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What is This?
EQUITY OR ESSENTIALISM?

U.S. Courts and the Legitimation of Girls’ Teams in High School Sport

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Feminist scholars have critically analyzed the effects of sex segregation in numerous social institutions, yet sex-segregated sport often remains unchallenged. Even critics of sex-segregated sport have tended to accept the merits of women-only teams at face value. In this article, we revisit this issue by examining the underlying assumptions supporting women’s and girls’ teams and explore how they perpetuate gender inequality. Specifically, we analyze the 14 U.S. court cases wherein adolescent boys have sought to play on girls’ teams in their respective high schools. The courts’ decisions reveal taken-for-granted, essentialist assumptions about girls’ innate fragility and athletic inferiority. While the courts, policy makers, and many feminist scholars see maintaining teams for girls and women as a solution to the problem of boys’ and men’s dominance in sport, the logic supporting this form of segregation further entrenches notions of women’s inferiority.

Keywords: sport; law; education; gender inequality; gendered institutions; sex segregation; Title IX; 14th Amendment

Institutions encompass social structures and mechanisms channeling human activity and thought into patterns that appear to be the only logical or possible way to achieve a particular set of outcomes (Berger and Luckmann 1967). Gender is a core feature of institutions. As Acker (1992, 567) explains, “The term ‘gendered institutions’ means that gender is present in the processes, practices, images and ideologies, and distributions of power in the various
sectors of social life.” Gendered institutions involve explicit procedures that create gender hierarchies and frequently segregate men and women from one another. Institutions create symbols and ideologies legitimating these unequal arrangements, making them seem natural within everyday interaction (Acker 1992; Butler 1990; West and Zimmerman 1987). Feminist researchers have cast critical eyes on work, religion, media, sport, family, law, education, and government, as these institutions subordinate women by denying them access to the spaces and opportunities enjoyed by men, perpetuating myths about innate sex differences, and preventing cross-gender interaction undermining the prevailing gender order (e.g., Brasher 1997; Britton 1997; Buysse and Embser-Herbert 2004; Kimmel 2000; Messner and Bozada-Deas 2009; Misra, Moller, and Budig 2007).

Institutions interact to create and maintain gender inequity (Acker 1992; Martin 2004; Messner and Bozada-Deas 2009; Roscigno 2000). Forces in one institution may accelerate or hinder changes to gender relations in another. For example, Title VII of the Civil Rights Act of 1964 made it generally illegal to assign jobs based on sex, paving the way to substantial gains in occupations for women. Simultaneously, more limited changes in the family have constrained women’s work advances via the second shift (Budig and England 2001). On a similar note, physical education in schools throughout much of the twentieth century discouraged strenuous exercise and promoted a traditionally feminine appearance among girls, thereby implicating educational institutions in legitimating girls’ alleged lack of physical ability (Lorber 1993). These examples illustrate the interdependent nature of gendered institutions and forms of gender inequality (Acker 1992; Martin 2004).

In this article, we consider the interdependence of two particular institutions in maintaining gender inequality, exploring how the law reflects and reinforces assumptions about women’s alleged natural inferiority in sport. Sport is a particularly critical area for consideration, as gender divisions and men’s superiority are more naturalized in sport than perhaps any other institution (Burstyn 1999; Caudwell 2003; Messner 2000; Theberge 1993). Sport, typically segregated by sex, normalizes essentialist beliefs about gender differences. Establishing women and men as different from one another is the basis of men’s power when “physical strength is men’s prerogative and justifies men’s physical and sexual domination of women” (Lorber 1993, 574). Sport is embedded in the maintenance of privilege not only with respect to participation (Messner 1992) but also in such areas as televised sport (Messner, Dunbar, and Hunt 2000), advertising (Meân 2009), and even fantasy sports leagues (Davis and Duncan 2006). Many scholars, policy makers, and lay citizens reject sex segregation in other contexts yet see it as appropriate and even necessary in sport settings (Lorber 1993; Messner 2000). Thus, given its role
in normalizing essentialist beliefs about gender and its status as a rare area in which sex segregation goes generally unchallenged, it is particularly important to explore sport as a gendered institution maintaining men’s privilege.

In this article, we analyze court cases supporting the continuation of sex segregation in sport and the ideology used to legitimate these rulings. The law has disproportionate influence on sport as a gendered institution, as the courts can universally enforce a particular interpretation of appropriate gender relations. Rulings also influence the outcomes of subsequent cases when cited as precedent. As Martin (2004, 1258-59) points out,

States have power over other institutions when they codify particular practices into law and enforce them through the police, the military, [and] the courts. . . . Laws both reflect and create gender inequality when they lend state authority to gender institution practices by assigning women to an inferior status as citizens and workers.

And, we would add, as athletes. Thus, we have a highly essentialized institution (sport) interacting with a particularly unilateral institution (law) to (re)produce sex-segregated sport. These combined forces prevent forms of mixed interaction that could challenge gender essentialism and demonstrate the similarities between men and women. In turn, the gendered patterns produced between sport and law, particularly ideas about women’s inferiority, diffuse through other social institutions and have implications for gender inequality in such contexts as media and the family (Messner 2009). Given these considerations, the purpose of this article is to (1) explore the role played by the courts in normalizing sex-segregated sport and (2) critique the ways in which sex segregation generally and women-only sport particularly function to promote gender inequity.

