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Julius G. Getman

Indiana University School of Law

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THE EMERGING CONSTITUTIONAL PRINCIPLE OF SEXUAL EQUALITY

I. THE COURT CHANGES POSITION

Sexual equality, a matter for joking only a few years ago, seems today on the verge of being incorporated into the Constitution as a basic right. Courts, once committed to the doctrine that the sexes are inherently unequal, seem now eager to recant. The Supreme Court too has revised its former approach to sex discrimination, although without apparent enthusiasm and without formal announcement of a change of policy.

In *Reed v. Reed*,¹ the Court invalidated an Idaho statute which gave a preference to the man whenever two persons, a man and a woman equally entitled by degree of relationship to the deceased, filed letters seeking appointment as administrator of an estate. In *Stanley v. Illinois*,² the Court held that denial to an unwed father of a hearing on his fitness before removing a child from his custody

Julius G. Getman is Professor of Law, Indiana University.

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¹ 404 U.S. 71 (1971).

² 405 U.S. 645 (1972).

violated the Equal Protection Clause when unwed mothers in similar circumstances were entitled to a hearing.

Neither in *Reed* nor in *Stanley* did the Court repudiate its earlier decisions which had uniformly recognized the constitutionality of government action that differentiated between the sexes. Perhaps the most significant authority in support of sex discrimination was *Muller v. Oregon*,³ in which the Court affirmed the right of the Oregon legislature to set minimum hours for women even though similar legislation regulating men's hours was earlier held unconstitutional. The opinion was heavily influenced by the famous brief filed by Louis D. Brandeis which sought to demonstrate that women, because of physiological differences, were less capable of physical labor and were in greater need of protection against burdensome job requirements than men. The *Muller* case established the legitimacy of state efforts "to afford special protection to women." In subsequent cases the Court showed considerable ingenuity in ascribing to the state legitimate or protective reasons for sex discrimination.

The brief for the appellant in *Reed* strongly urged the Court either to declare sex a suspect classification or otherwise to elaborate on the approach it would take in future cases.⁴ The Court declined to do so. It justified its decision on the traditional grounds that the sex of the competing applicants did not bear "a rational relationship to a state objective that is sought to be advanced by the operation" of the statutes in question.⁵ The Court did not stress the importance of sexual equality as a constitutional goal. It also failed to explain why the legislative weighing of interests was improper.⁶

Despite the cautious nature of the opinions and the lack of elabo-

³ 208 U.S. 412 (1908).

⁴ Appellant was represented by Ruth Bader Ginsburg, Pauli Murray, Dorothy Kenyon, Melvin L. Wulf, and Allen R. Deer. Thirty-nine pages of argument were devoted to urging the Court to declare sex a suspect classification. This section of the brief contained an excellent summary of the various ways in which the law has traditionally discriminated against women. Only six pages were devoted to arguing that the classification did not bear a reasonable relationship to a legitimate legislative purpose.

⁵ 404 U.S. at 76.

⁶ The decision by the Idaho court did not discuss possible reasons for choosing men over women in such cases. 93 Idaho 511 (1970). The *Stanley* case was argued in terms of rationality of the state's differentiating between unwed fathers and other parents. The Court simply announced that "denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause." 405 U.S. at 658.

ration on the limits of sexual classification, the decisions in *Reed* and *Stanley* mark a significant change in the Court's approach to sex discrimination.

1. The Court in *Reed* did not attempt to supply a rationale to justify the sexual discrimination. In earlier cases the Supreme Court either did so or simply assumed legislative competence to determine areas unsuitable for women. Thus, in *Goesaert v. Cleary*,⁷ the Court upheld a statute forbidding women from being licensed as bartenders. Even though women were permitted to serve as waitresses in places in which liquor was served, the Court concluded that the legislation was aimed at reducing moral and social problems which might result from women working as bartenders.⁸ Had the Court in *Reed* utilized a similar approach, it might have justified the statute on the grounds that men are more experienced at managing financial affairs than women; or the statute's provision preferring men might have been treated as equivalent to the legislature choosing among classes of relatives.

2. The Court stated in *Reed* and indicated in *Stanley* that the administrative gains involved in eliminating a hearing could not be accomplished at the cost of giving one sex preference over the other.

The Idaho Supreme Court had upheld the statute on the grounds that it was a legitimate way to eliminate the administrative burden which would be placed on the probate court if hearings were required in such cases. The Supreme Court, in rejecting this justification, stated:⁹

Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether §15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. 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.

The priority given to the rule of sexual equality over ease of administrative convenience is in marked contrast with earlier cases.

⁷ 335 U.S. 464 (1948).

⁸ The appellant contended that the motive was preserving jobs for male bartenders. The Court refused to "give ear to the suggestion" that such an "unchivalrous desire" was the real purpose. *Id.* at 467.

⁹ 404 U.S. at 76.

In *Hoyt v. Florida*¹⁰ the Court upheld a system of jury selection by which women were excluded from the rolls unless they specifically asked to serve while men were relieved only if they claimed a specific exemption. The Court rejected the argument that it was improper for the state to assume without a hearing that all women had competing responsibilities which made jury service a hardship.¹¹ We "cannot regard it as irrational for a state legislature to [assume] that it would not be administratively feasible to decide in each individual instance whether family responsibilities of a prospective female juror were serious enough to warrant an exemption." And in the cases in which it upheld the exclusion of women from certain occupations or limited their hours of work, the Court did not suggest a hearing to determine whether individual women were in fact capable of doing the prohibited work or working longer hours.¹²

3. Perhaps most significantly, the Court in both *Reed* and *Stanley* rejected the contention that the sex discrimination involved could be justified by the state's interest in regulating family relationships. The Court in *Reed* stated that "whatever the state's interest in 'avoiding intrafamily controversy,' it could not achieve this end by differentiating 'solely on the basis of sex.'"¹³ The Court in *Stanley* rejected the argument that differentiating between unwed fathers and other parents was a part of "a comprehensive legislative plan which affects all children in need of protection from abuse, neglect or abandonment."¹⁴

The regulation of family relationships has traditionally been recognized as a significant state interest justifying differentiation between classes of persons. Thus, in *Labine v. Vincent*¹⁵ it was held that the state could deny inheritance rights to illegitimate children as an incident of its "power to make rules, to establish, protect, and strengthen family life."¹⁶ The cases which have permitted the state to exclude women from full participation in our society have ulti-

¹⁰ 368 U.S. 57 (1961).

