INTRODUCTION

1997 marked the 25th anniversary of Title IX, the federal law that prohibits gender discrimination in high school and college sports programs that receive federal funds.\(^1\) Within a decade of its enactment, the number of girls competing in school sports increased by 500%.\(^2\) Benefits of athletic participation include greater confidence, self-esteem and pride.\(^3\) Students also are less likely to become involved with drugs, less likely to become pregnant and more likely to graduate high school than students who do not participate in sports.\(^4\) Despite Title IX’s success in reducing gender discrimination in sports,\(^5\) women continue to be denied equal access to the benefits of athletic competition.

Title IX requires that male and female sports programs receive the same benefits, such as: equipment, uniforms and supplies; access to weight room and training room; equal practice facilities; same size and quality locker rooms and competition facilities; equal access to practice and games during prime time; same quality coaches; opportunity to play the same quality opponents; the same awards and awards banquets; and to have cheerleaders.

\(^1\) Title IX states that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.” Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-09, 86 Stat. 235 (codified at 20 U.S.C. §§ 1681-1688 (1994)).


\(^3\) Women’s Sports Foundation, supra note 2 (noting, further, that 80% of women who are key leaders in Fortune 500 companies participated in sports during their childhood; and citing additional benefits such as positive body image and up to a sixty percent reduction in the risk of breast cancer).

\(^4\) Id.

and the band perform at games. Despite the requirements of Title IX, extremely athletic girls are still denied equal access to the benefits of athletic competition. Karen O'Connor and Sandra Lynn Bucha are two such examples.

Karen, an extremely gifted athlete, has played on organized basketball teams since she was seven years old. While participating in various programs, camps, and competitions, she has almost always been her team's leading scorer. Over the years she has received numerous awards recognizing her ability. All her life, Karen has played with, and out performed, boys. As a sixth-grade student, she wanted to play interscholastic basketball with these same boys. Even though her ability had been judged by a professional basketball coach as that of a high school sophomore, the eleven-year-old was not allowed to try out for the boys' team. She voluntarily chose not to try out for the girls' team, which did not provide the same caliber of competition as did the boys' team.

Common differences imposed on female basketball teams include a "half-court" game, allowing six players on the court, permitting only the three forwards to shoot, not allowing the three non-forwards to cross the center line, and having nine feet high baskets. These rules differ significantly from the rules of traditional basketball. Usually only five players are allowed on the court, all players may shoot and cross the half-court line, and baskets are ten

---

6. 34 C.F.R. § 106.41(c) (1997) provides for equal athletic opportunity for members of both sexes. Among other factors, the following are to be considered when determining whether opportunities are equal:

- Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- The provision of equipment and supplies;
- Scheduling of games and practice time;
- Travel and per diem allowance;
- Opportunity to receive coaching and academic tutoring;
- Assignment and compensation of coaches and tutors;
- Provision of locker rooms, practice and competitive facilities;
- Provision of medical and training facilities and services;
- Provision of housing and dining facilities and services;
- Publicity.


7. For facts of the Karen O’Connor story, see generally O’Connor v. Board of Educ., 449 U.S. 1301 (1980); 645 F.2d 578 (7th Cir. 1981); 545 F. Supp. 376 (N.D. Ill. 1982).


9. See O’Connor, 449 U.S. at 1306 (rejecting Karen’s argument that her exclusion from the boys’ team was a violation because her interests and abilities were not accommodated as the Title IX requires, the court ruled that the school could prevent her from playing based solely on her sex).

feet high. Furthermore, when scheduling conflicts arise, it is common for the women's sports to be scheduled during the off-season.

Like Karen, Sandra Bucha was denied equal access to the benefits sports provide, despite her athletic ability. Sandra was excluded from trying out for and participating on her school's interscholastic swimming team solely because of her sex. Her school not only prohibited girls from playing on boys' teams, but it also enforced different treatment based on sex. The school imposed rules that prohibited female athletes from staying overnight for any athletic competitions, limited awards for female athletes to one dollar, and prohibited cheering for female teams. None of these rules applied to male athletes. The Illinois court upheld these rules despite the lack of any rational legitimate state purpose advanced by such inequality.

Karen and Sandra are not alone. Female athletes are disadvantaged by differences in rules; by scheduling during nontraditional seasons; by less qualified and underpaid coaching staffs; and at times, by a complete lack of an interscholastic team. This disadvantage is further complicated by conflicting federal and state court decisions regarding sex discrimination in athletics.

Nearly all court rulings have been decided under the Equal Protection Clause of the United States Constitution. However, the proper standard of review has not been agreed upon, even within the same jurisdiction. Some

---

12. See, e.g., Ridgeway v. Montana High Sch. Ass'n, 858 F.2d 579, 580 (9th Cir. 1988) (holding females' basketball and volleyball seasons do not need to be aligned with the national norm).
13. Bucha v. Illinois High Sch. Ass'n, 351 F. Supp. 69 (N.D. Ill. 1972) (finding limitations that applied to girls' athletic contests but not the boys' did not violate equal protection). The court found it rational that girls' athletic contests were purposely devoid of competition, with emphasis on intramural activities rather than concentration and competitiveness as in the boys programs. Furthermore, the court upheld a regulation prohibiting girls from participating in more than one sport on any day. The court reasoned that such regulations could be upheld because the Fourteenth Amendment does not create fictitious equality where there is real difference. Id. at 74.
16. See Estate of Hicks, 174 Ill.2d 433, 438 (1996) (ruling that because Article 1,
courts have ruled that it is not unconstitutional to deny girls access to boys' teams, whereas others have held that girls must be allowed to play on boys' teams whenever they want. Others have held they must be allowed to play on boys' teams only if a similar girls' team is not available. Still others have held that girls must only be allowed to play on boys' teams if the sport involved is not a contact sport. Likewise, courts have handed down inconsistent rulings on the issue of whether boys must be allowed a reciprocal right to play on girls' sports teams.

Section 18, of the 1970 Constitution bars discrimination on the basis of sex by the state or its units of local government or school districts, a classification based on sex is a "suspect classification" and must meet strict judicial scrutiny; People v. Ellis, 311 N.E.2d 98 (Ill. 1974); Phelps v. Bing, 316 N.E.2d 775 (Ill. 1974); People v. M.A., 529 N.E.2d 492 (Ill. 1988). But see, Bucha v. Illinois High Sch. Ass'n, 351 F. Supp. 69, 74-75 (holding that sex is not an inherently suspect classification and that treating the sexes differently is justified if a rational relationship is shown between the actions taken and the goals of interscholastic athletic competition); Petrie v. Illinois, 394 N.E.2d 855, 857 (Ill. 1979) (noting that the Supreme Court has never treated gender classifications as suspect and that gender classifications must serve important government objectives and be substantially related to achieving those objectives).

