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PENNSYLVANIA CONSTITUTION—EQUAL RIGHTS AMENDMENT—SEX DISCRIMINATION—INTERSCHOLASTIC SPORTS—The Commonwealth Court of Pennsylvania has held that a state-wide high school athletic association by-law which prohibited females from competing and practicing against males violated on its face the equal rights amendment to the Constitution of Pennsylvania.

Commonwealth v. Pennsylvania Interscholastic Athletic Association, 18 Pa. Commw. 45, 334 A.2d 839 (1975).

The Commonwealth of Pennsylvania, by its Attorney General,[1] brought suit in commonwealth court[2] against the Pennsylvania Interscholastic Athletic Association, a regulatory body for interscholastic competition among most public senior and some junior high schools in the state.[3] Plaintiff's equity complaint[4] challenged the constitutionality of article XIX, § 3B of the Association's by-laws, which provided that girls should not compete or practice against

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1. The Attorney General, as chief law enforcement officer of the state, has the duty to enforce all laws of the Commonwealth. PA. STAT. ANN. tit. 71, § 294 (1962).

In addition to his statutorily imposed duties, the Attorney General has all the powers and attributes of an attorney general under the common law. Commonwealth v. Bardascino, 210 Pa. Super. 202, 232 A.2d 236 (1967) (the Attorney General has powers and duties outside those enumerated in the Administrative Code and can investigate bribery charges against a magistrate). One of his responsibilities at common law is the protection of public rights. Commonwealth *ex rel.* Minerd v. Margiotti, 325 Pa. 17, 188 A. 524 (1936) (proper for the Attorney General to act as special attorney in a criminal case upon request of local judge).

The instant case was the first in which the Attorney General sought enforcement of the Pennsylvania equal rights amendment. His standing to sue was based on his *parens patriae* interest in insuring that the by-laws governing the state's public high school students did not offend the laws of the Commonwealth. Complaint at 1, Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. 45, 334 A.2d 839 (1975). *See* Commonwealth v. Brown, 260 F. Supp. 323 (E.D. Pa. 1966) (Commonwealth's interest in the education of its citizens confers standing as *parens patriae* to challenge alleged discrimination in the school system).

2. Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. 45, 334 A.2d 839 (1975). Commonwealth court has original jurisdiction in "[a]ll civil actions or proceedings by the Commonwealth or any officer thereof, acting in his official capacity . . . ." PA. STAT. ANN. tit. 17, § 211.401(a)(2) (Supp. 1975).

3. The Association has no jurisdiction in Philadelphia; its membership also includes some private schools. The Association regulates interscholastic sports competition among its member high schools in football, cross-country, basketball, wrestling, soccer, baseball, field hockey, lacrosse, gymnastics, swimming, volleyball, golf, tennis, track, softball, archery and badminton. 18 Pa. Commw. at 48, 334 A.2d at 840.

4. The Commonwealth sought declaratory relief in the form of preliminary and permanent injunctions against enforcement of the by-law by the Association. Complaint at 5.

boys in any athletic contest. The complaint alleged[5] that a sex-based exclusion of female student athletes from the same opportunities afforded males violated both the equal rights amendment to the Constitution of Pennsylvania[6] and the equal protection clause of the fourteenth amendment.[7]

The Commonwealth completed a series of pre-trial procedural volleys by filing a motion for summary judgment.[8] In granting the motion,[9] a majority of the court held article XIX, § 3B unconstitutional on its face under the ERA. The court concluded that even if proved, none of the offered justifications for the by-law could sustain its legality.[10]

Since there were no disputed issues of material fact,[11] the court advanced immediately to the question whether the Association's sex-based classification of teams in interscholastic athletic competition violated the Pennsylvania ERA. The court began with a review of leading ERA precedents which demonstrated consistent rejection of sex-based classifications by the Pennsylvania courts. *Conway v. Dana*[12] overruled the common law presumption that the father always carries the financial burden of child support after separation

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5. Point 21 of plaintiff's complaint averred: "The [by-law] . . . denies to female athletes equal access to the training facilities and programs, coaching staff and athletic equipment which is available to male athletes." *Id.* at 4.

The Commonwealth specifically excluded football and wrestling from its complaint against the classification because such sports involve forceful physical contact for the purpose of overpowering one's opponent. *Id.* at 3. The court's holding, however, included all sports within the Association's purview. 18 Pa. Commw. at 49, 334 A.2d at 843.

