Kentucky Law Journal

Volume 72 | Issue 4 Article 9

1984

Equal Protection Scrutiny of High School Athletics

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INTRODUCTION

During the last several years, courts have grappled with the relatively new issue of sex discrimination as a violation of the equal protection clause of the fourteenth amendment.[1] Although the United States Supreme Court has decided many sex discrimination issues, it has not addressed the issue of sex discrimination in sports.[2] However, this issue has been raised in the lower courts in a variety of contexts. One of the most commonly litigated issues is the constitutionality of "separate but equal" athletic teams for females and males.[3] Another is the constitutionality of prohibiting female participation on all-male teams either when the school provides only a male team for the sport,[4] or when a team for each sex is provided.[5]

Although those issues are of some relevance by analogy, they are not the subject of this Comment and no attempt is made to analyze or resolve them. Instead, this Comment focuses on a reverse issue—the constitutional validity of allowing female high school students *more* opportunities to participate on athletic teams than their male counterparts. The discussion centers on a recent decision, *Clark v. Arizona In-*

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[1] *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971) (statute providing for mandatory choice of the father over the mother as administrator for a deceased child's estate violates equal protecton). *Reed* was the first Supreme Court decision to invalidate a statute on grounds of sex discrimination. *See* H. KAY, SEX-BASED DISCRIMINATION 26 (2d ed. 1981).

[2] *But cf.* O'Connor v. Board of Educ., 449 U.S. 1301 (Stevens, Circuit Justice, 1980) (Federal district court granted preliminary injunction allowing female junior high students to try out for the male basketball team even though separate teams were provided for each sex. The appellate court stayed the district court's injunction. Justice Stevens, Supreme Court justice for that circuit, upheld the appellate court's stay of the preliminary injunction), *cert. denied*, 454 U.S. 1084 (1981).

[3] *See, e.g.*, Ritacco v. Norwin School Dist., 361 F. Supp. 930 (W.D. Pa. 1973) (rule requiring separate male and female teams for interscholastic non-contact sports does not violate equal protection).

[4] *See, e.g.*, Brenden v. Independent School Dist., 342 F. Supp. 1224 (D. Minn. 1972), *aff'd*, 477 F.2d 1292 (8th Cir. 1973).

[5] *See, e.g.*, Darrin v. H.D. Gould, 540 P.2d 882, 887 (Wash. 1975).

terscholastic Association,[6] which sustained the constitutionality of regulations prohibiting males from participating on the female volleyball team, the only volleyball team available at their schools.[7] However, the regulations permitted female participation on all-male teams.[8]

The plaintiffs in *Clark* were male Arizona high school students who, although talented volleyball players,[9] were denied the opportunity to play interscholastic volleyball because the teams sponsored by their schools were exclusively for females.[10] The Arizona Interscholastic Association (AIA) regulations precluded "boys from playing on the girls' teams, even though girls [were] permitted to participate on boys' athletic teams."[11]

The federal district court in Arizona dismissed the plaintiffs' claim that precluding boys from playing on the girls' team violated the equal protection clause.[12] The court of appeals affirmed the dismissal, by holding that the governmental interests of redressing past discrimination against women in

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[6] 695 F.2d 1126 (9th Cir. 1982), *cert. denied*, 104 S. Ct. 79 (1983).

[7] *Id.* at 1127. The *Clark* decision was based on the equal protection clause and did not refer to Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-86 (1983). Title IX, while relevant to the topic of this Comment, will not be discussed since *Clark* was not based on statutory interpretation. Further, proof of compliance with this federal statute would merely prove statutory compliance, not whether such actions are constitutional. *See* Mississippi University for Women v. Hogan, 458 U.S. 718, 732-33 (1982) ("[N]either Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment."). *See generally* Skilton, *The Emergent Law of Women and Amateur Sports: Recent Developments*, 28 WAYNE L. REV. 1701, 1701-57 (1981-82) (discussion of relation between Title IX and equality of opportunity for women).

[8] 695 F.2d at 1127. See note 35 *infra* for a further discussion of the situation.