17. O'Connor, 449 U.S. 1301 (stating sex based discrimination is needed in order to prevent boys from dominating girls sports). See also Ritacco v. Norwin Sch. Dist., 361 F. Supp. 930 (W.D. Pa. 1973) (finding that where there is a rational basis for providing separate but equal teams, and separate but equal teams are provided, then prohibiting girls from participating on the boys' teams does not unfairly discriminate against girls).

18. Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 334 A.2d 839, 843 (Pa. 1975) (holding girls must be allowed to play on the boys' team even if a girls team is provided); Darrin v. Gould, 540 P.2d 882 (Wash. 1975) (holding that girls must be allowed to play on all sports teams, including wrestling and football). See also Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1997) (holding excluding girls from soccer competition with males is an unconstitutional denial of equal educational opportunity).


20. Bednar v. Nebraska Sch. Activities Ass'n, 531 F.2d 922 (8th Cir. 1976) (holding girls cannot be excluded from cross-country competition and that girls and boys should not be prohibited from competing on the same team). See also, Haas v. South Bend Community Sch. Corp., 289 N.E.2d 495 (Ind. 1972), abrogated on other grounds by Collins v. Day, 644 N.E.2d 72 (Ind. 1994) (holding girls cannot be excluded from non-contact sports such as golf, swimming, tennis, track and gymnastics).

21. Compare Attorney General v. Massachusetts Interscholastic Athletic Ass'n, Inc., 393 N.E.2d 284, 292 (Mass. 1979) (concluding that excluding boys from participating in a particular sport, even when athletic opportunities are equal or greater for boys, can be a violation of equal protection), with Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1127, 1131 (9th Cir. 1982) (holding that the equal protection violation that applies when girls are excluded does not extend to males because the government does not have an interest in eliminating discrimination against boys in athletics. The court viewed the exclusion of males as furthering the goal of redressing past discrimination and providing equal opportunities for
This article begins by examining various approaches to dealing with sexual discrimination in sports. Part I provides the historical background of and legislative intent of Title IX. Part II examines the requirement of state action. Part III addresses proposed justifications for allowing discrimination on the basis of sex. Part IV discusses how the separate but equal standard has been applied to athletic programs. Part V examines the exclusion of boys from girls' athletic teams. Although many areas within athletics are affected by gender discrimination, including sports programs for children, high school sports programs, college athletics, amateur athletics, professional sports.

females); see also Hoover v. Meiklejohn, 430 F. Supp. 164 (D.C. Colo. 1977) (holding that given the lack of athletic opportunity for girls in past years, separation of teams may promote the legitimate purpose of encouraging their involvement. As such, it may also justify sanctioning some sports only for females).

Education Amendments of 1972, supra note 1.

National Org. of Women v. Little Leagues, 318 A.2d 33 (N.J. 1974) (rejecting the argument that resources should be expended solely on boys who could use the training to develop permanent baseball skill, the court held that developing "manhood" was no different from the way "womanhood" should be developed, by developing character and sportsmanship or sportswomanship).

See, e.g., Kelley v. Board of Trustees, 35 F.3d 265 (7th Cir. 1994) (holding that termination of the men's swimming program while retaining the women's swimming program did not violate Title IX or the equal protection clause because men's participation in athletics was more than proportionate to their percentage of the student body). See also Cohen v. Brown University, 101 F.3d 155 (1st Cir. 1996) (ruling that Brown University violated Title IX by demoting its women's gymnastics and volleyball teams from varsity status).

See Lafler v. Athletic Bd. of Control, 536 F. Supp. 104, 107 (W.D. Mich. 1982) (ruling against a woman who sought to compete in boxing matches with men because there was no league for women). The court stated that the plaintiff admitted that she wore a protective covering for her breasts which was clearly prohibited by Rule Six, Article 9 of the Amateur Boxing Federation Rules and that the same rule requires contestants to wear a protective cup. Id. at 106. The opinion failed to consider that the rule was based on male anatomy, therefore not a justification for discrimination but an example of it. Id.

See, e.g., Matthew J. McPhillips, "Girls of Summer": A Comprehensive Analysis of the Past, Present, and Future of Women in Baseball and a Roadmap to Litigating a Successful Gender Discrimination Case, 6 SETON HALL J. SPORT L. 301, 302 (1996) (featuring in part, The Colorado Silver Bullets). See also New York State Div. of Human Rights v. New York-Pennsylvania Prof'l Baseball League, 36 A.D.2d 364, 320 N.Y.S.2d 788 (1971) (finding sex discrimination when the national association of baseball leagues refused to hire a woman who was 5 feet 2 inches tall and weighed 129 pounds). The court found that standards of requiring umpires to be 5 feet 10 inches and weigh at least 170 pounds bore no reasonable relation to the requirements of the job of umpiring, yet served to bar more than 99 percent of all women from consideration. Id. at 793. Furthermore, evidence indicated that male professional baseball umpires in both the major and minor leagues who had failed to meet the height and weight standards were hired and performance was not impaired. Id. at 794.
media coverage,\textsuperscript{27} employment,\textsuperscript{28} and coaching,\textsuperscript{29} this comment focuses on discrimination in high school sports programs. Finally, this comment concludes that the preferable solution is not to look at whether separate teams are permissible, but rather to examine whether they are truly equal while keeping in mind the goal to further the educational opportunities and athletic experiences of both sexes.

I. HISTORICAL BACKGROUND

The stated purpose of interscholastic athletics is to provide students with an opportunity to cultivate good habits and to develop mental and physical abilities, equally beneficial to both girls and boys.\textsuperscript{30} When interscholastic athletic programs discriminate against girls, schools violate Title IX and the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{31} Even prior to the passage of Title IX, athletic programs were recognized as an important part of the educational process and subject to the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{32} Under an Equal Protection analysis, it has been