6. PA. CONST. art. I, § 28 [hereinafter referred to as ERA].

7. U.S. CONST. amend. XIV, § 1. Because the court disposed of the case on state constitutional grounds, it did not address this question. 18 Pa. Commw. at 49, 334 A.2d at 840-41.

8. PA. R. CIV. P. 1501 made summary judgment available in this equity action. The specific rule governing summary judgment is PA. R. CIV. P. 1035.

9. In addition to its attack on the by-law, the Commonwealth sought preliminary and permanent injunctions against the Association's sponsorship of any discriminatory sports program. It also requested that the defendant submit a plan for integration of the state-wide athletic program. Complaint at 5. The court denied this supplemental relief because the complaint specifically addressed only § 3B; moreover, the court believed its order would cure the alleged discriminatory practices because they were directly related to the disputed by-law. 18 Pa. Commw. at 53, 334 A.2d at 843.

10. 18 Pa. Commw. at 49, 334 A.2d at 841.

11. *Id*; Davis v. Pennzoil Co., 438 Pa. 194, 264 A.2d 597 (1970) (on a motion for summary judgment, all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party); Rose v. Food Fair Stores, Inc., 437 Pa. 117, 262 A.2d 851 (1970) (if there is no genuine issue as to a material fact, there is no logical reason to go to trial).

12. 456 Pa. 536, 318 A.2d 324 (1974).

or divorce. Prior to *Hopkins v. Blanco*,[13] only the husband had the right to recover damages for loss of consortium; *Hopkins* extended that right to the wife. *Henderson v. Henderson*[14] struck down a section of the Commonwealth's divorce law[15] which awarded payment of alimony pendente lite, counsel fees and expenses to the wife alone. In *Commonwealth v. Butler*,[16] the court held unconstitutional under the Pennsylvania ERA a portion of the Muncy Act which required a minimum sentence for men, but not women, convicted of crimes.

The Commonwealth maintained these holdings governed the by-law in *PIAA*, since it operated to deny females equal access to educational experiences, athletic recognition and monetary rewards solely because of their sex.[17] The Association urged that the present case was distinguishable on several grounds,[18] none of which persuaded a majority of the court. Because the precedents cited by the court dealt with sex-based deprivations of rights created by statute or case law, they fit the literal language of the ERA: "Equality of *rights* under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."[19] The Association argued that there was no legally acknowledged right to participate in interscholastic sports. Absent a legal right, defendant claimed the precedents and the language of the amendment itself indicated the ERA did not apply.[20] The court agreed that there was no fundamental right[21] to engage in interscholastic sports. The ERA, however, called for "equality of rights *under the law*."[22] The court considered this concept broad enough to include the Association's activities, which had previously been deemed state action within

13. 457 Pa. 90, 320 A.2d 139 (1974).

14. 458 Pa. 97, 327 A.2d 60 (1974).

15. PA. STAT. ANN. tit. 23, § 46 (1955), *as amended*, PA. STAT. ANN. tit. 23, § 46 (Supp. 1975). In the amended statute, the word "spouse" replaces "wife."

16. 458 Pa. 289, 328 A.2d 851 (1974).

17. Complaint at 4-5.

18. Brief for Defendant at 47, Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. 45, 334 A.2d 839 (1975).

19. PA. CONST. art. I, §28 (emphasis added).

20. Brief for Defendant at 50.

21. 18 Pa. Commw. at 51, 334 A.2d at 842. The opinion indicates that the court did not use "fundamental right" as a term of art in the context of a fourteenth amendment compelling state interest analysis. Rather, the court was asserting that students were not entitled to participate in interscholastic sports by virtue of a statutory or judicial pronouncement.

22. *Id.*

the meaning of the fourteenth amendment.[23] Once the state permitted any sports participation, the manner in which it did so became the subject of ERA scrutiny.[24]

The Association nevertheless maintained that its sex-based classification, unlike those overturned by ERA precedents, was justified because men generally possessed more athletic ability than women; women had a greater opportunity to participate where the competition was among their own sex.[25] The court was unmoved by this argument, since it would justify total exclusion of girls who wished to play a particular sport which their schools offered only to males. Even if the high school sponsored a female team, a girl might be forced to play beneath her appropriate level of competition.[26]

In final defense of the classification, the Association argued that in this context a distinction between sexes was reasonable because different physical characteristics made competition between males and females undesirable. The court responded that a greater or lesser incidence of certain neutral characteristics justified classification by those characteristics, but not by sex;[27] if a girl were weak and injury-prone, she could be properly excluded from competition because she was unskilled in athletics—but not because she was a girl.[28]