[9] *See* 695 F.2d at 1127 (the plaintiffs had participated on national championship volleyball teams sponsored by the Amateur Athletic Union).

[10] *Id.*

[11] *Id.*

[12] Before any party can successfully invoke the equal protection clause, some form of state involvement in the alleged discrimination must be proved. *See generally* J. WEISTART & C. LOWELL, THE LAW OF SPORTS 32-36 (1979); Note, *The Case For Equality in Athletics*, 22 CLEV. ST. L. REV. 570, 572-77 (1973). In *Clark*, the regulations challenged as violative of equal protection were promulgated and enforced by the Arizona Interscholastic Association (AIA). 695 F.2d at 1128. Although the state action issue was not raised, the court dutifully noted that "every court to consider the question has concluded that associations like the AIA are so intertwined with the state that their actions are considered state action." *Id.* at 1127.

athletics and promoting equality of opportunity for males and females were sufficient to justify the regulations.[13]

I. THE APPROPRIATE LEVEL OF CONSTITUTIONAL SCRUTINY

The foundation underlying the following discussion is that the equal protection clause of the fourteenth amendment applies equally to males and females. The necessity for even-handed application of the equal protection clause to males and females is demonstrated by analogy to equal protection analysis of race discrimination cases in which it has been held: "If both [blacks and whites] are not accorded the same protection then it is not equal."[14] It must be remembered that males also have borne a significant share of gender discrimination. Examples of discrimination against males include compulsory military service for males, statutory and judicial preference for females in child custody proceedings, and spouse and child support duties delegated primarily to males.[15] Moreover, in *Mississippi University for Women v. Hogan*,[16] the Court held: "That [a statute] discriminates against males rather than against females does not exempt it from scrutiny *or reduce the standard of review*."[17]

Depending on the class of persons being discriminated against, the Supreme Court has employed at least three different levels of scrutiny for equal protection challenges. For classifications based on inherently suspect categories,[18] the Court applies a standard of strict scrutiny of the highest level, under which only a *compelling* government interest can sustain the divergent treatment.[19] However, a majority of the Court has

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[13] 695 F.2d at 1131-32.

[14] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978).

[15] *See generally* Kanowitz, *"Benign" Sex Discrimination: Its Troubles and Their Cure*, 31 HASTINGS L.J. 1379, 1430 (1980) (arguing that past discrimination against *both* sexes is a sufficient reason for denying preferential treatment to *either* sex).

[16] 458 U.S. 718 (1982).

[17] *Id.* at 723 (citing Caban v. Mohammed, 441 U.S. 380, 394 (1979) (emphasis added)).

[18] *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (alienage is a suspect category); Loving v. Virginia, 388 U.S. 1, 11 (1967) (race is a suspect category).

[19] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 309-10, 320.

never held classifications based on gender to be an inherently suspect category deserving of strict scrutiny.[20] Instead, two other standards are employed to scrutinize equal protection challenges to classifications based on gender: an "intermediate" standard of scrutiny and a "not similarly situated" standard.[21]

II. THE INTERMEDIATE LEVEL OF SCRUTINY

The test most often employed in gender discrimination challenges is an "intermediate" level of scrutiny under which discrimination is more difficult to prove than when the strict scrutiny test is utilized.[22] The intermediate level of scrutiny consists of a two part test.[23] First, an *important* government interest must be shown to be the basis for the dissimilar treatment.[24] However, even if the asserted government interest is determined to be important, it will still fail the first part of the test if it is not a "legitimate"[25] government purpose. For example, if the asserted interest is not the government's *actual* interest or if it is an unnecessary interest, the regulation containing the gender based classification will fail this part of the test.[26] Once an important government interest is deter-

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[20] *But cf.* Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (plurality of four held sex to be suspect category and deserving of strict scrutiny).