THEORETICAL FRAMEWORK

Scholars such as Burke (1996), Butler (1990), and Fausto-Sterling (2000) challenge commonly accepted binary understandings of sex and gender. Such deconstruction of the two-sex system in the context of sport suggests men’s and women’s differing performances are largely caused by “social, political, economic, and psychological discrimination rather than biological factors,” and because of the nature of this cultural context in which athletes develop and perform, “there is no uncontaminated data to support essential performance related differences between men and women” (Travers 2008, 90). Such antiessentialist readings question the appropriateness of
sex-segregated sport. Yet despite widespread feminist challenges to sex segregation in work, religion, and education, few challenge the sex-segregated nature of sport. Even those calling for the elimination of men-only sport spaces still advocate women-only sport, fearing that a complete end to sex-segregated sport would “constitute a major setback for the participation of girls and women” (Travers 2008, 92; also see McDonagh and Pappano 2008).

In questioning the gender binary in sport, Kane (1995, 193) argues sport is a continuum wherein “many women routinely outperform many men and, in some cases, women outperform most—if not all—men in a variety of sports and physical skills/activities.” Viewing sport as a continuum avoids reinforcing stereotypes positing women’s abilities as inferior to men’s. This argument is supported by a growing number of women competing successfully in “men’s” sporting competitions. For example, Kelly Kulick earned a full-time position on the traditionally men’s Professional Bowlers Association Tour (Duerson 2006), becoming the first woman to win a tour event (Schneider 2010). High school sophomore Michaela Hutchison won an Alaska “boys” state wrestling title (Williams 2006). High school junior Annie Houghton won the Western Pennsylvania Interscholastic Athletic League “boys” singles tennis title with a 6-0, 6-1 victory in the championship match (White 2006). In football, perhaps the most traditionally masculine of sports, 15-year-old quarterback Miranda McOsker threw for three touchdowns in a varsity high school game (Washington Post 2005). These are just a few recent examples of girls and women effectively competing with boys and men. NBA Commissioner David Stern has even suggested women might soon play in the NBA (Thomsen 2009).

Evidence of a continuum may be repressed deliberately, however, when sports that were once “open” become sex segregated. For example, shooting events have been part of the Summer Olympic Games since the first modern games in 1896 (with the exception of the 1904 and 1928 games). Historically, many of the shooting competitions have been open to both sexes. Zhang Shan, a woman competitor, won a gold medal in the skeet event in 1992. In 1996, however, all shooting events were segregated, with five events for women and 10 events for men. Ironically, there was no women’s skeet event that year, so Shan could not defend her gold medal.

Efforts suppressing a continuum, however, are not limited to restricting girls’ and women’s access to masculinized sport. With respect to cases in which boys have sought to participate on teams reserved for girls, equal rights legislation plays an important role in maintaining sex segregation. Specifically, Title IX of the Educational Amendments of 1972 and the Fourteenth Amendment to the U.S. Constitution have a prominent influence in such cases. While the Equal Protection Clause of the Fourteenth Amendment
provides generic equal rights protection, Title IX specifically guards against
discrimination on the basis of sex in educational programs. It may appear on
the surface that such legislation is on the side of equality, and the cultural
phenomena outlined by Kane (1995) exist despite the law. Drawing from
critical feminist legal frameworks, however, we argue that inequality in sport
exists, at least in part, because of the law (MacKinnon 1987; Minow 1990).
When legal rulings support sex segregation in sport using an ideology of
women’s inferiority, they solidify cultural attitudes and increase the power
of these attitudes within institutions. In contrast to legal rhetoric officially
proclaiming there are not legitimate differences between men’s and women’s
abilities that justify mandatory occupational or educational segregation, cases
addressing sport are grounded in beliefs about inferiority, which causes the
law to entrench gender inequality rather than fight it. Based on our analysis
of legal decisions preserving girls-only teams, we question whether it is pos-
sible to maintain sex segregation and still truly achieve gender equality.

DATA AND METHOD

The data examined in this article consist of 14 judicial decisions issued
in cases wherein boys sought to play on girls’ high school sports teams
when there was no boys’ team available. The cases were collected using the
LexisNexis Academic search utility for federal and state cases in the United
States, in which we used search terms such as girl, boy, male, female, high
school, sport, and team. After sorting through results to identify the relevant
cases, we used the LexisNexis Shepard’s Citations utility, which provides a
listing of all authorities citing a particular case, to find any additional cases
not identified in the initial search. Furthermore, we utilized specialized media
databases, such as LexisNexis Academic news search, to locate items iden-
tifying any remaining relevant lawsuits. As a result, we are confident these
14 cases represent a comprehensive collection of state and federal judicial
opinion on this particular topic. In our analysis, we began with a reading of
each case to identify primary trends and patterns in the decisions. We then
looked for specific themes regarding the legal bases on which cases were
decided and evidence considered to justify the rulings. Finally, we selected
key excerpts from cases to illustrate the primary themes we address throughout
our findings and discussion. Like court cases addressing sex segregation in
other institutions, it is more common for girls and women to seek access to
men’s and boys’ arenas than the converse. Therefore, while the cases in this
study do not encompass every ruling relevant for sex-segregated sport, they
nonetheless compose a unique data set that allowed us to examine how would-be critical junctures in sport are created when boys seek access to girls’ teams and how the courts head off this unusual challenge to the gender binary.

