

THE CASE FOR ALL-FEMALE HEALTH CLUBS: CREATING A COMPENSATORY PURPOSE EXCEPTION TO STATE PUBLIC ACCOMMODATION LAWS

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I. INTRODUCTION

Two million American women belong to all-female health clubs or coed health clubs with separate male and female exercise rooms.¹ Some one to two thousand such all-female or sex-segregated health clubs exist in the United States, and the number is growing.² Already, about one in ten American health clubs have all-female membership or separate male and female facilities.³ These clubs are popular with women, many of whom are intimidated by exercising in front of men or simply want to be able to exercise in an environment free of

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1. See Ellen Goodman, *Single-Sex Sweating: If We Stand Behind Equal Rights, All-Female Health Clubs Should Open Doors to All*, ROCKY MOUNTAIN NEWS, Feb. 22, 1998, at 1B; Telephone interview with Jay Ablondi, Assistant Director of Government Relations, International Health, Racquet & Sportsclub Association (Feb. 5, 1999) [hereinafter Ablondi interview]. For the purposes of this Article, the terms "all-female," "single-sex," and "women-only" health clubs refer to both single-sex health clubs and health clubs that designate separate areas for male and female members.

2. See Goodman, *supra* note 1, at 1B (reporting that there are 2000 all-female health clubs in the United States); Ablondi interview, *supra* note 1 (stating that there are 1250 health clubs in the U.S. which are all-female or have all-female sections).

3. See Ablondi interview, *supra* note 1 (stating that all-female health clubs constitute about nine percent of the 14,100 health clubs in the United States).

sexual tension, harassment, and "leering" men.⁴ As many as eighty percent of female patrons of all-female health clubs say they would not continue to patronize their clubs if men were admitted as members.⁵ Yet just as they grow in popularity among women, these clubs are facing legal challenges that threaten their continued viability. In a string of lawsuits, male plaintiffs have claimed that women-only health clubs violate state public accommodation statutes, laws that prohibit businesses that are open to the public from discriminating on the basis of sex.⁶ Already in several states, including Massachusetts, New York, and California, men have been successful in court or before administrative agencies in challenging all-female membership policies.⁷

4. Some women describe co-ed gyms as "meat markets." *New Law Protects Women-Only Health Clubs*, PROVIDENCE SUNDAY J., Feb. 8, 1998, at C7.

5. During a Massachusetts lawsuit challenging an all-female health club in Boston, Dr. Robert Tanenbaum testified that more than 80% of the club members he surveyed would stop patronizing the club if men were allowed to join. *See Foster v. Back Bay Spas, Inc.*, No. 96-7060, 1997 WL 634354, at *1 (Mass. Super. Oct. 1, 1997) (summarizing an affidavit submitted by Dr. Tanenbaum on behalf of the health club defendant); *see also Hearing on H.B. 5057 Before the Joint Comm. on Commerce and Labor*, 180th Sess., 1st Term 3 (Mass. 1997) (statement of Robert L. Tanenbaum, Ph.D., psychologist) [hereinafter Tanenbaum testimony] (concluding that over 80% of women answering a survey or interviewed said that their motivation to exercise in a same sex environment was the most important reason or the decisive reason for joining a single-sex facility).

6. Congress and state legislatures enacted public accommodation laws during the civil rights era to prohibit discrimination against blacks and other minorities in public places such as hotels, restaurants, bus stations, and restrooms. These laws typically prohibit discrimination on the basis of race, religion, national origin, disability, and sex. In addition, some states prohibit discrimination on the basis of sexual orientation, age, and marital status. Many of these laws failed to prohibit discrimination on the basis of sex initially, but were amended to do so during the women's rights movement. For example, California's public accommodation law, the Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 1998), was amended in 1974 to add sex to the enumerated bases of discrimination. The most famous public accommodation law—Title II of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000a (1998)—did not prohibit discrimination on the basis of sex when it was enacted in 1964 and has never been amended to do so. Courts, moreover, have refused to find an implied prohibition on sex discrimination in the law. *See, e.g., Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593, 595 (S.D.N.Y. 1970) (concluding that Title II does not prohibit discrimination on the basis of sex).

Both men and women have sued businesses that discriminate on the basis of sex under state public accommodation statutes, and they have had some success. Courts have found sex discrimination in violation of state public accommodations laws where a Chippendales club denied male customers admittance to performances by male exotic dancers, *Easebe Enterprises, Inc. v. Rice*, 141 Cal. App. 3d 981 (Cal. Ct. App. 1983); where a nonprofit corporation providing boating lessons denied membership to female applicants, *United States Power Squadrons v. State Human Rights Appeal Bd.*, 452 N.E.2d 1199 (N.Y. 1983); and where a boys baseball league excluded girls, *National Organization for Women v. Little League Baseball, Inc.*, 318 A.2d 33 (N.J. Super. Ct. App. Div. 1974). Some courts also have found discounts for female customers to violate public accommodation laws. *See, e.g., Koire v. Metro Car Wash*, 707 P.2d 195 (Cal. 1985) (holding that car washes could not provide discounts to women on "Ladies' Day" without providing similar discounts to men); *Pennsylvania v. Dobrinoff*, 471 A.2d 941 (Pa. Commw. Ct. 1984) (exempting female patrons from cover charge violated law). As this Article observes, single-sex health clubs also have been declared violative of public accommodation laws.

In addition to challenging all-female facilities, men may challenge female-only sections within coed facilities. In the most recent case, a California man sued a gym that set aside some equipment for the use of women only, claiming it was unfair for him to have to wait to use other equipment when equipment dedicated to female members was available. *See Work it Out: A Tempest Brews in a Teapot at a Local Fitness Club*, FRESNO BEE, Sept. 14, 1999, at B6.

7. Among the forty-three states without judicial or legislative protection for all-female health clubs, several states have taken administrative stances that all-female health clubs violate state anti-discrimination laws. In New York and California, where men have sought to join all-female clubs, most cases have settled out of court, or the state boards overseeing human rights or equal opportunity have indicated they would not look

Courts and state legislatures are just beginning to come to grips with the legal and political dilemmas posed by these clubs. Lawmakers—legislative and judicial—are searching for ways to reconcile the letter of public accommodation law, which would seem to dictate an end to all-female facilities, with the clubs' popularity among women. Similarly, women's advocates are seeking to preserve the benefits of all-female clubs without compromising their commitment to equality. In response to lawsuits filed by men, seven states—six through legislation and one through court action—have acted to exempt single-sex health clubs from public accommodation laws, over the objections of some advocates for gender equality such as the National Organization for Women (NOW). These states exempt single-sex health clubs, including all-male and all-female facilities, from public accommodation laws on privacy grounds. In states that have not enacted such privacy exemptions, public accommodation laws prohibit single-sex health clubs, including both men-only and women-only clubs. In this Article, I categorize the exemption route as the "privacy approach" to the all-female health club dilemma. This categorization is based on the fact that these states exempt single-sex health clubs from public accommodation laws on the grounds that exercising is a private activity akin to bathing, undressing, or receiving intimate medical care. I categorize the non-exemption states as having adopted a "formal equality" approach. The laws in these states require rigid equality in public facilities, rejecting per se any sex segregation policies or exclusions on the basis of sex.

This Article rejects each of these approaches to the dilemma posed by all-female health clubs. The formal equality approach, sometimes called "gender blindness," is flawed because it would outlaw women-only health clubs, even when they advance the equality interests that motivated passage of laws prohibiting discrimination in public accommodations. The privacy approach is

favorably on such exclusions. See Patricia Wen, *Single-Sex Health Clubs Get Protection*, BOSTON GLOBE, Feb. 7, 1998, at B1 [hereinafter Wen, *Single-Sex Health Clubs Get Protection*]. Susan Ambrose, chief counsel for the California Department of Fair Employment and Housing, said in 1998 that California's civil rights laws prohibit such arbitrary exclusions in public places, and that she was certain an all-female health club could not exclude a man. See *id.* A New York official pronounced a similar position in 1998. "Individuals here are protected against discrimination," said Denise Ellison, assistant commissioner of public affairs for the New York Division of Human Rights. *Id.* But see Alan J. Hoff, *A Proposed Analysis for Gender-Based Practices and State Public Accommodations Laws*, 16 U. MICH. J.L. REFORM 135, 149 n.86 (1982) (citing a New York Human Rights Division decision in which a women-only health spa with inadequate facilities to serve both sexes was granted an exception from state public accommodation law).

In California, clubs consistently have agreed to admit male members because state agencies have declared that state civil rights laws, including the Unruh Civil Rights Act, prohibit all-female clubs. A Los Angeles health club for women agreed to allow male members in 1988, settling a lawsuit filed by feminist attorney Gloria Allred on behalf of a Los Angeles man. See Laura-Lynne Powell, *Anaheim Activist Roots out Bias Against Men*, ORANGE COUNTY REG., Apr. 17, 1992, at 1. In 1992, three Orange County all-female health clubs agreed to open their membership to men before the state Department of Fair Employment and Housing conducted a hearing on the matter. See *id.* Such a settlement, however, has little force if the state is unwilling to enforce it. About a year after the three clubs agreed to admit men, a man attempted to gain admission and was denied access to two of the clubs. State enforcement officials reportedly stated that they would not make enforcing the law against these clubs a high priority. See *County Scan*, ORANGE COUNTY REG., May 1, 1993, at B3. In December 1997, a court in California reportedly ruled against women-only rooms in a coed health club. See Carey Goldberg, *Lawyer's Suit Challenges Women-Only Gyms*, N.Y. TIMES, Jan. 26, 1998, at A10.

equally flawed. It is true that privacy interests are marginally implicated in exercising, an activity that involves physical positions such as bending over, thrusting hips, and spreading legs, often in revealing clothing. But privacy is not seriously implicated by exercising in a health club, a public activity. Moreover, the privacy approach undermines the goals of equality that public accommodation laws seek to achieve. While it protects all-female clubs, an outcome that this Article contends is justifiable, it also validates the exclusion of women from all-male clubs, turning back the clock on the struggle for sex equality.

After exposing the flaws in the two prevailing approaches to the dilemma posed by all-female health clubs, this Article proposes a new approach. The health club dilemma illuminates a flaw in public accommodation laws. Most civil rights and anti-discrimination laws permit the use of sex classifications for compensatory or remedial purposes. Among anti-discrimination statutes, and in equal protection doctrine, public accommodation laws uniquely prohibit distinctions on the basis of sex, *even to compensate for the effects of discrimination*. This Article proposes to harmonize public accommodation statutes with other anti-discrimination policies. It argues that public accommodation laws should be amended to allow the use of sex classifications that serve compensatory purposes.