[21] An intermediate level of scrutiny should be employed unless it is determined that the sexes are not similarly situated, in which case the level of scrutiny is lowered. *See* Parham v. Hughes, 441 U.S. 347, 354-57 (1979). The court in *Clark* apparently confused the tests. Although the holding was obviously based on the assumption that males and females are not similarly situated with respect to athletics, thus allowing for use of the lowest level of scrutiny, the intermediate level of scrutiny was applied. *See* Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982), *cert. denied*, 104 S. Ct. 79 (1983).

[22] *See* Michael M. v. Superior Court, 450 U.S. 464, 468-69 (1981).

[23] *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

[24] *See id.*

[25] *See* Mississippi Univ. for Women v. Hogan, 458 U.S. at 725. ("If the State's objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present.").

[26] Every government interest asserted, even though important, will not be automatically accepted. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975) ("But the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."). *See also* Orr v. Orr, 440 U.S. 268, 283 (1974) (invalidated gender based legislation because it was unnecessary to serve an important government interest).

mined to be legitimate, the gender based classification will be sustained if the second part of the intermediate test is met. To pass the second part of the test, the gender based classification must be *substantially* related to fulfilling the important government interest.[27]

In *Clark*, the state asserted two interests: promoting equality of athletic opportunity between the sexes and redressing past discrimination against women in athletics.[28] Instead of examining these interests to determine whether they passed the first part of the intermediate scrutiny test, the court summarily concluded without discussion that "[t]here is no question that [these are] . . . legitimate and important governmental interest[s]."[29] Recent United States Supreme Court decisions clearly reveal that there is a question as to whether these asserted government interests are sufficient to sustain the challenged regulations.[30]

Promoting equality of athletic opportunity is obviously an important government interest.[31] Therefore, unless promoting equality of athletic opportunity was not the *actual* purpose of the discriminatory regulations, the first part of the test is satisfied. No facts are present in the *Clark* opinion which could prove or disprove the validity of the asserted government interest. However, in the absence of relevant facts, such a determination can still be made by, in effect, using the second part of the intermediate test to disprove the first part of the test.[32] The lack of a substantial relationship between the gender based classification and the fulfillment of the im-

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[27] Mississippi Univ. for Women v. Hogan, 458 U.S. at 725; Orr v. Orr, 440 U.S. at 279.

[28] Both of the government's asserted interests were treated as one in *Clark*. *See* 695 F.2d at 1129. For purposes of analysis, this Comment will treat each separately.

[29] *Id.* at 1131.

[30] *See, e.g.*, Califano v. Webster, 430 U.S. 313 (1977); Kahn v. Shevin, 416 U.S. 351 (1974); Reed v. Reed, 404 U.S. 71 (1971). See also text accompanying notes 43-46 and 51-56 *infra* for a discussion of these cases.

[31] *Cf.* 20 U.S.C. § 1681 (1976) (Title IX of the Education Amendments which provides for equal athletic opportunity for each sex).

[32] *Cf.* Orr v. Orr, 440 U.S. at 280 n.10 ("Of course, if upon examination it becomes clear that there is no substantial relationship between the statutes and their purported objectives, this may well indicate that these objectives were not the statutes' goals in the first place.").

portant government interest asserted tends to disprove the validity of the asserted interest.[33] In other words, if there is no substantial relationship between the discriminatory regulations and the government interest of promoting equality of athletic opportunity, then promoting equality of athletic opportunity was not the actual purpose of the regulations. Consequently, the asserted regulations would fail the first part of the intermediate scrutiny test.[34]

The question, then, is what relationship exists between allowing females the opportunity to participate on *more* athletic teams than males[35] and promoting equality of athletic *opportunity* between males and females. In *Clark*, the court had little trouble finding a substantial relationship despite recognizing the existence of alternative schemes which would make athletic opportunities "more" equal.[36] Although correctly noting that the exclusion of males was unnecessary to accomplish equal athletic opportunities for females,[37] the court then relied on *Kahn v. Shevin*[38] to support its proposition that "absolute necessity is not required before a gender based classification can be sustained."[39] There are two flaws in the court's reliance on *Kahn*. First, the court never determined whether equality of opportunity was already afforded by the AIA regulations. To begin the analysis with the observation that "athletic opportunities could be equalized more

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[33] *See id.*

[34] The first part of the intermediate test requires an important and legitimate government interest to be present to support the gender classification. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. at 725. Thus, the government interest, by failing to be substantially related to the gender classification, could then in turn be found not to have been an important and legitimate interest. *Cf.* Orr v. Orr, 440 U.S. at 280 n.10.

