

Jim Crow, Title IX and the Facts of Life

The Supreme Court ought to say it plainly: A man can't become a woman.

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At left: Restrooms in the Jim Crow South were segregated by race, but not always by sex.

Nancy Jane Moore grew up near Houston in the 1950s and '60s. Decades later she contributed to "[Whites Remember Jim Crow](#)," a collection of reminiscences that accompanied a 2001 American RadioWorks documentary about racism in the segregated South. "I remember the little

things," she recalled, "like the first time I realized that the gas station where we did business had three restrooms: women, men and 'colored.'" She was "particularly appalled" that blacks had to use unisex facilities: "It seemed very rude to make women and men use the same restroom."

It was worse than rude. Most forms of segregation were equally dehumanizing regardless of sex. But segregating restrooms by race and then *not* segregating "colored" ones by sex imposed an extra indignity on black women by depriving them of the privacy, safety and respectability that white women could take for granted.

Beginning with the Civil Rights Act of 1964, America embraced equality among races and between the sexes as overriding policy goals. But as the bathroom example illustrates, those objectives differ in a crucial way. Racial equality consists in eliminating legal and social distinctions based on race. Sexual equality requires the acknowledgment and maintenance of certain distinctions between men and women.

The Supreme Court recognized this in *U.S. v. Virginia* (1996). The justices held that the Equal Protection Clause of the 14th Amendment prohibited the Virginia Military Institute, a public college, from limiting admissions to men. But they also noted that "admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs," as Justice Ruth Bader Ginsburg wrote for the majority. She cited a federal statute authorizing the U.S. service academies to make "minimum essential adjustments" to their standards "because of physiological differences between male and female individuals."

What sets sex apart from race and other demographic categories is that men and women are dimorphic—their bodies are different in function as well as form. Only women ovulate, menstruate, get pregnant, give birth and (with rare exceptions) lactate. Their physiology evolved to accommodate these functions, while men, whose reproductive role is far less demanding, have a much greater capacity to build mass and muscle.

Both sexes, but particularly women, need separation when these bodily differences implicate privacy, safety and fairness—in communal intimate spaces such as bathrooms, locker rooms, dressing rooms, sleeping quarters and prisons, where women are especially vulnerable to sexual and other assault and both sexes have an interest in privacy; and in sports, where women are at heightened risk of injury and can't compete on a level playing field against men.

The high court last month applied this principle directly to sports in *West Virginia v. B.P.J.* Justice Brett Kavanaugh's majority opinion notes that the physical differences between men and women include "height, weight, strength, speed, endurance, and jumping ability" and concludes: "Therefore, in contact sports, forcing female athletes to compete against males can create significant safety risks. And in virtually all competitive sports, forcing female athletes to compete against males can undermine competitive fairness."

The question before the justices in *B.P.J.*: "Under Title IX and the Equal Protection Clause of the Fourteenth Amendment, may schools maintain women's and girls' sports for biological females?" The court had never before addressed the question, because it was largely settled as a matter of history and tradition.

Title IX of the Education Amendments of 1972 prohibits sex discrimination by schools that receive federal money. Regulations dating to 1975 permit separate teams by sex "where selection for such teams is based upon competitive skill or the activity involved is a contact sport." In practice, when it comes to competitive or contact sports, separate teams are usually the only way to fulfill the mandate for equal opportunity. As Justice Kavanaugh notes, "Title IX's regulations also require schools to provide the women's and men's teams equivalent equipment, facilities, scheduling, and the like."

The reason the case reached the Supreme Court now is suggested by that peculiar phrase "biological females," which would have been a redundancy until a decade or so ago. The plaintiffs in *B.P.J.* and its companion case from Idaho, *Little v. Hecox*, which involved collegiate sports, were "transgender females"—boys or men who perceive, believe or claim that they are female. Both had been diagnosed with "gender dysphoria," a

psychiatric condition, and pharmaceutically treated for it—B.P.J. with puberty blockers, Lindsay Hecox with testosterone-suppressing drugs, and both with estrogen.