

No. 22225 -- State of West Virginia ex rel. Diana Lambert, by Her Next Friends, Kathleen Lambert and Hobert Lambert v. The West Virginia State Board of Education, a Corporation, and The West Virginia Secondary Schools Activities Commission, a Corporation

Neely, J., dissenting in part:

My personal law clerk this year is a woman who played on the first string Harvard tennis team. Therefore, my office is not entirely ignorant of the interest that women have in sports, but Christmas dinner is seldom delayed in America because wives and mothers are sitting around the television set watching the games.

All of government involves the rationing of scarce resources. A first best solution to most problems always requires the existence of A, B, C, D and E. In the real world, however, we usually don't have A, B, C, D and E simultaneously. Therefore, we must accept a "second best" solution and decide whether we want B, C, D and E; A, B, C and D; D, E, A and B; or some other combination with a missing letter.¹

¹Lipsey & Lancaster, "The General Theory of Second Best," 24 Review of Economic Studies 11-33 (1956-57).

In the case of girls' basketball, moving the girls' schedule from the fall to the winter might involve spending substantial money on new athletic facilities in light of the intensity of community support for boys' basketball. Given that money for education is basically fixed, as the regular defeat of excess levies these days clearly demonstrates, the money for new athletic facilities has to be taken from someplace else in education-- computers, foreign language instruction, vocational technical training, or science facilities.

The fact that women are equal to men does not mean that women are exactly like men. Wouldn't we look like jackasses if we were to agree to enter a court order giving all males between the ages of 20 and 40 four months of pregnancy leave every three years simply because such leave is regularly given to women? Although in some future world that we may conjure up in fantasy, women's sports teams might draw the same kinds of crowds that men's sports teams draw, that is certainly not the case today. How many people would pay \$4 apiece to watch the best women's basketball team West Virginia University ever produced play a comparable team from Indiana? The answer, of course, is that there wouldn't be nearly as many as for a comparable men's team. And what that bespeaks is a market decision made by millions of individuals and expressed collectively through

demand for tickets that women's sports do not have a very high community priority.

Now all of this might sound like the benighted rantings of a person nostalgic for the 19th Century; nonetheless, if we go to most working class schools in small towns where the school is the center of local social life, we will see that if there is a problem having boys play basketball in the winter because gym space must be apportioned between men and women, a new gym will be built! In fact, the political sentiment in favor of a vigorous sports program for boys (and cheerleading for girls) at the local level is so intense that athletic facilities will generally take precedence over computers, science laboratories, foreign language instruction, vocational technical facilities and compensatory reading programs. That's the real world!

Although after detailed scrutiny of the facts of high school sports none of my fears may be justified, determining when girls' basketball should be played is a decision to be made by the State Board of Education in the first instance. Consequently, I find the majority's holding that there cannot be a sufficiently compelling governmental reason to justify playing girls' and boys' sports in different seasons to be contrary to the best interests

of education. We must assume that the State Board of Education and local boards of education are as concerned about gender fairness as we are; indeed, the State Board under the pressure of this lawsuit has concluded that tentatively there is no reason not to merge the girls' and boys' seasons. If, either on the merits or in deference to political pressures the State Board determines such merger to be the best course, then so much the better. But I would not tie the State Board's hands with a premature constitutional ruling predicated on a meager record.

In government there is no such thing as a free lunch: when you help one group, you almost invariably hurt another group.

And, frequently the group that you hurt are not in court and, therefore, must be defended by the judges. The people who need defending in this case where there is no political capital to be made being "against women" are all the users of school programs from which money will be taken if, indeed, moving women's basketball to the winter involves the building of many more gyms or other augmentations of sports-related costs.