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Petrie v. Illinois High School Association: Gender Classification and High School Athletics, 14 J. Marshall L. Rev. 227 (1980)

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PETRIE V. ILLINOIS HIGH SCHOOL ASSOCIATION:* GENDER CLASSIFICATION AND HIGH SCHOOL ATHLETICS

During the past decade numerous courts have struck down rules prohibiting girls from playing on boys' teams in public school athletic programs.[1] In one of the first challenges[2] to the inevitable converse situation[3] the Illinois Appellate Court held in *Petrie v. Illinois High School Association*[4] that preventing boys from playing on girls' volleyball teams is constitutionally permissible. Indeed, this decision indicates that a rule prohibiting male players on any girls' team would be constitutional.[5]

FACTS

Trent Petrie was a 16-year-old high school junior, 5'11" in height and 170 lbs. in weight. He reported for, and was practicing with, the girls' volleyball team when school officials informed him that he could not play in interscholastic

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* 75 Ill. App. 3d 980, 394 N.E.2d 855 (1979).

1. *E.g.*, Brenden v. Independent School Dist., 477 F.2d 1292 (8th Cir. 1973) (high school athletic association rule prohibiting girls from engaging with boys in interscholastic athletic contests held unconstitutional); Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117 (E.D. Wis. 1978) (rule excluding girls from boys' teams unconstitutional unless girls' teams were established); Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975) (exclusion of capable girls from boys' team violated equal protection regardless of existence of girls' teams).

2. Only two other states, Rhode Island and Massachusetts, have considered the constitutionality of rules prohibiting boys from playing on girls' teams. Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659 (D. R.I.), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979); Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, Inc., 79 Mass. Adv. Sh. 1584, 393 N.E.2d 284 (1979). *See* notes 36-48 and accompanying text *infra*.

3. Since 1975, the U.S. Supreme Court has decided a few cases involving situations where discrimination against men was claimed. *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979) (invalidating statute allowing only women to claim alimony after a divorce); Craig v. Boren, 429 U.S. 190 (1976) (invalidating statute prohibiting sale of 3.2 beer to males under 21 and females under 18); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (invalidating social security provision which denied payments to surviving widowers but authorized payments to widows). For a discussion of these and other sex-discrimination cases, *see* Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813 (1978); Turkington, *Equal Protection of the Laws in Illinois*, 25 DEPAUL L. REV. 385 (1975-76).

4. 75 Ill. App. 3d 980, 394 N.E.2d 855 (1979).

5. *Id.* at 992, 394 N.E.2d at 864.

tournaments due to an Illinois High School Association rule.[6] Trent's mother sought to enjoin the Association[7] from enforcing this rule. After a hearing on the merits,[8] the suit was dismissed and this appeal followed.[9]

In upholding the validity of the rule, the Illinois Appellate Court first determined the applicable standards of judicial review[10] under the equal protection clause of the fourteenth amendment of the United States Constitution[11] and the equal

6. "To enter any of the tournaments a *girl* must be eligible under all of the eligibility rules and conditions of the Illinois High School Association. *Only girls shall be eligible* to participate in any of the tournament series matches." Sec. VII E, *1978-79 Girls State Volleyball Series Terms and Conditions*, ILLINOIS INTERSCHOLASTIC (Sept. 1978) (official publication of the Illinois High School Association) (emphasis added).

"The use of any ineligible participant in any interscholastic game or contest shall make the forfeiture of the game or contest automatic, and mandatory if won by the offending team." ILLINOIS HIGH SCHOOL ASSOCIATION BY-LAWS, § 6.020 (1980).

7. The court found the status of the Illinois High School Association unclear; however the organization conceded that, as an association of mostly public schools, its actions were also those of the state. This question was previously decided in Bucha v. Illinois High School Ass'n, 351 F. Supp. 69 (N.D. Ill. 1972) which held that a private, voluntary association with tax-supported public institutions was sufficient to constitute state action. *Accord*, Gilpin v. Kansas State High School Activities Ass'n, Inc., 377 F. Supp. 1233 (D. Kan. 1974); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972); Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, Inc., 79 Mass. Adv. Sh. 1584, 393 N.E.2d 284 (1979). The Illinois School Code provides for the involvement of the Illinois High School Association in the promulgation of guidelines for athletic programs. *See* note 12 *infra*. The suit also asked injunctive relief against the high school which, pursuant to Illinois High School Association rules, had prevented Trent from playing on the volleyball team. Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 981, 394 N.E.2d 855, 856 (1979).

8. Other evidence presented at the hearing was alluded to by the Illinois Appellate Court, but not specifically set forth. There was testimony that, in general, high school boys are substantially taller, heavier, and stronger than high school girls. Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 987, 394 N.E.2d 855, 861 (1979). The defendant also presented evidence of instances where participation by boys on a girls' team created an advantage for that team over all-female teams. *Id.* at 988, 394 N.E.2d at 861.