\begin{itemize}
\item \textsuperscript{27} Women's Sports Foundation, \textit{supra} note 2, at 4 (reporting that sports stories about women account for only 3.5\% of all sports stories in a study of USA Today, the Boston Globe, the Orange County Register, and the Dallas Morning News). Ninety-four percent of television news sports coverage goes to men's sports. In fifty-two weeks of Sports Illustrated (2/93-2/94), six women were awarded cover shots. The first was in a bathing suit. The second, had a knife in her back. The third and fourth were widows of baseball players. The fifth was a tennis player who was featured because she feared her father. The sixth was Nancy Kerrigan after she was attacked. \textit{Id.}
\item \textsuperscript{28} Title VII of the Civil Rights Act of 1964. The clearest prohibitions of Title VII relate to sex discrimination in the area of employment. \textit{Id.}
\item \textsuperscript{29} \textit{See} Wynn v. Columbus Mun. Separate Sch. Dist., 692 F. Supp. 672 (N.D. Miss. 1988) (finding a female coach had been discriminated against when the school board passed her over for Athletic Director in favor of a less-qualified male); Equal Employment Opportunity Comm'n v. Madison Community Unit Sch. Dist., 1986 WL 613 (S.D. Ill. 1986); \textit{see also} Women's Sports Foundation, \textit{supra} note 2 (reporting that head coaches of women's basketball average only 59\% of the salary of head coaches of men's basketball). Furthermore, between 1974 and 1975, coaching positions for college women's teams increased 185 percent; 182 percent of the new positions went to men and 3 percent went to women. \textit{Id.} \textit{See also} Ann Marie Dobosz et al., \textit{How Are We Doing?}, Ms. Magazine, Volume VIII, No. 2, at 22 (stating that in 1972, more than 90\% of coaches of college women's sports teams and administrators of women's sports programs were women). By 1996, the percentage of coaches of women's college teams that were women had dropped to 47.7\%, and the percentage of administrators of women's teams that were women had dropped to 18.5\%). \textit{Id.}
\item \textsuperscript{31} \textit{See infra} notes 32-4 and accompanying text.
\end{itemize}
held that exclusion of girls from contact sports in order to protect them from injury is not substantially related to any justifiable governmental interest. What Title IX adds is the general rule that an institution covered by the Act is forbidden from discriminating on the basis of sex in athletics. Title IX provides:

[W]here a recipient [of federal funds] operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport.

To fall within Title IX a school must receive federal assistance. Title IX allows schools receiving federal funds the discretion to determine for themselves how best to provide equality of athletic opportunity. In order to comply with Title IX schools must show: (1) they have provided opportunities for males and females in numbers that proportionately represent their respective enrollments; (2) they have a history of expanding programs in response to female’s developing interests and abilities in sports; or (3) they have fully and effectively accommodated female’s interests and abilities.

The underlying purpose of Title IX and similar legislation addressing sex discrimination is to emancipate women and girls from stereotypes and limiting conceptions that are discordant with their needs, capabilities and aspirations. This is in sharp contrast with decisions such as State v.

33. Leffel v. Wisconsin Interscholastic Athletic Ass’n, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978) (discussing alternatives such as providing coeducational teams, dropping all of the teams, or establishing separate girls’ teams for contact sports).
34. Title IX states that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.” Education Amendments of 1972, supra note 1.
35. Id.
36. Id.
37. Id. See also Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High School Athletic Ass’n, 647 F.2d 651 (6th Cir. 1981) (holding that an athletic association’s rule prohibiting girls from participating on boys’ teams in any contact sport violated Title IX because the rule took from the schools their power to determine how best to provide equal athletic opportunity).
38. John Gibeaut, supra note 5, at 40.
Hunter which approved of the legislature's use of the state's police power to "halt this ever-increasing feminine encroachment upon what for ages had been considered strictly as manly arts and privileges."

The Supreme Court has determined that gender-based classifications are to be analyzed under an intermediate level scrutiny. Thus, the gender-based classification must serve important governmental objectives that are substantially related to the achievement of those objectives. Gender-based classifications may be upheld if the purpose of the discrimination is to redress past discrimination. However, gender-based classifications will not be upheld if they are solely for administrative convenience or if they reflect archaic or over-broad generalizations that promote sexual stereotypes about the proper roles of men and women. Unfortunately, the highly deferential treatment given to schools often conflicts with the legislative intent of removing stereotyped conceptions and limitations placed on girls both in general and in athletics specifically.

ANALYSIS

II. STATE ACTION

To bring an action under Title IX, facts must be alleged sufficiently to support a finding of a state action. In Brenden v. Independent School
the Minnesota Court of Appeals weighed the following factors in
determining whether a state action existed: (1) whether the public schools are
members of a league; (2) whether expenses are paid from the revenues of
games, played at state-owned facilities; (3) whether the governing boards of
the associations are composed of public school officials, or others who are
paid or supervised by the state; and (4) whether the schools provide coaches,
athletic equipment, insurance for players or facilities, or transportation.48

Once the requisite state action is found, the exclusion of one sex from
enjoyment of equal privileges in places of public accommodation is actionable
as sex discrimination under Title IX.49

At times, courts find the requisite state action is not met. For example,
in Jr. Football Ass'n v. Gaudet,50 the Texas Court of Appeals denied an
injunction that would have allowed a girl to play football on the boys' football
team on the basis that there was not a sufficient state action.51 The court's
finding of no state action goes against the reasoning in Brenden,52 considering
that the team was chartered by the state as a nonprofit corporation, its players
practiced on school grounds, and its games were held in a city park.53

Following the reasoning in Brenden, the Illinois court in
Bucha v. Illinois High School Ass'n54 held that there was sufficient state action when an athletic association included
members of tax-supported public institutions and conducted
sporting events in facilities which benefited from taxpayer
expenses.55 Because there was sufficient state involvement,
the association was subject to equal protection requirements
of the Fourteenth Amendment.56

The state statute involved in National Organization for Women v. Little
League, Inc.57 allowed access to certain public places to be limited to one sex

47. 477 F.2d 1292 (8th Cir. 1973).
48. Id. at 1295-1296.
49. See Avery, supra note 46, at §1.
51. Id. at 71.
55. Id. at 73 (finding that sporting events conducted in facilities which were
constructed, operated, and maintained at taxpayer expense was sufficient to constitute state
action).
56. Id.
if the place was by its nature reasonably restricted to individuals of one sex.\textsuperscript{58} The association argued that the sporting league fell within this exception because the league was by its very nature reasonably restricted to boys.\textsuperscript{59} The court rejected this argument, holding that the statute was limited to facilities which provide for the changing of clothing or performing of bodily functions and did not apply to sports fields.\textsuperscript{60}

III. JUSTIFICATIONS FOR EXCLUSION

Some of the arguments advanced as justification for barring girls from participating on boys' athletic teams include: (a) separation of sexes as a tradition in sports; (b) prevention of physical harm to females; (c) prevention of psychological damage to the players; (d) costs involved in allowing girls to compete with boys; (e) development of separate girls' programs; and (f) because playing sports is not a right, but merely a privilege.

A. SEPARATION OF SEXES AS TRADITION IN SPORTS

Past findings demonstrate that an argument based on tradition should easily fail.\textsuperscript{61} Because classifications have been found unconstitutional if they reinforce a stereotype, or are byproducts of traditional ways of thinking about women, or have a stigmatic effect on one gender, tradition alone does not justify separating the sexes.\textsuperscript{62} Likewise, it has been held that stereotypes which portray women as unable to perform physical tasks as well as men are not enough to justify differences in treatment.\textsuperscript{63}

\textsuperscript{58} Id. at 35 (involving a state statute which prohibited denial in places of public accommodation of any accommodations, advantages, facilities, or privileges on account of race, creed, color, national origin, ancestry, marital status, or sex, except in the case of sex, where the place of public accommodation was in its nature reasonably restricted exclusively to individuals of one sex).