[35] The AIA rules give females more athletic opportunities than males by specifically allowing females to participate on male non-contact sports teams while specifically precluding males from playing on *any* female teams. *See* 695 F.2d at 1127. Whether females in these Arizona schools are allowed to participate on the male contact sport teams cannot be ascertained from the facts. Therefore, this Comment is limited to an analysis of opportunities for males and females in non-contact sports.

[36] *See* 695 F.2d at 1132.

[37] *Id.* at 1131 ("The existence of these alternatives shows only that the exclusion of boys is not *necessary* to achieve the desired goal." (emphasis in original)).

[38] 416 U.S. at 351.

[39] 695 F.2d at 1131 (citing Kahn v. Shevin, 416 U.S. at 351).

fully"[40] was to assume that opportunities were already equal to some extent. Such an assumption was incorrect. Under the AIA regulations, females had the opportunity to participate on more athletic teams than their male counterparts.[41] Consequently, females actually had *more opportunities* than males and, obviously, more opportunities are not equal opportunties.

Second, the court's reliance on *Kahn* indicates that the court confused equality of *opportunity* with equality of *results*. In *Clark*, the court was faced with the issue of equal opportunity. The purpose of the gender based legislation upheld in *Kahn* was to promote equal results.[42] More accurate authority could have been obtained from *Reed v. Reed*,[43] in which the United States Supreme Court determined that women must be afforded equal *opportunities* to compete with their male counterparts for appointment to the position of administrator.[44] In order to provide equal opportunities, a determination of who is best qualified must be made on an individual basis.[45] *Reed* directly supports the proposition that equality of opportunity is not contingent on equality of results.[46]

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[40] *Id.*

[41] *See* note 35 *supra*.

[42] *See* Kahn v. Shevin, 416 U.S. at 353-54. The legislation upheld in *Kahn* provided tax breaks for widows, but not for widowers, because past economic discrimination against women has left them in an inferior economic position. *Id.* However, this kind of legislation does not promote equal opportunities. This is remedial legislation to make up for past discrimination. An example of legislation designed to provide equal opportunities is the Equal Employment Opportunity Act of 1972, codified at 42 U.S.C. § 2000e(a)(1) (1976), which makes it unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

[43] 404 U.S. at 71.

[44] *Id.* at 74.

[45] *See id.* at 76 ("To give a mandatory preference to members of *either sex* over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment. . . ." (emphasis added)).

[46] Judicial notice was taken of the fact that many women will end up serving as administrators due to their greater longevity. *Id.* at 75. The significance of *Reed* is that equal opportunities must be afforded regardless of sex, even though the results might be unequal. *See id.* at 76. That is, even though ultimately, more women may serve as administrators due to physiological differences, *Reed* still held it necessary to afford equal opportunities to males and females.

Instead of concluding that the exclusion of males was not necessary to achieve equal opportunities, the court in *Clark* should have determined that allowing females *more* athletic opportunities is not *substantially related* to achieving the stated governmental interest of equality of athletic opportunity between the sexes. Without the requisite substantial relationship, the government interest of promoting equality of athletic opportunity would not pass the intermediate scrutiny test.[47] Unless the government's second interest can pass the two part intermediate scrutiny test, the gender based AIA regulations violate the equal protecion clause.[48]

Although the second asserted government interest, redressing past discrimination against females, is an important government interest,[49] it does not automatically pass the first part of the intermediate scrutiny test.[50] Although redressing past discrimination against women did pass the intermediate scrutiny test in *Kahn v. Shevin*[51] and *Califano v. Webster*,[52] both of these cases are distinguishable from *Clark*. The Court sustained the gender based classifications in *Kahn* and *Webster* because adult women were in *actual need* of remedial legislation to make up for past *economic* discrimination.[53] In *Kahn*, widows were allowed property tax relief denied to widowers because females were *still affected* by past *economic* discrimination.[54] Similarly, in *Webster*, women who reached sixty-two years of age before 1975 were allowed economic benefits to make up for past gender discrimination.[55] These

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[47] See notes 32-34 *supra* and accompanying text for a discussion of the interrelatedness of the substantial relationship requirement and the important government interest requirement.