9. The lower court agreed with the defendant that the classification, although based on sex, was justified because it preserved, fostered, and increased athletic competition for girls and prevented unfair competition that would arise from male dominance of the game. The plaintiff presented three counter-arguments: (1) there was no important state interest in avoiding imbalanced competition or male dominance; (2) the classification was both overbroad and underbroad and used sex as a substitute as a mere matter of convenience; and (3) it was constitutionally impermissible to have volleyball teams and tournaments only for girls without opportunity for participation by boys. *Id.* at 981, 394 N.E.2d at 857.

10. *Id.* at 982-83, 394 N.E.2d at 857-58.

11. The fourteenth amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. Although the issue presented, and the holding in *Petrie*, refers

rights provision of the Illinois Constitution of 1970.[12] The court considered cases from other jurisdictions which addressed this issue[13] but essentially developed its own reasoning, holding that separate teams may be provided for girls without providing a similar program for boys. The critical factors in the court's analysis were the innate physical differences between males and females,[14] and what the court deemed to be a compelling state interest in fostering athletic opportunities for girls.[15]

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to the due process clause of the fourteenth amendment, the standards applied by the court have been developed in relation to the equal protection clause. The standard advocated by the dissent has been used in deciding due process questions. *See* note 23 *infra*. The disagreement may stem from the conceptual difficulty in separating the due process and equal protection clauses. Federal equal protection claims are brought under the fifth amendment provision of due process of law. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (federal statute requiring married female Air Force officers to prove dependency of spouse for purpose of benefits violated due process, where same proof was not required for spouses of male Air Force officers). The United States Supreme Court's "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).

12. "The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts." ILL. CONST. art. I, § 18. The Illinois Supreme Court held that, under this article, classification based on sex was a suspect classification which, to be held valid, had to withstand strict judicial scrutiny. The purpose of the article was deemed to be to guarantee rights for females equal to those of males. People v. Ellis, 57 Ill. 2d 127, 311 N.E.2d 98 (1974).

The applicability of relevant parts of § 27-1 of the School Code was conceded. The court never discussed the implications of this statute, which would seem to clearly prohibit exclusion of a boy from a girls' team. ILL. REV. STAT. ch. 122, § 27-1 (1979) provides:

> No student shall, solely by reason of that person's sex, be denied access to physical education and interscholastic athletic programs or comparable programs supported from school district funds. Equal access to programs supported from school district funds and comparable programs will be defined in guidelines promulgated by the State Board of Education in consultation with the Illinois High School Association.

13. In most of the cases considered by the *Petrie* court, rules prohibiting girls from playing on boys' teams were questioned on state or federal equal protection grounds. *See* Brenden v. Independent School Dist., 477 F.2d 1292 (8th Cir. 1973); Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973); Leffel v. Wisconsin Interscholastic Athletic Ass'n, 344 F. Supp. 1117 (E.D. Wis. 1978); Gilpin v. Kansas State High School Activities Ass'n, Inc., 377 F. Supp. 1233 (D. Kan. 1973); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972); Haas v. South Bend Community School Corp., 259 Ind. 515, 289 N.E.2d 495 (1972); Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. Ct. 45, 334 A.2d 839 (1975); Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975).

14. Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 988-89, 394 N.E.2d 855, 861 (1979).

15. *Id.* at 990, 394 N.E.2d at 863.

THE STANDARD OF JUDICIAL REVIEW

In the federal courts, the applicable standard of judicial review depends on whether a classification has been labeled "suspect." In equal protection cases strict scrutiny[16] is applied to classifications involving a suspect class[17] or affecting a fundamental interest,[18] and a rational basis test is applied to other classifications.[19] Sex has not been treated as a suspect classification under the federal constitution.[20] Instead an intermediate test for determining the validity of gender-based classifications

16. In Loving v. Virginia, 388 U.S. 1 (1967), the Court stated that when strict scrutiny is applied, classifications must "be subjected to the 'most rigid scrutiny,' . . . and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of . . . discrimination." *Id.* at 11, quoting Korematsu v. United States, 323 U.S. 214, 216 (1944). In Graham v. Richardson, 403 U.S. 365 (1971) the court stated that the state interest must be "compelling." *Id.* at 375. Necessity to accomplish the government interest has also been stated to be a required element. *In re* Griffiths, 413 U.S. 717 (1973). *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087-1132 (1969); Comment, *Compelling State Interest Test and the Equal Protection Clause—An Analysis*, 6 CUM. L. REV. 109 (1975).

17. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Hunter v. Erickson, 393 U.S. 385 (1969) (race); Korematsu v. United States, 323 U.S. 214 (1944) (national origin).

18. In addition to traditional first amendment protections, the Court has recognized certain other rights as so fundamental that strict scrutiny is applicable. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (procreation); Roe v. Wade, 410 U.S. 113 (1973) (personal privacy); Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (voting); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel).