Specifically, this Article outlines a five-pronged standard that state legislatures should incorporate into public accommodation laws. Under an amended statute, public accommodations such as health clubs could differentiate on the basis of sex if they satisfied the following five criteria:

- (1) There is a sex-based disadvantage suffered;
- (2) The intention in forming or continuing a sex classification is to compensate for this disadvantage;
- (3) The sex classification directly and substantially compensates for the previous sex-based disadvantage;
- (4) The sex classification is not based upon and does not perpetuate archaic and stereotyped notions of the abilities or roles of the sexes; and
- (5) The use of the sex classification does not substantially and unnecessarily burden the sex that is disadvantaged by the compensatory action.

In addition to responding to the emerging debate over all-female health clubs, this approach has the advantage of strengthening public accommodation laws to deal with similar debates in the future. This proposal calls for amending public accommodation laws generally. Adoption of this proposal would prepare states for legal challenges to other all-female accommodations, such as all-female running races or single-sex domestic violence shelters. In each case, the use of sex classifications would be sustained if the classification served a compensatory purpose.

All-female health clubs would be permitted under a state public accommodation law incorporating the proposed compensatory purpose exception. All-female health clubs serve two compensatory purposes. First, they combat a legacy of sex-role socialization that has left many women disadvantaged in mixed-sex health clubs. As a result of sex-role socialization that defines women as physically weak, non-athletic, and insecure about their physical appearance, many women are intimidated from joining mixed-sex health clubs and exercising in front of men. Second, all-female health clubs compensate for specific instances of violence or sexual harassment suffered by some female club members at the hands of men. Women may be working out while recovering from past physical or sexual abuse, as part of a self-defense program, or as part of a regimen to enhance self-esteem. While all-female health clubs do carry some costs—reinforcing stereotypes about both male and female behavior—on the whole these clubs are remedial in nature and would be permissible under the proposed framework.

For these reasons, states interested in resolving the dilemma posed by all-female health clubs should avoid the flawed privacy and formal equality approaches and consider amending their public accommodation statutes to allow single-sex accommodations that serve remedial purposes. Such legislation would make public accommodation laws consistent with other anti-discrimination efforts and would avoid many of the pitfalls of both the privacy and formal equality approaches. Such an approach would bring the law into conformity with what two million women already recognize—that single-sex accommodations sometimes can advance the goal of sex equality by compensating for sex-based disadvantages suffered by women.

In Part II, this Article describes the growing phenomenon of all-female health clubs. Parts III through V describe three approaches to the legal dilemma posed by these clubs. The privacy approach is discussed in Part III. Formal equality is described in Part IV. Part V proposes a new approach: remediation. In Part VI, I argue that public accommodation laws that incorporate the proposed compensatory purpose exception likely would ensure the continued legal vitality of all-female fitness clubs.

II. THE PHENOMENON OF ALL-FEMALE HEALTH CLUBS

Sex segregation is increasingly controversial in America. Courts, legislatures, and even women's advocates are struggling to strike a balance between a commitment to sex equality and flexibility toward single-sex environments that may help women overcome sex-based disadvantages. Witness the recent debate over single-sex schools, such as the Young Women's Leadership School for girls

in East Harlem.⁸ Another area in which the equality versus separateness debate is heating up is all-female health clubs. When a Massachusetts court recently outlawed all-female health clubs in that state, the issue generated national media attention.⁹ In some places, these increasingly popular clubs are running into challenges by men, who claim the clubs violate state anti-discrimination laws. Across the country there are between one and two thousand all-women fitness facilities with about two million members.¹⁰ One health club industry association reports that there are approximately 1250 health clubs that are either all-female or have all-female sections.¹¹ This constitutes about nine percent of the 14,100 health clubs in the United States.¹² The actual number of all-female facilities might be larger, because small clubs that do not advertise are not included in these figures.¹³ Clubs with segregated sections are the fastest growing segment of the all-female health club industry.¹⁴ One state, Massachusetts, is home to thirty-two all-female health clubs, claiming 40,000 members and annual revenues of \$25 million.¹⁵

Women join all-female clubs for a variety of reasons. About seventy percent of women say they would prefer to belong to a single-sex gym.¹⁶ Many members prefer all-female health clubs to escape "leering men" and avoid embarrassment about their bodies. A female club may offer the best facilities or the most convenient location. It may provide equipment designed to fit women's bodies or classes that appeal more to women. Women may join all-female clubs for idiosyncratic, unanticipated, or ignoble reasons. During the height of the AIDS "scare" in the mid-1980s, for instance, some women fled coed gyms with large numbers of gay male members for all-female gyms because they were fearful of acquiring AIDS.¹⁷

An example of the all-female health club phenomenon is Healthworks, Boston's only all-female health club. Healthworks, a 3500-member club, caters to women. Its locker rooms and restrooms are designed for women; it offers fitness and health classes tailored specifically toward female concerns such as pre-natal programs and special nutrition counseling for women; and it contracts with the YWCA of Boston so that YWCA members can use its facilities.¹⁸ The evidence indicates that Healthworks provides a refuge for women who are

8. See Monica C. Fountain, *New York Girls Get a School of Their Own*, PLAIN DEALER, Sept. 29, 1998, at 5F. The Young Women's Leadership School is an all-female public high school in Harlem founded on the idea that a single-sex environment would be educationally beneficial to disadvantaged female students.

9. See *Foster*, 1997 WL 634354.

10. See Goodman, *supra* note 1, at 1B.

11. See Ablondi interview, *supra* note 1.

12. See *id.*

13. See *id.*

14. See *id.*

15. See Wen, *Single-Sex Health Clubs Get Protection*, *supra* note 7, at B1.

16. See Patricia Wen & Bruce Mohl, *Some Strong Support for Males-Only Gym Concept*, BOSTON GLOBE, May 31, 1999, at B1 (citing national survey finding that 69% of women prefer all-female gyms).

17. See Margaret Engel, *AIDS and the Public Spread of Disease Changes American Life*, WASH. POST, Oct. 27, 1985, at A1.

18. See *Foster v. Back Bay Spas, Inc.*, No. 96-7060, 1997 WL 634354, at *1 (Mass. Super. Oct. 1, 1997).

intimidated or harassed in coed clubs. Over eighty percent of the members of Healthworks state that the all-female aspect of the club was the most important reason for joining.¹⁹ Many Healthworks members are of “post-childbearing age and have experienced bodily changes resulting from pregnancy and childbirth which alter their appearance.”²⁰ Many are “older members who have recently gone through menopause [and] feel intimidated exercising in a coed environment.”²¹ Many of the women who exercise at the club are concerned about being watched by members of the opposite sex while exercising and some are recovering from past physical or sexual abuse.²² Some members have specific religious concerns about exercising in a coed facility.²³

This Article describes and analyzes three approaches to the legal dilemma posed by all-female health clubs. The first of these approaches, privacy, provides per se protection for single-sex health clubs, male or female, and has been adopted in several states. Formal equality, which prohibits all single-sex clubs, is presumptively the law in all other states, though only in a few locations have all-female clubs been dragged into court and forced to admit male members. This Article suggests a third approach: amend public accommodation laws to allow single-sex health clubs that compensate for past sex discrimination.

III. THE PRIVACY APPROACH

A. *Statutory and Judicial Protection for All-Female Health Clubs*

Seven states expressly allow all-female health clubs, all on privacy grounds. Six of these states protect all-female clubs by statutory exemptions in state public accommodation laws: New Jersey, Tennessee, Illinois, Colorado, Hawaii, and, most recently, Massachusetts. In the seventh state, Pennsylvania, a state court upheld all-female clubs on privacy grounds. The remaining states have not yet created any protection for all-female health clubs.

Six states allow all-female health clubs through statutory exceptions to state public accommodation laws. While the law in each state is different, most statutes require that the club be a “bona fide” health or fitness center. In each of these states, the exemptions are based on privacy rationales: the laws exempt health clubs in the same breath as restrooms and other very private accommodations.

The public accommodation laws of four of these six states—Massachusetts, Illinois, New Jersey, and Tennessee—explicitly exempt health and exercise facilities. The Massachusetts public accommodation law was amended in 1998 to

19. *See id.* (summarizing and quoting from the affidavit submitted by Dr. Tanenbaum on behalf of Healthworks).

20. *Id.*

21. *Id.*

22. *See id.*

23. *See id.*

protect all-female health clubs. It excludes from state anti-discrimination law "a place of exercise for the exclusive use of persons of the same sex which is a bona fide fitness facility established for the sole purpose of promoting and maintaining physical and mental health through physical exercise . . . , if such facility does not receive funds from a government source" ²⁴ Illinois law provides an exemption from public accommodation law to "[a]ny facility, as to discrimination based on sex, which is distinctly private in nature such as restrooms, shower rooms, bath houses, health clubs and other similar facilities for which the Department, in its rules and regulations, may grant exemptions based on bona fide considerations of public policy." ²⁵ New Jersey law provides an exemption to "any place of public accommodation which is in its nature reasonably restricted exclusively to individuals of one sex, and which shall include but not be limited to any summer camp, day camp or resort camp, bathhouse, dressing room, swimming pool, gymnasium, comfort station, dispensary, clinic or hospital" ²⁶ A similar provision is found in the Tennessee code: "Nothing in this part shall prohibit segregation on the basis of sex of bathrooms, health clubs, rooms for sleeping or changing clothes, or other places of public accommodation the commission specifically exempts on the basis of bona fide considerations of public policy." ²⁷

The public accommodation laws of the two other states—Hawaii and Colorado—protect health clubs implicitly. Hawaii law provides: "The provision of separate facilities or schedules for female and for male patrons does not constitute a discriminatory practice when such separate facilities or schedules for female and for male patrons are bona fide requirements to protect personal rights of privacy." ²⁸ Similarly, Colorado law provides:

Notwithstanding any other provisions of this section, it is not a discriminatory practice for a person to restrict admission to a place of public accommodation to individuals of one sex if such restriction has a bona fide relationship to the goods, services, facilities, privileges, advantages, or accommodations of such place of public accommodation. ²⁹

In a seventh state, Connecticut, legislation recently was proposed to authorize same-sex fitness facilities. The bill would have allowed a "bona fide fitness facility" to discriminate on the basis of sex. ³⁰

24. MASS. GEN. LAWS ch. 272 § 92A (1998).

25. 775 ILL. COMP. STAT. 5/5-103 (West 1998).

26. N.J. STAT. ANN. § 10:1-3 (West 1999); *see also* N.J. STAT. ANN. § 10:5-12(f) (West 1999) (providing a similar exemption in the employment discrimination context).

27. TENN. CODE ANN. § 4-21-503 (1998).

28. HAW. REV. STAT. § 489-4 (1998).

29. COLO. REV. STAT. § 24-34-601(3) (1998).

30. *See* H.B. 6438, Regular Sess. (Conn. 1999) (sponsored by Rep. John E. Piscopo). The bill died in committee in 1999.