\textsuperscript{59} Id.

\textsuperscript{60} Id. at 38 (noting that the only time Little League would be restricted by sex would be in the areas in which changing of clothing took place). However, at the Little League level, even this did not apply because the children changed clothing at home, not at the game site. Id.

\textsuperscript{61} See infra notes 62-3.


\textsuperscript{63} Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (quoting concurrence of Bradley, J., in Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1873)) (stating that goals which are based on paternalistic notions that men are protectors of women should be struck down as perpetuating the stereotype of women as fragile creatures, needing special treatment).
B. PREVENTION OF PHYSICAL HARM TO FEMALES

Some courts have found the second justification, preventing physical harm to athletes, sufficiently important to withstand intermediate scrutiny based on an interest in the health, safety, and welfare of citizens.\textsuperscript{64} As such, schools have been able to restrain girls from playing contact sports on boys’ teams precisely because they are girls.\textsuperscript{65} Other courts have found girls cannot be excluded from contact sports, such as football, wrestling, and soccer, because exclusion violates girls’ equal protection rights and Title IX.\textsuperscript{66}

Extensive expert testimony has found girls as a class are not any more subject to injury while playing contact sports than are boys.\textsuperscript{67} Because possibility of physical injury is no greater for girls than for boys, the court in \textit{Leffel v. Wisconsin Interscholastic Athletic Ass’n}\textsuperscript{68} ruled that excluding girls from contact sports was not justified.\textsuperscript{69} The \textit{Leffel} court opined that no objective whatsoever justified providing boys with the opportunity to participate in interscholastic competition in contact sports while absolutely


\textsuperscript{65} Id.

\textsuperscript{66} Id.

\textsuperscript{67} See \textit{Saint v. Nebraska Sch. Activities Ass’n}, 684 F. Supp. 626 (D.C. Neb. 1988) (ruling that the school district must allow a high school girl to try out for the boys’ wrestling team where the school did not have a girls’ wrestling program because there was no substantial relationship between the prohibition and the asserted goal of protecting girls from harm); Hoover v. Meiklejohn, 430 F. Supp. 164 (D.C. Colo. 1977) (holding that excluding girls from participating in soccer competitions in which male students were permitted to participate was an unconstitutional denial of equal educational opportunity); Opinion of Justices to House of Representatives, 371 N.E.2d 426 (1977) (finding a proposed bill that would bar females and males from participating together in football and wrestling unconstitutional because the prohibition could not survive the close scrutiny to which classifications based solely on sex must be subjected).

\textsuperscript{68} \textit{Id.} at 1122. \textit{See also} \textit{National Organization for Women v. Little Leagues}, 318 A.2d 33 (N.J. Super. Ct. App. Div. 1974) (finding substantial credible evidence that during the years eight through twelve, girls match boys in size and physical potential, eliminating any reasons for excluding girls); \textit{See also} \textit{Force v. Pierce City R-VI Sch. Dist.}, 570 F. Supp. 1020 (W.D. Mo. 1983) (invalidating a rule excluding girls from competing with boys for a place on the football team because girls were subjected to a fitness screening in order to weed out physically unfit girls but boys were not subject to the same fitness screening).
denying the same opportunity to girls.70 Likewise, the court in Lantz v. Ambach71 concluded that regulations prohibiting girls from trying out for the football team were overbroad and unconstitutional because they did not prevent "weak" males from playing football.72 These decisions demonstrate that exclusion of females premised on promoting safety of individuals is suspect when applied only against girls as a class.

There is even less support for prohibiting girls from competing on boys' teams when the sport is a noncontact sport. Considering that the composition of women, like men, includes individuals with widely differing athletic abilities, the court in Brenden v. Independent School District concluded there is no rational basis for disallowing "mixed competition" in noncontact sports.73 When evaluating factors involved in noncontact sports, such as coordination, concentration, agility and timing, the court found no evidence that males outperform females.74 In fact, studies demonstrate that women have the capacity for greater endurance and stamina than men.75

The idea that males are superior athletes based on physical features is challenged by increasing numbers of female athletes whose abilities exceed those of most men and in many cases approach those of the most talented men.76 Further, some argue that male advantage in sports is primarily due to the fact that males have a longer history of participation, rather than to any physical advantage.77 Other commentators suggest that the competitive advantage of males over females in athletics is due to the fact that girls and boys have been socialized differently toward involvement in sports.78 One study found that females are prevented from competing against males for the sole reason that it is not yet socially acceptable for a female to defeat a male.

70. Id.
72. Lantz v. Ambach, 620 F. Supp. 663 (S.D.N.Y. 1985) (holding that girls must be allowed to try out for the football team because the state regulation prohibiting all female participation on men's teams in basketball, boxing, football, ice hockey, rugby, and wrestling was overbroad and unconstitutional).
73. See Brenden v. Independent Sch. Dist., 477 F.2d 1292, 1300 (8th Cir. 1973) (finding opinions that females shouldn't compete with men were based on conclusions by individuals unfamiliar with mixed competition and such opinions were based on stereotyped notions about the sexes).
74. Id. (holding that there is no reason to exclude females from competing, and that females are entitled to an individualized determination of their ability). Id. at 1300.
75. See, e.g., Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, 393 N.E.2d 284, 293 (Mass. 1979) (examining various studies which demonstrate females have higher endurance levels and lower injury rates than do males).
76. Id. See also Croudace and Desmarais, supra note 10, at 1446.
77. Id.
in athletic competition. These propositions weaken the perception that male advantage is due to limitations of the female body.

In sum, many males are allowed to compete even though they are more fragile and injury-prone than females who wish to compete. Since regulations do not prevent these males from participating in sports with other males, the separation is not furthering the stated goal of protecting allegedly weaker athletes from stronger ones. Because females are no more susceptible to physical injuries than males, there is no additional risk in allowing females to compete against males. There is no clear connection between protecting girls from injury and forbidding girls to compete with boys. Rather, the classification is based on protecting fragile women, an illogical idea based in patriarchy.

C. PREVENTION OF PSYCHOLOGICAL DAMAGE TO THE PLAYERS

Even though courts have ruled that the third justification, psychological factors, does not justify separate teams, reasoning based on this justification is still evident. For example, the opinion in *Bucha v. Illinois High School Ass’n* was based in part on the psychological differences between male and female athletes. However, nowhere in the court’s opinion are the alleged psychological differences discussed, or even mentioned. Without saying what the psychological differences are, the court found them to be sufficient to prohibit competition between high school girls and boys, to conduct girls’ sporting programs differently from boys’, and to impose restrictions on girls only.