19. The Court explained the rational basis test in McGowan v. Maryland, 366 U.S. 420 (1961), stating that the fourteenth amendment

> is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Id. at 425-26. *See generally* Bice, *Standards of Judicial Review Under the Equal Protection and Due Process Clauses*, 65 CALIF. L. REV. 689, 698-702 (1977).

20. The United States Supreme Court almost declared sex a suspect classification in Frontiero v. Richardson, 411 U.S. 677 (1973). In *Frontiero*, a married female Air Force officer sought increased benefits for her husband. The statute governing these benefits provided that female officers had to prove that their spouses were in fact dependents in order to qualify for increased benefits. The spouses of male officers automatically qualified, with no inquiry as to their dependency in fact. Justices Brennan, Douglas, White, and Marshall agreed that sex was an inherently suspect classification. *Id.* at 682. However, Chief Justice Burger and Justices Powell and Blackmun, in the dissent, clearly opposed including sex in the category of suspect classification. *Id.* at 691-92. Justices Stewart and Rehnquist expressed no opinion. *Id.* at 691. The plurality opinion rationale for considering sex classification suspect offers an interesting discussion of the history of sex discrimination. *Id.* at 682-88. Later decisions have rejected suspect classification status. *See* note 21 *infra*.

has emerged. Under this test, to justify disparate treatment, a regulation must "serve important governmental objectives and must be substantially related to achievement of those objectives."[21] The *Petrie* court applied this intermediate federal standard in deciding that the rule in question was valid under the equal protection clause of the fourteenth amendment.[22]

In contrast, sex has been declared a suspect classification under the equal rights provision of the Illinois Constitution of 1970.[23] Therefore, the court stated its intention to apply a standard of strict scrutiny[24] in determining the rule's validity under the Illinois constitution. It is unclear, however, whether the strict scrutiny test announced by the Illinois Supreme Court in *People v. Ellis*,[25] and purportedly relied on in *Petrie*, fully adopts the federal strict scrutiny standard. The *Ellis* court addressed the need for a compelling state interest to justify disparate classifications, but did not require that the classifications be *necessary* to accomplish that interest.[26]

21. Craig v. Boren, 429 U.S. 190, 197 (1976). This standard has generated much discussion since it was first enunciated in the context of gender-based discrimination in Reed v. Reed, 404 U.S. 71 (1971). *See* note 59 *infra*. The *Craig* decision struck down an Oklahoma statute prohibiting the sale of beer to males under 21 and females under 18. The *Craig* Court rejected sex as a suspect classification, but confirmed interpretation of the *Reed* standard as an intermediate level of review. *See generally* Comment, *Sex Discrimination in Athletics: Conflicting Legislative and Judicial Approaches*, 29 ALA. L. REV. 390 (1978); Comment, *Constitutional Law: Equal Protection Challenges to Gender-Based Classifications Evoke Varied Court Responses*, 17 WASHBURN L.J. 182 (1977).

22. *See* note 11 *supra*.

23. *See* note 12 *supra*.

24. The dissent in *Petrie* advocated using an "irrebuttable presumption" test, in which due process bars classification based upon a permanent presumption where individual characteristics may rebut it. Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 995, 394 N.E.2d 855, 867 (1979). This test has been applied by the U.S. Supreme Court on numerous occasions. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (rules violated due process where employment restrictions on pregnant teachers made no individualized determination of their ability to continue working); Vlandis v. Kline, 412 U.S. 441 (1973) (college tuition system held invalid because it did not allow individuals a fair chance to prove they were residents of the state). *See* Bezanson, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine*, 7 IND. L. REV. 644 (1974). The test has been applied in one case dealing with discrimination in high school athletics. Yellow Springs Exempted School Dist. Bd. of Educ. v. Ohio High School Ass'n, 443 F. Supp. 753 (S.D. Ohio 1978). *See generally* Note, *Sex Discrimination in High School Athletics*, 47 U.M.K.C. L. REV. 109 (1978). However, the cases in which the test was used actually rested on an equal protection rationale. NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW 497 (1978).

25. 57 Ill. 2d 127, 311 N.E.2d 98 (1974).