Massachusetts is the state most recently to protect all-female health clubs through a privacy exemption to state public accommodation law. The history of the legislation in that state demonstrates the popularity of these amendments. While civil rights legislation often takes years to enact, the health club amendment sailed through the legislative process, winning broad support. The state legislature responded rapidly to a court decision declaring that all-female health clubs violate state anti-discrimination law.³¹ Lawmakers received hundreds of phone calls and letters from women saying they might not exercise if all-female clubs were abolished.³² The legislature swiftly enacted, and the governor signed, an amendment to the state public accommodation law to allow single-sex fitness facilities.³³

Only one state exempts all-female health clubs from public accommodation law as a result of judicial action. In that 1992 case, *LivingWell (North), Inc. v. Pennsylvania Human Relations Commission*,³⁴ Pennsylvania's highest court reversed the state Human Relations Commission and decided that a chain of women-only health clubs did not have to admit men.³⁵

In *LivingWell*, the court determined that ten all-female health club facilities did not violate the Pennsylvania Human Relations Act.³⁶ The court reached its decision after finding an "implied" privacy defense to the state public accommodation law. If such a defense did not exist, the court reasoned, then sex-segregated accommodations such as bathrooms, showers, and locker rooms would have to be open to the public.³⁷ Thus, Pennsylvania's high court concluded, a privacy defense had to exist.

Next the court determined that the test for whether such a public accommodation privacy defense was valid in a particular case should be borrowed from the employment context. In the workplace, defenses to sex discrimination are justified upon a showing that a sex classification is a "bona fide occupational qualification" (BFOQ). Most employment discrimination laws, including Title VII of the federal Civil Rights Act of 1964, provide for such a BFOQ defense. In court decisions, privacy interests have qualified as a BFOQ in

31. See *Foster v. Back Bay Spas, Inc.*, No. 96-7060, 1997 WL 634354 (Mass. Super. Oct. 1, 1997).

32. See Patricia Wen, *Single-Sex Health Clubs Get Senate OK*, BOSTON GLOBE, Jan. 16, 1998, at B2.

33. See *New Law Protects Women-Only Health Clubs*, *supra* note 4, at C7.

34. 606 A.2d 1287 (Pa. Commw. Ct. 1992).

35. See *LivingWell (North) Inc. v. Pennsylvania Human Relations Comm'n*, 606 A.2d 1287, 1294 (Pa. Commw. Ct. 1992).

36. See *id.* Section 5 of the Pennsylvania Human Relations Act, 43 PA. CONS. STAT. ANN. § 955 (West 1999), provides in relevant part: "It shall be unlawful discriminatory practice . . . (i) For . . . any place of public accommodation . . . to: (1) Refuse, withhold from, or deny to any person because of his . . . sex . . . any of the accommodations, advantages, facilities or privileges of such place of public accommodation."

The original complaint also charged *LivingWell* with refusing to employ men at its facilities. *LivingWell* abandoned its all-female employment policy under pressure from the Human Relations Commission before the matter reached court. See *LivingWell*, 606 A.2d at 1291.

37. See *LivingWell*, 606 A.2d at 1288.

the employment context where nudity, bathing, private bodily functions, and touching of genitals are involved.³⁸

A BFOQ defense is explicit in the employment discrimination context. The *LivingWell* court decided that such a defense must therefore be implicit in the context of membership to public accommodations. The court also read the privacy precedents in employment cases broadly as applying not only to the exposure of intimate body parts (the standard assumption), but also to all "situations where the customers, due to modesty, find it uncomfortable to have the opposite sex present because of the physical condition in which they find themselves. . . . These customers would be embarrassed or humiliated if cared for or observed by members of the opposite sex."³⁹ The court concluded:

The standard for recognizing a privacy interest as it relates to one's body is not limited to protecting one where there is an exposure of an "intimate area," but such a right may also be protected against embarrassment or suffer a loss of dignity because of the activity taking place. . . . To hold otherwise would mean that separate changing rooms . . . where workers change from street to work clothes and back . . . would not be permitted.⁴⁰

A contributing factor in the outcome of this case was that the court thought that the harm to men excluded by the membership policy was minimal: other conveniently located health clubs existed, and no business activity or other "networking" took place at the health clubs.⁴¹ The court also rejected the argument that recognizing a privacy interest in this case would patronize women by reinforcing negative stereotypes.⁴² Nor did the presence of men as employees

38. For an example of the privacy defense in the employment context under Pennsylvania state law, see *City of Philadelphia v. Pennsylvania Human Relations Comm'n*, 300 A.2d 97, 104 (Pa. Commw. Ct. 1973) (finding a valid privacy defense to not hiring staff members of the opposite sex to act as counselors in a male or female juvenile facility where juveniles would have been required to submit to a body search, disrobe, and shower in front of a staff member of the opposite sex, and where juveniles would be better able to discuss emotional problems with someone of the same sex).

For examples of a privacy-based BFOQ under Title VII, see, e.g., *Jones v. Hinds Gen. Hosp.*, 666 F. Supp. 933, 937 (S.D. Miss. 1987) (male gender is BFOQ for position of orderly where duties include catheterization of male patients and a significant number of men objected to being exposed to female nurse assistants); *Norwood v. Dale Maintenance Sys., Inc.*, 590 F. Supp. 1410, 1423 (N.D. Ill. 1984) (male gender is BFOQ for position of washroom attendant for men's washroom in office building); *EEOC v. Mercy Health Ctr.*, 28 EPD ¶ 32,603 (W.D. Okla. Feb. 2, 1982) (desire for sexual privacy may give rise to BFOQ in delivery room nurse position where duties include undressing patient, examining vaginal area, inserting catheter, and performing episiotomy); *Brooks v. ACF Indus.*, 537 F. Supp. 1122, 1128 (S.D. W.Va. 1982) (male employees' rights would be infringed upon by female janitors entering and performing duties in male bathhouse while men were using facility); *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191, 1198 (E.D. Ark. 1981) (need for personal privacy in labor room where intimate contact with constantly exposed genitalia justified BFOQ); *Fesel v. Masonic Home*, 447 F. Supp. 1346, 1351 (D. Del. 1978) (customer preference related to intimate privacy rights including dressing, bathing, toileting, geriatric pad changes, and catheter care may justify a BFOQ). For a broader view of sex as a bona fide job criterion, see *Hodgson v. Robert Hall Clothes, Inc.*, 326 F. Supp. 1264, 1269 (D. Del. 1971) (male gender is BFOQ for sales position in men's clothing store).

39. *LivingWell*, 606 A.2d at 1290.

40. *Id.* at 1293 & n.6.

41. *See id.* at 1293.

42. *See id.* at 1294-95.

in the health clubs undermine the clubs' argument that women would not exercise in the presence of male members, the court concluded. In this regard, the court distinguished employees from members because employees could be fired easily for improper conduct.⁴³

After finding that privacy interests were implicated, the court determined that the privacy defense was satisfied in this case because permitting male members would adversely affect the health clubs' business and because no adequate alternatives existed to the clubs' all-female membership policy.⁴⁴ Customers testified that they would not use a facility that permitted male members. Additionally, a psychologist, Dr. Robert Tanenbaum, testified that fifty percent of club members he interviewed stated that exercising in an all-female environment was the decisive and primary reason for choosing LivingWell.⁴⁵ As a consequence, the court reversed the state Human Relations Commission and approved the health clubs' all-female membership policy.

The court's vote was five to two. One of the dissenters objected to the two doctrinal leaps taken by the majority. The first was the extension of the privacy BFOQ defense from the employment context to the public accommodation context. The second was the even more far-fetched broadening of the privacy right from the exposure of intimate body parts, typical of precedents, to the clothed, public exercise activity at issue here.⁴⁶ This dissenter also found female members' alleged privacy claim hard to swallow. To this dissenter, the presence of male employees at the clubs undermined the claim that these women would refuse to patronize a club that allowed men to become members.⁴⁷ Finally, the dissent invoked the language of *Brown v. Board of Education*,⁴⁸ the landmark school desegregation case, and embraced the concept of formal equality, concluding that "women cannot continue to maintain . . . equality when decisions such as this purport to 'protect' women by keeping them separate, for separation is inherently unequal."⁴⁹ *LivingWell* is the only reported case of all-female membership policies finding judicial justification.⁵⁰

B. *Flaws in the Privacy Approach*

While privacy interests have been used to justify the use of sex classifications in some employment⁵¹ and public accommodation⁵² contexts, the privacy-based

43. See *id.* at 1294 n.7.

44. See *id.* at 1294.

45. See *id.* at 1291.

46. See *id.* at 1294-95 (Palladino, J., dissenting).

47. See *id.* at 1295 (Palladino, J., dissenting).

48. 347 U.S. 483, 495 (1954).

49. *LivingWell*, 606 A.2d at 1296 (Palladino, J., dissenting).

50. In the early 1990s, an Illinois court considered, but failed to resolve, whether an all-female hiring policy at a chain of health clubs was justified as a "bona fide occupational qualification." See *EEOC v. Sedita*, 755 F. Supp. 808 (N.D. Ill. 1991), *vacated*, *EEOC v. Sedita*, 816 F. Supp. 1291 (N.D. Ill. 1993).

51. In employment, privacy interests have allowed sex to be a bona fide occupational qualification (BFOQ) in the hiring of hospital orderlies, restroom attendants, hospital labor and delivery room employees,

justification for all-female health clubs is deeply flawed for several reasons. First, finding a privacy interest in all-female health clubs strains the definition of privacy. Privacy traditionally has been defined as the exposure of intimate body parts, such as genitalia and breasts.⁵³ Defining exercise as private activity, as did the court in *LivingWell* and the Massachusetts legislature, greatly expands the traditional definition. Under the *LivingWell* and Massachusetts approaches, mere "discomfort" may justify sex classifications. Such a broadening of privacy interests carries risks with it. One critic asks, "Perhaps some people feel uncomfortable exercising with people of different races. Should we permit all-white gyms too?"⁵⁴ Should a construction foreperson be permitted to refuse to hire women for a project because it inhibits his male workers?⁵⁵

Second, the privacy approach validates discrimination against women by exempting all-male as well as all-female health club facilities from public accommodation laws. It is difficult to judge the reliability of the claim that the Massachusetts amendment, for instance, might resurrect all-male clubs and otherwise legitimize discrimination against women. There is some evidence that this threat is more than mere fanciful political hyperbole. It is possible that all-male health clubs have sprung up in other states that have exempted health club facilities from public accommodation laws, such as Hawaii and Pennsylvania.⁵⁶

and a salesperson in a clothing store. See *supra* note 38. In a recent case, the privacy interests of female prison inmates were used to exclude male correction officers from female inmate areas. See *Tharp v. Iowa Dep't of Corrections*, 68 F.3d 223 (8th Cir. 1995). The Eighth Circuit found that the policy was instituted to further legitimate penological and privacy interests in having women conduct urinalysis and body searches of other women. The court also noted that male employees did not suffer termination, demotion, or reduction in pay, but were merely occasionally denied shift assignment of their choice. See *id.* at 226.