[48] As an alternative to gender based regulations favoring one sex, a school could provide a multi-tiered athletic program consisting of a varsity level and sub-varsity levels. *See* Note, *Equal Protection: A Closer Look at Closer Scrutiny*, 76 MICH. L. REV. 771, 871-81 (1977-78).

[49] *See, e.g.*, Califano v. Webster, 430 U.S. at 317-20; Kahn v. Shevin, 416 U.S. at 355.

[50] *See* note 26 *supra*.

[51] *See* 416 U.S. at 355.

[52] *See* 430 U.S. at 317-20.

[53] *See id.* at 316; 416 U.S. at 353-54.

[54] *See* 416 U.S. at 353-54.

[55] 430 U.S. at 316-17.

women, because of their age, were unable to benefit from recent equal opportunities legislation, and without the statutorily prescribed remedial measures they would have remained victims of past economic discrimination.[56]

In contrast, the AIA regulations upheld in *Clark* were unnecessary to redress past discrimination against females. The preferential treatment was directed towards high school aged females who had the privilege of beginning their athletic careers during a time of heightened awareness of past discrimination against females in sports.[57] Equal athletic opportunities for women are now federally mandated,[58] and the method for enforcement is power of the purse.[59]

In *Orr v. Orr*[60] the important government interest in redressing past discrimination against women was determined to be unnecessary under the circumstances and therefore failed the first part of the intermediate scrutiny test.[61] Consequently, the gender based classification imposing alimony obligations only on males was invalidated.[62] The Court also rejected an asserted compensatory governmental purpose for a gender based classification in *Mississippi University for Women v. Hogan*[63] stating: "[A] State can evoke a compensatory purpose to justify an otherwise discriminatory classification *only* if members of the gender benefited by the classification *actually* suffer a disadvantage related to the

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[56] Women who reached 62 before 1974 had few years to benefit from the Equal Pay Act of 1963, codified at 29 U.S.C. § 206. *Cf.* Kahn v. Shevin, 416 U.S. at 354 n.7 (since most married women were unemployed, women forced into the job market because of the loss of a spouse had fewer economic skills to offer).

[57] *See generally* APPENZELLER & APPENZELLER, SPORTS AND THE COURTS 71-88 (1980) (discusses the progression of women in athletics).

[58] *See* 20 U.S.C. § 1681(a) (1983) ("[N]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.").

[59] *See* 20 U.S.C. § 1682 (1983) (sanction for non-compliance with 20 U.S.C. § 1681(a) is loss of federal aid).

[60] 440 U.S. at 268.

[61] *See id.* at 281.

[62] *See id.* at 283 ("Where . . . compensatory and ameliorative purposes *are as well served* by a gender-neutral classification as one that gender classifies, . . . the State cannot be permitted to classify on the basis of sex." (emphasis added)).

[63] 458 U.S. at 718.

classification."[64] In *Hogan*, the Court held the all-female state supported nursing college to be unconstitutional because no showing was made "that women currently are deprived of such opportunities."[65]

Likewise, in *Clark*, no showing was made that females were being deprived of athletic opportunities. In fact, since *more* opportunities were afforded to females in *Clark*, the court should have held that, although redressing past discrimination against women in sports is an important government interest, it was unnecessary under the circumstances and therefore failed the first part of the intermediate scrutiny test.

Since the important government interest of redressing past discrimination is an unnecessary interest under the facts of *Clark*, and an unnecessary government interest fails the first part of the intermediate scrutiny test,[66] there is no reason to consider the substantial relationship element of the intermediate scrutiny test. An unnecessary government interest will not justify an "otherwise discriminatory classification."[67] Neither government interest passes the intermediate scrutiny test; thus, the gender based regulations in *Clark* violate equal protection unless they qualify for the alternative method[68] of scrutiny for equal protection challenges.

