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Sex Discrimination in High School Athletics

Minn. L. Rev. Editorial Board

Note: Sex Discrimination in High School Athletics

I. INTRODUCTION

In a number of recent cases, high school girls of exceptional athletic ability have challenged rules barring girls from participating on boys' athletic teams on the theory that such rules deny female athletes equal protection of the laws.[1] The decisions on this question are evenly divided.[2] Cases presenting this issue are currently on appeal to the Sixth and Eighth Circuit Courts of Appeals.[3]

This Note summarizes current equal protection doctrine as it relates to classifications by sex and isolates the standard of review appropriate to cases involving athletics. The arguments raised in defense of the existing segregated system are analyzed in light of this standard of review. Finally, the Note considers whether the development of equal athletic programs for girls

1. Bucha v. Illinois High School Ass'n, No. 72 C 378 (N.D. Ill., March 21, 1972); Harris v. Illinois High School Ass'n, Civ. No. S. Civ. 72-25 (S.D. Ill., Mar. 21, 1972); Morris v. Michigan State Bd. of Educ., Civ. No. 38169 (E.D. Mich., Apr. 24, 1972), *appeal docketed,* No. 72-1578, 6th Cir. 1972; Brenden v. Independent School Dist. 742, 342 F. Supp. 1224 (D. Minn. 1972), *appeal docketed,* No. 72-1287, 8th Cir. 1972; Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972); Seldin v. State Bd. of Educ., Civ. No. 202-72 (D.N.J. 1971); Hollander v. Connecticut Interscholastic Athletic Conference, Inc., Case No. 12-49-27 (Super. Ct., New Haven Cty, Conn., Mar. 29, 1971); Haas v. South Bend Community School Corp., — Ind. —, 289 N.E. 2d 495 (1972); Gregorio v. Bd. of Educ. of Asbury Park, No. A-1277-70 (Super. Ct. N.J., App. Div., April 5, 1971).

2. The following cases have held for the plaintiff: Brenden v. Independent School Dist. 742, 342 F. Supp. 1224 (D. Minn. 1972), *appeal docketed,* No. 72-1287, 8th Cir. 1972; Morris v. Michigan State Bd. of Educ., Civ. No. 38169 (E.D. Mich., Apr. 24, 1972), *appeal docketed,* No. 72-1578, 6th Cir. 1972; Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972); Haas v. South Bend Community School Corp., — Ind. —, 289 N.E.2d 495 (1972). The following cases have held for defendant: Bucha v. Illinois High School Ass'n, No. 72 C 378 (N.D. Ill., Nov. 21, 1972); Harris v. Illinois High School Ass'n, Civ. No. S. Civ. 72-25 (S.D. Ill., Mar. 21, 1972); Hollander v. Connecticut Interscholastic Athletic Conference, Inc., Case No. 12-49-27 (Super. Ct., New Haven Cty, Conn., March 29, 1971); Gregorio v. Bd. of Educ. of Asbury Park, No. A-1277-70 (Super. Ct. of N.J., App. Div., Apr. 5, 1971).

3. Brenden v. Independent School Dist. 742, 342 F. Supp. 1224 (D. Minn. 1972), *appeal docketed,* No. 72-1287, 8th Cir. 1972; Morris v. Michigan State Bd. of Educ., Civ. No. 38169 (E.D. Mich., Apr. 24, 1972), *appeal docketed,* No. 72-1578, 6th Cir. 1972.

would affect the legality of barring female participation on male athletic teams.

II. EQUAL PROTECTION IN GENERAL

To achieve a variety of legitimate ends a government must classify its citizens into various groups and, on the basis of these classifications, treat some differently than others. Income taxation provides a familiar example. To achieve the goal of financing government on a progressive basis, the government classifies taxpayers according to income and taxes the higher income groups more heavily. Such unequal treatment does not violate the equal protection requirement.[4] It is settled constitutional doctrine that the equal protection clause is not violated if people are classified in a manner relevant to the purpose of a rule or program which the government is administering, even though afforded dissimiliar treatment on the basis of such classification, provided the purpose of the rule or program is constitutionally permissible.[5]

In reviewing alleged violations of equal protection, courts apply a very permissive or a very strict standard of review, depending upon the subject matter involved. A general consideration in determining the appropriate standard of review is the effect of the program or rule.[6] If its operation is burdensome, courts require the classification used to distribute the burden to be precise. By contrast, a rule or program conferring a benefit may not require a classification to be as narrow and precise as possible. More specifically, according to current thought,[7] strict review is appropriate where the rule or program involves "fundamental interests"[8] or where a "suspect classification"[9] is

4. U.S. CONST. amend. XIV, § 1 provides: "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

5. For the most comprehensive treatment of equal protection see *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Developments*].

6. *Id.* at 1084-86.

7. Gunther, *The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8-10 (1972) [hereinafter cited as Gunther]; *Developments, supra* note 5, 1087-1131.

8. Boddie v. Connecticut, 401 U.S. 371 (1971) (divorce); Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel); Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Griswold v. Connecticut, 381 U.S. 479 (1965) (marital privacy); Reynolds v. Sims, 377 U.S. 533 (1964) (voting); Sherbert v. Verner, 374 U.S. 398 (1963) (practice of religion); Bates v. City of Little Rock, 361 U.S. 516 (1960) (freedom of

used to administer the program. Classifications are strictly reviewed where fundamental interests such as voting or interstate travel are concerned because government interference in these areas endangers individual liberties and any unnecessary interference here is unjustifiable. "Suspect classifications," such as those based on race or national origin, are strictly reviewed because they are almost wholly irrelevant to a prediction of one's ability to perform and therefore are presumed to have been chosen as a means to humiliate or oppress the selected group.[10]

Under a strict standard of review, both the purpose of the program or rule and the classification used to administer it must bear a "heavy burden of justification."[11] It should be noted, however, that rules or programs are less often found unconstitutional upon review of purpose than upon review of the classificatory scheme used as a means to achieve the purpose of the rule or program.[12] Strict review essentially dictates that classification schemes are unconstitutional if they are imprecise, that is, over- or under-inclusive, given the purpose of the rule or program.[13] An illustration of an imprecise means to achieving a legitimate end would be a rule that all third-graders be innoculated against measles to achieve a state goal of innoculating all eight year olds. The classification used here is over-inclusive because some seven and nine year olds will be innoculated, and it is under-inclusive because not all eight year olds will be in third grade.

Permissive review, on the other hand, is most common in fis-

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association); Griffin v. Illinois, 351 U.S. 12 (1956) (criminal appeals when granted as a matter of right); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (procreation); Truax v. Raich, 239 U.S. 33 (1915) (right to employment).

9. Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimacy); Harper v. Board of Elections, 383 U.S. 663 (1966) (wealth); Oyama v. California, 332 U.S. 633 (1948) (nationality); Korematsu v. United States, 323 U.S. 214 (1944) (race); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (alienage). *But see* Labine v. Vincent, 401 U.S. 532 (1971) (illegitimacy).

10. *Developments, supra* note 5, at 1173.

11. Loving v. Virginia, 388 U.S. 1, 9 (1967); *see also* Korematsu v. United States, 323 U.S. 214, 216 (1944) (purpose is subject to "the most rigid scrutiny").

12. *See Developments, supra* note 5, 1091-1101, for the cases in which courts have invalidated a rule or program upon review of its purpose or motive.

13. *Developments, supra* note 5, 1101-03. *See* McLaughlin v. Florida, 379 U.S. 184 (1964); *compare* Williamson v. Lee Optical, Inc., 348 U.S. 483, 488-89 (1944), *with* Sei Fujii v. State, 38 Cal. 2d 718, 732-33, 242 P.2d 617, 627 (1952).

cal and regulatory matters;[14] it also has been recently applied in a number of cases involving social welfare programs.[15] Under the permissive standard of review, there is in effect a presumption that the rule or program does not violate the equal protection guarantee. Here courts consciously attempt to find a proper purpose for the rule[16] and tolerate over- or under-inclusion so long as the means of classification is reasonably related to the purpose of the program.[17]

There are indications that this dichotomy in the standards of review for equal protection cases has become somewhat blurred in recent decisions of the Supreme Court. In a recent article,[18] Professor Gunther argued that the Burger Court has been unwilling to designate any new fundamental interests or suspect classifications[19] but has nevertheless taken a slightly more interventionist approach in some areas by employing a more rigorous "permissive" standard of review.[20] Gunther contends that by more closely scrutinizing the relevance of the means of classification to the purpose of the rule or program, the Court can intervene as it wishes without taking the controversial step of announcing new fundamental interests or suspect classifications.[21]

III. EQUAL PROTECTION DOCTRINES AND CLASSIFICATION BY SEX

A. Permissive Review in the Older Cases

Until very recently, classifications based on sex were almost always upheld. In fact, judicial deference to such legislative classifications was so extreme that one source commented that there was "almost a rule that sex distinctions can never violate the equal protection clause."[22] The earliest sex discrimination