26. In *Ellis*, the Illinois Supreme Court found no compelling state interest which justified treating juvenile males differently from juvenile females in deciding at what age an individual could be tried as an adult. *Id.* at 133, 311 N.E.2d at 101. Since no compelling interest was found to exist, the court

The *Petrie* court did not clarify this Illinois standard. After noting that the element of necessity had not been adopted by the Illinois Supreme Court,[27] the *Petrie* court held that the classification involved must be substantially or practically,[28] though not absolutely,[29] necessary to accomplish the compelling state interest. If the court is in fact adopting the element of necessity as part of an Illinois strict scrutiny test, such a test is closer to the federal intermediate test which requires that a gender-based classification be *substantially related* to achievement of the governmental interest than it is to the strict scrutiny requirement of absolute necessity.[30]

CONSIDERATION OF PRECEDENT

After determining the applicable standard, the court turned to earlier cases dealing with sex classification in high school athletics but accorded no precedential value to recent decisions striking down rules excluding females from all male teams.[31] It reasoned that such decisions were based on the stigma of inferiority placed on girls as an excluded class while in *Petrie* boys were excluded because they were *more* capable; thus no stigma of unworthiness attached.[32]

The dismissal of these cases with little or no discussion fails to do justice to an important line of decisions. While the under-

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never reached the question of whether the classification was necessary to promote the interest.

27. Under the federal strict scrutiny standard a classification must be shown to be necessary. Loving v. Virginia, 388 U.S. 1, 11 (1967). *See* note 29 *infra*.

28. Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 990, 394 N.E.2d 855, 863 (1979).

29. *Id.* at 992, 394 N.E.2d at 865.

30. Under strict scrutiny, legislation "must be narrowly drawn to express only the legitimate state interest at stake." Roe v. Wade, 410 U.S. 113, 155 (1973). A classification will not be upheld under strict scrutiny if less drastic means are available to accomplish the state purpose. Shapiro v. Thompson, 394 U.S. 618, 637 (1969).

31. *See* note 13 *supra*.

32. The *Petrie* dissent rejected this argument on two grounds. First, since the decision in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), freedom from discrimination applied equally to both males and females, and if both were not accorded the same protection, then it was not equal. Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 995, 394 N.E.2d 855, 866 (1979). *But see* Scherer, *Bakke Revisited, What the Court's Decision Means—and Doesn't Mean*, 7 HUMAN RIGHTS No. 2, p.22 (1978) (rejecting the argument that *Bakke* declared that affirmative action programs were divisive and create a stigma for their beneficiaries). Second, the statement that boys were more capable carried the implied conclusion that females were weak and inferior. Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 997, 394 N.E.2d 855, 868 (1979). *Accord*, Comment, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools*, 53 TEX. L. REV. 103 (1974).

lying theme of these cases may well be invidious discrimination, the decisions are much more varied and complex than the *Petrie* court indicated. For example, one court[33] rejected the argument that there were important innate physical differences between boys and girls, citing a successful program in which girls and boys played in mixed competition.[34] Two other cases,[35] decided under a strict scrutiny test, held that whatever interest the state school athletic association might advance the overriding state interest was the equal rights amendment adopted in the state constitution.[36] While the *Petrie* court might not have agreed with this view of the paramount importance of equal rights legislation, the point was at least worthy of consideration.

Two cases discussed by the court involved virtually identical fact patterns to *Petrie*: *Gomes v. Rhode Island Interscholastic League*[37] and *Attorney General v. Massachusetts Interscholastic Athletic Association, Inc.*[38] The court relied on *Gomes* for its extensive discussion of the physical disadvantage to girls in open competition[39] and dictum that discrimination between sexes, when done for a demonstrably benevolent purpose and based on objective and accurate medical evidence, raised no constitutional problem.[40] The *Petrie* court did not adequately

33. Brenden v. Independent School Dist., 477 F.2d 1292 (8th Cir. 1973).

34. *Id.* at 1301, citing University of the State of New York, the State Department of Education, Division of Health, Physical Education and Recreation, *Report on Experiment: Girls on Boys' Interscholastic Athletic Teams, March 1969-June 1970* (Feb. 1972). The report stated that the only negative factor found was "that it was not yet socially acceptable for a girl to defeat a boy in athletic competition." *Id.* at 1. Furthermore, the expert opinions solicited in preparing the report unanimously expressed the view that there were no medical reasons to prohibit mixed competition in non-contact sports. After a trial period, the vast majority of school personnel, student participants and parents favored continuing the practice. *Id.* at 4.

35. Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. Ct. 45, 334 A.2d 839 (1975) (exclusion of capable girls from boys' teams violative of equal protection regardless of existence of girls' teams); Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975). *See* note 36 *infra*.

36. The Washington court in *Darrin* did not distinguish discrimination against females and discrimination against males, indicating only that discrimination on account of sex was forbidden. "Equality of rights and responsibilities under the law shall not be denied or abridged on account of sex." WASH. CONST. art. 31, § 1. The Illinois Supreme Court has interpreted the comparable Illinois constitutional provision to be a guarantee of rights for females equal to those of males. *See* note 12 *supra*. This difference in interpretation could dictate a difference in application.

37. 469 F. Supp. 659 (D. R.I.), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979).

38. 79 Mass. Adv. Sh. 1584, 393 N.E.2d 284 (1979).

39. Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659, 662 (D. R.I.), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979).