52. In the public accommodation context, privacy interests have been used to exempt restrooms, showers, locker rooms, and similar areas. See, e.g., 775 ILL. COMP. STAT. ANN. 5/5-103 (West 1998) (exempting from public accommodation law "[a]ny facility . . . which is distinctly private in nature such as restrooms, shower rooms, bath houses, health clubs and other similar facilities. . ."). In the seven states mentioned above, privacy interests also exempt health clubs from public accommodation laws. See *supra* notes 24-29, 35.

53. See *supra* notes 38, 51.

54. Jennifer Coburn, *Single-Gender Health Clubs Set a Dangerous Precedent*, SAN DIEGO UNION-TRIBUNE, Feb. 19, 1998, at B9.

55. Privacy is a dubious justification for sex discrimination even in the more limited context of "exposure of intimate body parts." Privacy between the sexes is a constructed social norm. Perhaps it might even be described as an archaic sex stereotype. From a practical standpoint, single-sex restrooms, showers, and locker rooms are here to stay, at least for the time being. But the main argument for continuing these customs is inertia. It is worth examining whether segregating the sexes in such "private" settings really bears any rational relation to a legitimate interest. Or does it simply cater to widely held notions of social structure, not unlike racial segregation norms in the Jim Crow South? The main argument for continuing such segregation—other than tradition—involves assumptions about sexual tension. But this argument doesn't support a policy of sex segregation. If anything, it bolsters an argument for sexual orientation segregation: perhaps heterosexual males and homosexual females should use one locker room and homosexual males and heterosexual females another. Our privacy interest protects us against both men and women in equal proportion. Privacy may justify the door on the bathroom stall, but not the wall between the male and female restrooms. In contrast, the remedial theory advocated by this Article provides a stronger rationale for sex segregation in bathrooms, showers, and locker rooms. As long as discrimination—in the form of sexual harassment, violence against women, and sex-role socialization that makes women uncomfortable with their physical appearance—pervades society, separation of the sexes is justified in places where women feel sexually vulnerable.

56. See *Hearing on H.R. 5057 Before the Joint Comm. on Commerce and Labor*, 180th Sess., 1st Term 5 (Mass. 1997) (prepared statement of Douglas Seaver, attorney for Healthworks Fitness Center). Mr. Seaver

There is a definite market for all-male health clubs or clubs that segregate facilities on the basis of sex. A recent national survey found that forty-five percent of men have at least a slight preference for an all-male exercise environment, and that feeling increased with age.⁵⁷

Moreover, the privacy-exemption approach may legitimize sex discrimination against women at *coed* fitness facilities. During the debate over the Massachusetts amendment, one civil rights attorney complained that the proposal would adversely affect two discrimination claims she was handling for female clients. She represented two women who claimed they were discriminated against when they were prohibited from using weight lifting equipment that was designated for the exclusive use of male members of a fitness facility. One of the women was arrested for trespassing as she stood in the area reserved for the use of men.⁵⁸ The Massachusetts amendment threatened to legalize such discrimination and deny these women a legal remedy. Thus, under the privacy approach, all-female clubs can be protected only by legitimizing all-male associations.

By protecting both all-male and all-female facilities, the privacy approach ignores the fact that men and women are not equally disadvantaged by exclusion from single-sex health clubs. Deborah L. Rhode contends that segregation that excludes dominant groups such as men should be treated differently than segregation that excludes subordinate groups such as women and racial minorities.⁵⁹

Rhode argues against upholding all-male organizations in which the effect of sex segregation has been to perpetuate gender disadvantages.⁶⁰ In the case of all-male organizations, Professor Rhode rejects the use of sex as a crude proxy for

reported that Hawaii's "exemption has not resulted in the formation of a significant number of men-only fitness centers" and that after Pennsylvania's judicial sanction of single-sex clubs "few if any all-male fitness facilities" opened in the state. *But see* Ablondi interview, *supra* note 1 (reporting that his organization, a health club industry group, is not aware of the existence of any male-only health club facilities).

57. *See* Wen & Mohl, *supra* note 16, at B1. In a survey of more than 3000 households nationwide, 69% of women and 45% of men responded favorably to this statement: "If I were to join a health club, I would prefer to exercise with members of my own sex, rather than in a mixed environment." Participants could answer that they agreed—or disagreed—with the statement slightly, moderately or strongly. The following is a percentage of those who agreed with the statement in any way:

GENDER Male 45%; Female 69%

WEIGHT (both sexes) Normal 52%; Overweight 61%

AGE (both sexes) 18-34 49%; 35-54 58%; 55+ 67%

GENDER & AGE MALE 18-24 41%; 25-34 33%; 35-44 48%; 45-54 46%; 55+ 55%

FEMALE 18-24 59%; 25-34 65%; 35-44 63%; 45-54 75%; 55+ 77%.

See id.

58. *See* Hearing on H.R. 5057 Before the Joint Comm. on Commerce and Labor, 180th Session, 1st Term 1 (Mass. 1997) (prepared statement of Martha R. Bagley, attorney) [hereinafter Bagley testimony]. The particular claims about which Ms. Bagley spoke actually were not affected by the Massachusetts amendment because Ms. Bagley's clients were discriminated against at a health care facility "owned and operated" by the City of Boston. The Massachusetts amendment reached only those facilities that do not receive funds from a government source. *See* MASS. GEN. LAWS ch. 272, § 92A (1998).

59. *See* Deborah L. Rhode, *Association and Assimilation*, 81 NW. U. L. REV. 106, 120-24 (1986).

60. *See id.* at 120.

social compatibility, "however accurate" those generalizations are.⁶¹ Rhode argues that the social harms of allowing such generalizations in this context are too high and that more accurate screening devices for selecting compatibility are available.⁶²

Rather than focusing on the *benefits* to the *included* group in single-sex settings, Rhode concentrates on the *harm* to the *excluded* group. Finding that women are disadvantaged by all-male settings while men are not disadvantaged by all-female settings, at least in the context of private social clubs, Rhode argues that all-female and all-male settings need not be treated symmetrically.

Separatism imposed by empowered groups carries different symbolic and practical significance than separatism chosen by subordinate groups. Given this nation's historic traditions and cultural understandings, the exclusion of men from women's liberation groups or garden clubs no more conveys inferiority than the exclusion of whites from black associations or Protestants from Jewish social organizations. Nor does such exclusivity serve to perpetuate existing disparities in political and economic power.

By contrast, the forms of institutional separatism chosen by dominant groups tend to reinforce their privileged positions and the stereotypes underlying them.⁶³ At least one commentator has applied this sort of reasoning to the context of all-female health clubs.⁶⁴ Professor David B. Wilkins emphasizes the extent to which "women-only" health clubs fulfill a fundamentally different social purpose than all-male social and athletic facilities. "Women-only" workout clubs are unlikely to stigmatize men as inferior in the manner that all-male clubs stigmatized women. Moreover, the central problem with all-male clubs is the extent to which they denied women access to places where important decisions are made. Given that the vast majority of economic, political, and social power continues to be concentrated in the hands of men, "women-only" facilities are unlikely to produce the same exclusionary effects. Thus, to the extent that "women-only" clubs help to protect the special privacy interests of women, the absence of these other invidious effects substantially diminishes the case for denying women these important benefits.⁶⁵

The Rhode approach of evaluating sex classifications on the basis of the injury to the excluded party may make sense, but this approach is foreign to equality doctrine embodied by equal protection jurisprudence and much anti-discrimination law. The law tends to treat all sex classifications equally—whether benign or invidious, whether injurious or not.⁶⁶ It seems apparent,

61. *Id.*

62. *See id.*

63. *See id.* at 122.

64. *See* David B. Wilkins, *Identities and Roles: Race, Recognition and Professional Responsibility*, 57 MD. L. REV. 1502, 1582-83 (1998).

65. *See id.*

66. The Supreme Court's recent decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), is the clearest indication of the Court's determination to treat all classifications equally, whether benign or invidious. While that case involved racial classifications and, therefore, stricter scrutiny than is applied in sex

however, that any framework for evaluating sex classifications should consider the extent to which the excluded party is being disadvantaged. In most cases, this means that classifications benefiting women should be easier to justify than those benefiting men. By legitimizing both all-female and all-male health clubs, the privacy approach fails to consider that men and women are asymmetrically disadvantaged by segregation and exclusion. The formal equality approach shares this flaw, while the compensatory purpose approach I propose overcomes it.

The third flaw of the privacy approach is that it weakens the state's commitment to eradicating sex inequality, thereby allowing all-male groups to argue that the state's interest is insufficiently compelling to force them to accept female members. Some all-male organizations have tried to use first amendment free association principles to shield them from anti-discrimination laws and deny organizational membership to women.⁶⁷ The Supreme Court has construed the right of free association narrowly when the issue is exclusion based on sex. Forcing a club to accept members implicates first amendment rights, so strict scrutiny is applied. But anti-discrimination laws overcome strict scrutiny because they serve a "compelling interest in eradicating discrimination" based on sex.⁶⁸ A different result might occur if an organization could prove that forcing it to accept members of the excluded sex would impair its first amendment message,⁶⁹ but the Court is extremely skeptical of the use of sex as a proxy for viewpoint compatibility.⁷⁰

Indirectly and perversely, the privacy-based exception to public accommodation laws that states like Massachusetts have enacted may actually make it easier for men to exclude women from all-male organizations. Every time a state dilutes its laws against sex discrimination, it declares, in effect, that it is ratcheting down its interest in eliminating sex inequality. It even may be saying that its interest in ending sex-based disadvantages is no longer compelling. But nothing short of a "compelling" governmental interest will overcome the freedom of association defense employed by all-male organizations seeking an

classification cases, there is little reason to think the Court would be much less determined in the case of sex classifications. In *Adarand*, the Court stated, "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification. . . . Despite the surface appeal of holding 'benign' racial classifications to a lower standard, because it may not always be clear that a so-called preference is in fact benign." *Id.* at 224-26 (internal quotations omitted).

67. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (rejecting an all-male organization's claim that Minnesota's anti-discrimination law infringed its freedom of association by forcing it to admit women).

68. *Id.* at 610.

69. See *id.* at 627; see also *Hurley v. Irish-American Gay Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that a private parade did not have to allow gay marchers to march under their own banner); *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988) (stating that it was "conceivable . . . that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership").

70. See *Roberts*, 468 U.S. at 628.

exemption from public accommodation laws.⁷¹ Thus, the privacy approach may roll back women's gains and arm all-male organizations with a constitutional shield. In contrast, both the formal equality and remediation approaches avoid a weakening of a state's commitment to ending sex-based disadvantages.