14. *Developments, supra* note 5, at 1087.
15. Jefferson v. Hackney, 406 U.S. 535 (1972); Richardson v. Belchar, 404 U.S. 78 (1971); Dandridge v. Williams, 397 U.S. 471 (1970).
16. *E.g.*, Goesaert v. Cleary, 335 U.S. 464 (1948); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).
17. *Developments, supra* note 5, at 1083; *see* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).
18. *Gunther, supra* note 7.
19. *Id.* at 18.
20. *Id.* at 20.
21. *Id.*
22. *Developments in the Law—Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 Harv. L. Rev. 1499, 1504 (1971). For other works on sex discrimination in general *see* L. Kanowitz, Women and the Law (1969); Brown, Emerson, Falk and Freedman, *The Equal Rights Amendment: A Constitutional Basis for*

cases were notable not only for their deference to legislative classifications but also for the extensive dicta in which the proper role of women in society was defined as homemaker and housewife.[23]

Modern cases, although more restrained in their rhetoric, have nevertheless been equally deferential in deciding sex classification issues. Two cases stand out in particular. In *Muller v. Oregon*,[24] the Court upheld maximum working hours for women on the basis that women required special treatment which the legislature could quite properly provide. Although once thought to be a breakthrough because it validated progressive social legislation, the case has been cited so often for the proposition that women can be treated differently from men[25] that the decision is now viewed as a "roadblock to the full equality of women."[26] Permissive review in sex classifications reached its peak in *Goesaert v. Cleary*.[27] The Court in *Goesaert* considered a Michigan statute which prohibited women, with the exception of the wives and daughters of bar owners, from tending bar. Although the most likely purpose for the statute was probably impermissible,[28] the Court refused to inquire into the legislators' motives and upheld the classification. *Goesaert* has been criticized but never overruled; rather, it has long been cited for the proposition that in the area of classification based on sex, the judiciary should defer to legislative judgment.[29]

Equal Rights for Women, 80 YALE L.J. 871 (1971); Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U.L. REV. 723 (1935); Johnston & Knapp, *Sex Discrimination By Law: A Study in Judicial Perspective*, 46 N.Y.U.L. REV. 675 (1970) [hereinafter cited as Johnston & Knapp]; Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965) [hereinafter cited as Murray & Eastwood]; *Developments in the Law— Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971); *Symposium—Women and the Law*, 5 VALPARAISO U. L. REV. 203 (1971); Note, *Sex Discrimination and the Constitution*, 2 STAN. L. REV. 691 (1950).

23. *E.g.*, Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) and *In re* Lockwood, 154 U.S. 116 (1894). For the most blatantly male chauvinistic quotes see Johnston & Knapp, *supra* note 22.

24. 208 U.S. 412 (1908).

25. Johnston & Knapp, *supra* note 22, at 699.

26. *Id.*

27. 335 U.S. 464 (1948).

28. *See* Seidenberg v. McSorley's Old Ale House, Inc., 317 F. Supp. 593 (S.D.N.Y. 1970), quoted at note 37 *infra*.

29. Those who thought *Goesaert* was withering under the attack of state court decisions such as Paterson Tavern & Grill Owners Association, Inc. v. Borough of Hawthorne, 57 N.J. 180, 270 A.2d 628 (1970), and Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329

B. UNDERCURRENTS OF CHANGE

Notwithstanding cases like *Goesaert* and *Muller*, a number of lower federal and state court decisions have eroded to some extent the permissive standard of review in sex classifications. Even though such decisions have had to overcome the precedent of permissive review, these courts have shown a willingness to scrutinize the sex classifications more carefully than ever before.

This emerging attitude has produced decisions in a number of areas which have declared sex classifications invalid. The following practices have thus been held to violate equal protection: the exclusion of women from juries;[30] differential sentencing laws for men and women;[31] the exclusion of women patrons from liquor-licensed places of accommodation;[32] the exclusion of women patrons from an all-male "prestige" college in a state university system;[33] requiring all unmarried women under 21 to live in a state college dormitory when no such requirement was imposed on men;[34] and requiring extended periods of

(1971), were dealt a chilling blow in Dandridge v. Williams, 397 U.S. 471 (1970). In that case the Court stated that the permissive review standard "is a standard that has consistently been applied to state legislation restricting the availability of employment opportunities" [citing *Goesaert*] and that it "is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the states their views of what constitutes wise economic or social policy." *Id.* at 485-86.

Goesaert and *Muller* are two of the most notable decisions which have employed permissive review to uphold classifications based on sex, but they by no means stand alone. *See, e.g.*, Hoyt v. Florida, 368 U.S. 47 (1961) (men but not women required to register for jury service); Fay v. New York, 332 U.S. 261 (1947) (statute upheld which required men but only permitted women who volunteered to serve on juries); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (minimum wages upheld for women); Quong Wing v. Kukendall, 223 U.S. 59 (1912) (women exempted from laundry tax); Adams v. Cronin, 29 Colo. 488, 69 P. 590 (1902), *aff'd*, 192 U.S. 108 (1904) (women prohibited from patronizing bars); Marri v. Stamford St. R.R., 84 Conn. 9, 78 A. 582 (1911) (prohibited women but allowed men to sue for loss of consortium); State v. Heitman, 105 Kan. 139, 181 P. 630 (1919) (differential sentencing for women); State v. Hunter, 208 Ore. 282, 300 P.2d 455 (1956) (women prohibited from wrestling).

30. White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966).

31. United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968); Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968).

32. Seidenberg v. McSorley's Old Ale House, 317 F. Supp. 593 (S.D. N.Y. 1970).

33. Kirstein v. Rectors and Visitors of the Univ. of Virginia, 309 F. Supp. 184 (E.D. Va. 1970). *Cf.* Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.*, 401 U.S. 951 (1971).

34. Mollere v. Southeastern Louisiana College, 304 F. Supp. 826 (E.D. La. 1969).

mandatory maternity leave.[35] Finally, a California statute which provided maximum working hours for women was held to present a substantial enough question to merit convening a three-judge panel.[36]

Many of these decisions flatly reject the assumption that women are delicate creatures in need of male protection. More outspoken than most, a Pennsylvania appeals court commented that:

> [t]o anyone who even once has viewed women participating in a roller derby, the argument that women are the weaker sex, desirous of only the more genteel work carries little weight. The success of women jockeys is further evidence of which we take notice. It is no longer possible to state that all women desire or have an "interest" in, any one type or classification of work. Some women have the desire, ability and stamina to do any work that men can do.[37]

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35. LaFluer v. Cleveland Board of Education, 41 U.S.L.W. 2090 (6th Cir. 1972); Williams v. San Francisco Unified School Dist., 340 F. Supp. 438 (N.D. Cal. 1972); Cohen v. Chesterfield County School Board, 326 F. Supp. 1159 (E.D. Va. 1971).

36. Menglekoch v. Industrial Welfare Commission, 442 F.2d 1119 (9th Cir. 1971). This decision is a good example of a recent court which had to overcome the hostile precedent of permissive review. With regard to *Muller*, the court said:

> It may be seriously questioned, however, whether some or all of the other conditions referred to in the *Muller* opinion exist today, or if they do exist, whether they have the same importance as was attributed to them sixty-two years ago.

Id. at 1123. And concerning *Goesaert*, the court stated:

> We do not regard *Goesaert* as establishing, beyond reasonable debate, that a statute limiting the hours of women in general occupations may not be so discriminatory against females as to offend the Equal Protection Clause.

Id. at 1124.

37. Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 4 Pa. Commonwealth 448, 287 A.2d 161, 168-69 (1972). Other courts have made similar comments. For example, in Weeks v. Southern Bell Tel. & Tel. Co., the Fifth Circuit, while defining a bona fide occupational qualification under Title VII of the Civil Rights Act of 1964 stated:

> Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on an equal footing.

408 F.2d 228, 236 (5th Cir. 1969). And in another case, a federal district court stated:

> Outdated images of bars as dens of coarseness and iniquity and of women as peculiarly delicate and impressionable creatures in need of protection from the rough tumble of unvarnished humanity will no longer justify sexual separatism. At least to this extent women's emancipation is recognized.

Consistent with the spirit of such decisions, the California Supreme Court rendered an opinion which has already been termed a landmark decision in the area of sex discrimination because it designated sex a suspect classification. In *Sail'er Inn v. Kirby*,[38] the challenged statute was quite similar to the one considered by the Supreme Court in *Goesaert* in that it prohibited women from tending bar except in certain circumstances.[39] The California court could have invalidated the statute on a number of bases[40] but chose to do so under the equal protection clauses of the California and United States constitutions. Significantly, the court stated that "sex, like race and lineage, is an immutable trait, a status into which the class members are locked by accident of birth;" as a basis for classification it "frequently bears no relation to ability to perform," and imposes a "stigma of inferiority" on women.[41] Although the court made a pro forma attempt to distinguish *Goesaert*, in effect it disregarded that decision and challenged the Supreme Court to overrule *Goesaert*.