Of the 14 cases, seven involved the sport of volleyball, four field hockey, one tennis, one gymnastics, and one a blanket ban excluding boys from participation on all girls’ teams. Eight of the cases originated in the northeastern United States: two in New York, two in Rhode Island, and one each in Maine, Massachusetts, New Jersey, and Pennsylvania. Of the remaining cases, four originated in Arizona, one in Illinois, and one in Wisconsin. Eight of the cases were decided in state courts, while seven involved the federal court system; the Kleczek case was filed in both federal and state court.

The first five cases saw final decisions reached in either 1979 or 1980: MIAA, Gomes, Petrie, Mularadelis, and Forte. Following this early string of five cases, lawsuits involving this issue became less frequent. In the remainder of the 1980s, five cases were decided: Clark I, Winckel, Clark II, B.C., and Clark III. The 1990s, meanwhile, saw three cases filed: Kleczek, Williams, and Maine. The most recent case, Bukowski, was decided in 2006. A more complete overview of cases, including the rulings of lower courts and appellate courts (if applicable), is provided in Table 1.

**FINDINGS**

Courts in 13 of the 14 cases ultimately denied the plaintiff(s) access to girls’ teams, concluding that preserving sex-segregated sport for girls is necessary even when it means boys cannot play the sport in question. In this section, we discuss the most frequent legislation—the Fourteenth Amendment and Title IX—considered by courts, underscoring the specific justifications used in allowing the exclusion of boys from teams reserved for girls. We should note that in addition to equal rights legislation at the federal level, state-level legislation may be relevant to cases depending on the jurisdiction in question. However, we focus our discussion primarily on federal-level legislation given the wider relevance of federal law to all court jurisdictions in the United States, particularly as precedent in future cases.

**Constitutional Considerations—An Important Interest?**

Decisions in many of these cases consider the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The clause provides generic protection of equal rights, guaranteeing no federal, state, or local
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<tr>
<th>Case</th>
<th>Citation(s)</th>
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<tr>
<td>Petrie</td>
<td>Petrie v. Illinois High School Association (1978)</td>
<td>Illinois circuit court held that high school association rules preventing boys from playing on girls' volleyball teams were permissible (unpublished opinion).</td>
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<tr>
<td>Mularadelis</td>
<td>Mularadelis v. Haldane (1979)</td>
<td>New York Supreme Court at Special Term vacated school board decision to prohibit boy from playing on girls' tennis team (unpublished opinion).</td>
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<td>Mularadelis v. Haldane, 74 A.D.2d 248 (1980)</td>
<td>N.Y. Supreme Court, Appellate Division reversed the decision; barring boy from girls' team deemed permissible under Fourteenth Amendment and Title IX.</td>
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<td>Gomes</td>
<td>Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659 (1979)</td>
<td>U.S. District Court issued preliminary injunction against interscholastic league rules that prevented boy from playing on girls' volleyball team.</td>
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<td>Gomes v. Rhode Island Interscholastic League, 604 F.2d 733 (1979)</td>
<td>Appellate court stayed implementation of the district court's injunction pending appellate review. Case dismissed as moot after volleyball season ended.</td>
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<tr>
<td>MIAA</td>
<td>Attorney General v. Massachusetts Interscholastic, 378 Mass. 342 (1979)</td>
<td>Massachusetts Supreme Court declared invalid an athletic association rule that stated, “No boy may play on a girls’ team. A girl may play on a boys’ team if that sport is not offered in the school for the girl.” Such classifications were not permissible under state equal rights amendment, which required application of strict scrutiny.</td>
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<td>Forte</td>
<td>Forte v. Board of Education, 431 N.Y.S.2d 321 (1980)</td>
<td>New York Supreme Court, Special Term held that district rules prohibiting boys from playing on girls’ volleyball teams were acceptable under state law and Title IX because overall athletic opportunities for boys had not been previously limited.</td>
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<td>Clark I</td>
<td>Clark v. Arizona Interscholastic Association (1981)</td>
<td>U.S. District Court ruled that interscholastic association rules precluding boys from playing on girls’ volleyball teams were acceptable (unpublished opinion).</td>
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<td>Clark v. Arizona Interscholastic Association, 695 F.2d 1126 (1982)</td>
<td>Appellate court affirmed district court ruling; such rules do not violate equal protection clause of Fourteenth Amendment.</td>
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<td>B.C.</td>
<td>B.C. v. Cumberland, 531 A.2d 1059 (1987)</td>
<td>New Jersey Superior Court affirmed a decision by the commissioner of education that a boy could not play on the girls’ field hockey team; decision acceptable under state law and Fourteenth Amendment.</td>
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<td>Clark III</td>
<td>Clark v. Arizona Interscholastic Association (1989)</td>
<td>U.S. District Court ruled that interscholastic association rules precluding boys from playing on girls’ volleyball teams were acceptable (unpublished opinion).</td>
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<tr>
<td>Kleczek</td>
<td>Kleczek v. Rhode Island, 768 F. Supp. 951 (1991)</td>
<td>U.S. District Court refused to grant preliminary injunction against interscholastic league rules that prohibit boys from playing on girls’ field hockey teams; case was unlikely to succeed based on merits.</td>
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<td>Kleczek v. Rhode Island, 1991 R.I. Super. LEXIS 101 (1991)</td>
<td>Rhode Island Superior Court concluded such rules were not permissible under state constitution, which requires strict scrutiny to be applied to gender classifications.</td>
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<td>Case</td>
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<tr>
<td>Kleczek v. Rhode Island, 612 A.2d 734 (1992)</td>
<td>Rhode Island Supreme Court reversed superior court decision, holding that intermediate scrutiny should be applied to gender classifications.</td>
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<td>Williams</td>
<td>Williams v. School District of Bethlehem, 799 F. Supp. 513 (1992)</td>
<td>U.S. District Court ruled that a Pennsylvania boy must be allowed to play on girls’ field hockey team, as field hockey is not a contact sport and opportunities for males in the sport had previously been limited.</td>
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<td>Williams v. School District of Bethlehem, 998 F.2d 168 (1993)</td>
<td>Appellate court overturned district court decision, ruling that field hockey was a contact sport and the term previously limited refers to overall athletic opportunities.</td>
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<td>Bukowski v. Wisconsin Interscholastic Athletic Association, 2007 WI App 1 (2006)</td>
<td>State appellate court affirmed circuit court decision; plaintiff failed to demonstrate WIAA is a state actor or recipient of federal funds; thus, claims under Fourteenth Amendment, Title IX, and state constitution could not be considered.</td>
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NOTE: Because of such factors as a heavy case load, some courts issue rulings that are not accompanied by formally published written opinions. These rulings have been identified as “unpublished.”
agency can create classifications for differential treatment of individuals without having a defensible reason. Historically, courts review most classification schemes using either a strict or high level of scrutiny, which requires the discrimination to be “necessary” in accomplishing a “compelling” state interest, or a mild or low level of scrutiny, which requires the discrimination to be “rationally related” to a “legitimate” state interest (Carpenter 1997).