III. THE TRADITIONAL LEVEL OF SCRUTINY

In a few cases, the Supreme Court has determined that males and females are not similarly situated and consequently has lowered the scrutiny to the traditional level.[69] Under this analysis, the gender based classification will be upheld unless the classification is so unrelated to a legitimate purpose that it is irrational.[70] The traditional method of analysis[71] is relevant

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[64] *Id.* at 728 (emphasis added).

[65] *Id.* at 729.

[66] *See, e.g., id.* at 718; Orr v. Orr, 440 U.S. at 268.

[67] *See* 458 U.S. at 728.

[68] *See* note 21 *supra.*

[69] *See, e.g.,* Parham v. Hughes, 441 U.S. at 347.

[70] *See id.* at 352.

[71] The traditional level analysis is not to be confused with the foregoing intermediate level analysis which focused on redressing past discrimination against women. Once the sexes are determined to be not similarly situated, the level of scrutiny is

because the court in *Clark* upheld the gender based classification because of physiological differences between males and females.[72] This indicates that at least some reliance was placed on the assumption that males and females are not similarly situated with respect to athletics.[73] However, close examination of the relevant Supreme Court decisions indicates that such reliance was misplaced.

On three occasions the Court has validated gender based classifications because the legal rights of either sex were absolutely determined by statute. In *Parhan v. Hughes*,[74] the Court upheld legislation allowing only a mother to sue for the wrongful death of an illegitimate child because mothers and fathers of illegitimate children are not similarly situated in the state of Georgia.[75] In Georgia, mothers are statutorily precluded from legitimizing their children and therefore are not similarly situated with fathers who are statutorily permitted to legitimize their children.[76] Similarly, in *Schlesinger v. Ballard*,[77] the Court upheld a federal statute allowing female naval officers a longer time to obtain promotion before being discharged for failure to advance in rank.[78] Since females are statutorily precluded from combat duty, and combat participation is considered in evaluations for promotions, they are not similarly situated with males who have the opportunity to participate in combat.[79] Finally, in *Rostker v. Goldberg*,[80] the Court upheld the all-male draft registration.[81] The Court rea-

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lowered to the traditional level. *See id.* at 353-57.

[72] *See* Clark v. Arizona Interscholastic Ass'n, 695 F.2d at 1131 ("[D]ue to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team.").

[73] The court in *Clark* apparently confused the tests. Although the court determined that the real issue was "whether any real differences exist between boys and girls which justify the exclusion," it applied the intermediate level of scrutiny. *See id.* at 1129.

[74] 441 U.S. at 347.

[75] *Id.* at 355.

[76] *Id.* ("Under Georgia law, only a father can by voluntary unilateral action make an illegitimate child legitimate."). *See* GA. CODE ANN. § 19-7-22 (1981).

[77] 419 U.S. 498, 505-06, 510 (1975).

[78] *Id.* at 508-09.

[79] *See id.* at 508.

[80] 453 U.S. 57 (1981).

[81] *See id.* at 83.

soned that since women as a group are precluded from combat duty by statute and by military policy, they are not similarly situated with males.[82]

These cases are distinguishable from *Clark* because the females attending Arizona high schools were not statutorily precluded from any kind of athletic opportunity.[83] Rather, in *Clark*, the determination of whether high school males and females were not similarly situated was based on general physiological differences.[84] To date the Supreme Court has found physiological differences between males and females sufficient to render the sexes not similarly situated on only one occasion.[85] In *Michael M. v. Superior Court*,[86] the physiological difference relied on was the fact that only females are capable of becoming pregnant.[87] Such a physiological difference was both specific and determinative. *Clark* is distinguishable from *Michael M.* because the physiological differences relied on in *Clark* were neither specific nor determinative: "*Generally*, high school males are taller, can jump higher, and are stronger than high school females. . . . Males *generally* have the *potential* to be better [at two of the six basic volleyball skills] and thus *may* dominate these two skills in volleyball."[88] The court obviously realized these were only general differences, but erroneously concluded that these differences were determinative.[89]

The general physiological differences relied on in *Clark* are not determinative of diminished athletic opportunities for females for two reasons. First, even if there are general differ-

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[82] *See id.* at 78. *Cf.* note 35 *supra.*

[83] *See* Clark v. Arizona Interscholastic Ass'n, 695 F.2d at 1127.