C. REED: A STRICTER STANDARD

Six months after the *Sail'er Inn* decision, the Supreme Court handed down *Reed v. Reed*,[42] the only recent decision in which the Court has directly considered the problem of sex discrimination. Although initially hailed as a landmark decision[43] because the Court implicitly declined to designate sex a suspect classification,[44] the case has recently come under increasing criticism which has cast doubt on its significance.[45]

Seidenberg v. McSorley's Old Ale House, Inc., 317 F. Supp. 593, 606 (S.D.N.Y. 1970).

38. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

39. Any woman who owned an on-sale license, was the wife of a licensee, was independently, or in combination with her husband, sole shareholder of a corporation holding an on-sale license, could tend bar. CAL. BUS. & PROF. CODE ANN. § 25655 (West Supp. 1971).

40. The court could have invalidated the statute under the California Fair Employment Practices Act (CAL. LABOR CODE § 1411-12 (West 1971)); or Title VII of the 1964 Civil Rights Act (42 U.S.C. §§ 2000e-2000e-15); or upon a provision of the California constitution which prohibits the disqualification of any person on account of sex from pursuing a lawful profession (CAL. CONST. art. 20, § 18 (West 1954)).

41. 5 Cal. 3d at 18-19, 485 P.2d at 540, 95 Cal. Rptr. at 340.

42. 404 U.S. 71 (1971).

43. *See* N.Y. Times, Nov. 23, 1971, § 1, at 1, col. 7.

44. Brief for Appellant at 14-53, Reed v. Reed, 404 U.S. 71 (1971).

45. *See, e.g.*, Hodes, *A Disgruntled Look at Reed v. Reed From the Vantage Point of the Nineteenth Amendment*, WOMEN'S RIGHTS LAW REPORTER, Spring, 1972, at 12:

The challenged statute in *Reed* provided that when a male and female were otherwise equally entitled to administer a decedent's estate, the male was to be preferred over the female.[46] The State of Idaho advanced two reasons for the statute: it reduced the workload of probate courts[47] and men were more qualified as administrators. Either one of these arguments would have satisfied the permissive review test under decisions like *Goesaert* which held any rational basis sufficient to sustain the statute. However, in language quite unlike *Goesaert*, the *Reed* Court noted that by providing dissimilar treatment for men and women the classification used to achieve these purposes was "subject to scrutiny under the Equal Protection Clause."[48] The Court then stated its formula for equal protection analysis:

> A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[49]

The Court then carefully examined the argument that the objective of the statute was to reduce the workload of probate courts, noting that the objective was "not without some legitimacy."[50] However, the Court concluded that this argument was insufficient, holding that:

> By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause. *Royster Guano Co. v. Virginia* [253 U.S. 412 (1920)]. . . .[51]

The mystery, and the source of the criticism, of the decision stems from the fact that the Court completely ignored the argument that men should be preferred over women because they are generally more qualified. Since the Court avoided that argument, critics reason the case has little precedential value for combatting sex discrimination. This criticism, however, fails to confront the fact that the statute was held unconstitutional.

> The recent case of Reed v. Reed, although a minor victory for the woman plaintiff, is really no improvement at all. . . . It took no courage and no change of doctrine for the Court to reach the Reed result.

See also Comment, 1972 WISC. L. REV. 626.

46. IDAHO CODE ANN. § 15-314 (1948).

47. The statute reduced the workload of the probate courts by removing the discretion of the court. In effect, it served the same function that the flip of a coin would in similar situations.

48. 404 U.S. 71, at 75.

49. *Id.* at 76 (footnotes omitted).

50. *Id.* at 76.

51. *Id.* at 77.

Although it would have been preferable for the Court to have explicitly rejected the argument, its implicit rejection does not destroy the case's precedential value. The important point is that a justification for the challenged statute which would have prevailed under the old permissive review test was rejected. Thus *Reed* marks a significant departure from *Goesaert.*

Professor Gunther, recognizing this change, sought to explain *Reed* by fitting it into his model, that is, by hypothesizing that the intensified means-focused scrutiny is a technique employed by the Court to avoid the sex-as-a-suspect classification issue.[52] Although the argument is outwardly appealing, Gunther recognized that *Reed* could not be so easily explained. He acknowledged that even an intensified means-focused scrutiny would be satisfied by the argument that the statute reduced the workload of the probate courts.[53] This led him to conclude

> that some special sensitivity to sex as a classifying factor entered into the analysis. . . . Only by importing some special suspicion of sex related means from the new equal protection area can the result be made entirely persuasive.[54]

Another criticism is that *Reed* involved such an inconsequential right that the case is, despite appearances, relatively unimportant.[55] It is true that the right to be considered equally with men in a conflict over who is to administer an estate would hardly be considered basic by most women. But this is precisely why *Reed* is significant. If the *Reed* decision had been intertwined with a fundamental right its meaning would have been obscured; it would have been unclear whether the change in the standard of review was premised on sex classification or the protection of a fundamental right. However, since the right protected in *Reed* was so inconsequential, it is quite clear that the change in the standard of review resulted because the classification was based on sex. As it is, one would logically assume that the same, or possibly even a stricter, scope of review would be indicated when a more important right was threatened. In this situation, the Court would thus be less willing than ever before to extend its reasoning to find a constitutionally permis-

52. Gunther, *supra* note 7, at 30. *See* text accompanying notes 20-21 *supra.*

53. *Id.* at 34.

54. *Id.*

55. Of course, an administrator of an estate does receive some compensation for his or her services. It is doubtful, however, that this form of employment would be considered a fundamental right to employment since it is not a full-time occupation. *Cf.* Truax v. Raich, 239 U.S. 33 (1915).

sible purpose and would also be less tolerant of under- or over-inclusion. *Reed,* then, marks a significant change in the standard of review of sex classifications, even though that change was made without the accompanying rhetoric which so many commentators thought necessary.

IV. ANALYSIS OF THE SEX DISCRIMINATION IN ATHLETICS CASES IN LIGHT OF *REED*

The following analysis will first discuss the fact situations typically involved in sex discrimination in athletics cases. These cases are then discussed in the context of the essential elements of the equal protection doctrine: (1) the finding of "state action" which is prerequisite to invocation of the equal protection guarantee; (2) the existence of a permissible purpose for the allegedly discriminatory rule; and (3) the relevance, or the relationship, of the purpose to the classification scheme.

A. The Fact Situations

The fact patterns of the sex discrimination in athletics cases are usually quite similar. *Brenden v. Independent School District 742,*[56] a typical case, involved two high school girls, a junior and a senior, who wanted to play on the boys' interscholastic athletic teams at their schools. Both were prevented from doing so by a Minnesota State High School League rule which prohibited girls from participating in "the boys' interscholastic athletic program either as a member of the boys' team or a member of the girls' team playing on the boys' team."[57]

It was demonstrated at trial that both girls were excellent athletes capable of competing effectively with males. Peggy Brenden had played in a number of tennis tournaments outside her high school and was ranked the number one eighteen-year-old woman tennis player in the area by the Northwestern Lawn Tennis Association.[58] Toni St. Pierre had demonstrated her ability by running in a number of Amateur Athletic Union cross-country events and by skiing in United States Ski Association cross-country skiing meets.[59]

56. 342 F. Supp. 1224 (D. Minn. 1972), *appeal docketed,* No. 72-1287, 8th Cir. 1972.

57. 1971-1972 Minnesota State High School League Official Handbook, Athletic Rules for Girls, Article III, § 5.

58. 342 F. Supp. at 1226.

59. *Id.*

Neither girl had an opportunity to participate in a meaningful manner in her sport at her high school. Peggy Brenden's school had a tennis program which the Minnesota State High School League defined as an "extramural" tennis program. The girls' program was not comparable to that of the boys. It consisted of four one-hour practice sessions spread out over a period of a month in the fall. There was only informal coaching, no organized meets, and interscholastic tennis was unavailable for girls. . Toni St. Pierre's school had no cross-country running or skiing programs available for girls. The administration at Toni's school would have established a cross-country running program for girls but there was insufficient interest among other girls to justify such a program.

Suits in other states have involved tennis,[60] golf,[61] cross-country[62] and swimming.[63] It is important to note the common factors in these cases. First, in every known case the plaintiffs have sued to play in non-contact sports. Second, in every case except one,[64] there has been no girls' team. Third, all cases have involved an exceptional female athlete of proven ability. Finally, the female athlete's complaint in each case was that, even though they were similarly situated with boys on the basis of ability, they were prohibited from competing with them solely on the basis of sex and were thereby denied equal protection of the law.

B. State Action

There can be no doubt that there is a sufficiently close relationship between state high school leagues and the state to support a finding of state action. Generally, all public schools are members of the league, whose expenses are paid from revenues derived from games between member schools which are often played at state-owned facilities. The governing boards usually

60. Harris v. Illinois High School Ass'n, Civ. No. S. Civ. 72-25 (S.D. Ill., Mar. 21, 1972); Gregorio v. Bd. of Educ. of Asbury Park, No. A-1277-70 (Super. Ct. of N.J., App. Div., Apr. 5, 1971).

61. Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972); Haas v. South Bend Community School Corp., — Ind. —, 289 N.E.2d 495 (1972).

62. Hollander v. Connecticut Interscholastic Athletic Conference, Inc., Case No. 12-49-27 (Super. Ct., New Haven Cty. Conn., Mar. 29, 1971).

63. Bucha v. Illinois High School Ass'n, No. 72 C 378 (N.D. Ill., Nov. 21, 1972).

64. *Id.* The judge noted that "this case does not deal with the total absence of a girls' athletic program." *Id.* at 12.

are composed of public school principals or superintendents, who are paid and supervised by the state. The member schools provide and pay coaches, supply athletic equipment, carry insurance on players and facilities and supply transportation to the teams. Consequently, even though the high school leagues classify themselves as "voluntary educational associations," all the decisions to date have held that there is a sufficient nexus between the state and the defendant high school leagues to support the requisite finding of state action.[65]

C. PURPOSE OF CLASSIFICATION

The rule barring girls from participation on boys' athletic teams must have a permissible purpose to withstand an equal protection attack. There is a reasonable and constitutionally permissible purpose that can be advanced in support of these rules, that is, to group athletes by ability.[66] Several other purposes have been advanced as justifications for the rule and, since even one impermissible purpose could make the rule unconstitutional, it may be helpful to analyze those justifications which have been discussed in recent cases.

1. *Separation of the sexes is a tradition in sports*

One court has stated that a partial justification of the rule is that it reflects the customs and traditions of sports. In *Hollander v. Connecticut Interscholastic Athletic Conference, Inc.*,[67] the court took judicial notice that important athletic events always involve segregated competition and concluded:

> 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 or similar groups so composed?[68]

However, the invocation of tradition cannot supply the requisite purpose. Unless the tradition the rule preserves is legal or permissible, the rule is not saved merely because it preserves

65. St. Augustine High School v. Louisiana High School Athletic Ass'n, 396 F.2d 224 (5th Cir. 1968); Oklahoma High School Athletic Ass'n v. Bray, 321 F.2d 269 (10th Cir. 1963); Bucha v. Illinois High School Ass'n, No. 72 C 378 (N.D. Ill., Nov. 21, 1972); Brenden v. Independent School Dist. 742, 342 F. Supp. 1224 (D. Minn. 1972); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972); Haas v. South Bend Community School Corp., — Ind. —, 289 N.E.2d (1972).

66. *See* text following note 86 *infra*.

67. Case No. 12-49-17 (Super. Ct., New Haven Cty., Conn., Mar. 29, 1971).

68. *Id.* at 19-20.

tradition. One must therefore look beyond tradition to the rationale underlying that tradition to determine in the first instance whether there is a constitutionally permissible purpose for barring female athletes from athletic competition with males.

2. *Separation of the sexes prevents psychological damage to the participants*

Another alleged purpose of the rule is to prevent psychological damage to the participants which might occur if girls compete with boys. The arguments concerning potential psychological damage have been confusing and the testimony inconclusive. Expert witnesses have not even been able to concur on who might be damaged. Generally, the argument is that in direct competition the girl will not be able to win and therefore might be psychologically damaged.[69] Apparently the experts believe that girls will not be able to excel or become the champion in their sport, and anything less than being the champion might cause psychological problems. There are two difficulties with this argument. First, there is no parallel concern for the inferior male athlete. There are many male athletes who would never make the first string on the football team or be the number one tennis player on the tennis team. Yet they are certainly not refused participation on the basis that they may be psychologically damaged. Hence, an apparently well-intended protectionist argument serves in effect to discriminate against women.[70]

Second, the argument ignores the realistic alternatives presently available to most high school female athletes and the fact that the female herself is allowed to choose between them. At the present time the choice for the exceptional female athlete is generally to play against the boys or not play at all. One expert witness has testified that in this situation to deny the female a chance to play may cause her psychological damage.[71] At any rate, the fact that the female is allowed to assess the alternatives open to her, and to choose whether or not to play,

69. *See, e.g.*, Hollander v. Connecticut Interscholastic Athletic Conference, Inc., Case No. 12-49-27 (Super. Ct., New Haven Cty, Conn., March 29, 1971); Gregorio v. Bd. of Educ. of Asbury Park, No. C-1988-69 (Super. Ct. of N.J., Ch. Div., Monmouth Cty., Apr. 13, 1970).

70. Such protectionist but discriminatory rules have been found unconstitutional in the employment sector. *See* text accompanying notes 96-105 *infra*.

71. Gregorio v. Bd. of Educ. of Asbury Park, No. C-1988-69 (Super. Ct. of N.J., Ch. Div., Monmouth Cty., Apr. 13, 1970).

gives some assurance that she will be mentally prepared for the competition.

The results of an experiment published in February of 1972 contradict the argument that psychological damage will result from competition between boys and girls.[72] In 1969, the New York State Board of Education was faced with a law suit similar to those involved here. Rather than engage in extensive litigation, the Board decided to grant the prospective plaintiffs' request to play on the boys' team and then study the effects of the mixed competition. The experiment ran for sixteen months, from March, 1969 to June, 1970. Girls were allowed to play on boys' teams in non-contact sports and educators were instructed to observe the situation very closely. No psychological damage was reported and, as a result of the experiment, the State Education Department changed its rules to allow girls to play on boys' teams in non-contact sports.[73]

The argument of potential psychological damage to girls who compete against boys can be criticized on two levels. First, the factual argument is itself quite tenuous. The unsubstantiated claims of defendants' witnesses have been contradicted by the only known systematic study conducted on the problem. Second, the fact that the argument is made with reference to females only is itself discriminatory. If it is discovered that athletes who cannot be champions might be psychologically damaged, then male athletes, as well as female athletes, who might be so damaged should also be barred from participation.

3. *Separation of the sexes is necessary because of the cost involved in allowing girls to compete with boys*

Another justification for the rule advanced by defendants is that it would be financially prohibitive to allow girls to play on boys' teams.[74] In terms of equal protection analysis, this posits

72. Report on Experiment: Girls on Boys' Interschool Athletic Teams March 1969-June 1970, The University of the State of New York, The State Educ. Dep't., Div. of Health, Physical Education and Recreation, Albany, N.Y., February, 1972 [hereinafter cited as New York Report].

73. *Id.* at 75.

74. Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258, 262 (D. Neb. 1972); Hollander v. Connecticut Interscholastic Athletic Conference, Inc., Case No. 12-49-27 (Super. Ct., New Haven Cty., Conn., Mar. 29, 1972) (Finding of Fact, Dec. 6, 1971, finding no. 266); Haas v. South Bend Community School Corp., — Ind. —, 289 N.E.2d 495, 500 (1972); Gregorio v. Bd. of Educ. of Asbury Park, No. C-1988-69, at 3 (Super. Ct. of N.J., Ch. Div., Monmouth Cty., Apr. 13, 1970).

that there is a fixed amount of money allocable to athletics and that one purpose of the rule is to preserve that money for boys' athletics. There are two reasons why this argument should not prevail. First, the added costs of allowing girls to play on boys' teams would appear to be quite small. For example, if girls were to compete on the boys' interscholastic tennis team, coaching, equipment, transportation to meets and other common necessities would be identical. The only real added cost might be the expense of having a chaperone at state tournaments or overnight trips and making some provision for separate shower facilities. It is submitted that this cost would not be prohibitive. Second, even if it were true that allowing girls to play on boys' teams would cost more, there certainly is no valid interest of the state in allocating the interscholastic sports monies to the boys rather than to the girls. For example, if a school could afford to support one ten-member tennis team, it clearly would be impermissible for the state to exclude females simply to preserve positions for males. The Indiana Supreme Court put this argument into its proper perspective in *Haas v. South Bend Community School Corporation*,[75] when it commented:

> [T]his increased expense, which would not appear to be substantial when one considers the cost of administering the entire system of interscholastic athletics in high schools throughout the state can not be considered a justifiable reason for denying approximately one-half of the high school students in Indiana the opportunity to participate in athletic competition.[76]

4. *Separation of the sexes in interscholastic sports is necessary to the development of separate girls' programs*

A number of the defendant state high school leagues have argued that allowing girls to play on boys' teams would have an adverse effect on the development of girls' interscholastic sports.[77]

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75. — Ind. —, 289 N.E.2d 495 (1972).

76. *Id.* at 500.

77. Gregorio v. Bd. of Educ. of Asbury Park, No. C-1988-69 (Super. Ct. of N.J., Ch. Div., Monmouth Cty., March 16, 1971), *aff'd. mem.*, No. A-1277-70, Super. Ct. of N.J., App. Div., April 5, 1971, at 17, wherein the judge stated:

> I am very strongly persuaded by the proofs and inferences that can be drawn that if we change the structure of this rule to honor Renee's desires we will eliminate or substantially damage the present girls' program in the system . . . .