Fourth, the privacy approach actually may be doing little more than giving effect to customer preferences, an impermissible goal. The privacy approach is rooted more in the "discomfort" of female club members than in a bona fide privacy concern. Customer preferences almost never justify sex classifications.⁷² The mere existence of a rational motivation has never been enough to uphold sex discrimination against legal challenge, whether in the economic (customer preference) context⁷³ or in the context of using preemptory challenges to strike female jurors.⁷⁴ To uphold a sex classification in the employment context, sex must be a "bona fide occupational qualification."⁷⁵ It would be anomalous to allow the preferences and prejudices of customers to determine whether the sex discrimination at issue is valid. To a large extent it is just such prejudices that civil rights laws and the equal protection doctrine were created to overcome. To the extent that privacy-based amendments to state public accommodation laws merely give effect to customer preferences, they are illegitimate.

Finally, the privacy approach deals a blow to the principle of equality. As the Massachusetts chapter of the National Organization for Women argued in opposing the Massachusetts amendment, "Equality must mean that both men and women have equal access to public accommodations, and in this case, women must give up the perks of belonging to women-only health clubs in the interests of long-term equality for all."⁷⁶ Sex classifications should be justified only where

71. See *id.* In *Roberts*, a Jaycee organization claimed it could not be forced to accept female members, notwithstanding a state anti-discrimination statute that prohibited discrimination on the basis of sex. The Supreme Court acknowledged that all-male clubs have a First Amendment free association interest in excluding female members. Thus, so-called "strict scrutiny" was applied and only a "compelling" state interest could justify forcing the Jaycees to "associate" with female members. The Court concluded, however, that this rigorous scrutiny was satisfied because the state's "compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms." *Id.* at 623. If state anti-discrimination laws are diluted by allowing single-sex clubs, it will be harder to conclude that the state considers ending sex classifications a "compelling" interest and cases such as *Roberts* might be decided differently in the future.

72. The EEOC recently sued a bar in Texas for paying male bartenders less than female bartenders on the grounds that customers preferred female bartenders. See *2 Men Claim Bias*, HOUSTON CHRON., Apr. 23, 1998, at 30. In another case, the EEOC sued a J. Crew subsidiary for refusing to hire men as customer representatives because women related better with female customers. See *Suit Accuses J. Crew of Mail Gender Bias Workplace*, L.A. TIMES, Sept. 4, 1998, at D3.

73. See, e.g., *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (declaring invalid defendant airline's policy restricting its hiring for cabin-attendant positions to females).

74. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 148-49 (1994) (O'Connor, J., concurring) (prohibiting the use of preemptory jury challenges solely on the basis of sex even though "[w]e know that like race, gender matters. A plethora of studies make clear that in rape cases, for example, female jurors are somewhat more likely to vote to convict than male jurors.").

75. 42 U.S.C. § 2000e-2(e) (1998); see also *Diaz*, 442 F.2d at 386.

76. *Hearing on H.R. 5057 Before the Joint Comm. on Commerce and Labor*, 180th Session, 1st Term 1-2 (Mass. 1997) (statement of Cheryl Garrity, President, Massachusetts chapter of the National Organization of Women) [hereinafter Garrity testimony].

they are remedial—where they employ limited inequality to advance the long-term goal of ending sex-based disadvantages.

For the foregoing reasons, privacy is not a constructive tool in building a framework for evaluating sex classifications such as all-female health clubs.

IV. THE FORMAL EQUALITY APPROACH: "GENDER BLINDNESS"

A. *Advantages and Flaws in the Formal Equality Approach*

Most public accommodation laws are "gender blind," that is, they prohibit sex-based policies in virtually all cases. This approach has the advantage of simplicity and uniformity. It also constitutes a powerful strategic weapon in the hands of many traditional feminist advocates—such as NOW—that believe an unwavering commitment to formal equality offers the best hope of attaining genuine equality for women. This position explains the strong opposition to all-female health clubs by the Massachusetts chapter of NOW, opposition to the all-girls Young Women's Leadership School by the New York chapter of NOW,⁷⁷ and the skepticism about single-sex schools by the American Association of University Women.⁷⁸ Advocates for gay and lesbian rights also may favor a formal equality approach. For champions of gay and lesbian equality, a law that never sanctions discrimination may offer the best legal strategy.

During the Massachusetts debate over whether to exempt all-female health clubs from the state public accommodation law, equal rights groups lobbied against weakening the formal equality approach embodied in the public accommodation law. The National Association of African-Americans, a two-hundred-member Boston organization, described the amendment as "retreating to the old days of discrimination, segregation, and exclusion."⁷⁹ Gay and lesbian advocates also worked against the amendment.⁸⁰ And the leading opponent of the amendment, the Massachusetts chapter of NOW, argued:

77. New York NOW filed a charge with the Department of Education Civil Rights Division claiming that the Young Women's Leadership School, an all-girls public school in East Harlem, violated Title IX of the Civil Rights Act of 1964, which prohibits sex discrimination by institutions receiving federal aid. See Fountain, *supra* note 8, at 5F.

78. A 1998 report by the American Association of University Women questioned the effectiveness of single-sex schools and classrooms. See AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., SEPARATED BY SEX 2 (1998); see also Fountain, *supra* note 8, at 5F.

79. Wen, *Single-Sex Health Clubs Get Protection*, *supra* note 7, at B1 (quoting Jack E. Robinson, president of the National Association of African-Americans).

80. See Goldberg, *supra* note 7, at A10.

As a matter of policy, we cannot advocate for the end of male-only bastions on the one hand, while sanctioning women-only clubs on the other. Equality must mean that both men and women have equal access to public accommodations, and in this case, women must give up the perks of belonging to women-only health clubs in the interests of long-term equality for all.⁸¹

Women's advocates who opposed the amendment acknowledged that all-female health clubs help women, but argued that the larger issue of equality outweighed the narrow interest in being able to work out in a woman-friendly environment. If women want equality, said Cheryl Garrity, the NOW chapter's president, they must give up perks. "It benefits women," she said of the health clubs, "but we have to give it up because discrimination is wrong."⁸² NOW argued that women's discomfort with a mixed-sex environment was insufficient to overcome the interest in adhering to a principle of formal equality. "A history of exclusion by those who are 'uncomfortable' with people who are different is the very reason we passed public accommodation laws in the first place, laws that make it illegal to discriminate on the basis of religion, creed, race, color, gender, sexual orientation, national origin, or disability," declared NOW's prepared testimony opposing the amendment.⁸³ The Massachusetts chapter of NOW threatened to challenge the amendment under the state's equal rights amendment, especially if an all-male gym opened for business.⁸⁴

Opponents of single-sex health clubs who ascribe to the formal equality approach contend that the answer to the problems faced by women in coed health clubs is to make these facilities "a comfortable environment for women, albeit within a coed setting."⁸⁵ They argue that harassing behavior be vigorously rooted out. "The solution to the problem is for these facilities to set forth and enforce rules of behavior which would protect all members from unwelcome advances or harassment," one opponent of the Massachusetts amendment argued.⁸⁶ Health clubs could cater to women's health and fitness needs and market themselves to women, just as women's clothing stores do, but the one thing they could not do is exclude male members.⁸⁷ Health clubs could "feminize," but they could not formally segregate. This argument resembles the Supreme Court's decision in the case desegregating the Virginia Military Institute (VMI),⁸⁸ in which the Court approved of VMI's "adversative" (masculine) pedagogy, but denied VMI's right to exclude female cadets. Similarly, Deborah Rhode suggests that the solution to

81. Garrity testimony, *supra* note 76, at 1-2.

82. Goldberg, *supra* note 7, at A10.

83. Garrity testimony, *supra* note 76, at 2.

84. See Wen, *Single-Sex Health Clubs Get Protection*, *supra* note 7, at B1.

85. Garrity testimony, *supra* note 76, at 1.

86. Bagley testimony, *supra* note 58, at 1.

87. See Garrity testimony, *supra* note 76, at 2.

88. *U.S. v. Virginia*, 518 U.S. 515 (1996).

schools that disadvantage females is to "feminize" coed schools rather than resort to separate schools for male and female students:

Separatist education, like other forms of separatist affiliation, offers the vices and virtues of a ghetto: it provides support, solidarity, and self-esteem for subordinate groups, but often at the price of perpetuating attitudes that perpetuate subordination. . . .

Separate-but-equal as educational policy remains a perplexing misnomer. In some respects separate is better. . . . In the long run, however, the role of separatist education requires reexamination. Responding to problems in mixed institutions by perpetuating segregated alternatives is at best a palliative. In all-female settings, it is more difficult to challenge the underlying cultural attitudes that perpetuate subordination; by definition, many of those most in need of such challenge are absent. Moreover, . . . the strongest arguments for all-women's institutions raise obvious problems of asymmetry. It is difficult to defend women's separate culture while demanding entry into men's. . . . One goal of contemporary women's schools should be to create a society in which their compensatory function no longer is required. To the extent that women's institutions have been especially supportive for women, by providing role models, leadership opportunities, and positive faculty/student interaction, such characteristics should become more dominant in coeducational environments as well.⁸⁹

Health clubs are not schools—they do not play the major role in socialization that schools play—but much of Rhode's reasoning applies to the health club context.

The weakness of formal gender-blindness is apparent. This approach is rigid, and offers no outlet for remedial efforts. This weakness is illustrated by *Foster v. Back Bay Spas, Inc.*,⁹⁰ the Massachusetts lawsuit, in which an all-female health club was ordered to offer membership to men. Confronted with a gender-blind anti-discrimination statute and the defendants' weak privacy defense, the court summarily ruled against the health club. The formal equality approach ignores the fact that men and women are asymmetrically disadvantaged by single-sex environments. In its inflexibility and formality, the approach fails to consider that sexual distinctions sometimes advance the equality interests that anti-discrimination laws ultimately were created to further. In the end, the formal equality approach, like the privacy approach, is deeply flawed.