¹¹ *Id.* at 63.

¹² *Muller v. Oregon*, 208 U.S. at 422; *Radice v. New York*, 264 U.S. 292 (1924).

¹³ 404 U.S. at 77.

¹⁴ See Brief for the State at p. 11. The decision in *Stanley* is less significant than that in *Reed*. Four Justices joined the majority opinion in *Stanley*, two dissented, and Douglas, J., concurred separately.

¹⁵ 401 U.S. 532 (1971).

¹⁶ *Id.* at 538.

mately rested on this basis. In *Bradwell v. State*,¹⁷ Justice Bradley, concurring, explained that the state could exclude women from the practice of law on the grounds that "it is within the province of the legislature to ordain what offices, positions and callings shall be filled and discharged by men" in order to preserve "the family organization, which is founded in the divine ordinance, as well as in the nature of things."¹⁸ As recently as 1961 the Court justified the automatic exemption from jury service for women using similar reasoning if somewhat less florid language:¹⁹

Despite the enlightened emancipation of women from the restrictions and protections of bygone years and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.

The Court in *Reed* did not hold that the regulation of family relations may never justify treating the sexes differently. Nevertheless, the summary rejection of this traditional basis for sexual discrimination in a case where the interest being vindicated was not very significant suggests that the Court has fundamentally altered the balance between sexual equality and state regulation of family relations. The *Stanley* case is further indication of the Court's shift. Not only did the majority reject the argument that the state could distinguish between unwed mothers and fathers to protect the welfare of illegitimate children, but perhaps for the first time in American jurisprudence, it was unwilling to indulge the presumption of the unique nature of mother's love. This assumption was repeatedly invoked in the brief for the state. It was accepted by Chief Justice Burger, who was prepared to uphold the state system on the grounds that it merely reflected an observable difference between the sexes:²⁰

¹⁷ 16 Wall. 130 (1872). See also *In re Lockwood*, 154 U.S. 116 (1894). Both were overruled, *sub silentio*. *Konigsberg v. State Bar*, 353 U.S. 252 (1957); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957).

¹⁸ 16 Wall. at 142, 141.

¹⁹ 368 U.S. at 61-62.

²⁰ 405 U.S. at 665-66. It is curious that the Chief Justice who wrote the Court's opinion in *Reed* dissented in *Stanley*. He was prepared to accept the constitutionality of Illinois's conclusion that women make better parents (at least when the parents are unwed) but was not willing to accept the constitutional validity of Idaho's assumption

I believe that a state is fully justified in concluding, on the basis of common human experience, that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter. This view is reinforced by the observable fact that most unwed mothers exhibit a concern for their offspring either permanently or at least until they are safely placed for adoption, while unwed fathers rarely burden either the mother or the child with their attentions or loyalties. Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers.

The decisions in *Reed* and *Stanley* demonstrate that the Court can significantly alter the constitutional importance of sexual equality without formally changing the standard of review under the Fourteenth Amendment. The traditional tests under the Fourteenth Amendment have always left considerable discretion to the Court through the technique of defining the statute's purpose. If the purpose is described narrowly in terms of the immediate ends which a statute seeks to achieve, then distinctions which serve peripheral or secondary goals may be held improper. Thus, the statute in *Reed* was described as a way to resolve disputes about administration. Differentiation between the sexes was neither necessary nor directly related to the purpose. It also could have been characterized as seeking to resolve disputes without disturbing interfamily harmony.

While the *Reed* opinion does not suggest what type of justification would be adequate to support sexual discrimination, it together with *Stanley* suggests that the factors to be considered are the importance of the state interest being served by the discrimination and the possibility of achieving the objective by other means. These are the same factors which would be considered were the Court to announce that sex is a suspect classification. Recent cases suggest a general policy of stricter judicial scrutiny of state classifications in equal protection cases. In *Weber v. Aetna Casualty Co.*,²¹ Mr. Justice Powell, writing for the majority, stated that the balance to be struck in determining how closely to examine state action is, "What

that men are better or more desirable administrators. His seemingly contradictory opinions would indicate that the state's power to distinguish between the sexes is inevitably affected by whether the Justices think particular distinctions reflect actual differences between men and women.

²¹ 406 U.S. 164 (1972).

legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"²² Following this approach the Court invalidated Louisiana's workmen's compensation law which denied equal recovery to illegitimate and legitimate children. The Court recognized the state interest in regulating family relationships but closely examined how that regulation was to be accomplished. The Court required a "significant relationship" between the purpose and the means. The dissent called this standard a hybrid of the rational relationship and strict scrutiny standards.²³

In *Eisenstadt v. Baird*,²⁴ the Court used the same formulation that it used in *Reed* to invalidate a Massachusetts law making it a felony to distribute contraceptives. Not only was the Court unwilling to supply the necessary justification, it rejected the purposes proposed by the state (protection of health, public morals, and family relationships) as too broad or too attenuated. The Court was clearly looking for more than a possible rational basis to justify state action, though not stating that it was using anything stricter. It is not clear, however, that this general trend will continue because there is a dispute within the Court about the extent to which the Equal Protection Clause should be used to review the reasonableness of legislation. Justices Rehnquist, Blackmun, and Burger all dissented in one or more of the cases applying the Fourteenth Amendment to invalidate state legislation.²⁵

The change in the standard of review in *Reed* and *Stanley* was made so indirectly, however, that the *Reed* opinion has given rise to conflicting interpretations in the lower courts.²⁶ This conflict and the increase in the amount of litigation concerning women

²² *Id.* at 173.