See also Brief for Appellant at 19, Brenden v. Independent School Dist. 742, 342 F. Supp. 1224 (D. Minn. 1972):

> Permitting girls to play on boys' teams will have a detrimental effect upon the development of a broad and expanding girls'

The reasoning seems to be that, if the schools allow girls to try out for the boys' team, the schools will not be motivated to develop separate girls' teams. This would result in the five to ten percent of the girls who are exceptional athletes making the boys' team, while the remaining 90-95 percent would still have no opportunity at all.[78] It should be noted that this argument is based on a "vague and undocumented fear."[79] There is no logical reason why girls' sports should suffer simply because girls are allowed to play on boys' teams. However, even if allowing girls to play on boys' teams would have such an effect, this should not be determinative. Courts should disregard any claim that public officials will not honor their obligation to provide an effective girls' athletic program because, as Judge Lord noted in the *Brenden* case, "[t]he law presumes that public officials will do their duty . . . ."[80]

5. *Separation of the sexes is necessary to achieve "equitable competition"*

It was argued in the *Brenden* trial that the purpose of the rule barring female athletes from competing on male teams was to insure "equitable competition." The Minnesota State High School League's principal witness explained the meaning of "equitable competition" in the following manner:

> We believe there are two separate classifications of performance, that of male and that of female, and that in order for the female [*sic*] of that program, within their classification, to achieve their ultimate level of skill, they must be placed in a program which offers them the opportunity to achieve recognition and success commensurate with their performance.[81]

"Equitable competition," then, essentially entails the grouping of athletes by ability for a number of sensible reasons. It is obvious to anyone familiar with sports that there is little enjoyment in competing against someone of markedly higher or lower skills. Furthermore, if an athlete always or never wins, he is

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interscholastic program among the high schools in the State of Minnesota.

78. Brief for Appellant at 20, Brenden v. Independent School Dist. 742, 342 F. Supp. 1224 (D. Minn. 1972).

79. Brenden v. Independent School Dist. 742, 342 F. Supp. 1224, at 1233 (D. Minn. 1972).

80. *Id.* at 1233 n.16.

81. Record at 173-74, Brenden v. Independent School Dist. 742, 342 F. Supp. 1224 (D. Minn. 1972). This argument was made in other cases in similar form. *See, e.g.*, Gregorio v. Bd. of Educ. of Asbury Park, No. C-1988-69, at 3 (Super. Ct. of N.J., Ch. Div., Apr. 13, 1970).

unlikely to be motivated to improve. Also, it is extremely difficult for a coach to train a team to achieve given levels of proficiency if the members of that team are of radically different abilities.

The argument that females cannot compete equally with males is premised on the notion that "the physiological differences between males and females make it impossible for the latter to compete equitably with males in athletic competition."[82] Extensive, uncontroverted testimony was introduced by an expert witness at the *Brenden* trial to demonstrate the physiological differences between males and females. The expert witness testified that men are taller than women and also stronger by reason of greater muscle mass;[83] that men are able to process oxygen more efficiently than women;[84] and that men can run more efficiently than women because at puberty a woman's pelvis widens, causing the femur to bend outward, thus reducing running efficiency.[85] The League concluded from this data that "[e]ven the most skilled girls are unable to compete equitably with boys except when the very best are matched with the mediocre or less talented male."[86]

Given this data, a permissible purpose for the rule arguably can be established. Most female athletes do not possess the same athletic ability as men, and the rule accordingly groups athletes by ability to avoid the problems caused by competition among mismatched opponents. This would seem to be a constitutionally permissible purpose for proscribing male-female competition. However, the equal protection guarantee demands more than a permissible purpose; it requires also that the classification which implements that purpose be sufficiently precise to satisfy the relevant standard of review. The ultimate issue, then, is whether a classification based on sex, and designed to

82. Brief for Appellant at 14, Brenden v. Independent School Dist. 742, 342 F. Supp. 1224 (D. Minn. 1972).

83. Record at 300, Brenden v. Independent School Dist. 742, 342 F. Supp. 1224 (D. Minn. 1972).

84. *Id.* at 302. The figures were given in terms of cubic centimeters of oxygen processed per kilogram of body weight per minute. It was stated that male cross-country skiers are the most efficient in this area and that they average 80-85 cubic centimeters per kilogram per minute. The highest known level for any woman on record was 68 cubic centimeters per kilogram per minute.

85. *Id.* at 255.

86. Brief for Appellant at 22, Brenden v. Independent School Dist. 742, 342 F. Supp. 1224 (D. Minn. 1972).

group athletes by ability, satisfies that precision demanded by the equal protection guarantee.

D. RELEVANCE OF PURPOSE TO CLASSIFICATION

Once a permissible purpose has been established, the relationship of the classification scheme to the purpose must be evaluated. This could prove to be the most difficult step, particularly if Professor Gunther's theory is correct that the Burger Court will use an intensified means-focused inquiry to avoid taking a controversial stand on "fundamental interests" or "suspect classifications." The courts are evenly split on which one of two approaches to this problem is correct, depending upon the perspective from which the classification is viewed.

One approach, consistent with arguments advanced by the state high school leagues, asserts that participation in interscholastic sports is a privilege and not a right[87] and that the state thus should not be required to be precise in its classification scheme. In traditional equal protection terms, the argument would be that, since athletics is not a fundamental right and sex is not a suspect classification, permissive review is appropriate and the slightly under-inclusive classification should be sustained.

The argument that participation in athletics is a privilege and not a right is premised on a long line of cases,[88] of which

87. One federal court was so persuaded by this argument that the judge dismissed the suit for lack of jurisdiction. Harris v. Illinois High School Ass'n, Civ. No. S. Civ. 72-25, at 2 (S.D. Ill., Mar. 21, 1972), which stated:

> Participation in interscholastic competition is not a right guaranteed by the Fourteenth Amendment to the Constitution of the United States, nor by the laws of the State of Illinois. *See* Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 115, 1157 (5th Cir. 1970).

But see text following note 90 *infra*.

88. *E.g.*, Brief for Appellant at 10, Morris v. Michigan State Bd. of Educ., Civ. No. 38169 (E.D. Mich., Apr. 26, 1972), *appeal docketed*, No. 72-1578, 6th Cir. 1972, and Brief for Appellant at 35, Brenden v. Independent School Dist. 742, 342 F. Supp. 1224 (D. Minn. 1972); both cite the following cases: Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 1155 (5th Cir. 1970); Oklahoma High School Athletic Ass'n v. Bray, 321 F.2d 269 (10th Cir. 1968); Paschol v. Florida High School Activities Ass'n, 45 Ill. App. 2d 277, 195 N.E.2d 38 (1968), *cert. denied*, 379 U.S. 960 (1965); State of Indiana *ex rel.* Indiana High School Athletic Ass'n v. Lawrence Circuit Court, 240 Ind. 114, 162 N.E.2d 250 (1959); Marino v. T.H. Waters, 220 So. 2d 802 (La. App. 1969); Brown v. Wells, 288 Minn. 468, 181 N.W.2d 708 (1970); Morrison v. Roberts, 183 Okla. 359, 82 P.2d 1028 (1938); Tennessee Secondary School Athletic Ass'n v. Cos, 221 Tenn. 164, 425 S.W.2d 597 (1968); Starkey v. Bd. of Educ., 14 Utah 2d 1227, 381 P.2d 718 (1963). For a good discus-

the most recent and frequently cited is *Mitchell v. Louisiana High School Athletic Association.*[89] *Mitchell* involved a rule which prohibited students who voluntarily repeated a grade from participating their senior year. Students who failed a grade were declared ineligible only for the following semester. The students challenged the rule on two grounds: first, that they were deprived of due process because they had not received notice of the rule in junior high school and, second, that since they were treated differently from students who had failed a grade, they were denied equal protection. *Mitchell* held that failure to give notice was not a violation of due process and that there was a rational basis for treating those who voluntarily repeated a grade differently from those who had failed. The court premised its decision with respect to equal protection on the fact that some high school coaches had persuaded students to repeat a year in order to preserve winning teams. Nevertheless, the court in dicta commented:

> Rights, privileges and immunities not derived from the federal Constitution or secured thereby are left exclusively to the protection of the states. The privilege of participating in interscholastic athletics must be deemed to fall in the latter category and outside the protection of due process.[90]

Although the holding in *Mitchell* is arguably valid given its particular fact pattern, the right-privilege argument in the opinion's dicta has been rejected by the Supreme Court in the due process area.[91]

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sion of these cases and athletic associations in general, see Note, *State High School Athletic Associations: When Will a Court Interfere?*, 36 Mo. L. REV. 400 (1970) which states:

> These cases form a chain of precedent for the general rule that court[s] will usually not interfere with the internal affairs of such associations. Nearly all of the cases find in favor of the associations. But this uniformity of result can not be read as an indication that the law is settled in the area. In all but the two earliest cases in the series, the state appellate courts have either reversed or prohibited a lower court's ruling against the athletic association, or have prohibited the lower court from hearing a complaint against an association. In other words, state athletic associations have consistently been losers at the trial level and winners on appeal. One reason for this phenomena is that new methods of attack are devised by the plaintiffs. Because the athletic associations have muddled along for many years without any recognized authority over their actions in either the statutes or the cases, many facets of their conduct were untested and many more remain untested.