In a brief dissent,[29] Judge Bowman observed that the majority had granted summary judgment too hastily; he would have heard the evidence to determine whether there was a rational basis[30] for the sex-based classification. He questioned the majority's use of precedent: the cited cases had his full support, but he felt they should not control in this situation since it did not involve a recognized right. Those cases had applied the ERA without explaining whether its operation absolutely negated any classification by sex. The Judge reasoned that the plaintiff had excluded contact sports from its

23. Harrisburg School Dist. v. Pennsylvania Interscholastic Athletic Ass'n, 453 Pa. 495, 501-02, 309 A.2d 353, 356-57, (1973) (state action found because Association was funded by fees from public high schools and so, ultimately, by taxpayers).

24. 18 Pa. Commw. at 51, 334 A.2d at 842.

25. *Id.*; Brief for Defendant at 13.

26. 18 Pa. Commw. at 52, 334 A.2d at 842.

27. *See* Wiegand v. Wiegand, 226 Pa. Super. 278, 310 A.2d 426 (1973), where the particular characteristic involved was economic capability.

28. 18 Pa. Commw. at 52, 334 A.2d at 843.

29. *Id.* at 53, 334 A.2d at 843 (Bowman, J., dissenting).

30. It is unclear whether Judge Bowman used the phrase "rational basis" in the equal protection sense or whether he simply meant "justification" under some other test.

complaint in anticipation of a ruling that in certain instances there could be a justifiable basis for distinction between sexes. He feared the majority had endorsed the former reading[31] even though the precedents did not necessarily require it.

Pennsylvania ERA decisions have followed a set pattern.[32] The analysis begins with a finding that there has been state action[33] which has perpetuated a sex-based classification affecting a legally protected right. Once it has made this threshold finding, the court examines the classification to determine whether it violates the ERA. In *PIAA*, the court was able to invoke the ERA because the Association's activities had already been characterized as state action.[34] Although students had no statutory entitlement to participa-

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31. 18 Pa. Commw. at 53-54, 334 A.2d at 843 (Bowman, J., dissenting). The court had included football and wrestling in its order even though the defendant had had no opportunity to submit evidence bearing specifically on those sports.

32. *PIAA* differs from the earlier cases in one important aspect. Before the classifications in those cases could operate, the trier of fact had to make findings in an evidentiary hearing. *See, e.g.*, Commonwealth v. Butler, 458 Pa. 289, 328 A.2d 851 (1974) (decision on criminal guilt); Hopkins v. Blanco, 457 Pa. 90, 320 A.2d 139 (1974) (finding of negligence); Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974) (determination of economic capability). The ERA question was usually considered only on appeal, since stare decisis locked the lower courts into reapplying pre-ERA case law. *PIAA* was the first case to apply the ERA on a motion for summary judgment. The Association argued there was a factual dispute concerning the purpose of the by-law, including the debate among experts on whether boys and girls should compete together and the hypothesis that segregated teams provide greater opportunity for girls. Brief for Defendant at 24. It was clear, however, that the by-law flatly excluded female students from competition with males on high school teams; the court felt this was the only finding relevant to the question of law. 18 Pa. Commw. at 49, 334 A.2d at 841.

33. Like the federal equal rights amendment, the Pennsylvania ERA applies only to activities practiced under the auspices of state action. 18 Pa. Commw. at 51, 334 A.2d at 842. *See* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 905 (1971) [hereinafter cited as Brown]. It does not extend to private sex discrimination. 118 CONG. REC. 9570 (1972) (statement of Judiciary Committee submitted by Senator Bayh).

34. In Harrisburg School Dist. v. Pennsylvania Interscholastic Athletic Ass'n, 453 Pa. 495, 309 A.2d 353 (1973), the Association had imposed sanctions on a high school following an outbreak of violence at a football game. The school district argued that the censuring procedure violated the fourteenth amendment. Before reaching the due process issue, the court had to determine whether the Association's role constituted state action. *See* note 23 *supra*. *Harrisburg* is distinguishable from *PIAA*, however, since the former concerned the lack of procedural safeguards within the processes of the Association while the latter dealt with the composition of teams within the schools themselves. Had the *PIAA* court considered sports competition an integral part of the school curriculum, it might have found state action *and* a statutory entitlement to participation under PA. CONST. art. III, § 14, which directs the General Assembly to provide a system of public education that serves the needs of the Commonwealth.

tion in interscholastic sports, the state could not extend the opportunity on a discriminatory basis.[35] Yet it is unclear what standard the court used in concluding that the by-law was unconstitutional on its face. A broad reading of the opinion suggests an absolute standard whereby classification by sex would never be permissible.[36] A narrower interpretation connotes a less stringent test, comparable to an equal protection strict scrutiny analysis.[37] Neither approach was expressly adopted by the court. It did not articulate an absolute ban against classification by sex, but its summary disposition of the by-law supports that reading.[38] The resulting ambiguity might be cured by inquiring into the legislative intent of the ERA.