40. *Id.* at 663. The benevolent purpose was almost identical to that offered in *Petrie*: promoting athletic opportunities for girls. *See* note 59 *infra*. The *Gomes* court apparently found the rule acceptable under the four-

distinguish *Gomes*, which was ultimately resolved in *favor* of a male student who wished to play on a girls' volleyball team. *Gomes* is distinguishable, since its decision was based on the court's interpretation of Title IX of the Education Amendments Act of 1972.[41] Although Title IX is equally applicable to Illinois public schools it can only be assumed that the *Petrie* court did not agree with the *Gomes* interpretation,[42] since it did not discuss the issue.[43]

Massachusetts Interscholastic is more difficult to distinguish than *Gomes* since it was decided on a state constitutional provision similar to the Illinois equal rights provision.[44] *Massachusetts Interscholastic* held that the total exclusion of boys from teams designated for girls violated equal protection. The *Petrie* court failed to discuss the reasoning in *Massachusetts Interscholastic*, relying instead on dictum approving separate but equal teams.[45] *Petrie* and *Massachusetts Interscholastic* should have

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teenth amendment, despite the fact that it bestowed a benefit on females while penalizing males.

41. Title IX provides in relevant part that, where a recipient of federal funds under the 1972 Education Amendments

> 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.

45 C.F.R. § 86.41(b) (1978). The regulation further provides that contact sports include boxing, wrestling, rugby, ice hockey, football, and basketball, as well as other sports where the major activity involves bodily contact. The *Gomes* court interpreted this regulation to mean that where athletic opportunities in a *particular* sport have been limited, a member of the excluded sex must be allowed to try-out. Since volleyball participation had been limited to girls, a boy's opportunity in that sport would have been limited. Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659, 663-64 (D. R.I.), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979).

42. The applicable section of Title IX regulations, note 40 *supra*, could reasonably be interpreted to mean where *general* athletic opportunities have been denied. This interpretation is supported by the exception of contact sports since, traditionally, it is girls and not boys who have been excluded from contact sports.

43. In stating the *Gomes* interpretation of Title IX, the *Petrie* court said: "Although agreeing that the phrase 'athletic opportunities' used in the rule could mean overall athletic opportunities, *as the words would imply*, the [*Gomes*] court stated that it was required to construe it to mean opportunities in the sport under consideration. . . ." Petrie v. Illinois High School Ass'n, 75 Ill. 3d 980, 986, 394 N.E.2d 855, 860 (1979) (emphasis added). It is impossible to tell whether the *Petrie* court means that *it* would interpret the provision to mean overall athletic opportunities, or that the *Gomes* court said that the words implied overall athletic opportunity, but that such an interpretation would be unconstitutional.

44. "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." MASS. CONST. pt. 1, art. 1.

45. Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 987, 394 N.E.2d 855, 861 (1979).

been compared, however, because *Petrie* rejected many of the premises upon which that decision was based: (1) the Massachusetts equal rights amendment prohibited discrimination against *either* sex;[46] (2) physical differences between the sexes were not so clear or uniform as to justify a rule in which sex was used as a substitute for functional classification such as height or weight;[47] (3) sex classification labeled women as inherently weak;[48] and (4) there were viable alternatives to gender-based classification.[49]

THE COURT'S REASONING

The *Petrie* court gave several reasons for holding the Illinois High School Association rule valid. First, the court asserted that the rule was consistent with the long-standing international and national tradition of having separate teams for males and females.[50] This assertion, however, is contradicted by many of the cases which the court rejected.[51] In addition, tradition is a poor justification for disparate classification, when one remembers that "separate but equal" schools were traditional until ruled discriminatory by the United States Supreme Court.[52]

46. Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, Inc., 79 Mass. Adv. Sh. 1584, 393 N.E.2d 284, 289 (1979). *See* note 12 and accompanying text *supra.*

47. Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, Inc., 79 Mass. Adv. Sh. 1584, 393 N.E.2d 284, 290 (1979). *See* notes 52-53 and accompanying text *infra.*

48. Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, Inc., 79 Mass. Adv. Sh. 1584, 393 N.E.2d 284, 294 (1979). *See* note 55 and accompanying text *infra.*

49. Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, Inc., 79 Mass. Adv. Sh. 1584, 393 N.E.2d 284, 295 (1979). *See* notes 60-63 and accompanying text *infra.*

50. Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 987, 394 N.E.2d 855, 861 (1979). The court cites no authority for this assertion.

51. *See* notes 30-35 and accompanying text *supra.* Given the many decisions allowing girls to participate on boys' teams, the "tradition" is already being eroded.