89. Rhode, *supra* note 59, at 143-45.

90. No. 96-7060, 1997 WL 634354 (Mass. Super. Ct. Oct. 1, 1997).

B. *Inapplicability of "Real Differences" Doctrine*

Real differences doctrine, which can be categorized as a corollary to formal equality theory, should be mentioned, but ultimately is inapplicable to the dilemma posed by single-sex health clubs. Sexual classifications in some contexts are justified upon an assumption that men and women are not truly similarly situated because of so-called "real differences" between men and women. In its equal protection cases, the Supreme Court has upheld classifications based on "real differences" where the state denied health care benefits for pregnancy services,⁹¹ where a state law punished men but not women for statutory rape,⁹² and where a state provided a preference for veterans in public employment even though most veterans were men.⁹³

Real differences justifications also influence the statutory approaches to sex discrimination law. Employment discrimination statutes allow sex classifications based on the physical characteristics of men and women. Public accommodation statutes exempt bathrooms and showers based, presumably, on physical differences between men and women.⁹⁴ Title IX of the federal Civil Rights Act of 1964, which prohibits sex discrimination by educational institutions receiving federal aid, allows segregated athletic teams based on actual physical differences.⁹⁵

One could argue that real differences justify all-female health clubs. Some gyms have separate free weight areas for men and women because the women's area has equipment that is lighter and easier to handle. Some clubs have more lower body machines targeting the abdominal area and hips and thighs in the women's area. Gym equipment is often designed for men.⁹⁶ Because of the expense of buying equipment, most clubs have only one set of equipment. A few clubs, such as California's Linda Evans chain, stock equipment geared specifically for women.⁹⁷ The argument that these differences justify segregated fitness clubs ultimately falls short, however. Some men undoubtedly would find the "women's" equipment desirable, and some women would want to use the "men's" equipment. As the Supreme Court concluded in the VMI case, *United*

91. See *Geduldig v. Aiello*, 417 U.S. 484, 497 n.20 (1974) (claiming that the challenged classification was not "based upon gender as such" because the law classified on the basis of pregnancy and not sex).

92. See *Michael M. v. Superior Court*, 450 U.S. 464, 473 (1981) (concluding that because only women can get pregnant that law was justified as "equaliz[ing] the deterrents on the sexes").

93. See *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) (holding that disparate impact on women was insufficient to establish an Equal Protection Clause violation).

94. See, e.g., TENN. CODE ANN. § 4-21-503 (1998) (allowing "segregation on the basis of sex for bathrooms, health clubs, rooms for sleeping or changing clothes, or other places of public accommodation the commission specifically exempts on the basis of bona fide considerations of public policy").

95. See 45 C.F.R. § 86.41(b) (1999) (stating that "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").

96. See Lisa Jackson, *All-Female Health Clubs a Big Hit: Separate Workout Areas Give Women Chance to Lift in Peace*, DETROIT NEWS, Nov. 5, 1997, at C5.

97. See Ablondi interview, *supra* note 1.

States v. Virginia, sex classifications based on the “average” man or woman are unjustified.⁹⁸

V. A NEW APPROACH: REMEDIATION

Like most anti-discrimination laws, and consistent with equal protection doctrine, public accommodation laws generally embody a formal equality approach. Unlike anti-discrimination laws and equal protection doctrine, however, public accommodation laws do not allow the use of sex classifications for compensatory purposes. Other statutory and judicial anti-discrimination policies allow sex classifications to remedy sex-based disadvantages. Title VII allows voluntary affirmative action programs to counteract sex-based disadvantages in employment.⁹⁹ Similarly, Title IX allows affirmative action programs to remediate sex-based disadvantages in public educational institutions.¹⁰⁰ In the judicial context, equal protection case law allows sex classifications to remedy sex disparities.¹⁰¹ Oddly, public accommodation laws make no allowance for remedial efforts, a failing that this Article proposes to rectify.

A. Background on Remediation: Equal Protection Doctrine

Any proposal for a compensatory purpose approach should understand the constitutional landscape. In several respects, equal protection doctrine supports the compensatory purpose approach advocated here. For example, the doctrine accepts sex classifications for remedial purposes. It also recognizes that sex segregation may sometimes be beneficial. Finally, like the proposal made in this Article, the doctrine limits the use of sex classifications for compensatory purposes to those situations that do not perpetuate sex stereotypes.

The equal protection doctrine’s approach to sex classifications can be summarized briefly. Where the state differentiates on the basis of sex, the state is required to show an “exceedingly persuasive justification” for the classification.¹⁰² The state must show at least that the challenged classification serves important governmental objectives and that the discriminatory means

98. *U.S. v. Virginia*, 518 U.S. 515, 541-42 (1996) (concluding that VMI needed to be open for women as long as *some* women preferred the adversative environment).

99. *See, e.g., Johnson v. Transportation Agency*, 480 U.S. 616, 634 (1987) (stating that sex or race may be considered for the purpose of remedying underrepresentation of women and minorities in traditionally segregated job categories).

100. Subpart A of the Title IX regulations permit a covered institution to adopt voluntary affirmative measures where persons of a particular sex have limited participation in an education program or activity. *See* 34 C.F.R. § 106.3(b) (1999); *see also* Fred Von Lohmann, *Single-Sex Courses, Title IX, and Equal Protection: The Case for Self-Defense for Women*, 48 STAN. L. REV. 177, 183-93 (1995) (discussing the potential use of affirmative remedial action under Title IX to permit single-sex education).

101. *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982) (stating that “a State can evoke a compensatory purpose to justify an otherwise discriminatory classification . . . if members of the gender benefited by the classification . . . suffer a disadvantage related to the classification”).

102. *See id.* at 718.

employed are substantially related to the achievement of those objectives. The justification must be genuine, not hypothesized or invented post hoc in response to litigation. "And it must not rely on overbroad generalizations or stereotypes about the different talents, capacities, or preferences of males or females."¹⁰³ Sex segregation can be an acceptable goal, at least in the educational context, if for a truly remedial purpose. In *Mississippi University for Women v. Hogan*,¹⁰⁴ the Court acknowledged that, in "limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened."¹⁰⁵ A state can establish a "compensatory purpose" justification "if members of the gender benefited by the classification actually suffer a disadvantage related to the classification."¹⁰⁶

The Court has suggested that sex segregation may have benefits, at least in the context of higher education. In *United States v. Virginia*,¹⁰⁷ the case desegregating the Virginia Military Institute, the Court stated, "[s]ingle-sex education affords pedagogical benefits to at least some students . . . and that reality is uncontested in this litigation. Similarly, it is not disputed that diversity among public educational institutions can serve the public good."¹⁰⁸ But sex segregation may not perpetuate gender stereotypes. In *U.S. v. Virginia*, the Court assailed the use of gender stereotypes as a justification for separate and distinct education. The district court had made findings on "gender-based developmental differences" based on expert testimony that characterized typically male or typically female "tendencies," such as "[m]ales tend to need an atmosphere of adversativeness," while "[f]emales tend to thrive in a cooperative atmosphere."¹⁰⁹ Such generalizations were not a legitimate basis for sex segregation.

The constitutional standard, at least in theory, allows sex classifications for any "exceedingly persuasive" purpose, not just remediation. In practice, however, the Court rarely has sustained a sex classification for any purpose other than remediation. The constitutional standard is at once both broader and narrower than the remediation standard advocated in this Article. It is broader—at least theoretically—because it would sustain sex classifications for *any* sufficiently compelling purpose, not just remediation. It is also narrower because it may thinly construe the bounds of remediation, whereas this Article advocates that remediation be defined liberally.

103. 518 U.S. at 516.

104. 458 U.S. 718 (1982).

105. *Id.* at 728.

106. *Id.*

107. 518 U.S. 515 (1996).

108. *Id.* at 535.

109. *Id.* at 541 (internal quotations omitted).

B. *Proposing a Remediation Approach*

A broadly defined remedial standard, with appropriate safeguards, offers a promising legal framework for resolving questions about sex classifications in public accommodations. Accordingly, legislatures confronting challenges to all-female health clubs should amend their public accommodation laws by adopting a remedial framework, under which sex classifications satisfying the following criteria would be permitted:

- (1) There is a sex-based disadvantage suffered;
- (2) The intention in forming or continuing a sex classification is to compensate for this disadvantage;
- (3) The sex classification directly and substantially compensates for the previous sex-based disadvantage;
- (4) The sex classification is not based upon and does not perpetuate archaic and stereotyped notions of the abilities or roles of the sexes; and
- (5) The use of the sex classification does not substantially and unnecessarily burden the sex that is disadvantaged by the compensatory action.

The first of these elements merely provides that there has been some real disadvantage based on sex. Thus, for instance, the women-only admissions policy in *Mississippi University for Women v. Hogan*¹¹⁰ would fall outside this framework because women were not disadvantaged in nursing school admissions. The first part of the proposed remediation framework makes it both easier and harder to justify sex classifications than the equal protection standard. It is easier where there is demonstrable sex-based disadvantage—no “exceedingly persuasive justification” is required—but harder where there is no history of disadvantage. Thus, generally speaking, classifications designed to assist women would be easier to justify than those seeking to help men. The third element of the framework merely assures that there be a substantial connection or fit between the remedy of a sex classification and the problem of sex-based disadvantage. The fourth and fifth elements introduce balancing into the standard: where the benefits of a sex classification would be outweighed by the costs to equality—in terms of reinforcing stereotypes or a substantial, unnecessary burden on the excluded sex—a classification would not be justified.

This proposal does not break entirely new ground. It builds on the remediation standards in the equal protection doctrine, Title VII, and Title IX, and borrows heavily from some commentators who have argued that remediation, broadly defined, offers the best approach to separating worthwhile sex classifications from harmful ones. This framework relies particularly heavily on the work of Chai R. Feldblum, Nancy Fredman Krent, and Virginia G.

110. 458 U.S. 718 (1982).

Watkin.¹¹¹ These commentators have proposed a broad remedial standard for adjudicating questions about the validity of single-sex organizations and clubs.

To Feldblum, Krent, and Watkin, the compensatory purpose doctrine offers the best hope of safeguarding meritorious all-female organizations and drawing a line between those all-female organizations that should be preserved and those that should give way to sex-blindness. They argue that some all-female organizations counteract the social disadvantages that women have suffered. They would invoke the compensatory purpose doctrine where acting in a "sex-blind" or formally "equal" manner would result in perpetuating existing inequalities. Where girls and women are not treated as equals in a mixed-sex setting, single-sex organizations are compensatory and consistent with the purposes of equal protection doctrine and anti-discrimination laws.¹¹²

These commentators argue for a broad notion of compensation based on the theory that men and women are not similarly situated. Rather than relying on biological differences for this conclusion, however, they base their argument instead on socially created differences. They write, "[a] legacy of sex-role socialization has left many women still disadvantaged in ordinary mixed-sex settings. Thus, in certain ways, women are still different from men and certain sex classifications, such as those inherent in all-female organizations, respond to and compensate for such differences."¹¹³

These commentators suggest a four-part test, based loosely on *Mississippi University for Women v. Hogan*,¹¹⁴ that would sustain all-female organizations that demonstrate that (1) there is a sex-based disadvantage suffered by its membership related to its basis of classification; (2) the intention in forming or continuing the organization is to compensate for this disadvantage; (3) the organization's programs and policies are not based upon and do not perpetuate archaic and stereotyped notions of the abilities or roles of the sexes; and (4) it is the organization's single-sex policy and programs that directly and substantially help its members compensate for the previous disadvantage.¹¹⁵

The key departure of this approach from much traditional sex equality theory is that remediation is quite broadly—and realistically—defined. Such a broad notion of remediation has at times been recognized by the Supreme Court in justifying sex classifications. One such case, *Johnson v. Transportation Agency*,¹¹⁶ set forth the standards for allowing voluntary affirmative action programs under Title VII. The Court held that an actor who chooses to remedy or compensate for discrimination against women need not itself have been the cause of the initial discriminatory injury. The Court held that an employer seeking to justify the adoption of a voluntary affirmative action plan "need not point to its

111. See Chai R. Feldblum et al., *Legal Challenges to All-Female Organizations*, 21 HARV. C.R.-C.L. L. REV. 171 (1986).

112. See *id.* at 173.

113. *Id.* at 214.