Based on legal precedent, classifications regarding race, alienage, or nationality are subject to strict scrutiny, meaning courts tolerate such classifications only if not doing so would directly prevent the state from fulfilling critical functions. A notable application of strict scrutiny is *Loving v. Virginia* (388 U.S. 1, 1967), the case in which the U.S. Supreme Court struck down laws banning interracial marriage on the grounds that regulating such personal decisions was a direct subversion of personal liberty and equality between citizens. Mild scrutiny, also referred to as the rational basis test, is reserved for cases where categorizing people and acting on these categorizations is presumed to be rational unless the plaintiff can demonstrate otherwise. Common categories falling under mild scrutiny include mental ability and sexual orientation. For example, homophobic classifications potentially may be considered “rational” if the state claims its purpose is to protect widely valued practices, such as heterosexual marriage, but not if such classifications primarily serve to disenfranchise certain individuals based on sexual orientation (e.g., *Bowers v. Hardwick*, 478 U.S. 186, 1986; also see O’Connor’s concurrence in *Lawrence v. Texas*, 539 U.S. 558, 2003; for a ruling that finds such classifications failed to meet this standard, see *Romer v. Evans*, 517 U.S. 620, 1996). Using mild scrutiny, courts base their decisions on the specific issues at hand, not on whether categorizing people by a specific attribute is universally constitutional.

Between strict and mild scrutiny is an evolving intermediate level of scrutiny used for gender (Carpenter 1997) and commonly employed in the cases considering Fourteenth Amendment claims in our study, namely *Petrie, Clark I, B.C.*, and *Kleczek*. In their decisions, judges in all four cases cite a line from a non-sports-related case, *Craig v. Boren* (429 U.S. 190, 1976, 197), as precedent for the use of intermediate scrutiny: “Classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” Courts applying intermediate scrutiny generally found that excluding boys from girls’ teams follows these criteria.

Courts in our study using intermediate scrutiny outline two key governmental objectives at play: (1) promoting equal athletic opportunities for girls in sports and (2) redressing the effects of past discrimination. The case of *Clark I*, for example, involved a high school boy challenging an Arizona Interscholastic
Association rule that prevented him from playing on his school’s girls’ volleyball team. In Clark I, the court ruled that the achievement of the two aforementioned objectives justified the prohibition of boys from the girls’ volleyball team even though no team existed for boys. The court concluded, “[T]he record makes clear that due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team. Thus, athletic opportunities for women would be diminished” (27). The court also found that the Arizona Interscholastic Association “is simply recognizing the physiological fact that males would have an undue advantage competing against women for positions on the volleyball team” and that “[t]he situation here is one where there is clearly a substantial relationship between the exclusion of males from the team and the goal of redressing past discrimination and providing equal opportunities for women” (27). The B.C. case, which involved a boy seeking to play on a girls’ field hockey team, also defends girls-only teams by arguing that such a policy “prevents males from dominating and displacing females from meaningful participation in available athletic opportunities” (17).

