

HANDS OFF POLICY: EQUAL PROTECTION
AND THE CONTACT SPORTS
EXEMPTION OF TITLE IX

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INTRODUCTION

Before becoming a poster child for gender equity in athletics, Heather Sue Mercer was an all-state place kicker at Yorktown Heights High School in Yorktown Heights, New York¹ (pop. 7,972).² She enrolled at Duke University in the fall of 1994 and decided to become the first woman ever to try out for the Duke football team. Initially she failed to make the team as a walk-on, but the following spring she was invited by the seniors on the team to play in the annual Blue-White scrimmage.³ She ended up kicking a game-winning twenty-eight-yard field goal.⁴ Afterwards, Duke head coach Fred Goldsmith and kicking coach Fred Chatham both told her she was on the team, and she appeared on *The Tonight Show* at the school's behest.⁵ It became clear before long, though, that Mercer would not be treated just like one of the boys.

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1. See *Mercer v. Duke Univ.*, 190 F.3d 643, 644 (4th Cir. 1999).

2. U.S. CENSUS BUREAU, CENSUS 2000 SUMMARY FILE 1, available at http://factfinder.census.gov/servlet/GCTTable?ds_name=DEC_2000_SF1_U&geo_id=04000US36&_box_head_nbr=GCT-PH1&format=ST-7 (last visited Mar. 31, 2005).

3. *Mercer*, 190 F.3d at 644.

4. *Mercer*, 190 F.3d at 644–45.

5. *Mercer*, 190 F.3d at 644–45.

Goldsmith did not allow her to attend pre-season camp.⁶ He suggested to her instead that she might participate in other extracurricular activities, such as beauty pageants or cheerleading.⁷ She should, as Goldsmith's daughter had done with baseball, "outgrow her interest."⁸ He refused to issue her a uniform, banished her to sit in the stands "with her boyfriend," and removed her, uniquely, from the team's "active roster."⁹ After a year in which Mercer was the only team member not issued a uniform, she was officially told that there was no place for her on the Duke football team.¹⁰ Her dismissal made her another first: the first member of the team Goldsmith ever had dismissed for ostensible performance-based reasons.¹¹ Mercer contacted an attorney the following spring and subsequently filed suit against the university.¹²

Title IX of the Education Amendments of 1972 provides that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"¹³ Duke is covered by Title IX.¹⁴ A 1975 policy interpretation expressly extended the reach of Title IX to intercollegiate athletics.¹⁵ Provided she could prove that her dismissal was because she was a woman rather than because of her kicking skills, Mercer's case would appear to be open and shut. It was not.

When the Department of Health, Education and Welfare (HEW) enacted its regulation applying Title IX to athletics, it specifically allowed schools to deny members of the opposite sex the chance to try out for single-sex teams for any reason or for no reason at all if the sport involved was a contact sport.¹⁶ One court has called the "contact sport exemption" "the broadest exception recognized to the overarching goal of equal athletic opportunity."¹⁷ It enables any private school to deny otherwise qualified athletes the opportunity to try out for its single-sex teams in "boxing, wrestling, rugby, ice hockey, football, basketball [or]

6. See *Mercer v. Duke Univ.*, 181 F. Supp. 2d 525, 531–32 (M.D.N.C. 2001).

7. *Mercer*, 181 F. Supp. 2d at 531–32.

8. *Mercer*, 181 F. Supp. 2d at 531–32.

9. *Mercer*, 181 F. Supp. 2d at 531–32.

10. *Mercer*, 181 F. Supp. 2d at 533–34.

11. *Mercer*, 181 F. Supp. 2d at 534.

12. *Mercer*, 181 F. Supp. 2d at 534.

13. 20 U.S.C. § 1681(a) (2000).

14. See *Mercer v. Duke Univ.*, 32 F. Supp. 2d 836, 838 n.4 (M.D.N.C. 1998).

15. See *Athletics*, 34 C.F.R. § 106.41(a) (2004); see also 40 Fed. Reg. 24,128 (June 21, 1975).

16. See *Athletics*, 34 C.F.R. § 106.41(b).

17. *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 172 (3d Cir. 1993).

other sports the purpose or major activity of which involves bodily contact,"¹⁸ solely on the basis of sex. It enabled Duke to argue, successfully in district court, that it was entitled to treat Mercer as it wished.

Were Duke a public university, however, its behavior would clearly violate the Equal Protection Clause of the Constitution.¹⁹ The Supreme Court's decision in *United States v. Virginia (VMI)*, which forced the Virginia Military Institute to open its doors to women, made clear that those who seek "to uphold government action based on sex" must satisfy intermediate scrutiny by, inter alia, demonstrating an "exceedingly persuasive justification" for classification.²⁰ "[O]verbroad generalizations about the different talents, capacities, or preferences of males and females" will not do.²¹ Even before *VMI*, only one published opinion from an athletic discrimination case brought in federal court under the Equal Protection Clause made any allowance for discrimination in try-outs against qualified women on the basis of innate biological differences.²²

The disparity between what the Constitution permits of public schools and what Title IX permits of private ones is thus unquestionably stark. This Article calls this disparity into question. First, it asks under what circumstances, if any, allowance for sex discrimination in athletics may be justified under constitutional standards. Then, it considers the practical relevance of the disparity between how a school may lawfully discriminate under Title IX and how it may do so under the Equal Protection Clause. Finally, it offers a prescription for bringing into balance the gender equity messages sent by Title IX and the Constitution.