[84] *See id.* at 1131.

[85] *Cf.* Geduldig v. Aiello, 417 U.S. 484 (1975). In *Geduldig*, the Court upheld a California statute providing disability benefits for any disability except pregnancy; however, this case was not decided as a sex discrimination case. *See id.* at 496 n.20.

[86] 450 U.S. at 464 (Court upheld California "statutory rape" law which defined "an act of sexual intercourse accomplished with a female not the wife of a perpetrator, where the female is under the age of 18 years" as unlawful sexual intercourse).

[87] *Id.* at 471.

[88] *See* 695 F.2d at 1127 (emphasis added). Serving, passing, setting, digging, hitting and blocking are the six basic volleyball skills. The parties stipulated at trial that males generally have the potential to be better hitters and blockers. *Id.*

[89] *Id.* at 1131 ("Thus, athletic opportunities for women would be diminished.").

ences between high school females and males, any person regardless of gender may possess the differentiating characteristic, i.e., the tendency to be taller, stronger or to jump higher than the average representative of the opposite gender. Height, strength, and jumping ability are not exclusively male characteristics, as some females are taller, stronger, and better jumpers than some males.[90] In contrast, becoming pregnant is an exclusively female characteristic. Furthermore, height, strength and jumping ability are not the sole factors determining which athlete makes the team, as there are many nonphysical characteristics which are also necesary to produce top athletes.[91] The physiological differences relied on in *Clark* are not determinative differences; therefore, the AIA gender classifications do not qualify for "not similarly situated" scrutiny which has only been invoked to justify gender based classifications when the position of either sex was absolutely determined by statute[92] or by a specific and determinative physiological difference.[93]

It should be noted that the *Clark* analysis contained a significant deficiency. The court in *Clark* held that the physiological differences justified the preclusion of males from the female volleyball team.[94] However, the male plaintiffs in *Clark* were not asserting a constitutional right *per se* to play on the *female* volleyball team. Their equal protection rights were violated because they were denied the same rights enjoyed by female students who had opportunities to: (1) compete in vol-

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[90] *Cf.* Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (pension plan requiring larger contribution from females than males because women as a class live longer than men violates the Civil Rights Act of 1964).

[91] *See* Note, *Sex Discrimination in High School Athletics*, 57 MINN. L. REV. 339 (1972-73):

> 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.

Id. at 363.

[92] *See* text accompanying notes 74-82 *supra*.

[93] *See* notes 85-87 *supra* and accompanying text.

[94] *See* 695 F.2d at 1131.

leyball; and (2) compete on male teams.[95] By sustaining the constitutionality of prohibiting males from playing on the female team because of physiological differences, the court hung its hat on a rationale which *at most* could have justified "separate but equal" teams for males and females. Consequently, the real discrimination issue of denying males the same rights afforded females was never reached.[96]

CONCLUSION

Without analyzing *actual* skill differentials, the court in *Clark* justified the gender based classification by reference to *general* physiological differences.[97] Such classifications are based on "archaic and overbroad generalizations"[98] prohibited by the equal protection clause.[99]

The Supreme Court has repeatedly struck down legislation purporting to classify according to sexual differences which, in reality, classified according to sexual stereotypes. For example, classifications based on each of the following stereotypical assumptions violate equal protection: (1) females usually are dependent on their male spouses but males usually are not;[100] (2) male workers' earnings are significantly more vital to the support of their families than female workers' earnings;[101] (3) young males are destined to support a family

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[95] *Id.*

[96] The *Clark* court seemed to have forgotten that for the plaintiffs, being barred from the female volleyball team meant being barred from volleyball. Instead of deciding whether the school could constitutionally prohibit male participation on the female team, the court should have decided if the school could constitutionally provide only one sex with opportunities to compete in a particular sport and opportunities to compete on a team of the opposite gender.