²³ *Id.* at 181.

²⁴ 405 U.S. 438 (1972).

²⁵ *Stanley v. Illinois*, 405 U.S. 645 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Peters v. Kiff*, 407 U.S. 493 (1972); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

²⁶ Thus, in *Schattman v. Texas Employment Commission*, 4 FEP CASES 353 (CA 5th, 1972), in upholding a policy of forced maternity leave, the court cited *Reed* for the proposition that "in applying the Equal Protection Clause the Supreme Court has consistently recognized that the Fourteenth Amendment does not deny the States the power to treat different classes of persons in different ways. The clause does prohibit the States from placing people in different classes 'on the basis of criteria wholly unrelated to the objective of the statute.'" *Id.* at 359. On the other hand, in *LaFleur v. Board of Education*, 4 FEP CASES 1070 (CA 6th, 1972), the court in rejecting a forced maternity leave program cited *Reed* for the proposition "there is a marked trend of eases to invalidate regulations based on sex classification unless supported by a valid state interest." *Id.* at 1073. In *Green v. Board of Regents*, 335 F. Supp. 249 (1971), the court stated, "The Supreme

make it inevitable that the Court will have an opportunity to reconsider the application of the Fourteenth Amendment to sex discrimination. The general political and social commitment to equal rights for women is too great to retreat from *Reed* and *Stanley* and return to the Court's casual acceptance of the state's ability to "draw sharp lines" between the sexes.²⁷ The inclusion of sex discrimination in Title VII of the 1964 Civil Rights Act has made a significant impact on employment practices and concepts. It has in recent years been vigorously pursued by the EEOC and has led to similar provisions in many state laws.²⁸ A variety of administrative and legal techniques have recently been developed for the purpose of eliminating sex discrimination.²⁹ The Equal Rights Amendment has passed both houses of Congress, and the platforms of both major parties contain pledges to achieve legal equality between the sexes. Thus, distinction based on the concept of separate spheres has become much less consistent with the general fabric of our legal system.³⁰ It seems

Court of the United States has recently made it quite clear that discrimination . . . on the basis of sex is not to be tolerated." *Id.* at 250.

²⁷ *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd*, 405 U.S. 970 (1972), does not mark a retreat from the Supreme Court's position in *Reed* and *Stanley*. In *Forbush*, the lower court held that Alabama's common law requiring women to assume their husband's surname on marrying does not violate the Equal Protection Clause. The lower court opinion was based in part, however, on the fact that no real injury was involved because it was easy for the woman to change her name. Moreover, the Supreme Court's affirmance of a case such as this one on its appellate docket, without hearing or opinion as here, is considered equivalent to a mere denial of certiorari. See *Serrano v. Priest*, 5 Cal.3d 584, 615-18, and especially note 34 (1971).

²⁸ Forty states currently ban sex discrimination in employment.

²⁹ See, in general, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1166-94, 1242-1303 (1971) (hereinafter cited as *Developments—Title VII*); BLUMROSEN, *BLACK EMPLOYMENT AND THE LAW* 408-16 (1971). An area ripe for testing is the state action implication in tax benefits to private schools and associations that discriminate in admissions. Tax-exempt status may not be granted, and tax-deductible contributions may not be made to schools or other associations that discriminate on racial grounds. *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971); *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972); *Pitts v. Wisconsin Department of Revenue*, 333 F. Supp. 662 (E.D. Wisc. 1971). See recent action of NLRB General Counsel on the unions' duty of fair representation in sex discrimination. 80 BNA LABOR REPORTER 65 (1972).

³⁰ This is not to say that the concept of sexual equality has been generally accepted. It is still widely assumed that certain types of work are for one sex or the other, that men's and women's personalities are unalterably different, and that certain types of behavior which are suitable for men or boys are unsuitable for women or girls. See Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for*

likely that *Reed* and *Stanley* are the forerunners of a policy of strict review in cases involving discrimination on the basis of sex.

The change in policy should be made explicit. The simplest method for declaring legal equality between the sexes to be an important constitutional principle is to hold that sex is a suspect classification under the Fourteenth Amendment. Such a declaration would acknowledge that sexual classification has historically been used as a technique for depriving women of opportunities available to men. It would also be implicit acceptance of the analogy between sexual and racial discrimination which has been urged so forcefully by proponents of women's rights.³¹

Despite the historic significance involved in these determinations, the precise ways in which existing law would be changed are unclear. Under the suspect classification analysis, it is still necessary in particular cases to determine whether a compelling state interest justifies the use of sexual classification. The Court would have to consider the extent to which the classification is based on what it considers to be legitimate differences between the sexes, the importance of the state interest being served, and whether the goal could be achieved in ways which do not involve sexual classification. The doctrine of suspect classification does not supply answers in particular cases to the questions raised by these considerations.³² Announcement that sex is to be treated as a suspect classification would be understood as rejecting traditional justifications for sex discrimination and as notice that the national commitment to sexual equality will be given great weight in future cases. The interest in achieving sexual equality, however, does not always militate against the use of sexual classification. Indeed, in certain cases the promotion of sexual equality may be the compelling state interest which permits the use

Equal Rights for Women, 80 YALE L.J. 871, 882 nn.29, 30 (1971). What has been accepted, however, is the principle that the law should not be used to prevent women from full participation in national life.

³¹ See, e.g., Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. CIV. RTS.—CIV. LIB. L. REV. 253, 257 (1971); *Sail'er Inn v. Kirby*, 95 Cal. Rep. 329 (1971).

³² Indeed, had the suspect classification formulation been used when such cases as *Muller v. Oregon*, and *Goesaert v. Cleary*, were considered, they might well have been decided the same way. *Muller*, which involved the constitutionality of legislation regulating hours of work for women, could have been justified by the compelling state interest in protecting women from the perils of overwork, and *Goesaert* by the state's interest in regulating the sale of liquor to prevent social harm to women.

of sexual classification. The Court must still address itself to the difficult question of elaborating the legal implications of sexual equality and of weighing the importance of various types of justification for sexual classification.