114. 458 U.S. 718 (1982).

115. See Feldblum et al., *supra* note 111, at 219.

116. 480 U.S. 616 (1987).

own prior discriminatory practices.”¹¹⁷ Rather, the employer need point only to a “conspicuous . . . imbalance in traditionally segregated job categories.”¹¹⁸ The Court was motivated by “the recognition that voluntary employer action can play a crucial role in . . . eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts.”¹¹⁹

Recent Supreme Court cases suggest a stronger connection between injury and remedy would be required under an equal protection analysis. Under the *Hogan* standard, a voluntary affirmative action program must benefit the same women who were injured by past discrimination.¹²⁰ The fit need not be perfect, however. A remedy benefiting *women as a whole* apparently will withstand constitutional challenge so long as the injury is generally dispersed in the female population. This proposition is supported by the Supreme Court’s decision in *Califano v. Webster*,¹²¹ which involved a challenge to a statutory classification that allowed women to eliminate more low-earning years than men for purposes of computing Social Security retirement benefits. Although the effect of the classification was to allow women higher monthly benefits than were available to men with the same earnings history, the Court upheld the statutory scheme, noting that it took into account that women “as such have been unfairly hindered from earning as much as men” and “work[ed] directly to remedy” the resulting economic disparity.¹²²

Such a broad compensatory or remedial approach also has been urged in the Title IX context. University-sponsored, all-female self-defense classes may be justifiable as “affirmative remedial action” allowable under Title IX.¹²³ As one commentator argues, “Self-defense classes for women can serve as a remedy for the effects of the discriminatory realities of on-campus sexual discrimination, harassment, and violence that adversely affect women’s educational opportunities.”¹²⁴

These commentators focus on the benefits to women of all-female settings, rather than on the harm to the excluded men. Von Lohmann, for instance, proposes a remedial formula that would preserve single-sex classes only where they “provide benefits to women.”¹²⁵ Remedial sex classifications, however, must account for the harm to men as well as the benefit to women. In *Johnson v. Transportation Agency*,¹²⁶ for instance, the Supreme Court upheld a voluntary

117. *Id.* at 630 (citing *United Steel Workers of America v. Weber*, 443 U.S. 193, 212 (1979)).

118. *Id.* (citing *United Steel Workers of America v. Weber*, 443 U.S. 193, 209 (1979)).

119. *Id.* (citing *United Steel Workers of America v. Weber*, 443 U.S. 193, 204 (1979)).

120. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982) (stating, “[i]t is readily apparent that a State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification”).

121. 430 U.S. 313 (1977).

122. *Id.* at 318.

123. Von Lohmann, *supra* note 100, at 183.

124. *Id.*

125. *Id.* at 181.

126. 480 U.S. 616 (1987).

affirmative action plan aimed at remedying underrepresentation of women and minorities in traditionally segregated job categories only because the plan did not "unnecessarily trammel" rights of male employees or "create an absolute bar" to their advancement.¹²⁷ A remedial theory also must ensure that a compensatory purpose is not used to justify sex classifications at the cost of perpetuating sex stereotypes about either men or women. The fourth and fifth parts of the framework proposed in this Article give appropriate weight to these potential harms of compensatory sex classifications.

Feldblum and her co-authors make a strong case for a compensatory purpose exception to public accommodation laws, but they stop short of recommending formal legislative action to amend these laws. Rather, they argue that such an exception is implicit in public accommodation laws. Writing in 1986, they predicted that courts would infer the exception if raised as a defense by all-female organizations challenged under public accommodation laws.¹²⁸ Experience suggests that these authors were overly optimistic. There is no evidence of courts reading compensatory purpose exceptions into public accommodation laws. In neither the Pennsylvania nor the Massachusetts cases highlighted in this Article did the reviewing court make reference to such a defense for all-female health clubs. Even the Pennsylvania court, so sympathetic to the cause of all-female health facilities, decided to infer a privacy exception rather than a compensatory purpose exception to the state's public accommodation law. The evidence suggests, therefore, that only legislative amendment of these laws will provide all-female health clubs and other worthwhile public accommodations the protection they warrant.

127. *Id.* at 630.

128. See Feldblum et al., *supra* note 111, at 222-23. They contend:

[The compensatory purpose] doctrine is a novel one in the public accommodation field and an organization seeking to rely upon it would have to convince a court of the doctrine's applicability to public accommodation laws. This is not, however, an insurmountable task.

If an all-female organization is challenged under a state public accommodation statute, it can show that it was not intended by the state legislature to be included within the purview of the statute. Rather than arguing that it does come within the statutory construction of the term 'place of public accommodation,' the organization can insist that a statute prohibiting discrimination on the basis of sex implicitly exempts from coverage any entity that advances the underlying goals of the legislation. . . .

This interpretation of an anti-discrimination statute would draw on the Supreme Court's development of the compensatory purpose doctrine in the area of federal equal protection and the adoption of that doctrine by various courts in addressing challenges brought under state [Equal Rights Amendments]. Because few if any state legislative histories include an explicit endorsement of this type of compensatory purpose exception for all-female organizations, the defense depends on a court's willingness to infer such an endorsement from the intent of the sex-discrimination prohibition. Such an intent should, however, be implicit in any statute designed to promote equality between the sexes.

Id.

C. Advantages of a Remediation Approach

The proposed framework reflects the fact that sex classifications tend to disadvantage men and women asymmetrically. Sex classifications which exclude a dominant sex should be easier to justify than those which exclude a subordinate sex. At the same time, this framework recognizes that sex classifications should become harder to justify as the harm to the excluded group increases. Second, this framework does not call into question the state's commitment to sex equality; the framework makes clear that the state's interest in ending sex-based disadvantages is compelling. Third, in drawing on equal protection doctrine, this framework recognizes that single-sex accommodations may sometimes serve society's overall interests, and the framework acknowledges a presumption against sex classifications which perpetuate sex stereotypes. Fourth, the framework adheres to the principle of equality, and permits departures from gender-blindness only when those departures more effectively serve the goals of equality. Thus, this proposal justifies sex classifications in the public accommodation context where use of a sex classification compensates for sex-based disadvantages. This proposal allows sex classifications in the remediation context, just as they already are permitted in employment, in public education, and under equal protection doctrine.

The proposed approach is not a panacea. It departs from formal equality, which carries symbolic costs to the principal of sex equality. Moreover, permitting single-sex environments, even where compensatory, may perpetuate sex stereotypes and reinforce feelings in some women and men that the sex segregation is tolerable generally. It may teach men to think they are incapable of sharing semi-private spaces with women. It may encourage women to think they are incapable of competing with men in physical environments. In addition, the proposed five-part compensatory purpose approach calls for a fact-specific inquiry to determine if a particular facility is justified. This approach may lead to costly litigation and, perhaps, non-uniform results. In contrast, the rigid privacy and formal equality approaches offer uniformity and low implementation costs. The compensatory purpose approach, moreover, will evolve over time. As time elapses and sex-based disadvantages theoretically diminish, compensatory sex classifications should become harder to justify. All remediation is in theory temporary. Finally, the proposed remediation approach is based on a broad notion of "compensatory purpose" by identifying generalized sex-role socialization as a sex-based disadvantage warranting remediation. Analogizing to the equal protection context, it is unlikely that such a broad notion of remediation would be upheld with respect to racial classifications, where strict scrutiny applies. But sex classifications confront lesser scrutiny.

VI. APPLYING THE FRAMEWORK TO ALL-FEMALE HEALTH CLUBS

Under the proposed five-part framework, state public accommodation laws would be amended to allow remedial sex classifications. As demonstrated below, all-female accommodations such as health clubs would be protected under this framework.¹²⁹

All-female health clubs serve two remedial purposes. First, they combat what commentators Feldblum, Krent, and Walker have termed a "legacy of sex-role socialization [that] has left many women still disadvantaged in ordinary mixed-sex settings."¹³⁰ Society defines women as subordinate and physically weaker than men. It defines athletics as a male preserve. Due to such deeply pervasive socialization, women may feel intimidated from joining mixed-sex health clubs, exercising in workout clothes in front of men, and using an exercise machine that a man is waiting to use. Research has indicated that most members of female health clubs would not join a coed facility.¹³¹ "There is a sizable group of mid to late age women who for reasons of poor self image, timidity, performance anxiety, and fear of humiliation, would not exercise if men were present," according to the testimony of Dr. Scott E. Kerns, a primary care doctor in Salem, Massachusetts.¹³² He continued:

They would not attire themselves in exercise clothing, would not display themselves, or risk poor performance in front of men. They tend to be obese, hypertensive, and may have coronary disease. Medically speaking they need a regular exercise program with good supervision. A significant proportion of these people would just not go to a mixed-gender facility.¹³³

129. While this Article focuses on one particular type of public accommodation—all-female health clubs—other accommodations could be challenged as illegal sex classifications under public accommodation laws. One example is all-female running races. See Claire Kowalchik, *Woman to Woman: Girl Power*, RUNNER'S WORLD, June 1, 1998, at S9 (surveying female runners' views about sex-segregated races). Shelters that exclude men also could be challenged. For instance, a Wisconsin man recently filed a lawsuit against a county domestic abuse agency, claiming the agency violated Wisconsin law by providing shelter to women and children but not equally to men. The state Equal Rights Division found probable cause for the claim. See *Men's-Rights Activist Sues Abuse Agency*, MILWAUKEE J. & SENTINEL, June 8, 1997, at 3. In another case, homeless advocates in Chicago alleged that family homeless shelters discriminated against males between the ages of 12 and 18. The shelters, which provided dormitory-style sleeping areas for families and children, allegedly excluded teenage males, but not female teens, on privacy grounds. See *All Things Considered* (NPR radio broadcast, Feb. 10, 1999).

130. Feldblum et al., *supra* note 111, at 214 & n.207.

131. Dr. Robert Tanenbaum testified that more than 80% of the members of an all-female health club in Boston would stop patronizing the club if men were allowed to join. See *Foster v. Back Bay Spas, Inc.*, No. 96-7060, 1997 WL 634354, at *1 (Mass. Super. Oct. 1, 1997) (summarizing an affidavit submitted by Dr. Tanenbaum on behalf of the health club defendant); see also Tanenbaum testimony, *supra* note 5, at 3 (concluding that over 80% of women answering a survey or interviewed said that their motivation to exercise in a same sex environment was the most important reason or the decisive reason for joining a single-sex facility).