In a landmark case addressing sex-segregated education, decided after Petrie but before Clark I, B.C., Kleczek, and other cases under consideration in our study, the Supreme Court further clarified the purpose of intermediate scrutiny, stating that it

must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or “protect” members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate. (Mississippi University for Women et al. v. Hogan, 458 U.S. 718, 1982, 724-725)

Thus, for the three later cases under consideration here, intermediate scrutiny should consider whether barring boys from girls’ teams imposes stereotypic notions of gender difference. However, in ruling that sex segregation in sport is a critical part of meeting governmental goals, no court troubled the ideology of girls’ inferiority. Even after the Mississippi clarification, the courts seem to embrace inferiority as a foregone conclusion, moving from the statement, “high school males are taller, can jump higher and are stronger than high school females,” to the conclusion, “there seems to be no question, then, that boys will on average be better volleyball players than girls” (Clark I 1982, 3). Such statements are made without consideration of specific physiological evidence or social factors that might contribute to boys’ and girls’ differing performances and are then used to justify the complete
prohibition of boys from girls’ teams. Thus, rather than challenging inequality, the courts in these cases played a significant role in perpetuating the ideology and practices maintaining it. While on the surface the necessity of girls-only teams for achieving such objectives may appear commonsensical, a more critical examination reveals how boys’ exclusion from girls’ teams may be detrimental to the promotion of gender equity.

Exceptions to Title IX: The “Previously Limited Opportunities Clause” and “Contact Sports Exemption”

Title IX of the Educational Amendments of 1972 is a one-sentence law stating, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” (Title IX 1972). Additional implementing regulations clarifying Title IX’s application to sport were passed in 1975 (Carpenter 1997). A particularly relevant section, located in the U.S. Code of Federal Regulations under Title 34 section 106.41, subparagraph (a), states,

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis. (Implementing Regulations 1975)

Subparagraph (b) of this section, however, provides two exceptions to the rule “no recipient shall provide any such athletics separately on such basis,” by stating,

Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient 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. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact. (Implementing Regulations 1975)

The two parts of this subparagraph central to the rulings under consideration are the “contact sports exemption” and the “previously limited opportunities clause.”
Regarding the issue of previously limited opportunities, the regulations appear to state that a school may not restrict participation on a sports team to one gender if opportunities have been previously limited for the other gender. Thus, for the cases included in this study, the courts considered whether or not athletic opportunities were previously limited for boys. On the surface it seems the clear answer to this question is no. The issue, however, is complicated by the fact that some courts reasoned the “previously limited” phrase refers only to opportunities in a particular sport rather than overall athletic opportunities in all sports.

The first ruling on this matter came in the *Gomes* case, which involved a boy challenging Rhode Island Interscholastic League rules that prevented him from participating on the girls’ volleyball team. In this case, the district court initially ruled that Gomes, who had tried out for and made the girls’ volleyball team, should be allowed to play because opportunities for boys in the sport of volleyball had previously been limited. The appellate court, however, stayed implementation of the district court’s decision pending review, and the case was eventually dismissed as moot after the volleyball season ended. In contrast, the New York Supreme Court in *Mularadelis* concluded that the previously limited opportunities clause referred to overall sports activities. In this case, a boy had participated on the girls’ tennis team during his sophomore year because his high school had been unable to generate sufficient interest to sponsor a boys’ tennis team. However, prior to his junior year, the school established a policy prohibiting boys from playing on teams reserved for girls. The court found the policy to be permissible because, even though opportunities for boys in the sport of tennis had previously been limited at the school, overall opportunities for boys had not been limited in comparison to those of girls. More recently, disagreement on the meaning of the previously limited opportunities clause also appeared in *Williams*, which involved a school policy banning boys from the girls’ field hockey team. Here, the district court initially held that because the high school sponsored 10 teams exclusively for girls, 10 boys’ teams for which girls could also try out, and two coed teams, girls actually had 22 teams on which they could participate, while boys had only 12. Because this situation had existed for 18 years, the district court concluded that opportunities for boys to participate had been previously limited, ruling that a boy could play on the girls’ field hockey team. The appellate court in *Williams*, however, reversed this ruling, arguing that in the previously limited opportunities clause, “athletic opportunities” refers to “real opportunities, not illusory ones” (21). In other words, although girls were allowed to try out for boys’ teams, that did not amount to “real opportunities” because girls were not able to compete at the same level as boys. A key witness for the defense argued that high school boys have “greater height, weight, total body strength, upper body strength and
aerobic capacity... a greater quantity of lean body mass... [and] a greater ability to create explosive and sustained muscle power and sustained physical activity” (22). Thus, the boy in question was not allowed to play on the field hockey team. While the courts disagreed on the meaning of previously limited opportunities, both shared an assumption that allowing boys on girls’ teams would be harmful to girls because of their inferior abilities.