The application of the suspect classification doctrine to sex may be made unnecessary by passage of the Equal Rights Amendment, which provides: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." The Amendment also authorizes the Congress and the states to enforce the Amendment by appropriate enforcement legislation. Although it has been suggested that the Equal Rights Amendment would prohibit almost any classification based on sex, this is not necessarily so. Indeed, it can be read as specifically authorizing such sexual classification for the purpose of promoting equality. Thus, under the Equal Rights Amendment, as under the doctrine of suspect classification, the Court will have to decide the extent to which programs employing sexual classifications are consistent with the elusive concept of sexual equality. In the rest of this paper I will discuss the interests which the Court should consider in answering questions likely to arise after passage of the Equal Rights Amendment or application of the suspect classification doctrine to sex. The discussion is focused primarily in the area of education.

II. AFFIRMATIVE ACTION PROGRAMS

Fair employment practices laws, including Title VII, were originally aimed at preventing conscious discrimination by providing remedies in specific cases.³³ This approach, however, did not make a significant impact on hiring or promotional practices. Employers changed avowedly discriminatory policies without substantially changing the composition of their work force. Standards frequently used and seemingly objective turned out to have discriminatory impact.³⁴ It has proved difficult to establish whether neutral

³³ See generally *Developments—Title VII*, 1113-19, 1123-26; Blumrosen, *The Duty of Fair Recruitment under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465, 465-66, 509-27 (1968); H.R. Rep. No. 570, 88th Cong., 1st Sess. (1963). See also SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* (1966).

³⁴ *Griggs v. Duke Power, Co.*, 401 U.S. 424 (1971); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968); Gould, *Seniority and the Black Worker: Reflections on Quarles and Its Implications*, 47 TEXAS L. REV. 1039 (1969).

standards are in fact being applied in a discriminatory fashion. Techniques for evasion are many. Nondiscriminatory policies which may have been adopted in good faith can be subverted by those taking part in the hiring process.³⁵ Only a small fraction of violations were ever called to the attention of the agencies, and even then the process was slow and the result uncertain. The EEOC and the courts responded by permitting the use of racial statistics as a way of establishing a violation of the Act and of treating cases as class actions.³⁶ It became possible to prove discrimination by showing that the existing work force did not contain qualified women or blacks and that existing recruitment and promotion techniques were not serving to redress the balance.

Affirmative action programs began as a way of overcoming the limitations involved in case-by-case adjudication. They began as voluntary programs with little or no enforcement machinery. Government contractors simply pledged themselves to seek out qualified minority group members. The Philadelphia Plan combined the concept of affirmative action with the use of racial statistics. The program, adopted by the Office of Federal Contract Compliance in the Philadelphia area, required construction contractors to establish a program which recruited qualified minority group workers in order to obtain or continue working under a government contract.³⁷ The Department of Labor announced the percentage of minority group employees which it expected would be hired by a specified date if nondiscriminatory hiring policies were used. While the plan also provided that no qualified worker was to be denied a job because of race, failure to hire the proscribed percentage was deemed a *prima facie* evidence of discriminatory hiring, which could lead to loss of contracts unless adequately explained. The plan was hailed by some because it promised results.³⁸ It was attacked by others as involving the use of quotas and therefore illegal.³⁹ Its legality was, however, upheld in the Court of Appeals on the grounds that it did

³⁵ *Penn v. Stumpf*, 308 F. Supp. 1238 (N.D. Cal. 1970); see also *Brown et al.*, note 30 *supra*, at 899, n.51, for cases and sources.

³⁶ Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971).

³⁷ Jones, *The Bugaboo of Employment Quotas*, 1970 Wisc. L. REV. 341; for revised guidelines, see 401 F.E.P. 25, 255, 262 (1972).

³⁸ Jones, note 37 *supra*, at 347, 364-73, 398-403.

³⁹ The Comptroller General took this position. *Id.* at 358-61, 394-98.

not involve a fixed hiring quota.⁴⁰ Similar plans have since been adopted in other areas.

The widespread use of affirmative action programs in higher education developed after a finding by HEW (which had responsibility for eliminating discrimination by government contractors in education) that the University of Michigan had been guilty of sex discrimination. The university was threatened with loss of government contracts. Since such contracts are now crucial to the economic well-being of colleges and universities, and since the Michigan hiring policies did not seem very different from those employed by most other major institutions, the finding created serious concern among academic administrators throughout the country. Under pressure from HEW, which has since established guidelines for affirmative action programs,⁴¹ and from women's groups, many universities have now adopted affirmative action programs dealing with the recruitment and hiring and promotion of women. Although there are considerable variations among the programs, generally they involve the commitment to an effort to recruit or hire a stated percentage of women and to equalize salaries of men and women. All these programs require that those making significant decisions consider the sex of those receiving benefits.

There has been very little discussion of the constitutionality of benign quotas and compensatory programs for women under either the Equal Rights Amendment or the suspect classification doctrine. The landmark article interpreting the Equal Rights Amendment by Brown, Emerson, Falk, and Freedman takes the position that under the Fourteenth Amendment, such programs could be justified by "compelling [state] reasons," but that under the Equal Rights Amendment, "the guarantee of equal rights for women may not be qualified in the manner that 'suspect classification' or 'fundamental interest' doctrines allow."⁴²

⁴⁰ *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (CA 3d, 1971).

⁴¹ 29 C.F.R. § 1604, Guidelines; Institute of Continuing Legal Education, *Women's Work Has Just Begun: Legal Problems of Employing Women in Universities*, Ann Arbor (1972).

⁴² Brown *et al.*, note 30 *supra*, at 904. The Senate Judiciary Committee's Majority Report on the Equal Rights Amendment, 14 March 1972, stated that although that Amendment would not permit separate-but-equal schools, it would also "not require quotas for men and women, nor would it require that schools accurately reflect the sex distribution in the population." P. 17.