81. Darrin v. Gould, 540 P.2d 882, at 892 (finding that even in contact sports, risk of serious injury to female reproductive organs and breasts is less than the risk of injury to male organs; male genitals are far more exposed, whereas the uterus is extremely “shock-resistant”).
82. See Fontiero v. Richardson, 411 U.S. 677, 684 (1973) (“Traditionally... discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”).
85. Id. at 74.
86. Id.
87. Id. at 71 (upholding restrictions which included a prohibition on cheering for girls’ sports, a one dollar limitation on the value of awards, and a prohibition on overnight trips in...
The objective of preventing psychological harm concerns the effect on members of one sex who lose in competition with members of the opposite sex. This justification is based entirely on the type of "archaic and overbroad" generalizations which have been denounced by the Supreme Court in Mississippi Univ. for Women v. Hogan. The theory is that males suffer psychological harm when they lose to females because females have been considered inferior for so long. To allow separation based on fear of males losing to females wrongfully excludes females and reinforces the notion that they are unworthy opponents.

D. FINANCIAL COSTS INVOLVED IN ALLOWING GIRLS TO COMPETE WITH BOYS

A fourth justification has been that states have a financial interest in excluding girls from athletic teams or in not having to establish separate girls' teams. In Haas v. South Bend Community School Corp., the court ruled expense alone is not a justifiable reason for denying one-half of high school students the opportunity to participate in interscholastic sports. While recognizing the interests of girls outweigh the school's interest in saving money, the court in Petrie v. Illinois High School Ass'n recognized that public schools often have limited funds. However, to arrange sports programs in such a way that denies girls the chance to be on a team does not foster equal opportunities as required by Title IX. Unfortunately, providing comparable programs may at times require athletic departments to reduce costs by eliminating certain activities. The decision of which programs and activities to eliminate will be scrutinized to ensure that schools comply with Title IX.

conjunction with girls' competition).

90. Id. (noting also, that it is not clear that females suffer psychological harm when they lose in athletic competition with males). Rather, the claim that females would be psychologically harmed by competition with males is based on the stereotype of women as less competitive and less able to deal with failure. Id. at 1443.
92. 289 N.E.2d 495 (Ind. 1972).
93. Id.
95. Id. at 989.
96. See Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992), aff'd, 991 F.2d 888 (1993) (holding that two women's teams must be restored to varsity status in order for Brown University to comply with Title IX because the men's varsity teams provided opportunities for more than sixty percent of all athletes whereas women's teams served less than forty percent of
E. DEVELOPMENT OF SEPARATE GIRLS’ PROGRAMS

Some courts find the fifth justification, excluding girls from participating on boys teams in order to develop stronger girls’ teams, acceptable. For example, the United States Supreme Court in *O’Connor v. Board of Education*97 held that sex-based discrimination is needed in order to prevent boys from dominating girls sports.98 The Court reasoned that without a gender-based classification in contact sports, there is a risk that boys will participate in girls’ programs, dominating those programs and denying girls an opportunity to compete in sports.99

The *Haas v. South Bend Community School Corp.* court also looked at the argument that without gender-based teams, boys would be permitted to try out for girls’ teams, which would result in both teams being composed of mostly males.100 The court found the concern for the welfare of girls’ athletic programs to be admirable.101 However, upon further examination the court found the majority of schools in the state of Indiana did not maintain interscholastic athletic programs for female students.102 Therefore, the court held that gender-based teams could not be justified as a protection of girls’ athletic programs until comparable girls’ programs were established.103

F. PLAYING SPORTS IS NOT A RIGHT, BUT MERELY A PRIVILEGE

The sixth justification for the exclusion of girls from boys’ teams is that girls have no right to play. This argument is based on the view that participation in sports, unlike education, is a privilege and not a right.104 In *Bucha* the
court found prohibitions on girls' sports teams to be acceptable, in part, because participation in interscholastic swimming contests have not been accorded constitutional protection. Responding to the same argument, the court in Reed v. Nebraska School Activities Ass'n held the proper issue is not whether a plaintiff has a "right" to play sports, but whether she can be treated differently from boys in an activity provided by the state. The court found no rational basis to support discrimination which denies girls the value of competition, enhancement of reputation, and instructional benefits of the school coaching staff.

Similarly, the court in Hoover v. Meiklejohn held that while there is no constitutional requirement for schools to provide athletic programs, it is required that whatever opportunities are made available by schools be available to all on equal terms. Therefore, under the reasoning of Reed and Hoover, the Bucha court misconstrued the issue. The real issue is whether the state can treat girls and boys differently, not whether there is a constitutional right to play a particular sport.

Upon examining the stated justifications for separation of the sexes it becomes apparent that most are deeply flawed. However, the fifth justification, to encourage the development of separate girls' programs, is an exception. Development of separate girls' programs is a valid and admirable goal. However, courts should be cautious. Rules or laws appearing to be valid and nondiscriminatory on their face must be struck down as a violation of equal protection if they are discriminatory in operation. Therefore, when separation of the sexes serves to discourage female participation or perpetuate limiting stereotypes about women, separation is not equal and courts must remedy the injustice.

105. Id.
107. Id. at 262.
108. Id. But see In re Calzadilla v. Dooley, 286 N.Y.S.2d 510 (1968) (holding that an athletic commission's rule that "[n]o woman may compete in any wrestling or boxing contest or exhibition and no woman may be licensed as a boxer, wrestler, manager or second" was valid and therefore ruled that prohibiting a wrestling license to a female wrestler did not violate equal protection as discrimination).
110. Id. at 169, 171 (stating that whether it be algebra or athletics, whatever opportunities are provided must be open to all).
111. Haas, 289 N.E.2d at 499.
112. See Croudace and Desmarais, supra note 10, at 1427.
IV. "SEPARATE BUT EQUAL" TEAMS

Most courts hold that as long as a comparable girls' athletic team exists, denying girls the right to be on the boys team does not violate the Equal Protection Clause.\(^{113}\) However, where a comparable girls' athletic program does not exist, regulations barring mixed competition do violate the Equal Protection Clause.\(^{114}\) Other courts disagree and find the separate but equal standard to be invalid.\(^{115}\) These courts hold that girls cannot be excluded from competition on boys' teams and that state rules prohibiting competition of girls and boys on the same athletic team should not be given effect.\(^{116}\) This is especially true in non-contact sports such as golf, swimming, track, tennis, and gymnastics.\(^{117}\) Issues concerning "separate but equal" teams include physical differences between males and females; requirements of the separate but equal


\(^{114}\) See Brenden v. Independent Sch. Dist., 477 F. 2d 1292 (8th Cir. 1973); Haas, 289 N.E.2d 495 (holding that denying female student the opportunity to participate on the boys' golf team violated her equal protection rights where she was prohibited from participating on the only team provided).