132. *Hearing on H.R. 5057 Before the Joint Comm. on Commerce and Labor*, 180th Session, 1st Term 1 (Mass. 1997) (prepared statement of Scott E. Kerns, M.D.) [hereafter Kerns testimony].

133. *Id.*

According to Dr. Robert L. Tanenbaum, a clinical psychologist, members of all-female health clubs perceive themselves as out of shape and experience a high level of “performance anxiety”—meaning they feel intimidated and anticipate difficulties—when exercising in public, especially in the presence of men.¹³⁴ Exercises leading to pronounced performance anxiety include spreading one’s legs and thrusting one’s pelvis, exposing one’s chest while bouncing up and down, and bending over with one’s arms outstretched. Exercise attire such as spandex shorts and a jog bra or T-shirt contributes to performance anxiety, he said.¹³⁵ These women focus on improving their physical condition and health and do not want to be concerned with a sexualized dynamic and the concurrent emphasis on appearance. Many members of all-female health clubs express concern about being observed and judged physically by members of the opposite sex at a time when they are focused on gaining control over the function and appearance of their bodies.¹³⁶ Women club members between the ages of thirty and fifty who have undergone various bodily changes may feel particularly intimidated about exercising in the presence of the opposite sex, according to Dr. Tanenbaum. Many of these women have experienced bodily changes associated with pregnancy and childbirth which alter their appearance. Some women experience embarrassment of menstrual staining during exercise. Other women have recently gone through menopause and are adjusting to the functional changes in their bodies as they go through the aging process. Still other women struggle with changes in their appearance due to physical problems, such as mastectomies, osteoporosis, and back pain.¹³⁷

Lawmakers enacting legislation protecting all-female health clubs in Massachusetts implicitly recognized that such clubs compensate for socialized sex roles that disadvantage women. A sponsor of the bill stated, “There are older women who feel embarrassed or uncomfortable exercising in the presence of men.” He added, “it’s a fairly intimate environment, you’re in a semi-state of dress. . . . You’re in all sorts of positions that leave women, and men for that matter, vulnerable.”¹³⁸ A female state senator added, “We all know men like to look at women. Guess what? There are some women who don’t mind it. But there are some women who do.”¹³⁹ Noting all the public comment about Hillary Clinton’s thighs in much-publicized vacation photographs of her and the President, she said women’s bodies are constantly scrutinized.¹⁴⁰

Second, all-female health clubs compensate for specific violent experiences suffered by some female club members at the hands of men. Violence against

134. Tanenbaum testimony, *supra* note 5, at 3-4.

135. *See id.* at 1.

136. *See id.* at 3.

137. *See id.* at 4.

138. *New Law Protects Women-Only Health Clubs*, *supra* note 4, at C4 (quoting Rep. Doug Peterson, who sponsored the bill).

139. *Id.*

140. *See Wen, Single-Sex Health Clubs Get Senate OK*, *supra* note 32, at B2 (quoting Sen. Dianne Wilkerson).

women is endemic. Conservative estimates suggest that between twenty to thirty percent of females over the age of twelve will experience a violent sexual assault outside of marriage at some point in their lives.¹⁴¹ Studies show that from one-fifth to one-third of all women will be physically assaulted by a partner or ex-partner during their lifetime.¹⁴² Because violence against women is a general problem, broad solutions such as sex-segregated public accommodations may constitute justifiable remedies. Many members of all-female health clubs are recovering from past physical or sexual abuse by men.¹⁴³ During the Massachusetts debate, Dr. Kerns testified that "[f]emale victims of male physical, verbal, and sexual abuse also find mixed-gender situations an obstacle to exercise."¹⁴⁴ Some health club members may be exercising as part of a self-defense regimen. Their exercise plan may be part of a program to enhance self-esteem. Female club members may be the victims of sexual harassment, a form of sex discrimination. In a 1976 *Redbook* study of nine thousand women, eighty-eight percent of respondents reported that they had experienced sexual harassment, and the vast majority of women surveyed found unwelcome sexual attention humiliating, demeaning, and intimidating.¹⁴⁵ For these women, being subjected to even mild "leering" by male club members might be traumatic and might deter them from attending a health club.

All-female health clubs thus satisfy the first three prongs of the proposed framework: they directly and substantially compensate for disadvantages suffered by women.

Turning to the remaining two parts of the proposed framework—the "costs" side—all-female health clubs have a harder, but ultimately winning, argument. All-female health clubs do not place a substantial or unnecessary burden on men. Women-only clubs account for less than ten percent of private health clubs, leaving ample alternatives for men.¹⁴⁶ Business activities and networking generally do not occur at health clubs, so men are not cut off from important business opportunities by their exclusion.

A stronger case can be made that all-female health clubs perpetuate negative sex-role stereotypes. As one commentator has noted, "We can't have a public policy based again on the legal argument that men are all potential leering abusers and women are all so fragile they need to be protected by the state—even while they're doing Nautilus."¹⁴⁷ Separate exercise facilities may convey to

141. See DEBORAH L. RHODE, *JUSTICE AND GENDER* 246 (1989).

142. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 891 (1992) (citing a 1991 American Medical Association study).

143. See *Foster v. Back Bay Spas, Inc.*, No. 96-7060, 1997 WL 634354, at *1 (Mass. Super. Oct. 1, 1997) (summarizing an affidavit submitted by Dr. Tanenbaum).

144. Kerns testimony, *supra* note 132, at 1.

145. See BARBARA ALLEN BABCOCK ET AL., *SEX DISCRIMINATION AND THE LAW* 580 (1996) (citing the 1976 *Redbook* study).

146. See Ablondi interview, *supra* note 1.

147. Goodman, *supra* note 1, at 1B.

women the message that they cannot compete with men.¹⁴⁸ Men are portrayed as sexual predators who are incapable of attending a health club without "leering" at women. Reinforcing this stereotype has its costs, and it may seem unfair to men who believe their behavior is sensitive to women. On the whole, however, this negative stereotype reinforcement is probably outweighed by the benefits of single-sex health clubs to women. In the end, therefore, the proposed five-part framework would protect many single-sex health clubs.

VII. CONCLUSION

As the two million American women who belong to all-female health clubs have learned, sex segregation is sometimes justifiable. Because regular exercise extends life¹⁴⁹ and getting in shape can improve self-esteem, these health clubs provide important physical and psychological health benefits to women. These clubs especially benefit those women who would not attend a mixed-sex health club because of their past histories of sexual abuse and violence or the sex-role socialization that leaves them intimidated about exercising in front of men. For

148. These paradoxes abound when women weigh the costs and benefits of sex segregation, whether the issue is single-sex education, health clubs, or some other subject. A recent series of letters from women runners, published in *Runner's World* magazine, demonstrates how heterogeneous, complex, and even contradictory women's views of segregation can be. Some women wrote about the remedial benefits of all-female races, while others argued that the costs of remediation outweighed the benefits. See Kowalchik, *supra* note 129, at F9.

Some women favored the option of single-sex races as a remedy for past discrimination and insecurity based on sex-role socialization. Several women wrote that women needed to overcome initial fear and intimidation—the "jump start" theory. See *id.* One wrote, "Many women use these races to build confidence before moving on to other challenges." *Id.* Another wrote: "Women-only races . . . are instrumental in encouraging women to join the league of runners." *Id.* This runner's remedial justification pointed to past "prejudice, discrimination and society's message to women that we couldn't and shouldn't run." *Id.* Another woman justified separate races because she believed both men and women should have the choice of single-sex companionship: "Men and women are different. Why not give both sexes an opportunity, at times, to race exclusively with their own sex?" *Id.* One woman wrote that women should have the opportunity to celebrate their solidarity and differences: "Mom needs a 'run of her own.'" *Id.*

Women who opposed segregated races did so on the grounds that such events would stigmatize women, prevent them from learning to compete in the male world, and ultimately prove detrimental to women's goals of equality. See *id.* One woman wrote that separate races would stigmatize women: "Whenever any event is organized for one specific group of people, it suggests that this group needs a little help getting started." *Id.* Another female runner stated that separation would build male resentment: all-women races would "spark[] hostile feelings from male runners." *Id.* Another runner said all-female races would fail to build women's confidence: "Support and camaraderie can be fostered effectively in mixed events, whereas self-segregation can prevent us from confronting or overcoming obstacles." *Id.* Still another woman said simply that she enjoyed running with her husband. See *id.*

Several of the women taking a position against separate female races articulated surprising rationales that were directly contrary to some justifications for separation. To one woman, the sexual nature of mixed events was a plus, not a minus: "I truly love to watch a male runner's body perform in front of me." *Id.* Another woman found integrated races less competitive and intimidating than all-female races: "I had always preferred mixed races because they were less threatening. I don't view myself as competing against men, and in a mixed race, I was less aware of my female competition." *Id.*

These voices indicate the futility of assigning "average" characteristics based on sex. They establish that sex segregation, even if remedial, is fraught with hidden costs, and therefore must be applied sparingly.

149. "People who exercise 30 minutes 3 times a week to a level that sustains heart rate to 80% of maximum live 2 ½ years longer than those who don't, have fewer fractures, and are hospitalized less." Kerns testimony, *supra* note 132, at 1.

these women, single-sex gyms compensate for sex-based disadvantages and are, therefore, consistent with the goal of ending discrimination on the basis of sex.

Unfortunately, anti-discrimination laws governing state public accommodations prohibit almost all sex classifications, even those that remedy sex-based disadvantages. Under these laws, all-female health clubs may be deemed unlawful, as they recently have been in Massachusetts, New York, and California.

State legislatures and courts are just beginning to come to grips with the challenges posed by these clubs. A few states have protected all-female health clubs by exempting them from public accommodation laws on the basis of privacy. As this Article argues, however, the use of privacy to justify sex-segregated public accommodations is deeply flawed. Among other criticisms, the privacy approach strains the definition of privacy and creates dangers by validating all-male accommodations along with all-female ones. In addition, the privacy approach leaves unprotected other all-female accommodations that compensate for sex-based disadvantages, such as all-female running races.¹⁵⁰

A different approach is in order. State public accommodation statutes should be brought into line with other anti-discrimination laws. They should be amended to permit sex classifications that remedy sex-based disadvantages. Under this approach, classifications that compensate for sex-based disadvantages would be permitted as long as they do not substantially and unnecessarily burden men or perpetuate negative sex stereotypes. Two million American women would continue to have the option of exercising in a single-sex environment. Public accommodation laws would contain a comprehensive framework for addressing future legal challenges to all-female accommodations, separating worthwhile sex classifications from harmful ones.

150. See Kowalchik, *supra* note 129, at S9 (discussing the advantages and disadvantages of all-female running races).