The compelling reason used to justify affirmative action programs is that they promote sexual equality. A similar justification has been implicitly accepted in some cases of affirmative action aimed at eliminating racial disparities.⁴³ As noted above, however, this argument can be made with equal force under the Equal Rights Amendment. The purpose of the Equal Rights Amendment is to remove barriers preventing women from full participation in national life. Affirmative action programs are consistent with this goal. On the other hand, affirmative action programs may be challenged under either the Fourteenth Amendment or the Equal Rights Amendment on the ground that they involve singling out women for favored treatment. It has been argued that any system which grants benefits on the basis of group affiliation is inconsistent with the principle of evaluation based on individual merit, traditionally considered to be central to the concept of equal treatment.⁴⁴

Judicial authority and public sentiment are both profoundly divided on the question whether equality permits recognition of group affiliation.⁴⁵ It is unnecessary for the Court in resolving this question to reject either the principle of individual merit or the concept of compensatory affirmative action. Affirmative action pro-

⁴³ *Balaban v. Rubin*, 14 N.Y.2d 192 (1964). The New York Court of Appeals approved a school board plan to rezone a junior high school. In addition to the usual factors, the board considered improving racial balance in drawing the boundaries. The plan was challenged under a law that said that a child could not be denied admittance to a school on the basis of race. The court approved the plan on the basis that these laws were intended to protect blacks and other minority groups. See also Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965).

⁴⁴ See Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966); Seabury, *HEW and the Universities*, 53 COMMENTARY 38 (1972).

⁴⁵ See *Quotas: The Sleeper Issue of 1972*, NEWSWEEK 36-37 (18 September, 1972). In *DeFunis v. Odegaard*, No. 741727, Wash. King County Super. Ct. (Washington, Sept. 22, 1971), the court ordered the admission to law school of the plaintiff because his academic credentials seemed superior to minority applicants who were admitted. In *Carter v. Gallagher*, 452 F.2d 315 (CA 8th, 1971), the court upheld a plan for remedying past discrimination, which required that one out of every three hired must be a minority group member until twenty were hired.

The Democratic party at its 1972 national convention insisted that each delegation contain minimum percentages of women and minority group members. The Republicans specifically rejected such an approach and insisted that a system of quotas is discriminatory and, in fact, contrary to the basic principle of individual merit. Good statements of opposing considerations are to be found in the exchange of letters between Professors Gould and Glazer in the *New York Times* on 2 March 1972, 11 April 1972, and 20 April 1972.

grams differ in the extent to which they depart from a standard of individual merit and in their potential for furthering equality. Each should be evaluated separately considering several factors.

1. How likely is it that objective or nonbiased standards will be used if the affirmative action program is invalidated? Much of the criticism of compensatory hiring and promotional programs in universities is based on the assumption that the current system selects the ablest teachers and scholars available and rewards them according to merit without regard to race, religion, sex, or other extraneous considerations. Thus, Professor Paul Seabury of the University of California, a severe critic of affirmative action programs, recently wrote in *Commentary*:⁴⁶

Fifteen years ago, David Riesman in his *Constraint and Variety in American Education* pointed to certain qualities which distinctively characterized avant-garde institutions of higher learning in this country. The world of scholarship, he said "is democratic rather than aristocratic in tone, and scholars are made, not born." . . . Paradoxically this democratization of the university (with its stress not on status but upon excellence in performance) had not begun in rank-and-file small colleges of the nation, which were exemplars of America's ethnic, religious, and cultural diversity. Rather it had come out of those innovating institutions which, in quest of excellence, either abandoned or transcended much of their discriminatory sociological parochialism. . . . The egalitarianism of excellence, a democracy of performance, was an ethos consummated by the avant-garde.

. . . by the 1950's the great American universities attained an authentic cosmopolitanism of scholarship matched by no other university system in the world. And the outward reach of American higher education toward the best the world of scholarship could offer generated an inward magnetism, attracting to itself the most qualified students who could be found to study with these newly renowned faculties.

This system of recruitment also left a myriad of American sociological categories statistically underrepresented in the highest precincts of American higher education. Today, with respect to race and ethnicity, blacks, Irish, Italians, Greeks, Poles, and all other Slavic groups (including Slovaks, Slovenes, Serbs, Czechs, and Croatians) are underrepresented. On faculties, at least, women are underrepresented. Important religious categories are underrepresented.

⁴⁶ Seabury, note 44 *supra*, at 40.

Despite Professor Seabury's eloquence, the picture which he paints of university hiring and selection processes is unduly flattering. Subtle but real discrimination has traditionally been a part of the process of faculty appointment even at leading universities.⁴⁷ For example, the factor of personal recommendation, which is crucial to the hiring process, has built into it an unconscious sex bias. Certain students call themselves to the attention of their professors as likely prospects for future teaching positions. They appear to be seriously committed to scholarship and to possess the necessary mental abilities. For the most part they are skillful at argument, verbally aggressive, what we like to call tough-minded, and willing to challenge the professor openly in class discussion. Whatever their characteristics, women students are less likely than men to be seen as serious scholars by their teachers. Moreover, verbal aggressiveness and tough-mindedness have been discouraged in young girls and, when demonstrated by women, verbal aggressiveness and tough-mindedness often seem less praiseworthy, even offensive.⁴⁸

The same considerations will affect the impression which a woman applicant makes in an interview. Many men unconsciously desire or expect submissive behavior from women in a discussion. Many women are accustomed to complying.⁴⁹ If they do, they may be thought to lack the toughness necessary for a good teacher or scholar. If the expected behavior is not forthcoming, the man may feel uncomfortable, possibly even threatened, and conclude that the woman would not be a desirable colleague.⁵⁰

2. To what extent are the people benefited by the affirmative action program likely to be the same ones disadvantaged by previous policies? *E.g.*, a program to give special financial assistance or

⁴⁷ The statistics are set forth and the dynamics pointed out in Murray, *Economic and Educational Inequality Based on Sex: An Overview*, 5 VALPO. L. REV. 237, 258-68 (1972); Indiana University AAUP Committee on the Status of Women, *Study of Women: Study of the Status of Women Faculty at Indiana University, Bloomington Campus* (1971).