52. Brown v. Board of Educ., 347 U.S. 483 (1954). In *Brown*, the United States Supreme Court found that separate public schools for white and black students were unconstitutional, even though the facilities provided were equal. The separate but equal doctrine dates back to Plessy v. Ferguson, 163 U.S. 547 (1896), where separate transportation facilities for white and black passengers were found to be constitutional so long as they were equal. Cases dealing with separate *schools* had not challenged the separate but equal doctrine, contending only that equal education was not being provided in the particular case. *E.g.*, Sweatt v. Painter, 339 U.S. 629 (1950). The *Brown* court found that separation of students, even where physical facilities were equal, placed a stigma of inferiority on the black students. This finding rejected the doctrine of separate but equal. "Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. Any language in

Second, the rule was upheld because there was evidence that girls would be at a substantial disadvantage playing against boys, which would lead to male dominance in athletics.[53] In support of this reasoning, the court cited a statement in *Gomes* that the "overwhelming majority of positions on teams open to both sexes were held by boys."[54] The *Petrie* court, however, failed to consider that the teams referred to in *Gomes* were in traditionally male-dominated sports, and the teams were only recently opened to girls. Thus the difference in playing ability of the two sexes may be due to the fact that girls had not had equal training and opportunity to participate in previously all-male sports.

Finally, the court asserted that sex classification was consistent with the tradition in sports of setting up classifications of players with similar physical characteristics, such as classifying wrestlers by weight.[55] The court admitted that classification based only on sex was both overbroad, in protecting superior female athletes, and underbroad, in excluding from protection males less skilled in athletics than most females.[56] In United

Plessy v. Ferguson contrary to this finding is rejected." Brown v. Board of Educ., 347 U.S. 483, 494-95 (1954).

53. Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 987-88, 394 N.E.2d 855, 861 (1979).

54. Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659, 661 (D. R.I.), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979).

55. Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 988, 394 N.E.2d 855, 861 (1979). This last point was used by the *Petrie* dissent in arguing against any classification based on sex. *Id.* at 996-97, 394 N.E.2d at 867. The dissenting judge argued that since objectively measured characteristics were available, adopting sex as a substitute was unacceptable. "The existence of certain characteristics to a greater degree in one sex does not justify classification by sex rather than by the particular characteristic." *Id.* at 996, 394 N.E.2d at 867, citing Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. Ct. 45, 52, 334 A.2d 839, 843 (1975) (exclusion on basis of weakness or lack of skill permissible, but not on basis of sex). *See also* Hoover v. Meicklejohn, 430 F. Supp. 164 (D. Colo. 1977) (arbitrary to consider only general physiological differences without regard to individual variants within a class); *accord*, City of Los Angeles v. Manhart, 435 U.S. 702 (1978) (impermissible to require larger pension fund contributions from female workers based on mortality tables showing women as a rule live longer than men).

56. Among the reasons the court gave for using sex as a substitute for particular physical characteristics were: (1) a system based on physical characteristics would be difficult to devise; (2) classification by gender in sports was itself based on innate physical differences; and (3) for a school system to provide the number of levels necessary to accommodate classification on the basis of physical characteristics would be prohibitively expensive and would deny girls the opportunity to play at the varsity level. Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 988-89, 394 N.E.2d 855, 862 (1979). There is, however, some indication that furtherance of economic or administrative convenience is not a defense where classification based on gender is concerned. *See* Frontiero v. Richardson, 411 U.S. 677 (1973) (cost not valid reason for automatically allowing dependent benefits to male Air

States Supreme Court cases, decided under the federal intermediate standard, overbroad and underbroad classification has been tolerated only where it was done for the purpose of undoing the effects of past discrimination against women.[57] However, under the strict scrutiny standard, if there is a less detrimental method available to promote the state's interest, the use of a suspect classification is unconstitutional.[58] If the *Petrie* court is in fact adopting an intermediate standard as the Illinois strict scrutiny test, a standard of substantial rather than absolute necessity, then the use of a gender-based classification may be justified to promote the state's interest in undoing past discrimination.[59]

In upholding sex as the *only* feasible classification which would promote the state's interest,[60] the court considered but rejected two alternatives suggested by other courts[61] to accommodate the state's interest. In an almost incomprehensible passage, the court apparently rejected as impractical the concept of

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Force officers while female officers had to prove their husbands were in fact dependent); Haas v. South Bend Community School Corp., 259 Ind. 515, 289 N.E.2d 495 (1972) (increased cost of administering program insufficient grounds for excluding girls from athletic competition).

57. *Compare* Schlesinger v. Ballard, 419 U.S. 498 (1975) (allowing women officers to stay longer in rank to compensate for restrictions in other areas) *and* Kahn v. Shevin, 416 U.S. 351 (1974) (statute providing tax-exemption for widows but not for widowers compensated for past discrimination) *with* Dunn v. Blumstein, 405 U.S. 330 (1972) (one year residency requirement for voters not necessary to promote state interest in preventing fraud) *and* Graham v. Richardson, 403 U.S. 365 (1971) (fifteen year residency requirement for aliens for purposes of welfare eligibility not necessary to protect state interest).