\(^{115}\) See, e.g., Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 334 A.2d 839, 842 (Pa. 1975) (stating that "even where separate teams are offered for boys and girls in the same sport, the most talented girls still may be denied the right to play at that level of competition which their ability might otherwise permit them. For a girl in that position, who has been relegated to the 'girls' team', solely because of her sex, 'equality under the law' has been denied."); Bednar v. Nebraska Sch. Activities Ass'n, 531 F.2d 922 (8th Cir. 1976) (finding that upholding the separate but equal standard would be a denial of equal protection as guaranteed by the Fourteenth Amendment because girls' programs simply are not comparable to those which exist for boys); see generally Morris v. Michigan State Bd. of Educ., 472 F.2d 1207, 1209 (noting that recent Michigan legislation requires girls be permitted to participate on male teams even where a female team is offered).

\(^{116}\) Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 334 A.2d 839, 843 (Pa. 1975) (reasoning that if any individual girl is too weak, injury-prone, or unskilled, then she may be excluded from competition on that basis but she cannot be excluded solely because of her sex). See generally Darrin v. Gould, 540 P.2d 882, 877-888 (Wash. 1975) (agreeing with the rationale of Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, supra, that discrimination on account of sex is forbidden. Stating further, that rules forbidding qualified girls from playing on the football team are invalid because girls have the right to participate as members of that team. The court stated that this is all the more true when the school provides no comparable girls' football team).

\(^{117}\) Haas, 289 N.E.2d at 500 (opining that "no reasons have been presented, nor do any exist, which justify denying female high school students the opportunity to qualify for participation with male high school students in interscholastic athletic contests which do not involve physical contact between the participants."); Brenden v. Independent Sch. Dist., 477 F.2d 1292 (8th Cir. 1973) (striking down a state rule precluding female students from participating on the men's tennis, cross-country skiing, and cross-country running teams).
standard; reasons advanced by schools supporting separate but equal teams; and alternatives to separate but equal teams. Each shall be examined in turn.

A. PHYSICAL ATTRIBUTES AS SUPPORT FOR SEPARATE BUT EQUAL TEAMS

In finding that physiological differences between boys and girls justifies separate but equal teams, the court in *Bucha v. Illinois High School Ass'n* relied on testimony that (1) men are taller than women; (2) men have greater muscle mass; (3) men have larger hearts and a deeper breathing capacity; and (4) men can run faster. Following the reasoning of *Bucha* the court in *Ritacco v. Norwin School District* held that requiring separate girls' and boys' teams did not violate the Equal Protection Clause when the purpose is to enhance the quality, quantity and caliber of sports opportunities for girls and boys.

However, the very physiological differences relied upon by the court in *Bucha* were rejected by the Minnesota Court of Appeals in *Brenden v. Independent School District* which found such differences failed to demonstrate that women are incapable of competing with men in sports. The court stated that the witnesses testifying as to physiological differences between the sexes were themselves unfamiliar with mixed competition, and referred to a contrary study showing that mixed competition is overwhelmingly favorable.

Noting that differences among individuals in both sexes is greater than the differences between the sexes, the federal court in *Hoover v. Meiklejohn* held that girls should not be denied team participation based on physical attributes. The court found exclusion of girls to protect them from injury to be unconstitutional. The failure to establish any criteria to protect small or weak males from injury of competition with stronger or larger males destroys any reasoning for separating the sexes. Therefore, even if males

120. *Id.* (upholding separate teams based on physical and psychological differences of girls and boys).
121. 477 F.2d 1292 (1973).
122. *Id.* at 1300.
125. *Id.* at 169.
126. *Id*.
127. *Id.* at 170.
as a class have an advantage in strength and speed, under the Hoover and Brenden decisions, there is no rationality in limiting such patronizing protection to females only.

B. THE REQUIREMENTS OF THE "SEPARATE BUT EQUAL" STANDARD

Because "separate but equal" teams remain constitutional, the question becomes, What is the meaning of equal? Teams that are found to be substantially comparable in programs and receiving substantially equal support will satisfy the equality of opportunity required by the Equal Protection Clause. As such, the standard requires opportunities to be equal, not necessarily identical.

Regulations imposing different rules on girls’ basketball, such as half-court, six-player restrictions, and permitting only forwards to shoot, were upheld as equal in Cape v. Tennessee Secondary School Athletic Ass’n. Conversely, the court in Dodson v. Arkansas Activities Ass’n held that the association and school districts must extend the benefits of physical training with similar rules for girls and boys. Considering that differences in rules can limit experiences, opportunities, and mastery of a sport which can lead to scholarship opportunities for students, the Dodson court has made the more reasonable and just ruling.

Comparable programs include comparable facilities, equipment, supplies, uniforms, coaches, tutors, playing time, practice time, medical care, and publicity. Under this description of equivalent programs, it is surprising that the court in Magill v. Avonworth Baseball Conference found the baseball conference did not have to allow girls to play because girls could play informal "sandlot" games or on an area girls’ softball team. A more reasonable ruling was handed down in Israel v. Secondary School Activities Commission. In Israel, the West Virginia court held that it was wrong for

129. Id.
130. Id.
131. 563 F.2d 793 (6th Cir. 1977).
133. Id. at 399.
137. Id. at 1214.
a high school female to be prohibited from playing on the boys’ baseball team where only softball was provided for females. The court correctly determined that Title IX was violated, because the games of baseball and softball were not equivalent and did not provide girls and boys with equal athletic opportunities.

At times, courts must look beyond the program itself in determining whether it is truly equal. For example, even though facilities, funding and coaching were equal for both the boys’ and girls’ basketball leagues, the court in *Michigan Department of Civil Rights v. Waterford Township Department of Parks and Recreation* found the separate programs were unequal, because girls who played on the football team were required to choose between playing football or basketball, a choice the boys did not have to make. Forcing girls to choose between sports results in lost opportunities to play sports of their preference, reduced opportunities to obtain college athletic scholarships, and emotional distress from unequal treatment.

C. EXAMINATION OF REASONS ADVANCED BY SCHOOLS IN SUPPORT OF SEPARATE, EQUAL TEAMS

At times, courts also must look beyond the stated reasons for creating separate teams. The rationale given should be examined to ensure that it is not merely an “after the fact justification” for a policy founded upon stereotypical conceptions. For example, in *Gilpin v. Kansas State High School Activities Ass’n* the association argued that if girls were allowed to participate on boys’ teams, unlimited participation by boys would necessarily follow and result in the demise of girls’ competition. The court found the objective of advancing girls’ interscholastic competition to be commendable and legitimate. However, because no girls’ team existed, the court found that a rule prohibiting mixed competition did not merely prevent girls from

---

139. *Id.* at 485.
140. *Id.*
142. *Id.* at 208.
144. Croudace and Demarais, *supra* note 10 (discussing the possibility that separate programs do provide females opportunities and benefits not provided by coeducational teams, while noting that the possibility of nebulous rationales should be examined).
146. *Id.* at 1237-1238.
147. *Id.* at 1243.
competing on boys’ teams but completely barred girls from participation. Because the rule barred participation solely on the basis of sex without regard to individual qualifications, the court held that the prohibition was not related to the stated objective of advancing separate but equal teams.