The second influential component of Title IX’s implementing regulations, the “contact sports exemption,” allows the exclusion of members of the other sex from teams involving contact sports. In Kleczek, a boy challenged Rhode Island Interscholastic League rules that prevented him from participating on the girls’ field hockey team, arguing that field hockey was not a contact sport. The district court, however, refused to grant a preliminary injunction allowing him to play, in part because it decided field hockey was a contact sport. The court concluded, “[F]ield hockey is in reality an ‘incidental contact’ sport, more akin to basketball [a sport specifically mentioned in the implementing regulations] than volleyball or tennis” (13), noting that “contact is inevitable in a sport that combines running, sticks, a hard ball, and a wide-open playing field” (14). Likewise, in Williams, the Third Circuit Appellate Court overturned a district court’s ruling that field hockey could not be considered a contact sport. The appellate court found that while contact is not the purpose of field hockey, it may be a major activity of the sport, particularly considering that rules require mouth protectors and shin guards. In these cases, courts focused on formal, technical interpretations of the definition of “contact sport,” not whether sex segregation is appropriate in contact sports. While the courts in these two cases refrained from explicit arguments about gender differences, sex segregation and the reasons for its continuation were taken for granted.

Overall, the courts established a strong precedent of prohibiting boys from playing on girls’ teams. The courts have found such policies permissible under the Fourteenth Amendment, as they ostensibly serve important governmental interests by promoting equal opportunities for girls in sport and redressing the effects of past discrimination. Somewhat similarly, on grounds of Title IX, the courts exclude boys from girls’ teams because overall opportunities for boys in sport have not been limited in the past. Protecting girls’ teams from boys’ intrusion has even greater legal support if the team involves a contact sport. We now move to a detailed discussion of the problematic nature of the logic supported by these decisions.

DISCUSSION

The use of intermediate scrutiny in the courts’ rulings is highly problematic. Specifically, by subjecting race-based claims to the highest level of
scrutiny and gender-based claims to a less stringent standard, the courts imply that preventing gender discrimination is less important than preventing racial discrimination. By severely limiting legal race categorization to only those cases when it is necessary to achieve compelling state interests, the courts (rightfully) take the position that race is a social construct, not a source of meaningful biological difference or natural hierarchy. In contrast, the use of intermediate scrutiny does not automatically trigger suspicion of unfair treatment based on sex or gender, indicating the courts are more likely to view sex as a legitimate means of categorizing people rather than a form of discrimination or an ideological construct. The willingness to accept classifications designating some groups as inherently inferior becomes even more obvious when considering the practice of applying mild scrutiny to classifications such as sexual orientation.

It is telling that the only case where a prohibition of boys from girls’ teams was disallowed, MIAA, involved the application of strict scrutiny based on Massachusetts state law. Although other rulings were based on uncritical acceptance of boys’ presumably natural advantages over girls and concerns for the safety of girls competing with boys, the Massachusetts Supreme Court questioned this conclusion, stating “any notion that young women are so inherently weak, delicate or physically inadequate that the state must protect them from the folly of participation in vigorous athletics is a cultural anachronism unrelated to reality” (33). The court reasoned, “[G]eneral male athletic superiority based on physical features is challenged by the development in increasing numbers of female athletes whose abilities exceed those of most men, and in some cases approach those of the most talented men” (29). The court concluded that “classification on strict grounds of sex, without reference to actual skill differentials in particular sports, would merely echo ‘archaic and overbroad generalizations’” (29). In making these arguments, the 1979 MIAA case appears to foreshadow the Mississippi case decided by the Supreme Court in 1982, which explicitly forbade reliance on stereotypical ideas of a group’s inferiority when applying intermediate scrutiny. However, the MIAA ruling stands alone, as later cases included in our study failed to take MIAA or Mississippi as relevant precedent regarding gender stereotypes.

The majority of rulings also rely on unfounded or outdated claims while ignoring more recent and relevant information. Rulings based on such questionable evidence then become precedent when cited by subsequent cases, thus seamlessly reproducing the inferior status of girls and women. In the 1979 Petrie case, for example, a boy challenged rules established by his high school and the Illinois High School Association barring boys from the girls’ volleyball team. The court justified girls-only teams by pointing out that none of the girls’ state record holders in the previous high school track and field
The court took this as persuasive evidence of “innate” differences rather than considering social or historical factors contributing to differing athletic performances. The Petrie ruling, however, was made in 1979. Given the advances in women’s sport participation since that time, one might expect courts to be less likely to accept simplistic arguments about women’s inferiority in subsequent decades. However, based on our review of cases, we found little change in reasoning. Kleczek, decided in 1992 by the Rhode Island Supreme Court, specifically cites Petrie as providing evidence that boys are innately athletically superior to girls, adding that “there is a longstanding international and national tradition of having separate teams for males and females” (18). Even more recently, in the 1999 Maine case, a state superior court suggested that “boys of similar age and experience intimidate girls and affect the way girls play field hockey” (15). In justifying its decision to bar boys from girls’ field hockey, the Maine court further reasoned, “[P]hysiologically they [boys] have superior cardiovascular endurance and aerobic capacity” (14). These cases provide clear examples of the logic of inferiority essential to justifying the maintenance of girls’ teams.

The courts’ uncritical acceptance of women’s inferiority in Fourteenth Amendment cases has serious consequences for gender equity in sport and preempts serious consideration of how to achieve this equity. Because the majority of courts in our study assumed boys and girls are inherently unequal in sport ability, the rulings ironically reflect “archaic and overbroad generalizations” (MIAA 1979, 29) about girls’ inferiority, undermining the very state interests intermediate scrutiny allegedly protects. While policies excluding boys from girls’ teams may promote more equal participation numbers, such policies do not necessarily contribute to a society in which people view boys’ and girls’ sports with equal importance. Instead, by legally enforcing the notion that boys are athletically superior to such an extent that girls must be legally protected from having boys dominate their teams, the legal precedent established in these cases may be detrimental to hopes of achieving true “equal athletic opportunities” where girls are not marginalized in comparison to boys.