58. *See generally* Turkington, *Equal Protection of the Laws in Illinois*, 25 DEPAUL L. REV. 385 (1975-76); Note, *Sex Discrimination in High School Athletics*, 57 MINN. L. REV. 339 (1972-73).

59. *See* notes 22-29 and accompanying text *supra*.

60. Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 990, 394 N.E.2d 855, 863 (1979). The court found the provision of separate teams for girls necessary because, given the past disparity of opportunity and innate physical differences, boys and girls were not similarly situated as they entered into most athletic endeavors. The concept of treating alike those who are similarly situated is often stated as a part of the intermediate standard of judicial review applied to gender-based classification. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971). In *Reed*, the Court struck down a state statute which gave preference to men over women when persons of the same entitlement class applied for appointment as administrator of a decedent's estate. The Court said: "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, *so that all persons similarly circumstanced shall be treated alike.*' " *Id.* at 76, citing Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (emphasis added).

61. Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659 (D. R.I.), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979); Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, Inc., 79 Mass. Adv. Sh. 1584, 393 N.E.2d 284 (1979).

separate but equal teams.[62] Most courts, in defining "separate but equal," have allowed some variation, such as softball for girls and baseball for boys. The *Petrie* court's rationale seemed to be that, if equal opportunity must be given in a *particular* sport, then any variation would be impermissible; for example, since the required skills in baseball and softball differ, the court would not consider them equal. To achieve true equality, accordingly, it would be necessary to have a girls' and a boys' baseball team, and a girls' and a boys' softball team. Carried to its extreme, in any sport where there was any variation in rules or skills, such as lower nets in girls' volleyball than in boys', multiple teams would be necessary. This apparently would lead in the court's reasoning to the ludicrous result of having four volleyball teams: one for girls and one for boys using a low net, and one for girls and one for boys using a higher net. This reasoning is unique to the *Petrie* court. If one accepts this definition of separate but equal, however, it is easy to see that such a scheme would not be feasible. Economic considerations aside, most schools would not have enough students for all the teams.

Having discarded the alternative of separate but equal teams, the court turned next to the proposition of establishing a quota of boys on girls' teams. The court rejected this, based on *Regents of the University of California v. Bakke*,[63] which it asserted stood for the proposition that an unconstitutional classification cannot be made constitutional by a quota system. *Bakke* should not have been relied on to justify rejection of a quota system in the *Petrie* case. The *Petrie* court had already decided that sex classification in athletics was constitutional.[64] Since the court was not dealing with an unconstitutional classification, a quota system would have no effect on its constitutionality.

The court concluded that in order to promote equality it was not necessary to offer boys and girls the opportunity to play exactly the same sports, but rather the opportunity to participate in "a total athletic program presenting a variety of choices. . . ."[65] The court reasoned that since volleyball and

62. Most of the decisions involving exclusion of girls from boys' teams have indicated that "separate but equal" is a valid alternative. Few have questioned, as the court did here, the uniqueness of the skills involved. *Compare* Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117 (E.D. Wis. 1978) (girls need not be allowed to try out for boys' teams where separate girls' teams with comparable programs are provided) *with* Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975) (capable girls may not be excluded from boys' team regardless of existence of girls' team).

63. 438 U.S. 265 (1978).

64. Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 990, 394 N.E.2d 855, 863 (1979).

65. *Id.* at 992, 394 N.E.2d at 864, quoting Hoover v. Meicklejohn, 430 F. Supp. 164, 171 (D. Colo. 1977).

football are both fall sports, students of both genders were given equal athletic opportunities through different sports. "Girls . . . are given volleyball playing opportunities because they have little if any in football."[66]

The court supported its conclusion by analogy to the statutory scheme in *Schlesinger v. Ballard*.[67] In *Ballard*, female officers were allowed to remain longer at one rank without being penalized because they could not go into combat and, hence, could not get the same promotion points available to men.[68] This analogy is tenuous. *Ballard* would better support an argument for separate but equal teams or different rules for girls' sports. The female officers in *Ballard* were in the same "game," but with a slight variation in rules; they were not completely excluded.

CONCLUSION

It is only in the past ten years that gender-based classifications have been successfully challenged, and only in the past five that they have been successfully challenged by men.[69] The *Petrie* decision is in harmony with decisions of the United States Supreme Court[70] which may be moving toward a theory of "one-way suspect classification" in sex discrimination cases.[71] This means that where disparate treatment is directed toward women the classification is suspect and subject to strict scrutiny, while disparate treatment of males need only be rationally related to the achievement of state objectives. If, indeed, one-way suspect classification is a reality, rejection of the precedential value of cases dealing with disparate treatment of women, as

66. Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 992, 394 N.E.2d 855, 864 (1979). This argument borders on a return to sex-stereotyping of activites, *i.e.*, boys have guns and girls have dolls, boys grow up to be doctors and girls grow up to be nurses.