⁴⁸ Cavanagh, *A Little Dearer Than His Horse: Legal Stereotypes and the Feminine Personality*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 260 (1971); Romer & Secor, *The Time Is Here For Women's Liberation*, 397 ANNALS 129 (1971); Horner, *Women's Will to Fail*, PSYCHOLOGY TODAY (November 1969).

⁴⁹ Cavanagh, note 48 *supra*, at 274.

⁵⁰ Even the evaluation of publications will in many disciplines contain an element of sex bias. For an interesting description of the way sexual expectations may affect critical reaction to published work, see Ozick, *We Are the Crazy Lady and Other Feisty Feminist Fables*, Ms., p. 40 (Spring 1971).

hiring preference to older married women with children would have a special claim to validity. In the recent past it was especially difficult for married women to obtain a desirable teaching position or admission to a graduate school. Some admissions committees felt that a professional education would be wasted on married women. It was often assumed that job offers would be declined or that positions accepted would be given up eventually to serve family needs. If a woman had children, all of these concerns were increased, and maternity policies in many institutions were so framed as to create severe conflict between motherhood and professional interests.

It is impossible to reconstruct the ways in which these policies affected individual women because the impact was felt at so many levels. Some women were denied education or employment because of these policies. Some did not apply or even consider certain careers because of their awareness of the policies or because of their own acceptance of the underlying value judgment that a woman's primary obligation was to her family.⁵¹

3. Is the program in an area in which achieving equality will serve significant social interests or in which existing inequalities have special costs? The Supreme Court has noted that methods of selection which keep women off juries deprive the deliberative process of qualities which women bring to bear. The classic statement was made by Mr. Justice Douglas in *Ballard v. United States*:⁵²

The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either is excluded.

Most institutions will function better if they can avail themselves more fully of the diverse experiences of different groups.⁵³ In addition, the inclusion of either sex in an area previously reserved to the

⁵¹ Cavanagh, note 48 *supra*, at 272.

⁵² 329 U.S. 187, 193-94 (1946). The Supreme Court adopted this approach in *Peters v. Kiff*, 407 U.S. 493 (1972), holding that a white man was deprived of due process of law because blacks had been systematically excluded from the jury that convicted him. "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." *Id.* at 503.

⁵³ MEAD, *MALE AND FEMALE: A STUDY OF THE SEXES IN A CHANGING WORLD* 357 (1968).

other serves an educational function. When women assume positions formerly held by men, it educates women to the fact that a wider range of choice is now available, and it causes men to re-evaluate their conception of women. No easy method exists to identify those areas in which the benefits of inclusion are greatest. Some of the applicable considerations can be recognized.

a) Equality is particularly important for institutions such as education, the legal profession, and the arts which play a major role in shaping the standards and goals of the society.

b) Equality is also necessary in those positions which involve stating or effectuating public policy. This includes legislative, judicial, and high-level administrative positions.

c) The availability of different models is most crucial in areas of high prestige and in occupations which have traditionally been thought of as requiring attributes associated with one sex or the other. This would include the military and police, athletics, and grade school teaching.

4. Does the program require rejecting qualified people on the basis of sex? A requirement that the next person hired for a department must be a woman might mean that a highly qualified man will not even be considered. Such an approach is much more inconsistent with the idea of judging individuals on their own merits than a flexible program of percentages, which forces those in charge of hiring to make special efforts to locate qualified women or minorities. The latter is only marginally, if at all, inconsistent with the concept of individual merit. Of course to be effective any program requires an enforcement mechanism. Where flexible targets are involved, however, those doing the selecting are given an opportunity to demonstrate that failure to meet the target was not the result of lack of sincere or reasonable effort.

5. Is there a significant existing imbalance in the work force or student population? Such an imbalance would suggest past discrimination against women or that women have been discouraged from entering the field. In such cases affirmative action programs may be necessary to make known that opportunities do exist or that it is acceptable for women to enter the field.

III. PREGNANCY

The policies which an institution adopts concerning pregnancy and childbirth will significantly affect employment oppor-

tunities for women. Neither the Equal Rights Amendment nor the suspect classification doctrine provides the standards to be applied in evaluating the validity of programs applicable to pregnancy. Because pregnancy is unique to one sex, considerations of equality are necessarily interwoven with questions concerning the reasonableness of the program.⁵⁴ Determining the meaning of equality requires a decision as to the appropriate standard for comparison. Reasonableness requires attention both to the legitimate needs of the institution and to the principle of equality of economic opportunity. Different considerations apply and different institutional policies are arguably pertinent depending upon the nature of the regulation applied and whether it is being applied to pregnancy, delivery, or the post-delivery period.

A. MATERNITY LEAVE

The easiest issue involves the common policy of requiring a pregnant woman to take leave after a certain number of months

⁵⁴ In *Miller v. Industrial Commission*, 480 P.2d 565 (Col. 1971), the Supreme Court of Colorado rejected the argument that singling out pregnancy for special treatment under the employment insurance law was a form of sex discrimination: "[T]he act treats men and women workers the same for purposes of eligibility and qualification for unemployment benefits, . . . It is only where the woman worker has become pregnant that she is treated differently, placed in a separate classification from other men and women workers. Such a classification founded on the special consideration of pregnancy cannot be said to be unreasonable and therefore unconstitutional. . . . Such a classification is not based upon sex alone . . . which classification then might be subject to a valid criticism of unreasonableness." *Id.* at 568.

The court distinguished between categories based on sex and categories based on sex in combination with some other attribute. This distinction (the so-called "sex plus" doctrine) has been rejected in Title VII cases. *Cohen v. Chesterfield*, 4 FEP Cases 1237 (CA 4th, 1972). Both the EEOC and the courts have taken the position that when all or substantially all of the people in a class singled out for special treatment are of one sex, sex discrimination exists.

Guideline 1604.3 provides that it is "not . . . relevant that the rule is not directed against all females . . . for so long as sex is a factor in the application of the rule, such application involves discrimination based on sex."