At times, discovering the actual reasons behind a policy does not require very close examination. For example, *State v. Hunter* involved a case in which a female was accused of participating in a wrestling competition in violation of a state statute which provided that no person other than males should participate in any wrestling competition or exhibition. In declaring the statute constitutional, the court stated that the legislature, composed predominantly of men, obviously had intended that there be “at least one island on the sea of life reserved for man that would be impregnable to the assault of woman.”

The court in *Brenden v. Independent School District* cautions that sex-based classifications may be based on outdated stereotypes. Therefore, courts must be particularly sensitive to invidious discrimination when making evaluations and must be particularly demanding in ascertaining whether a substantial basis for the sex-based classification has been shown.

D. ALTERNATIVES TO SEPARATE BUT EQUAL TEAMS

Alternatives to having two gender-based separate but equal teams include having three teams (one female, one male, and one based on ability); two teams, one with a gender-based quota; or one gender-neutral team.

Three teams, one based on ability and the other two segregated by sex, would allow the most talented athletes to compete together regardless of sex, while at the same time providing equal opportunity for both sexes. However, as the courts in *Petrie v. Illinois High School Ass’n* and *Haas v. South Bend*

148. *Id.*
149. *Id.* at 1243; *see also Haas*, 289 N.E.2d 495 (holding that justification for separate teams does not exist when only one athletic program is provided).
151. *Id.*
152. *Id.* at 458.
153. 477 F.2d 1292 (8th Cir. 1973).
154. *Id.* at 1300.
155. *Id.*
156. Croudace and Desmarais, *supra* note 10 (arguing that separate and equal teams promote sexual equality better than the other alternatives). *See also* Woods, *supra* note 43 (citing Attorney Gen. v. Massachusetts Interscholastic Athletic Ass’n, Inc., 393 N.E.2d 284, 290 (Mass. 1979) (proposing other possible approaches such as using standards based on height, weight, or skill, a system of handicapping, or limiting the number of boys allowed to participate on the girls’ team).
Community School Corp. have recognized, most schools do not have the necessary funding to support three teams.\textsuperscript{157}

Providing two teams and allowing girls to participate on the boys' team if they qualify based on ability is another alternative. The Court in \textit{O'Connor v. Board of Education} recognized that allowing seventh-grade students to try out for eighth-grade teams, without the eighth-grade students having reciprocal rights, is based on fairness.\textsuperscript{158} As the Court properly stated, this indicates that boys may be required to compete with talented girls without having reciprocal rights.\textsuperscript{159} The \textit{Clark v. Arizona Interscholastic Ass'n}\textsuperscript{160} court feared that permitting boys to play on girls' teams could impede the progress of girls' programs, which continue to suffer from great disparities compared to the male programs.\textsuperscript{161} This is a valid concern. However, following the reasoning in \textit{O'Connor}, it is permissible to exclude boys from the girls team, while allowing girls to play on the boys team if they so choose.

The \textit{O'Connor} reasoning is further supported by \textit{Forte v. Board of Education}\textsuperscript{162} which held that males may be precluded from participation because overall athletic opportunity for males has not been limited in the past.\textsuperscript{163} Furthermore, providing two separate teams but still allowing girls who qualify based on ability to play on the boys' team is a sound alternative. This is similar to the varsity system already upheld at most schools.\textsuperscript{164}

Providing a gender-neutral team based on ability is another alternative. However, a gender-neutral team would nonetheless discriminate in the sense that more males than females would qualify, leading to male dominated teams and less female participation. Were the opportunities for engaging in sports equal, this would be less true.\textsuperscript{165} As the court in \textit{Petrie v. Illinois High School Ass'n} points out, it is because of the current inequality of athletic opportunity that allowing boys to compete on girls' teams may diminish equality and increase overall disparity of athletic opportunity.\textsuperscript{166}

After examining various alternatives to separate but equal teams, the alternative of providing three teams appears to be the most ideal solution. If

\begin{itemize}
\item \textsuperscript{157} Petrie v. Illinois High Sch. Ass’n, 394 N.E.2d 855, 862 (Ill. 1979) (acknowledging schools often have limited funds).
\item \textsuperscript{158} O’Connor v. Board of Educ., 449 U.S. 1301, at 1306, n.4 (1980).
\item \textsuperscript{159} Id. at 1306.
\item \textsuperscript{160} 886 F.2d 1191 (9th Cir. 1989).
\item \textsuperscript{161} Id. at 1192.
\item \textsuperscript{162} 431 N.Y.S.2d 321 (Sup. Ct. 1980).
\item \textsuperscript{163} Id. at 323.
\item \textsuperscript{164} O’Connor, 449 U.S. at 1306.
\item \textsuperscript{165} See id. (holding that sex-based discrimination is needed to prevent boys from dominating girls' sports).
\item \textsuperscript{166} Petrie v. Illinois High Sch. Ass’n, 394 N.E.2d 855 (Ill. 1979).
\end{itemize}
a school cannot afford three teams, equal male and female teams should be provided. Of course, if there is not enough interest to support a separate girls’ team, girls must be allowed to try out for the boys’ team, as held in Lantz v. Ambach and Force v. Pierce City R-VI School District. When two teams are provided, girls should be authorized to participate on the male team if they qualify. This is a less than perfect alternative, however, because it takes quality players from the female team and possibly lowers the image of athletes who play on the girls’ team.