Id. at 402 (footnotes omitted).

89. 430 F.2d 1155 (5th Cir. 1970).

90. *Id.* at 1158.

91. [T]his court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is char-

Moreover, the right-privilege argument as employed in sex discrimination in athletics cases does not withstand equal protection analysis. The equal protection clause does not guarantee absolute substantive rights; rather, it guarantees the right to be treated equally to other similarly situated people, absent a proper purpose for not doing so. This was recognized in *Reed v. Nebraska*:

> One justification advanced by the defendants for the rule prohibiting girls from playing golf with and against boys is that golf, unlike education, is a privilege, rather than a right. Even assuming that inter-school competition in golf is not educational, the privilege-right distinction is not viable . . . . The issue is not whether Debbie Reed has a "right" to play golf; the issue is whether she can be treated differently from boys in an activity provided by the state. Her right is not the right to play golf. Her right is the right to be treated the same as boys unless there is a rational basis for her being treated differently.[92]

A second approach, exemplified by *Reed v. Nebraska*, views

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acterized as a "right" or as a "privilege."
Graham v. Richardson, 403 U.S. 365, 374 (1970).

92. Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258, 262 (D. Neb. 1972) (footnotes omitted). A corollary of the "privilege" argument is that, since these cases involve the actions of voluntary educational associations, the courts should not interfere with their decision making. Brief for Appellant at 51, Brenden v. Independent School Dist. 742, 342 F. Supp. 1224 (D. Minn. 1972); Brief for Appellant at 14, Morris v. Michigan State Bd. of Educ., Civ. No. 38169 (E.D. Mich., April 26, 1972), *appeal docketed*, No. 72-1578, 6th Cir. 1972. The thrust of this argument is that these associations have some special expertise in educational matters and the courts should not interfere with them unless there has been a mistake, fraud, collusion or some sort of arbitrariness.

The speciousness of the argument is illustrated readily by substituting the word "Negro" or "Jew" for "girl" in the rule. In such matters the courts should, and have, not hesitated to interfere. For example, in Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 225 (5th Cir. 1968), the court did not hesitate to interfere when racial discrimination was involved. This argument was considered in Reed v. Nebraska. Concerning the cases cited for the proposition that courts should not interfere with the educational associations, Chief Judge Urbom said:

> they assume that schools and activities associations may make any rule they choose to make, irrespective of whether there be any rational connection with a reasonable objective of the state; and they indicate and they assume that students have only "privileges" relating to sports activities. These assumptions may be proper as matters of state law, with which those state courts primarily were dealing, but as matters of federal constitutional law they are untenable in view of the declarations of the Supreme Court of the United States cited in this memorandum. [Namely *Reed v. Reed.*]

Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258, 262 (D. Neb. 1972).

the rule prohibiting mixed competition as precluding some qualified female athletes from participation, thereby imposing a burden on females solely on the basis of their sex. From this perspective, in traditional equal protection terms, the rule constitutes an over-inclusive imposition of a burden rather than an under-inclusive conferral of a privilege or benefit.[93]

As discussed previously,[94] *Reed v. Reed* established certain requirements which classifications on the basis of sex must satisfy even in areas not involving fundamental rights. Although the right of a woman to participate in athletics may not be fundamental, it is certainly as important as the right of a female to have an opportunity equal to that of a male to administer an estate.

The situtation in *Reed v. Reed* occurs only rarely, and even where a woman loses the right to administer an estate, the consequences would not seem to be that serious. Participation in athletics would appear to be more important. The Minnesota State High School League itself has declared that:

> Sports are a vital, cultural expression of America. They are as expressive of the American way of life as are freedom of speech, the right to vote, schools and choice of church. . . . Sports portray the true character of America and they are filled with vitality, with ideals and opportunities. . . . They are fundamental to the purposes of education and democracy.[95]

Although this may slightly overstate the case, it is true that there are many intangible benefits to be derived from participation in athletics. The chance to compete comes at a particularly formative stage of life and can never be recovered. Certainly

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93. The terms over- and under-inclusion can be confusing, since:

> [a]s a matter of logic, under-inclusion and over-inclusion are complementary and always occur simultaneously. Thus, if a statute classifying people into groups A and B is under-inclusive with respect to group A, it will necessarily be over-inclusive with respect to group B, and vice-versa. In practice, however, the courts commonly are concerned with only one of the groups, and the terminology permits them to focus on the effects which the classification has on that group.

Developments, supra note 5, at 1084 n.36. When focusing on the effects which the rule prohibiting mixed competition has on females, the classification is over-inclusive from a plaintiff's perspective because it prohibits more people from participating than should be prohibited on the basis of ability; specifically, it precludes participation by qualified females. From the perspective of a high school league, of course, the classification is under-inclusive. *See* text accompanying note 87 *supra*.

94. *See* text accompanying notes 42-54 *supra*.

95. Minnesota State High School League undated pamphlet entitled *An Introduction to Interscholastic Activities*. Quotation taken from "Value of Interscholastic Activities," at 1.

the sex discrimination cases are entitled to at least as strict a standard of review as that of *Reed*.

If the goal of the classification is to ensure that people of similar ability compete against each other, the perfect criterion for selection would be a test of ability only. All those who possess sufficient ability would make the team, while all others would be rejected. Yet the present high school league rules which bar all females from competing on male athletic teams eliminate more than those who could not make the team on the basis of ability. Females who could compete effectively with boys are eliminated solely because they are girls. After *Reed*, such an over-inclusive classification device cannot stand.

The over-inclusion of these rules is based on a stereotype or presumption that all women have limited athletic ability. In a relevant series of federal appellate decisions it has been held that employers can no longer exclude women from certain jobs by setting up non-rebuttable presumptions for women as a class when there are admittedly some women who could rebut the presumption. The cases involve the definition of a bona fide occupation qualification [BFOQ] under Title VII of the 1964 Civil Rights Act.[96] In *Weeks v. Southern Bell Telephone Co.*,[97] women were prohibited by a company rule from any employment position in which they would have to lift over thirty pounds. The court rejected the thirty pound limit, stating that these rules "are sometimes unrealistic and always rigid. They should be replaced by flexible regulations applicable to both men and women . . . . "[98] The court further noted that Southern Bell had not proved that thirty pounds would be an appropriate figure.

> Rather, they would have us "assume," on the basis of a "stereotyped characterization" that few or no women can safely lift 30 pounds, while all men are treated as if they can. While one might accept, *arguendo*, that men are stronger on the average than women, it is not clear that any conclusions about relative lifiting ability would follow. This is because it can be argued tenably that technique is as important as strength in determining lifting ability. Technique is hardly a function of sex.[99]

Bowe v. Colgate-Palmolive Co.[100] involved a rule similar to that in *Weeks*. The *Bowe* court stated that individual qualifications and conditions should be considered:

96. 42 U.S.C. § 2000e-2(e) (1970).
97. 408 F.2d 228 (5th Cir. 1969).
98. *Id.* at 233.
99. *Id.* at 235-36.
100. 416 F.2d 711 (7th Cir. 1969).

> Accordingly, we hold that Colgate may, if it so desires, retain its 35-pound weight-lifting limit as a general guideline for all of its employees, male and female. However, it must notify all of its workers that each of them who desires to do so will be afforded a reasonable opportunity to demonstrate his or her ability to perform more strenuous jobs on a regular basis. Each employee who is able to so demonstrate must be permitted to bid on and fill any position to which his or her seniority may entitle him or her.[101]

Rosenfeld v. Southern Pacific Co.[102] employed the same reasoning to hold that even a fifty pound limitation would not qualify as a BFOQ.

Such procedures, which disqualify certain individuals through the use of rigid presumptions, were rejected by the Supreme Court recently in *Stanley v. Illinois.*[103] *Stanley* involved an Illinois statute which created a presumption that unwed fathers were unfit parents and denied them a hearing on their fitness but which accorded all other parents a hearing before they could be deprived of their children. The Court granted *certiorari*

> to determine whether this method of procedure by presumption could be allowed to stand in light of the fact that Illinois allows married fathers—whether divorced, widowed, or separated—and mothers—even if unwed—the benefit of the presumption that they are fit to raise their children.[104]

The Court noted that, while perhaps most unmarried fathers are neglectful parents, all are not, so that even though "[p]rocedure by presumption is always cheaper and easier than individualized determination," it could not stand.[105]

This reasoning is directly applicable to the sex discrimination in athletics cases. The presumption that the women generally cannot compete with men should not be allowed to deprive all women of the right to compete when an individualized determination would be relatively inexpensive and easy to administer. Indeed, all the schools would have to do to provide an individualized determination would be to permit girls to try out for sports teams with the boys. Certainly this cost would be negligible to the schools and would undoubtedly involve less effort than providing the full administrative hearing to unwed fathers required in *Stanley.*

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101. *Id.* at 718.
102. 444 F.2d 1219 (9th Cir. 1971).
103. 405 U.S. 645 (1972).
104. 405 U.S. at 647.
105. 405 U.S. at 656-57.