[97] *See* 695 F.2d at 1127.

[98] *See* Schlesinger v. Ballard, 419 U.S. 498, 508 (1975).

[99] *See* Califano v. Goldfarb, 430 U.S. 199, 206-07 (1977); Attorney General v. Massachusetts Interscholastic Athletic Ass'n, 393 N.E.2d 284, 293 (1979).

[100] *See* Orr v. Orr, 440 U.S. 268, 281-83 (1979) (invalidated statute imposing alimony obligations only on males); Califano v. Goldfarb, 430 U.S. at 206-07 (invalidated Social Security provision for survivors' benefits for any widow but only for dependent widowers); Frontiero v. Richardson, 411 U.S. 677, 688-90 (1973) (invalidated a federal statute providing benefits for any female spouse of a service man but only for dependent male spouses of service women).

[101] *See* Wengler v. Druggist Mut. Ins., 446 U.S. 142, 151 (1980) (invalidated a workers' compensation law that provided benefits for the work related death of a

but young females are destined to be supported;[102] (4) maternal roles are more important than paternal roles;[103] (5) males are more dangerous when drinking than are females;[104] and (6) nursing is an exclusively female occupation.[105]

Many of these stereotypical assumptions are based on some empirical support.[106] In *Craig v. Boren*,[107] statistics established that males in a particular age group were *ten times* as likely to be arrested for driving under the influence of alcohol as were females in the same age group.[108] Yet, the Court found these statistics insufficient to sustain the gender based classification establishing different drinking ages for males and females.[109]

The empirical support relied on in *Clark* falls far short of conclusively establishing the effect of allowing males the opportunity to participate on female teams when no male team is provided. Whether the physiological differences relied on[110] would in fact cause "athletic opportunities for women to be

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spouse to all widows but only to dependent widowers); Califano v. Westcott, 443 U.S. 76, 87-89 (1979) (extended a provision of the AFDC program to grant benefits to families with unemployed mothers as well as unemployed fathers); Weinberger v. Weisenfeld, 420 U.S. 636, 644 (1975) (extended Social Security provision for "mothers' benefits" to fathers).

[102] *See* Stanton v. Stanton, 421 U.S. 7 (1975) (invalidated a statute providing a different age of majority for females and males in context of parental support obligations).

[103] *See* Caban v. Mohammed, 441 U.S. 380, 388-89 (1979) (invalidated a statute allowing unwed mothers but not unwed fathers to block the adoption of their child by simply withholding consent).

[104] *See* Craig v. Boren, 429 U.S. 190, 200-02 (1976) (invalidated a statute providing different drinking ages for females and males).

[105] *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 729-30 (1982) (held all state supported nursing colleges for women to be in violation of the equal protection clause).

[106] *See, e.g.*, Weinberger v. Weisenfeld, 420 U.S. at 645 (citing Kahn v. Shevin, 416 U.S. 351, 354 n.7 (1974)) ("obviously, the notion that men are more likely than women to be primary supporters of their spouses and children is not entirely without empirical support").

[107] 429 U.S. at 190.

[108] *Id.* at 200-02 ("[T]he statistics broadly establish that .18% of females and two percent of males in that age group were arrested for that offense.").

[109] *Id.* ("While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device.").

[110] *See* 695 F.2d at 1127 ("Generally high school males are taller, can jump higher and are stronger than high school females.").

diminished"[111] was not factually or conclusively determined.[112] To the contrary, the holding in *Clark* was the product of "archaic and overbroad generalizations," and such generalizations violate equal protection.

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[111] *Id.* at 1131.

[112] The court in *Clark* did not rely on known results of mixed athletic competition as evidence. Instead, the court relied on what it believed would happen. *See* 695 F.2d at 1126.