V. EXCLUSION OF BOYS FROM GIRLS’ ATHLETIC TEAMS

While courts generally conclude the Equal Protection Clause prevents schools from excluding girls from boys’ athletic teams when there is no corresponding girls’ team, courts have often refused to extend the same protection to boys. It has been reasoned that athletic opportunities have not previously been limited for members of their sex, as required under Title IX, therefore boys may be excluded from girls’ programs. Furthermore, because the government has announced a strong interest in redressing past discrimination against girls in athletics and promoting athletic opportunity to girls, the courts have applied the Equal Protection Clause to prohibit their exclusion. Conversely, there is no similar government interest in eliminating

168. Croudace and Demarais, supra note 10, at 1455-1456 (noting that female athletes that do not qualify for the boys’ team, or who chose to play on the girls’ team, may by comparison be deemed unexceptional, thereby lowering the image of those who play on the girls team).
171. See, e.g., Kleezvek v. Rhode Island Interscholastic League, Inc., 768 F. Supp. 951, 955 (1991) (upholding the exclusion of males from participating in girls’ field hockey because only female athletes, not males, had limited opportunities, such that they fall within the protections of Title IX).
172. Woods, supra note 43 (stating that denying boys access to girls’ sports has been upheld as a means of fostering the important governmental interest in promoting athletic opportunities for girls and redressing the disparate athletic opportunities available to girls and boys).
discrimination against boys in athletics, so equal protection has not been applied.\textsuperscript{173}

The court in \textit{Clark v. Arizona Interscholastic Ass'n},\textsuperscript{174} held that boys could be excluded in order to prevent them from displacing females, thereby diminishing the athletic opportunities for girls and hindering equality of opportunity between the sexes.\textsuperscript{175} As stated in \textit{Petrie v. Illinois High School Ass'n},\textsuperscript{176} excluding boys from girls' sports teams in order to permit girls to develop their own athletic abilities does not carry the stigma of unworthiness that excluding girls, based solely on the fact they are girls, carries.\textsuperscript{177}

Conversely, other courts have held that prohibiting boys from playing on girls' athletic teams is discriminatory.\textsuperscript{178} In \textit{Attorney General v. Massachusetts Interscholastic Athletic Ass'n},\textsuperscript{179} the court held that the exclusion of boys cannot be justified by biological differences between girls and boys, interest in protecting players' safety, or an interest in fostering emerging girls' sports programs.\textsuperscript{180} One court viewed the twenty-year history of liberalizing athletics as having caused males to suffer limited athletic opportunities and therefore found that excluding a boy from playing on the girls' team violated his equal protection rights.\textsuperscript{181}

\textsuperscript{173} Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1989) (holding that boys could be excluded because the policy of excluding males is substantially related to the government interest of redressing past discrimination against women and promoting equality of athletic opportunity between the sexes); See also Mularadelis v. Haldane Cent. Sch. Bd., 427 N.Y.S.2d 458 (N.Y. 1980) (holding the exclusion of males was a permissible means of redressing disparate treatment of female athletes and did not violate the equal protection of males, because males had an opportunity to participate in sports in general under the school regulations).

\textsuperscript{174} 695 F.2d 1126 (9th Cir. 1982).

\textsuperscript{175} Id. See also Petrie v. Illinois High Sch. Assoc., 394 N.E.2d 855 (Ill. 1979) (holding that restricting participation on the only volleyball team to girls was valid because it furthers the compelling government interest of fostering athletic opportunities for girls); Mularadelis v. Haldane Cent. Sch. Bd., 427 N.Y.S.2d 458 (N.Y. 1980) (holding that males could be prohibited from competing on the girls tennis team even though there was no boys' tennis team).

\textsuperscript{176} Petrie v. Illinois, 394 N.E.2d 855 (Ill. 1979) (reasoning that there is no stigma of unworthiness attached under the circumstances and the exclusion is not based on archaic generalizations as are reasons for excluding girls).

\textsuperscript{177} Id.

\textsuperscript{178} But see Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1989) (holding contra, that the overall inequality of opportunity does not justify specific inequality in a particular sport); Williams v. School Dist. of Bethlehem, 799 F. Supp. 513 (E.D. Pa. 1992), rev'd on other grounds, 998 F.2d 168 (3rd Cir. 1993) (holding that excluding a boy who sought to play on the girls' team violated his equal protection rights).

\textsuperscript{179} 393 N.E.2d 284 (Mass. 1979).

\textsuperscript{180} Id. (holding that prohibiting boys from participation on a girls' team was invalid).

\textsuperscript{181} See Williams v. School Dist. of Bethlehem, 799 F. Supp. 513 (E.D. Pa. 1992), rev'd on other grounds, 998 F.2d 168 (3rd Cir. 1993) (ruling that excluding a boy who sought to play
However, most courts follow the reasoning in *Forte v. Board of Education*, which held that prohibiting male students from participating on the girls' volleyball team was a permissible means toward redressing disparate treatment of female students in athletic programs. The court relied on the long history of male advantage to uphold regulations preventing male participation in order to afford girls an opportunity to develop programs equal to boys'.

In sum, boys have been given, and continue to receive, greater athletic opportunities. Therefore, the exclusion of boys from girls' high school athletic teams prevents boys from further dominating and displacing females from meaningful participation in athletics.

**CONCLUSION**

One would have thought the issue of discrimination within school athletic programs was put to rest when Title IX was enacted. Title IX, a federal law, prohibits gender discrimination in school sports programs receiving federal funds. Unfortunately, due to inconsistent rulings, the issue of male and female team participation remains unsettled.

Generally, if a male team is offered, but no female team, the courts conclude females should be permitted to play on the male team in noncontact sports. Regarding contact sports, courts are split on whether physical differences justify denying all females the right to participate without any regard to their strength or ability. Courts have also been inconsistent regarding the question of whether males must be allowed to play on female teams if a male team is not offered. This author proposes that two separate and equal (substantially comparable and receiving equal support) teams should be provided. Girls, based on ability, should qualify to participate on boys' teams regardless of whether the sport is a contact or non-contact sport. In order to further the participation of female athletes and afford girls’ on the girls' team violated his equal protection rights because girls, who could try out for traditionally male-dominated teams, were eligible to join twenty-two different teams, and boys, who could not try out for traditionally female-dominated teams, were eligible for only twelve teams).

183. *Id.* at 324.
184. *Id.*
185. Woods, *supra* note 43, at 907 (acknowledging that the number of girls participating in sports has increased, and when athletic opportunities for males do not exceed those afforded to females, this rationale must fail). However, the need for redressing past discrimination is still existent at this point in time. *Id.*
programs the opportunity to develop as fully as boys’, the exclusion of boys from girls’ athletic teams is justified.

There are many pressing issues concerning American women these days. Included among them are poverty, sexual violence, reproductive liberty, occupational inequality, sexual harassment, discrimination, and childcare issues. In comparison to these problems, equality in sports may seem trivial. Yet, athletic participation promotes physical and psychological health and it fosters personal skills and relationships. With every athletic achievement comes prestige, respect, and self-esteem. These are not trivial concerns. Gender disparities in sports are not only a consequence of cultural stereotypes but also a cause of these stereotypes.

Discriminatory practices in educational institutions can never be justified. The enthusiasm of administrators, the prestige of the sport, the quality of the coaches, and the standardization of rules and scheduling must be examined when evaluating the equality of athletic programs. With the advent of associations such as the Women’s Basketball Association and the Women’s Hockey Association, high school sports programs, as training grounds, are more important than ever. Athletic programs based on equality will further the goals of providing educational opportunities and athletic experiences for all.

TRACY J. JOHNSON