The rulings in Title IX cases demonstrate an even more explicit acceptance of women’s inferiority. What all Title IX rulings—both those involving the “previously limited opportunities clause” and the “contact sports exemption”—have in common is the underlying assumption of girls’ fragility and weakness. Contact sports are the inviolate line for boys who want to enter girls’ sports. Courts will at least consider allowing boys access to girls’ teams when no team is available for boys in noncontact sports. In such cases, infringing on boys’ equal protection rights by barring their participation would at least
merit the court considering whether to let them play on girls’ teams. In the case of contact sports, however, the courts reasoned that boys’ allegedly superior strength would bring such severe risk of physical harm to girls that neither state interests nor previously limited opportunities justified giving boys access. Some courts have even broadened the scope of activities considered “contact sports,” even when the contact is merely “incidental” and risk could be lessened or eliminated with appropriate protective equipment (e.g., Kleczek 1991; Williams 1993). By promoting the idea that girls would be endangered by simply participating in contact sports with boys, the contact sports exemption may cause Title IX to act as an impediment to women athletes achieving a status equal to that of men (Furman 2007; Sangree 2000).

Given the scope of the contact sports exemption, one might wonder how some girls have been able to play on boys’ teams in such sports as football. One answer is that girls have largely avoided Title IX claims when seeking to play on boys’ contact sport teams (Sangree 2000). While courts have interpreted the contact sports exemption as allowing regulations to exclude girls from boys’ teams, it does not mandate girls’ exclusion, and some jurisdictions choose to allow girls to participate on boys’ teams. As Sangree (2000, 396) explains, however, “[B]y allowing individual schools to decide whether to allow girls to participate in contact sports, Title IX declares such sports to be outside the guarantee of equality.” When girls do gain access to boys’ teams, courts have often used a gender-specific interpretation of the Equal Protection Clause. For example, in Lantz v. Ainbach (620 F. Supp. 663, 1985), the court ruled that the federal Equal Protection Clause requires girls to be judged by individual ability, and thus the girl plaintiff was allowed to try out for her school’s football team. Ironically, courts relying on the Equal Protection Clause in cases examined in our study did not consider the individual boys’ abilities to be relevant and apparently assumed a priori that boys’ abilities would automatically be greater than those of girls.

It is also relevant to consider the nature of the sports, viewed by some to be lower-status sports with less connection to masculinity, generally involved in these cases. Like court cases focused on occupational sex segregation, it is rare to see men seek access to less-valued women’s domains because doing so involves surrendering privilege. The rulings in these cases, therefore, may have less significance for potentially ending sex segregation than they do for preserving the relationship between sport and masculinity. If boys play “feminized” sport and do well relative to the girls on their teams, this does not help them establish masculinity—masculinity norms are predicated on the assumption that boys can beat girls in sport. If, on the other hand, girls on the teams play better than boys, the connection between sport performance
and masculinity, as well as the presumed connection between inferiority and femininity, is lost. The taken-for-granted nature of these connections may help explain why the courts decided these cases based on stereotypical notions about girls’ abilities despite legal precedent forbidding them to do so. The consequences of disproving these assumptions so threaten men’s privilege and the established gender hierarchy that the courts may be unable to contemplate desegregating sport.

The problematic assumptions in the court rulings we analyzed here and the practices they enforce have broader implications for girls’ and women’s status throughout society. If, as the rulings we have examined suggest, women are biologically inferior to men in ways that matter for sport, then, by logical extension, they are inferior in ways that matter for other institutions as well (Brace-Govan 2004; Kane 1995). These notions of inferiority are maintained within sport and reflected in other social institutions, including the law. The gendered nature of institutions becomes mutually reinforcing as sport and law rely on ideologies of inferiority and put these ideas into practice via organizational policy and the resulting interactions that reflect ways of “doing gender” (West and Zimmerman 1987). These rulings also work to obscure an important truth. In reality, it is not men’s superiority that dictates sex segregation on behalf of protecting women. Instead, it is sex segregation that allows (ideologies of) superiority to exist. It is a necessary precondition for suppressing any evidence of a continuum of difference and maintaining a priori assumptions of binary sex differences. If men’s superiority were natural, there would be no need to invest significant cultural and institutional resources into preserving the boundaries of sex-segregated sports (Messner 2000; Messner and Bozada-Deas 2009; Theberge 1993). The assumptions in the law become self-enforcing, self-fulfilling prophecies as policy is translated into practice.

Kane’s (1995) call for viewing sport as a continuum requires we identify the mechanisms obscuring evidence of a continuum. The legal system provides the mechanisms for making and enforcing political rules and carries the full weight of the state behind it. The rulings in these 14 cases demonstrate the gendered nature of law as an institution, and given its ability to constrain organizational practices in schools, it is disproportionally influential in gendering sport as an institution as well. These rulings reinforce segregation, implying that breaking down this binary would place girls at physical risk because of the mere presence of boys on their teams. The courts accept that boys and men will dominate and possibly hurt girls and women if given the opportunity, and their solution has been to restrict the range of experiences—and opportunities for revealing the continuum—available to girls and women. These structural impositions then become “evidence” of innate sex differences
justifying structural conditions as logical, beneficial, and inevitable, much like “protective” legislation limiting the number of hours and types of work women could perform in certain states prior to the Civil Rights Act of 1964.