It should be noted that both *Stanley* and the BFOQ cases may be distinguishable from the sex discrimination in athletics cases because they arguably involve more important rights than participation in athletics. However, it is not the specific holdings of the cases that are important; rather, it is the reasoning which the courts employed. The idea that individuals must be judged as individuals and not on the basis of stereotyped characteristics is entirely within the thrust of the equal protection clause.[106] *Reed* stands for the proposition that classifications on the basis of sex must be carefully analyzed even in relatively unimportant activities. The holding of *Reed,* combined with the reasoning employed in *Stanley* and the employment cases, precludes procedure by presumption in sex discrimination cases.

One final point deserves comment. Implicit in the high school league's argument that girls cannot compete with men is the assumption that physical characteristics are the only ones necessary for success in athletics. This assumption is fallacious, for there are many other factors which are necessary to make a good athlete. These factors are not unique to either sex and may more than compensate for lack of speed or strength in a given athlete, male or female. These include mind-body coordination, mental determination, sensory perception, courage, intelligence, willingness to practice and experience. Different mixtures of these and other physiological factors are required for success in different sports. For example, a maximal oxygen consumption rate is hardly necessary for golf. Any golfer recognizes that concentration and coordination are as important as sheer physical strength. This is also true of many other sports.

In view of the above analysis, it would appear that the most persuasive characterization of the situation is that, in relation to its avowed purpose, the rule barring women from competing on male athletic teams is premised on the impermissible presumption that all women are physiologically unable to compete equally with men. This classification based on sex is demonstrably over-inclusive since it precludes competition by competent female athletes with males and therefore constitutes a denial of equal protection of the laws.

106. Johnston & Knapp, *supra* note 22, at 701.
That "individuals must be judged as individuals" is, of course, also the essence of the equal protection argument. The reasoning employed in *Richards* to find a violation at Title VII could thus just as easily be used to strike down, on equal protection grounds, any state regulation that discriminates against individuals solely on the basis of their sex.

V. LITIGATION STRATEGY

Since the *Reed* case, four of the six sex discrimination in athletics cases have held for the female plaintiff.[107] These cases stand for the general proposition that it is a denial of equal protection to prohibit females from playing on the boys' team when there is no comparable girls' team. Within the four cases, there have been notable differences in litigation strategy of which the practitioner should be aware.

The practitioner's first decision is whether to attack the rule directly or simply its application. *Reed v. Nebraska* and *Morris v. Michigan*[108] represent one approach to this problem. In both cases preliminary injunctions were issued which prohibited the enforcement of rules barring mixed competition. In effect, these cases rendered the high school league rules invalid. Moreover, it was evident that the *Reed v. Nebraska* court based its decision on *Reed v. Reed* and *Stanley v. Illinois*.[109]

A different approach was used in the *Brenden* and *Haas* cases.[110] Rather than holding the rule itself invalid, these courts held that the application of the rule was invalid. Although both courts reached the same decision, they did so for different reasons. *Brenden*[111] evidenced a desire to declare the rule invalid but felt that this might result in reversal on appeal. Accordingly, the court attempted to present the narrowest and least assailable holding possible. After commenting that the

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107. The post-*Reed* decisions which have held for plaintiff are: Brenden v. Independent School Dist. 742, 342 F. Supp. 1224 (D. Minn. 1972); Morris v. Michigan State Bd. of Educ., Civ. No. 38169 (E.D. Mich., Apr. 24, 1972); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972); Haas v. South Bend Community School Corp., — Ind. —, 289 N.E.2d 495 (1972). The post-*Reed* decisions which have held for defendant are: Bucha v. Illinois High School Ass'n, No. 72 C 378 (N.D. Ill., Nov. 21, 1972); Harris v. Illinois High School Ass'n, Civ. No. S. Civ. 72-25 (S.D. Ill., Mar. 21, 1972). The pre-*Reed* cases are: Hollander v. Connecticut Interscholastic Athletic Conference, Inc., Case No. 12-49-27 (Super. Ct., New Haven Cty., Conn., Mar. 29, 1971; Gregorio v. Bd. of Educ. of Asbury Park, No. A-1277-70 (Super. Ct. of N.J., App. Div., April 5, 1971).

108. Civ. No. 38169 (E.D. Mich., Apr. 24, 1972), *appeal docketed*, No. 72-1578, 6th Cir. 1972.

109. Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258, 261-62 (D. Neb. 1972).

110. Brenden v. Independent School Dist. 742, 342 F. Supp. 1224, 1232 (D. Minn. 1972); Haas v. South Bend Community School Corp., — Ind. —, 289 N.E.2d 495, 499 (1972).

111. *See* text following note 56 *supra*.

reasoning of *Sail'er Inn* was "strongly persuasive,"[112] the *Brenden* court commented:

> [I]t should first be made emphatically clear what this Court's ensuing decision does not turn upon. First, this Court does not decide whether participation in interscholastic athletics is of such importance as to be fundamental in nature. . . . Second, this Court is not deciding whether sex . . . is suspect in the historical sense. . . . Third, this case does not involve a class action. . . . Fourth, this Court is not deciding whether the League rules . . . is [sic] unconstitutional or constitutional. . . . What the Court is concerned with in this case is the application of League rules preventing participation of two female high school students in three sports at two high schools, involving only two school districts.[113]

Then, after avoiding every controversial issue, the court held that the effect of the rule was discriminatory since there existed no comparable teams for females and thus females were completely excluded from athletic participation. The court held this a denial of equal protection precluded by *Yick Wo v. Hopkins*.[114] The *Yick Wo* analogy is troubling, however, because in that case the Supreme Court held unconstitutional an ordinance, valid on its face, which was being applied in a discriminatory manner. However, the *Brenden* court, after casting considerable suspicion on the league's rule, held the application discriminatory but allowed the rule to stand.

The *Haas*[115] court reached a holding similar to *Brenden*, but the opinion contained dicta possibly damaging to the female case in the future. The majority opinion stated that the rule "appears reasonable on its face"[116] because "the difference in athletic ability is a justifiable reason for the separation of male and female athletic programs . . . ."[117] The court then commented that:

> [u]ntil girls' programs comparable to those maintained for boys exist, the difference in athletic ability alone is not justification for the rule denying "mixed" participation in non-contact sports.[118]

The dangers inherent in the *Haas* approach are obvious.

112. Brenden v. Independent School Dist. 742, 342 F. Supp. 1224, 1231 n.13 (D. Minn. 1972).
113. Brenden v. Independent School Dist. 742, 342 F. Supp. 1224, 1231-32 (D. Minn. 1972).
114. 118 U.S. 356 (1886) *cited* in Brenden v. Independent School Dist. 742, 342 F. Supp. 1224, 1232 (D. Minn. 1972).
115. *See* text following note 75 *supra*.
116. Haas v. South Bend Community School Corp., — Ind. —, 289 N.E.2d 495, 499 (1972).
117. *Id.*
118. *Id.* at 501.

First, it constitutes a less reliable guide than *Reed v. Nebraska*[119] to courts which will face similar cases in the future. Courts less sympathetic to female rights are virtually invited to distinguish the *Haas* decision on the basis that a comparable girls' program has been developed. This could lead to the exhumation of the separate but equal doctrine to justify separation of the sexes in athletics.[120] The practitioner who desires to avoid this development should therefore attack the rule directly rather than merely its application.

The practitioner must also decide whether to seek individual relief or institute a class action. A class action is preferable for a number of reasons. First, it could prevent a case from becoming moot. Mootness is a substantial danger in these cases because, even if plaintiff is a junior in high school when the action is commenced, there is a real possibility that the plaintiff would graduate and thus be ineligible for further high school competition before an appeal is finally decided. A class action would solve this problem.[121] Second, a class action would have a broader political-psychological effect. Finally, maintenance of a class action does not preclude focusing the effect of an allegedly discriminatory rule on specific plaintiffs. It is therefore recommended that plaintiffs of demonstrated athletic ability be included since, even in a class action, they would provide concrete individual cases in which the rule produces an obviously discriminatory effect.

VI. FUTURE OF SIMILAR SUITS AS GIRLS' SPORTS DEVELOP

It is apparent from an examination of the sex discrimination in athletics cases that the stage of development of girls' programs was crucial to the result in those cases. In all four cases decided favorably for the plaintiff, there were no girls' teams.[122]

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119. *See* text accompanying note 92 *supra*.

120. The viability of the separate but equal doctrine in the sex discrimination in athletics cases is examined in the following section. *See* text accompanying notes 125-41 *infra*.

121. Gaddis v. Wyman, 304 F. Supp. 713, 715 (1969), wherein it is stated:

> To say that the whole action is mooted simply because it may be moot as to the named plaintiff would be contrary to the expressed purpose of Rule 23(e), which prohibits dismissal or compromise of a class action if the result would be to injure the other members of a purported class.