As the Seventh Circuit stated in rejecting the contention that distinctions not phrased in terms of sex do not constitute sex discrimination for purposes of Title VII, "The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex." *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971) *aff'g* 308 F. Supp. 959 (N.D. Ill. 1970). In *Phillips v. Martin Marietta Corporation*, 400 U.S. 542 (1971), the Supreme Court, without discussion, rejected the argument that categories based on sex plus some other factor cannot constitute discrimination for the purposes of Title VII. There is little reason to suppose it will adopt a different standard in construing the Fourteenth Amendment or the Equal Rights Amendment.

of pregnancy. Such regulations have been challenged in a number of recent cases by women teachers who wished to remain on the job.⁵⁵ In each case the pregnant woman has introduced medical evidence to support her contention that she was not physically disabled in any way from performing her duties. The institution has typically responded with evidence indicating that pregnant women in general require assistance or that the rule eliminates administrative problems which would be involved in making individual determinations of disability. In one case a school system suggested that pregnant teachers had been subject in the past to some minor harassment by pupils.⁵⁶ The institution did not challenge medical testimony indicating that the woman was medically capable of performing her duties.

In some cases such rules have been affirmed without recognition of the fact that sex discrimination was involved. Thus, in *Cerra v. East Stroudsburg Area School District*,⁵⁷ the court upheld the constitutionality of a rule requiring the resignation of schoolteachers after the fifth month of pregnancy. The court did not address itself to the wisdom of the regulation nor did it consider whether the regulation was discriminatory. It merely referred to testimony by the Secretary of Education that the regulation "was a reasonable one" and within the Board's authority. Most recent cases, however, have recognized that the question is not solely whether the regulation serves a legitimate purpose but also whether pregnant women are being denied benefits available to men who have no greater claim to them. In holding a forced maternity leave policy to be invalid under the Fourteenth Amendment, the Sixth Circuit recently stated:⁵⁸

Male teachers are not subject to pregnancy but they are subject to many types of illnesses and disabilities. This record indicates clearly that pregnant women teachers have been singled out for unconstitutionally unequal restrictions upon their employment.

⁵⁵ See *Cohen v. Chesterfield County School Board*, 4 FEP CASES 1237 (CA 4th, 1972); *LaFleur v. Board of Education*, 4 FEP CASES 1070 (CA 6th 1972); *Schattman v. Texas Employment Commission*, 4 FEP CASES 353 (CA 5th, 1972); *William v. San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Cal. 1972). *Bravo v. Board of Education*, 4 FEP CASES 995 (N.D. Ill. 1972).

⁵⁶ See *LaFleur v. Cleveland Board of Education*, 326 F. Supp. 1208 (N.D. Ohio 1971), *reversed*, 4 FEP CASES 107 (CA 6th, 1972).

⁵⁷ 285 A.2d 206 (Pa. Comm. Ct. 1971).

⁵⁸ *LaFleur v. Board*, note 55 *supra*, at 1073.

The application of such rules to women capable of working is inconsistent with the Court's decision in *Reed v. Reed*. The major thrust of the *Reed* decision is that administrative convenience does not justify treating women as a class and thereby ignoring the specific claims of individual women. Under a strict standard of review, pregnant women should not be treated as a class and healthy pregnant women should not be treated differently from healthy men. Moreover, equality cannot be obtained if the negative reactions of others are grounds for continuing to disfavor the group previously discriminated against.⁵⁹

Even under a more lenient standard, such regulations are probably invalid. Where teachers are concerned, the institution's interest in preventing mishaps is offset by the desirability of maintaining continuity in the educational experience of the pupils. Moreover, forced maternity leave programs have a significant impact upon the employment situation of the women affected by them. Where substantial periods of leave are involved, a teacher may be forced to miss two semesters. In addition to the financial sacrifice, the woman's professional development is halted. She does not accrue benefits during this period, and she may not be able to return to the precise position which she was forced to give up even if she is entitled to return to work. Thus, as the Court of Appeals for the Fourth Circuit recently stated:⁶⁰

We need not concern ourselves with the applicable test to discriminate validity on the basis of sex . . . because under either we think the regulation denies equal protection. The record is literally devoid of any reason medical or administrative why a pregnant teacher must accept an enforced leave by the end of the fifth month of pregnancy if she and her doctor conclude that she can perform her duties beyond that date.

There are many possible issues concerning pregnancy and childbirth which pose more complicated questions. Some of these are discussed below. The preliminary discussion assumes that these

⁵⁹ *Buchanan v. Warley*, 245 U.S. 60 (1917); *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 389 (CA 5th, 1971).

⁶⁰ *Cohen v. Chesterfield County School Board*, note 54 *supra*, at 1239. One way in which pregnancy-related leave might be treated differently from other forms of temporary disability is in requiring advance notice of the employee's decision to stop work at a certain point in the pregnancy if she does not desire to work as long as is medically possible.

issues will be treated as constitutional questions. It would in general be more desirable to handle these problems under currently applicable statutes.

B. THE RIGHT TO RETURN TO WORK

In some cases so much time off will either be required or voluntarily sought that under established sick leave or disability standards the woman would not be automatically entitled to return to work. In such cases pregnant women would not be treated differently from employees in comparable leave situations. Moreover, such policies serve legitimate institutional interests in continuity of employment. A rational argument can be made, however, to support special constitutional protection for pregnant women.⁶¹

Childbirth has a unique social value not possessed by other human behavior. A great percentage of women become pregnant at an early and crucial state of their professional development. If women are forced to choose between motherhood and career, the goal of economic equality cannot be achieved. Even if those terminated returned to the work force, denial of the right to return to the job held before pregnancy would prevent them from developing seniority rights for promotion and accruing fringe benefits. The Court might compromise by holding that a constitutional right to return to work after pregnancy exists, limited to the time of medical disability.⁶²

C. THE RIGHT TO HEALTH BENEFITS

Normally illness and disability are compensated by health insurance and paid sick leave which is accrued by seniority. With respect to insurance benefits, current programs might exclude medical ex-

⁶¹ Comment, *Love's Labor's Lost: New Conceptions of Maternity Leave*, 7 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 260, 268 (1972); *Developments—Title VII*, at 1170.