The recorded legislative history[39] of the Pennsylvania ERA does not discuss whether it was intended to abolish all classification by sex.[40] By analogy, the history of the federal ERA[41] gives some indica-

35. This language parallels a fourteenth amendment due process analysis. *See* Goss v. Lopez, 419 U.S. 565, 574 (1975) (procedural due process).

36. Quoting language from Henderson v. Henderson, 458 Pa. 97, 101, 327 A.2d 60, 62 (1974), the majority stated, "The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities." 18 Pa. Commw. at 50, 334 A.2d at 842.

37. At first the majority seemed willing to entertain defendant's justifications for the classification, only to find the suggested rationales insufficient to overcome an apparent presumption of discrimination. 18 Pa. Commw. at 49, 334 A.2d at 841.

38. Although the court did not unequivocably hold that under no conditions could there be a rational basis for distinction between the sexes, the dissent maintained that reading was inescapable. That contention was based on the inclusion of football and wrestling in the court's order. *Id.* at 53-54, 334 A.2d at 843 (Bowman, J., dissenting).

39. The bill was referred to the House Judiciary Committee on October 7, 1969. 2 PA. LEGIS. J., 153d Sess. 1370 (1969) (House). It was reported as amended on November 12, *id.* at 1487, and received its first consideration approximately one week later. *Id.* at 1501. The House reconsidered the proposal on November 24. *Id.* at 1518. The bill passed on December 2. *Id.* at 1543. It reached the Senate Constitutional Changes and Federal Relations Committee that same day. PA. LEGIS. J., 153d Sess. 739 (1969) (Senate).

The Senate acted quickly on the proposed amendment during the 1970 Session. It was reported as committed and first considered on March 10, 1970. PA. LEGIS. J., 154th Sess. 1038, 1043 (1970) (Senate). It was considered again on the following day, *id.* at 1052, and amended and reconsidered within a week. *Id.* at 1082. The bill was finally signed in the Senate on April 29, 1970. *Id.* at 1156.

40. Legislative proposals and administrative regulations regarding the Pennsylvania ERA reveal how state legislators and officials have interpreted its intent. Prior to *PIAA*, the state Board of Education promulgated a regulation governing athletic programs in the public schools. 22 PA. CODE § 5.25(e) (1974). The regulation, which is still in effect, provides separate male/female sports programs but requires equal access to athletic facilities and coaching staffs. *Id.* § 5.25(e)(2). It prohibits any rule that excludes girls from participation on boys' teams, *id.* § 5.25(e)(4), and also endorses coeducational teams. *Id.* § 5.25(e)(3). These provisions may indicate a willingness to accomodate an absolute interpretation of the ERA. For a

tion of the proper test for determining the validity of a classification under the amendment.[42] Although the federal ERA does not articulate a particular standard, one can be inferred from certain classifications which were specifically excluded from ERA coverage.[43] One such exclusion allows reasonable classifications based on characteristics that are unique to one sex.[44] Another, derived from the constitutional right to privacy,[45] permits separation of public restrooms and institutional sleeping facilities.[46] The ERA's sponsors wished it to promote equality between the sexes more vigorously than would be possible under the traditional equal protection rational basis test,[47] but they recognized that in certain contexts the state had a compelling interest in classification by sex. Since these exceptions were justifiable to the framers of the federal ERA, it seems clear that they did not intend the amendment should apply absolutely in every case.

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discussion of such administrative schemes see Comment, *Sex Discrimination in Interscholastic High School Athletics*, 25 SYRACUSE L. REV. 535 (1974).