Overall, the problem demonstrated in the language of these rulings is that women are legally defined as weak, fragile, and athletically inferior to men. The courts perceive girls-only teams as an appropriate solution to this problem. However, like institutionalized sex segregation in such institutions as work, sex-segregated sport is supported by problematic logic premised on women’s inferiority. In other words, the courts view maintaining teams for girls as a solution to the problem of men’s dominance of sports, not as a problem in itself. This leaves stereotypical ideas intact and prevents evidence of a gender-integrated continuum of ability from coming to the surface. For this reason, we question if it is possible to maintain any form of sex segregation and still achieve gender equality.

CONCLUSION

In this article, we problematize the essentialist reasoning used by courts in “protecting” girls’ teams in high school sport. We recognize, however, that when a marginalized group chooses to separate itself from oppressive practices, segregation can serve as a valuable tool for resistance. For example, women-only sport spaces may foster feminist strategies for resisting masculinist definitions of sport and women’s supposed inferiority, such as expanding the definition of what constitutes an athlete and attaching cooperative values to sport. Participants in women’s sport also cite such positive benefits as physical and psychological empowerment and improved perceptions of women and the female body (see McDermott 2004 for an overview). However, as important as such positive effects are, they are limited to the girls and women participating, without transforming the broader society.

While we recognize and agree with many points other feminist researchers have made about the value of women-only sport, we feel compelled to ask if complete equality can be accomplished without (eventual) complete integration, even if support for segregated teams is predicated on girls’ and women’s preferences. The explicit rationale used by the courts to justify sex segregation stands in direct opposition to the reasons feminist scholars value women’s sport. While feminists seek sex segregation in sport on social grounds, the courts have used it to justify biological essentialism. A result of this thinking is that women’s abilities and sports are not separate and equal to men’s, they are seen as lesser and unequal. Nowhere is this more obvious than the legal
rulings we reviewed here. Feminists must, therefore, question whether separate can ever be equal, and historical precedent indicates it cannot. Thus, at some point, integration may be the only possibility supporting equality.

We would not, however, advocate imposing draconian change on unwilling athletes. Many feminists have legitimate reservations toward integrating under existing conditions of deep-seated gender inequality (MacKinnon 1987). Therefore, instead of calling for automatic and instant integration, we recommend feminist scholars and policy makers consider how selectively increasing integration may advance gender equity. Furthermore, an end to sex segregation would not necessitate an end to other, more rational forms of organizing sporting competition. For example, weight classes are currently used to organize competition in such sports as wrestling and boxing. Height divisions are, in some settings, used in sports ranging from basketball to volleyball. Age divisions are, of course, used in sports at both the youth and adult levels. In other words, some classifications based on physical characteristics make sense in certain situations. We encourage scholars and policy makers to carefully consider meaningful, non-gender-based strategies for organizing sporting competition, which (even if by default) promote opportunities for integrated participation.

To move toward equality, men and women must play together in mainstream sports with sufficient proportions of each sex to deconstruct the binary and reveal the continuum (Kane 1995). In short, we need to start by building a critical mass of integrated sport. If boys and girls, women and men, were encouraged rather than prevented from playing on integrated teams, differences in abilities (or the lack thereof) would come to light. If women commonly perform on the same level as many men (or even better), it will become clear women are not so inferior or frail that they must be protected from competition with men. In fact, preliminary studies show many men in integrated contexts welcome women as competitors and espouse new feelings of respect for women’s athletic abilities and for women in general (Anderson 2008; Fink 2010). Critical mass, therefore, is necessary for the continuum to be a reality for the majority of men and women rather than as a handful of exceptional girls and women holding their own with boys and men. Such evidence from integrated sport could prompt more accurate readings of intermediate scrutiny or, better yet, establish gender-based claims as grounds for strict scrutiny, effectively ending gender as a legal form of discrimination. Given the institutionalized power of law and sport to perpetuate gender inequality, these changes could sever the damaging connection between superiority and masculinity created by sport, having implications in other institutions predicated on women’s difference and inferiority as well.
NOTES

1. Craig v. Boren involved an Oklahoma law that prohibited the sale of alcohol to men under 21 but still allowed women between 18 and 21 to purchase alcohol. It was the first case in which a majority in the Supreme Court held that gender classifications were subject to intermediate scrutiny.

2. While this “competitive skill” clause is certainly problematic in its assumption girls cannot be competitive against boys and thus need their own teams, in this article we focus on boys seeking to play on girls’ teams when only a girls’ team is available, not on situations involving two sex-specific teams.

3. Of course, in some instances courts have allowed girls access to boys’ contact sports teams. However, girls in these cases actively sought such access and courts likely presumed they represented no physical threat to boys. In the cases analyzed in our study, the courts framed giving boys access to girls’ teams as imposing a physical threat on unwilling and fragile girls.

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