⁶² If a woman takes off more time than is medically necessary, she would be treated as are other people who take leave for personal reasons. Such a rule would be extremely difficult to operate effectively. Fine questions about the meaning of medical necessity would inevitably arise, and there would be little guidance available to school administrators in deciding the category in which a particular employee fell. Moreover, such a rule would fail to recognize the important psychological need which may exist for a family to adjust to a new life. It would be administratively simpler and more responsive to the interests involved for the Court to require that in addition to the woman's being able to take off the time medically required, either parent should be permitted leave for a reasonable time after birth without risking his or her job.

penses connected with childbirth on the theory that pregnancy is a voluntarily acquired condition. In addition, most policies do not provide benefits for conditions which predate the time of hire or else have a one-year waiting period for maternity benefits. The denial of insurance benefits on the grounds that pregnancy is voluntary should not be permitted.⁶³ Pregnancy is unlike other voluntary disability requiring medical care because it is socially useful. On the other hand, the requirement of a waiting period makes sense as a way of preventing women from seeking a job primarily as the means of financing the cost of delivery of their children. In this case, the reasons for the general policy apply to pregnancy as well.

D. UNWED MATERNITY

Some schools treat unwed maternity as grounds for expulsion or other sanctions.⁶⁴ Such policies are obviously discriminatory unless they are made applicable to unwed fathers as well. Even where such rules are theoretically applicable to both men and women, often only the mother will be affected because only she will be identified. Since it is difficult to defend such rules in terms of legitimate institutional concerns, their validity should not be upheld unless it can be shown that in practice they are applied to both men and women.⁶⁵

E. PREGNANCY AND AFFIRMATIVE ACTION

An institution seeking to increase the number of its women employees or students might permit pregnant women to work part time or carry a reduced course load and provide special insurance benefits or leave with pay.

It is arguable that such programs deny equal protection of the laws to men. The argument should be rejected. As the discussion above indicates, the concept of equality cannot be applied with precision in cases involving questions of pregnancy. Moreover,

⁶³ *Id.* at 283 *et seq.*

⁶⁴ Some schools penalize students who become mothers by keeping them from extra-curricular activities. In such cases the program would be discriminatory unless a similar program was in existence for men students who became unwed fathers. Recent cases have held that unwed mothers may not be barred from high school. *Ordway v. Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971); *Shull v. Columbus Municipal School District*, 338 F. Supp. 1376 (N.D. Miss. 1972).

⁶⁵ *Doe v. Osteopathic Hospital*, 333 F. Supp. 1357 (D. Kans. 1971); Dec. No. 71-562, 1 CCH EMPL. PRAC. GUIDE ¶6184 (EEOC) (4 December 1970).

even with special benefits, there will be some educational or professional costs involved for the woman and for her family. The most that any economically and politically feasible affirmative action program could do is minimize the cost.

Sexual equality would, however, require that any program of leave after the birth of a child apart from that required for delivery should be available to men and to women equally.⁶⁶ It should be for the parents to decide which of them will take leave to care for the child. Limiting such leaves to women would mean that the professional careers of women but not of men would be interrupted if the parents decide that a newborn child should have close parental attention during infancy.

F. THE AVOIDANCE OF CONSTITUTIONAL DETERMINATION

Constitutional litigation does not seem the best way to resolve the conflicting interests of educational institutions and pregnant women. The delicate interest-balancing engaged in above is highly theoretical and based in part on conjecture. The practical and financial implications involved in many of the positions argued for cannot be understood until they are tried. It is important that the law change as practical experience reveals problems and issues not now clearly perceived. Currently, either Title VII, Executive Order 11,246 as amended by 11,375, or the Equal Educational Opportunities Act, and state law cover all the questions raised. The agencies which enforce these statutes and regulations are in a position to develop rules and guidelines as experience shows them to be necessary and feasible. Accordingly, it would make sense for the courts to deal with these questions to the extent possible as matters of statutory construction. The courts should give great weight to administrative determination so as not to foreclose questions under the statute prematurely. The Constitution should be invoked only where statutes do not provide a remedy.

IV. CONCLUSION

The principle of sexual equality does not require that sex always be treated as an invalid consideration.⁶⁷ Indeed, in certain cir-

⁶⁶ *Danielson v. Board of Higher Education*, 4 FEP Cases 885 (S.D. N.Y. 1972).

⁶⁷ Athletic programs are another area in which equality may require recognition of sex. There are currently far more male students than females involved in sports. Certain

cumstances achieving equality requires specific awareness of sex. The next decade will involve the courts in the difficult task of enunciating the circumstances under which recognition of sex can coexist with the Equal Rights Amendment or with the concept of sexual equality embodied in the Fourteenth Amendment. Sure answers are likely to be as elusive here as they have proved to be in race cases.

sports such as football, basketball, and baseball are almost entirely masculine enterprises. These are the top priority sports involving the greatest expenditure of money and the active interest of other students and the outside community. Participation by girls is limited to being cheerleaders, pompom girls, or drum majorettes, all of which are subordinate positions emphasizing attractiveness rather than athletic skills.

Some progress can be made by opening up existing programs to women. However, the removal of formal barriers is likely to have only a limited effect. Current differences between the sexes make it unlikely that many women would enter into existing athletic programs, and most would be at a competitive disadvantage. Affirmative action is necessary if women are to participate equally in athletics. This would require in most schools establishing or substantially strengthening women's athletic programs and focusing on areas not currently emphasized in women's intra- or extramural athletics. The measure of equality for athletic programs should be the number of women participating, the amount of money spent by the system, and the availability of resources. These, rather than technical eligibility under existing programs or whether male and female programs concentrate on the same areas, should determine whether a school system is complying with the Fourteenth Amendment or the Equal Rights Amendment.