More significantly, however, a bill has been introduced in the Pennsylvania General Assembly which proposes exclusion of high school athletics from the ERA's purview and approves separate but equal athletic opportunity. Pa. H.R. 1074, 159th Sess. (1975). The proposal echoes the rational basis test applied in Ritacco v. Norwin School Dist., 361 F. Supp. 930 (W.D. Pa. 1973), where the court upheld the same by-law at issue in *PIAA* in light of the physiological and psychological differences between boys and girls. Due to the state constitutional amendment procedure, the proposed modification of the Pennsylvania ERA cannot be adopted before 1978. PA. CONST. art. XI, § 1. The amendment was referred to and has remained in the House Education Committee since April 22, 1975. PENNSYLVANIA LEGISLATIVE REFERENCE BUREAU, HISTORY OF SENATE AND HOUSE BILLS—HISTORY OF HOUSE BILLS AND RESOLUTIONS 1975-1976, at A-126 (Sept. 22, 1975).

41. The proposed amendment to the United States Constitution provides in pertinent part: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." H.R.J. Res. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8, 92d Cong., 1st Sess. (1971).

42. It is unlikely that a rational basis test was intended to implement the ERA, since that test has been traditionally used in sex discrimination cases brought under the equal protection clause.

43. The House Report on the ERA shows that "equality" does not require that women and men be treated the same in all respects. Different treatment can be based on individual attributes of the particular person, which might be found among members of both sexes. 118 CONG. REC. 9571 (1972) (majority report of the Committee on the Judiciary).

44. Maternity leave for female employees falls under this exception.

45. Griswold v. Connecticut, 381 U.S. 479 (1965).

46. This exception also involves the state's power to regulate cohabitation and sexual activity by unmarried persons. 118 CONG. REC. 9571 (1972) (majority report of the Committee on the Judiciary).

47. The Supreme Court has suffered the criticism that it approaches sex discrimination more diffidently than it does racial discrimination. *Id.* at 9569.

Like *PIAA*, prior ERA cases[48] can be read as support for either an absolute or less than absolute standard for the validity of a classification under the amendment. Generally, the opinions maintain that the ERA should operate to guarantee equality between men and women[49] and eliminate distinctions based on sex.[50] This language may be dictum, however, since the classifications at issue could have failed a less stringent test. Each opinion concerned a situation in which extension of a benefit to one sex but not the other would have been discriminatory per se under an absolute application of the ERA; in those cases, the court did not strike the classifications without first examining them in terms of the characteristics which purported to justify different treatment. If the characteristic was not peculiar to one sex, the sex-based classification served no legitimate purpose and hence was invalid.[51] The court never inquired into the state's compelling interest in maintaining the classification because it never reached that question in its analysis, which fell somewhere between the judicial deference of a rational basis test and the rigidity of an absolute application of the ERA.[52]

Cases dealing with sex discrimination in high school athletics have generally been decided on equal protection grounds.[53] In *Reed*

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48. *See* text at notes 12-16 *supra*.

49. *E.g.*, Hopkins v. Blanco, 457 Pa. 90, 93, 320 A.2d 139, 140 (1974).

50. Henderson v. Henderson, 458 Pa. 97, 101, 327 A.2d 60, 62 (1974).

51. For example, in Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974), the court found that the crucial characteristic in an award for support was financial capability, which could not always be presumed on the part of the husband.

52. In Commonwealth v. Butler, 458 Pa. 289, 328 A.2d 851 (1974), the court used concepts from various equal protection tests. It characterized the interest in freedom from lawfully-imposed confinement as "fundamental" public policy. *Id.* at 297, 328 A.2d at 856. Later in the opinion, the court stated, "We perceive no basis, let alone a rational basis, for predicating eligibility for parole on a person's sex," and supported its conclusion with equal protection cases utilizing the rational basis test. *Id.* at 298, 328 A.2d at 856 (footnote omitted). Yet it prefaced its discussion with the broad proposition that sex might no longer be used as an exclusive classifying tool in the Commonwealth. *Id.* at 296, 328 A.2d at 855.

53. *See, e.g.*, Brenden v. Independent School Dist. 742, 477 F.2d 1292 (8th Cir. 1973) (high school must sponsor teams for both boys and girls in non-contact sports); Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973) (temporary injunction against enforcement of state-wide athletic association regulation upheld where girls were restricted from playing on boys' tennis team); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972) (injunction against prohibition of females from men's golf team); Haas v. South Bend Community School Corp., 259 Ind. 515, 289 N.E.2d 495 (1972) (girls banned from golf team). *But see* Bucha v. Illinois High School Ass'n, 351 F. Supp. 69 (N.D. Ill. 1972), where the court applied the rational basis test and found no violation of equal protection due to the physical and psychological differences between boys and girls. *See generally* Comment, *Sex Discrimi-*

v. Reed,[54] the Supreme Court examined a classification which effected dissimilar treatment of men and women. It has been suggested that *Reed* established a compromise test somewhere between the rational basis and the more exacting strict scrutiny tests; the Court did not label sex-based classifications as suspect, but its language connoted a certain sensitivity to such classifications.[55] To date the Court has found it unnecessary to determine whether sex-based distinctions are suspect classifications.[56] Proponents of the federal ERA, however, maintain that it was the legislative creation of a new suspect classification which would be defensible only when the state could demonstrate a compelling interest.[57]

