iowa and Oklahoma.
sons for different rules. There is no evidence that the differences in the rules protect weaker or more awkward students even if one makes the mistaken assumption that all females are weak and awkward and, therefore, need protection.

Different basketball rules for females were also challenged in Jones v. Oklahoma Secondary School Activities Association. The Jones court rejected plaintiff’s argument that the female basketball rules denied her the full pleasure and physical development inherent in male basketball rules and that her future basketball career was being impaired in violation of her rights to equal protection of the law. It held that such allegations failed to state a substantial constitutional question.

One other court expressed a similar view in dicta, i.e., that “[a] federal court is no place to decide whether a particular sex should be allowed to dribble the full length of a basketball court or pitch underhand.”

Nevertheless, in Dodson v. Arkansas Activities Association, the court held that the disparate rules between male and female basketball violated the federal Constitution’s equal protection clause. It emphatically rejected the proposition that there was any physiological or anatomical reason which precluded high school girls from successfully playing under the boys’ rules. Since it found that the only reason for the different rules was tradition, it concluded that there was no important governmental objective at stake and that the rule could not pass constitutional muster. It also explicitly rejected the Jones court’s conclusion that no substantial constitutional question was raised.

VI

Different Seasons

In Striebel v. Minnesota State High School League, plaintiffs alleged they were the victims of illegal sex discrimination because the state high school association established different

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176. Id. at 155.
177. Id. at 156.
180. Id. at 397.
181. Id. at 398.
182. Id.
183. 321 N.W.2d 400 (Minn. Sup. Ct. 1982).
seasons for boys and girls in tennis and swimming. The court upheld this policy regarding different seasons because (1) there was "uncontroverted" evidence that access to pools and tennis courts was limited in many high schools and there was no feasible way to accommodate both male and female teams in the same season, and (2) neither season in either sport is substantially better than the other. It was unclear whether the different season policy was tested under the Minnesota or federal Constitution, or both.

Four justices dissented. They argued that the majority opinion was mistaken in both of its major findings. First, additional facilities could be obtained, e.g., by leasing them. Second, the female tennis season, which occurs in the fall, is less desirable than the male season because it begins before the school year starts and may be cut short by early winter weather. Additionally, the dissenters argued that rigid sex-defined teams have long-term detrimental effects on male-female relationships—a result to be avoided.

This case is notable because of the court's conclusory handling of what are relatively objective facts. Certainly the number of pools, tennis courts, teams and interscholastic events can be determined with precision. Further, the availability and costs of leasing additional facilities can also be shown with specificity. Nonetheless, none of those figures were explicitly analyzed in either the majority or dissenting opinions.

Although a trial court's factual findings generally should be upheld unless they are shown to be clearly erroneous, some analysis must be made to determine whether the findings are merited. Under one view, only "historical," not "legislative," facts are tested under the clearly erroneous rule. Legislative facts are those general considerations that move a rule-making body to adopt a rule, as distinguished from the facts which de-

184. Id. at 402.
185. Id.
186. Justices Wahl, Todd, Yetka and Scott.
187. 321 N.W.2d at 404 (Wahl, J., dissenting).
188. Id. There was no discussion regarding whether the girls' swimming season was less desirable than the boys' swimming season.
189. Id.
termine whether the rule was correctly applied.\textsuperscript{192} Facts which go to the reasonableness of a rule are examples of legislative facts\textsuperscript{193} and therefore the different seasons rule would fall in this category. Accordingly, under this view, the clearly erroneous standard would have been inapplicable, and the factual findings should have been subjected to a heightened level of scrutiny.

\section*{VII Conclusion}

The courts are still in the process of determining the appropriate principles of law to test the legality of different forms of sex discrimination in amateur athletics. Nevertheless, it can now be stated with some certainty that amateur athletic rules excluding females from the only team available, a male team, are invalid in noncontact sports, and probably invalid in contact sports.\textsuperscript{194} There are two possible exceptions: (1) when female participation would necessarily alter the rules of the sport,\textsuperscript{195} and (2) when there is a comparable female team.\textsuperscript{196} As discussed earlier however, it will be rare to find comparable teams.

In contrast, several recent cases have held that males can be excluded from the only team available, a female team, because of the affirmative action goal of maximizing current female participation.\textsuperscript{197} These decisions are questionable since they failed to focus on the particular sport involved and instead, considered athletics in general. The decisions also failed to analyze the extent of prior athletic discrimination against females or consider that the programs did not have a set termination date for their affirmative action.

Most female athletes who have challenged the legality of having to play a sport under different rules than males have been unsuccessful.\textsuperscript{198} However, given that the rules governing

\begin{thebibliography}{6}

\bibitem{192} Id.
\bibitem{193} Id.
\bibitem{194} \textit{See}, \textit{e.g.}, Force \textit{v.} Pierce City R-VI School Dist., 570 F. Supp. 1020 (W.D. Mo. 1983) and cases cited \textit{supra} note 72.
\bibitem{195} \textit{See} Lafler \textit{v.} Athletic Bd. of Control, 536 F. Supp. 104 (W.D. Mich. 1982).
\bibitem{196} \textit{See} O'Connor \textit{v.} Board of Educ., 545 F. Supp. 376 (N.D. Ill. 1982).
\bibitem{197} \textit{See}, \textit{e.g.}, Clark \textit{v.} Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982), \textit{cert. denied}, 104 S. Ct. 79 (1983) and cases cited \textit{supra} note 109.
\bibitem{198} \textit{See}, \textit{e.g.}, Cape \textit{v.} Tennessee Secondary School Athletic Ass'n, 563 F.2d 793 (6th Cir. 1977) and cases cited \textit{supra} note 166.
\end{thebibliography}
the female version of a sport were based on incorrect, stereotypical notions of male-female athletic ability, and that there was no demonstrated important governmental objective in upholding them, the rules should have been declared invalid.

One recent decision held that there can be different male and female seasons for certain sports when neither season is substantially better than the other and no practicable way exists to accommodate both male and female teams in the same season. Although this legal proposition may appear sound, the decision is flawed because the court failed to consider whether there was a feasible way to accommodate both teams in one season.

As the preceding analysis has illustrated, many of the recent decisions regarding sex discrimination in amateur athletics have failed adequately to analyze the problems involved. For this reason, these decisions should not be blindly followed.