122. Brenden v. Independent School Dist. 742, 342 F. Supp. 1224 (D. Minn. 1972); Morris v. Michigan State Bd. of Educ., Civ. No. 38169

Moreover, in one of the two post-*Reed* decisions adverse to plaintiffs, the outcome was partially determined by the fact that there was a girls' interscholastic team.[123] One issue raised by these cases is whether the development of girls' programs will affect the potential for success of similar suits in the future. That is, as the girls' programs develop and the state's argument that it is trying to preserve a girls' program becomes more credible, it is unclear whether the high school leagues will be allowed to maintain their sexually segregated rules of eligibility. Two justices of the Indiana Supreme Court suggested in dicta in *Haas* that if "comparable" girls' programs had existed the outcome of the case may have been different.[124] Thus the issue raised is whether or not the discountenanced separate but equal doctrine could be resurrected in sex classification cases to prohibit girls from competing with boys.

The validity of the separate but equal doctrine in sex classifications has not been definitively determined. Two state appellate courts, however, have considered the concept and rejected it. In *J.S.K. Enterprises, Inc. v. City of Lacey*,[125] a Washington municipality sought to combat immoral conduct in sauna massage parlors by prohibiting massagists from performing massages upon members of the opposite sex. The trial court upheld the ordinance on the basis, *inter alia*, that it treated men and women equally.[126] The appellate court, however, declared the ordinance invalid on the theory that "[t]he rule of Plessy v. Ferguson . . . is not a viable doctrine with respect to sex segregation."[127] Similarly, in *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*,[128] a Pennsylvania appeals court rejected "Jobs — Female Interest," "Jobs — Male Interest," and "Male-Female Help" headings in the classified advertisement section of the paper because "[t]he 'separate but equal' principle is no longer a legitimate argument in civil rights cases."[129]

In spite of such judicial statements, some commentators have suggested that the concept may have some lingering vitality

(E.D. Mich., Apr. 24, 1972); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972); Haas v. South Bend Community School Corp., — Ind. —, 289 N.E.2d 495 (1972).

123. Bucha v. Illinois High School Ass'n, No. 72 C 378 (N.D. Ill., Nov. 21, 1972).

124. — Ind. —, 289 N.E.2d at 501.

125. 6 Wash. App. 43, 492 P.2d 600 (1972).

126. *Id.* at 601.

127. *Id.* at 605.

128. 4 Pa. Commonwealth 448, 287 A.2d 161 (1972).

129. *Id.* at 168.

with regard to "notions of personal privacy surrounding the sexual organs or exposure of the body."[130] Under this theory, separate bathrooms and dressing-rooms would be permissible as long as they were equal. The underlying theory is that, while separate but equal confers a badge of inferiority in racial situations, it carries no such implication in distinctions of this sort based on sex.[131] The commentators believe, however, that the doctrine should be

> strictly limited to those facilities which involve potential exposure of intimate parts of the body. No such potential exists in schools, state-run public accommodations, or other facilities where sexual segregation may be traditional but is not motivated by notions of bodily privacy.[132]

Separate but equal sexually-segregated colleges have been sustained where they were part of a state-wide system of colleges which offered the potential student a choice between co-educational, all-male and all-female schools.[133] However, in *Kirstein v. Rectors and Visitors of the University of Virginia*,[134] the all-male school was found to possess prestige not equalled by any other school in the system. The system was declared unequal in fact and the school was compelled to admit women. The court commented in a footnote that:

> We need not decide on the facts of this case whether the now discountenanced principle of "separate but equal" may have lingering validity in another area—for the facilities elsewhere are not equal with respect to these plaintiffs.[135]

The only opinion which actually considered the separate but equal doctrine in the sex discrimination in athletics cases suggested that the doctrine would be difficult to justify. Concurring in *Haas*, Justice DeBruler noted that the separate but equal issue was not decided in that case because it was not properly before the court.[136] However, since the majority had hinted that the doctrine might be applicable, he stated that:

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130. *Developments in the Law—Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1514 (1971).

131. Murray & Eastwood, *supra* note 22 at 240; *Developments in the Law, supra* note 130, at 1515.

132. *Developments in the Law, supra* note 130, at 1515.

133. Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970), *aff'd. mem.*, 401 U.S. 951 (1971); Allred v. Heaton, 336 S.W.2d 251 (Tex. Civ. App.), *cert. denied*, 364 U.S. 517 (1960); Heaton v. Bristol, 317 S.W.2d 86 (Tex. Civ. App. 1958), *cert. denied*, 359 U.S. 230 (1959).

134. 309 F. Supp. 184 (E.D. Va. 1970).

135. *Id.* at 187 n.1.

136. Haas v. South Bend Community School Corp., — Ind. —, 289 N.E.2d 495, 502 (1972).

> [a]nyone who would seek to support the rationality of the separatist principle served by such dual systems would have a difficult burden indeed.[137]

Justice DeBruler also asserted that the burden would not be met merely by presenting the records of past competition and that a proper constitutional inquiry would require a close examination of the causes of the different performances of girls and boys.[138]

There are three reasons why the separate but equal doctrine should be rejected in sex discrimination in athletics cases. First, with respect to non-contact sports, no intimate body contact is required so there is no justification for separation on that basis. Second, separation of the sexes in athletics does not only imply inferiority for women, it is premised on it. Third, separate girls' teams can never be equal in fact to boys' teams. The high school leagues themselves proved this with their physiological data. Although that data may not be valid as applied to specific individuals, it is valid for women generally. It follows then that the girls' team will generally be less skilled as a whole than the boys' team. Thus the boys' team will always have the "prestige" factor which was determinative in *Kirstein*. As long as this prestige factor obtains, boys' and girls' teams will never be truly equal. The exceptional female athlete would still not be afforded equal treatment with male athletes of the same ability. *Brown v. Board of Education*[139] was essentially a factual determination that separate was not equal in the racial context. The effect of that determination is so pervasive that it would be difficult to accept the separate but equal doctrine in the area of sexually segregated athletic teams. The experience

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137. *Id.* at 503.

138. *Id.* Justice DeBruler's comments are worth noting:

> The defender of such a system in court, surely could not be successful merely by presenting evidence that the high school track and field records of men are better than those of women, as was done by appellee in the case before us. No trial court investigation into the relative athletic abilities of men and women could be complete merely upon a demonstration that male track and field champions have historically bettered their female counterparts in the record books. Such evidence cannot support a conclusion that the male sex is athletically superior. An objective observer could not determine which of two opposing armies is superior merely by examining the strongest and bravest soldier in each. For constitutional purposes, such an investigation would necessarily focus on the causes of any differential in the relative performances of male and female athletes.

139. 247 U.S. 483 (1954).

of generations of racial discrimination should cause the courts to reject the separate but equal doctrine in this area.

Recently, the necessity to accommodate the exceptional female athlete in spite of the development of girls' teams was recognized by both the New York State Board of Education and the Michigan Legislature. The New York Board adopted a rule that girls will not be allowed to play against boys when there is a girls' team except in exceptional cases where the high school principal may waive the rule.[140] The Michigan legislature realized that even if girls' programs were developed there was still a need to permit the exceptional female athlete to try out for the boys' team.[141]

Finally, it should be noted that in every case to date, the female athletes have sued to establish their right to play in non-contact sports. This raises the question of whether or not it might become feasible for females to sue to play in contact sports. At the present time, it would appear that the only valid objection to female participation with males in contact sports is that intimate body contact between opposite sexes at an adolescent age would probably offend many people. For example, many parents would object to girls wrestling with boys; they would be repulsed by the intimate body contact involved in that sport. However, as society's sexual mores change, and if physiological data does not demonstrate that females are more susceptible to injury, males and females might compete against each other in contact sports at some future time.

VII. CONCLUSION

Reed v. Reed signaled the end of the era of entirely permissive review in sex classification. Even if *Reed* attempted to avoid reaching the sex-as-a-suspect-classification issue, the case can only be properly explained by concluding that the Court's decision was at least partially motivated by a suspicion of sex as a classifying factor.[142] This marks a significant change in the standard of review and forms a sufficient basis for the conclusion that it is a denial of equal protection of the laws to prohibit females from competing against males in high school athletics. This conclusion need not hamper the development of girls' athletic programs. In fact, it may act as a catalyst by stimu-

140. New York Report, *supra* note 72, at 77.
141. MICH. COMP. LAWS ANN. § 340.379(2) (Supp. 1972).
142. *See* text accompanying notes 42-55 *supra*.

lating thought in the area and by graphically demonstrating the inequities of the present system. Moreover, the development of girls' programs should not preclude female athletes from trying out for boys' teams. The separate but equal doctrine should not be resurrected here; but even if it were, lawyers could nevertheless demonstrate that "separate" is not "equal" in fact.

The significance of sex discrimination in athletics cases extends beyond the immediate changes which they will cause in high school athletic programs. A basic tenet of equality is that people should be treated as individuals and not on the basis of commonly-held stereotypes. One such stereotype posits that women cannot perform physical tasks as well as men because of their physiological disabilities. A sound and well-reasoned holding that such assumptions are insufficient to justify differences in treatment without an individualized determination would be a step forward in the area of women's rights.