67. 419 U.S. 498 (1975). This decision, however, has been much criticized because, while it was upheld as an example of remedying past discrimination against women, the court took little notice of the fact that the "past" discrimination was still going on. *See* Ginsburg, *Women, Men and the Constitution: Key Supreme Court Rulings, reprinted in* WOMEN IN THE COURTS at 21 (1978).

68. Male officers who were twice passed over for promotion in a ten year period were subject to mandatory discharge. Female officers were subject to mandatory discharge for want of promotion after 13 years.

69. Hochfelder, *Equal Rights — Where Are We Now?*, 64 ILL. BAR J. 558, 560 (1976).

70. *See* note 72 *infra*. *See generally* Ginsburg, *Women, Equality & the Bakke Case*, 4 CIVIL LIBERTIES REV. 48 (Nov./Dec. 1977).

71. *See* Erickson, *Kahn, Ballard and Wiesenfeld: A New Equal Protection Test in "Reverse" Sex Discrimination Cases?*, 42 BROOKLYN L. REV. 1, 2 n.3 (1975).

the *Petrie* court did, may be necessary in deciding rules which apparently discriminate against men.[72]

The *Petrie* decision may be yet another example of paternalistic protection of women, preserving the stereotype of the female as weak and inferior.[73] Such criticism has been leveled at many of the recent United States Supreme Court decisions purporting to have the benign purpose of redressing past injustice.[74] True affirmative action should result neither in "reverse discrimination" nor abandonment of the merit principle; rather, precise fundamental descriptions should be substituted for gross gender classifications.[75] A principle of non-discrimination, not special favors or benign classification, is the desirable goal since adverse consequences have occurred when women as a class were singled out by the law for special treatment.[76]

The logical converse argument is that the judiciary must respond to the needs of particular groups who deserve judicial protection to overcome past disadvantage.[77] Simple neutrality has seldom worked in changing discriminatory patterns, and affirmative action plans can more quickly eliminate discrimination by requiring action in favor of disadvantaged groups.[78]

The *Petrie* case was one of the first to be brought by a male under a constitutional provision construed as making gender a suspect classification. The court was therefore almost without guidance in reaching its decision.[79] Proponents of the Equal

72. The United States Supreme Court has upheld statutes designed to compensate women for past discrimination, and the fact that they discriminated against men did not make them constitutionally defective. *E.g.*, Califano v. Webster, 430 U.S. 313 (1977) (provision allowing women to eliminate additional low-earning years from calculation of retirement benefits worked directly to remedy part of the effect of past discrimination); Schlesinger v. Ballard, 419 U.S. 498 (1975) (allowing women officers to stay longer in grade to compensate for restrictions in other areas); Kahn v. Shevin, 416 U.S. 351 (1974) (statute providing tax-exemption for widows but not for widowers compensated for past discrimination).

73. *See, e.g.*, Ginsburg, *The Need for the Equal Rights Amendment*, 59 A.B.A.J. 1013 (1973); Johnson & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675 (1971).

74. Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813, 819-27 (1978).

75. *See* note 54 *supra*.

76. For example, in the past, in order to "protect" women from exposure to knowledge of the evils of society, women were denied the right to practice law or serve on a jury. *See generally* Hochfelder, *Equal Rights — Where Are We Now?*, 64 ILL. B. J. 558 (1976).

77. *See generally* Turkington, *Equal Protection of the Laws in Illinois*, 25 DEPAUL L. REV. 385 (1975-76).

78. Comment, *Constitutional Law: Ameliorative Sex Classification and the Equal Protection Clause*, 14 WASHBURN L.J. 127, 130-31 (1975).

79. The equal protection clause of the Illinois Constitution was added on the floor of the constitutional convention, so there is no committee report to aid in its interpretation. ILL. ANN. STAT. Const., art. I, § 18 (Smith-Hurd). Nor is the transcript of the proceedings for the date of passage helpful, as

Rights Amendment have expressed the hope that gender will not be a factor in determining the legal rights of men and women, and that any sex classification, whether it favors men or women, will be disallowed.[80] If other courts follow the *Petrie* lead, and interpret equal rights as being a law for women only, that hope will not be realized.

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support can be found both for the proposition that the provision was solely for the protection of women, and that it was meant to avoid discrimination against either sex. *Compare* 5 RECORD OF PROCEEDINGS, SIXTH ILL. CONSTITUTIONAL CONVENTION 3675-76 (1970) (proponents of the amendment argue that courts had interpreted the general equal protection clause in such a way that gender classifications were common and proper; therefore, the provision was necessary to guarantee women the same type of equality granted, for example, to blacks) *with id.* at 3673 ("It well may abolish many of the . . . statutes . . . set up for the protection of women; and the point is that women don't want this kind of protection) *and id* at 3675 ("[T]his does not set us apart as being discriminatory, it says 'on account of sex.' It does not say 'women' or 'females.' ").

80. *See, e.g.*, Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975).