The disposition of a sex-based classification under the strict scrutiny test would depend on what the court would consider a compelling state interest.[58] In prior Pennsylvania ERA cases, there was no need to continue testing a sex-based classification after the court had determined that the classification did not further its intended purpose.[59] In the context of sports, however, it may be that there is no such thing as a neutral characteristic: in reality the athlete's skill is directly related to his or her sex.[60] Had the court analyzed the

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nation in Interscholastic High School Athletics, 25 SYRACUSE L. REV. 535 (1974); Note, *Sex Discrimination in High School Athletics*, 57 MINN. L. REV. 339 (1972); Annot., 23 A.L.R. FED. 664 (1975).

54. 404 U.S. 71 (1971) (probate code provision which gave mandatory preference to men over women when both applied for appointment as administrator of a decedent's estate violated the equal protection clause).

55. *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 34 (1972). *But cf.* Frontiero v. Richardson, 411 U.S. 677 (1973), where a majority of the Court refused to adopt the strict scrutiny test for sex-based classifications. *See also* 12 DUQ. L. REV. 982 (1974).

In Percival v. City of Phila., 12 Pa. Commw. 628, 317 A.2d 667 (1974), the *PIAA* court may have tried a version of the *Reed* approach when it reasoned:

> Did the people intend [the ERA] to do more than provide that equality of rights may not be denied or abridged on account of sex where sex bears no rational relationship to the object of the legislation; or did they intend that sex, like race and color, should be a wholly impermissible basis for state regulation? *We are inclined to believe that they meant more than the former and less than the latter.*

Id. at 639, 317 A.2d at 673 (emphasis added).

56. Stanton v. Stanton, 421 U.S. 7, 13 (1975).

57. *See* 116 CONG. REC. 28003-04 (1970) (remarks of Representative Dwyer). *But see* Brown, *supra* note 33, at 880-81.

58. *See* Note, *Sex Discrimination and Equal Protection: Do we need a Constitutional Amendment?* 84 HARV. L. REV. 1499, 1509-12 (1971).

59. *See* text at notes 49-53 *supra*.

60. The federal ERA appears amenable to any classification so long as it is not overtly tied to a sexual stereotype. 118 CONG. REC. 9571 (1972).

PIAA by-law in this light, it might have asked if the state had a compelling interest in maintaining the distinction.[61] Had it considered athletic competition as part of a school's curriculum,[62] or seriously appraised the Association's justifications for the by-law[63] after hearing the evidence at trial, the court might have reached a different result.

PIAA presented an awkward situation. The court must have foreseen—although it did not acknowledge—the difficulties accompanying the elimination of sexual barriers in interscholastic athletic competition.[64] It may have thought itself bound, however, by ERA precedents which it felt dictated an absolute stand against classification by sex.[65] Had the court used a strict scrutiny standard, it might have found a compelling state interest to uphold the classification. Under this approach the ERA would have had a certain desirable flexibility[66] which may have been lost in *PIAA*.

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61. It is interesting that the burden of justification would have been on the state; in *PIAA*, the state was both plaintiff and, by implication through the state action concept, the defendant.

62. *See* note 34 *supra*.

63. *See* text at notes 18-25 *supra*.

64. Now that girls are eligible for formerly all-male teams, team members must be selected on the basis of some neutral qualifying characteristic. *See* text at notes 26-28 *supra*. In all likelihood, the characteristic will be skill. If skill is the determining factor, only the most talented girls will be able to compete. The net result of *PIAA*, therefore, could be a decrease in female participation in high school athletics.

65. *See* 18 Pa. Commw. at 50-51, 334 A.2d at 841-42.

66. Under a strict scrutiny standard, affirmative action would be available to secure actual equality. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). In such a program, sex-based classification would be necessary to compensate women for past discrimination. Implementation could take various forms: females capable of varsity competition, for example, could be placed in competition with males while girls' teams were maintained—perhaps at a lower level of competition—to provide further opportunity for athletic advancement. *But cf.* Brown, *supra* note 33, at 903-04.