Specifically, I begin with a brief history of Title IX and of the contact sports exemption in an effort to determine why Congress and HEW so limited the statute's coverage. In Part II, I discuss the requirements of the Equal Protection Clause as applied to athletics and the reasons why the contact sports exemption fails to satisfy heightened scrutiny. Part III deals with the question—and it must be asked—of "Who cares?" Is whatever injury the exemption may inflict worth fighting? Finally, I propose a way in which a gender equity statute might satisfy the rigorous standards of

18. 34 C.F.R. § 106.41(b) (2004).

19. See U.S. CONST. amend. XIV § 1, cl. 2.

20. *United States v. Virginia*, 518 U.S. 515, 524 (1996) [hereinafter *VMI*] (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). See discussion *infra* Part II.

21. *VMI*, 518 U.S. at 533.

22. See Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 428 (2000) (discussing *Lafler v. Athletic Bd. of Control*, 536 F. Supp. 104 (W.D. Mich. 1982)).

the Equal Protection Clause, a way in which the death of the contact sports exemption need not mean the death of segregated athletics altogether.

Historically, the strongest argument against applying a constitutional standard to interscholastic athletics has been what might be called the "symmetry" problem: The Equal Protection Clause is a two-way street, and so skills-based arguments in favor of female participation in male-only sports inevitably invite challenges to female-only sports as well. I suggest that the skills gap, long used to justify exclusion of females, is the best argument in favor of a reasonable one-way ratchet that allows women to participate in male-only sports without extending the same opportunity to males who wish to participate in female-only sports.

I do not argue here, as others ably have, for an "affirmative" theory of Title IX.²³ The Supreme Court's equal protection jurisprudence through *VMI* has focused on what is known in feminist discourse as "formal equality."²⁴ Adherents to this view believe that, before the law, "individuals who are alike should be treated alike, according to their actual characteristics rather than assumptions made about them based on stereotypes."²⁵ This Article contends, if the courts will not, that an attack on the contact sports exemption and the separate sports provisions of Title IX does not require an extension beyond formal equality as it is presently understood.²⁶ Indeed, the exemption is more anachronistic than merely conservative, as it instantiates an abandoned understanding of female interest and ability. Agencies are given the flexibility to avoid this kind of calcified thinking.

23. See, e.g., Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13 (2001); Karen L. Tokarz, *Separate but Unequal Educational Sports Programs: The Need for a New Theory of Equality*, 1 BERKELEY WOMEN'S L.J. 201 (1985).

24. See MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 27-28 (2d ed. 2003); Valorie Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN'S L.J. 68, 71-72 (2002).

25. KATHARINE T. BARTLETT, ET AL. EDS., GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 117 (3d ed. 2002).

26. But see Dana Robinson, *A League of Their Own: Do Women Want Sex-Segregated Sports?*, 9 J. CONTEMP. LEGAL ISSUES 321, 350 (1998) (calling an asymmetrical model of sex-segregated athletics "very attractive from the special treatment feminist standpoint").

I. THE ORIGINS OF THE CONTACT SPORTS EXEMPTION

Between 1970 and 1971, Bernice Sandler, the self-styled "Woman Behind Title IX,"²⁷ filed more than 250 lawsuits against colleges and universities, charging sex discrimination in hiring at a time when no federal law restricted sex discrimination at private educational institutions.²⁸ Sandler's suits inspired Oregon Congresswoman Edith Green to hold the initial hearings that eventually led to the enactment of Title IX in 1972.²⁹ Yet, according to one account, when Sandler asked Green what lobbying she could do to help get Title IX enacted, Green replied with, "Nothing. Nobody knows what's in this bill. And if you start making noise, they'll ask."³⁰

Few involved in the passage of Title IX contemplated its reach. Green's hearings were the only ones conducted; no official representatives of higher education testified,³¹ and no committee reports were generated.³² The statute's basic purpose—to ban sex discrimination in all programs receiving federal funding—was understood.³³ Few interested parties seemed to worry about the details so long as quotas were disclaimed,³⁴ which they were.³⁵ The impact on athletic programs was mentioned just twice in floor debates. In debates on an earlier version of Title IX, Colorado Senator Peter Dominick asked its Senate sponsor, Birch Bayh of Indiana, whether the bill would reach "athletic facilities or equipment."³⁶ Bayh's answer captured the thinking at the time: "I [do not] feel it mandates the desegregation of football fields. What we are trying to do is provide equal access . . . to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved."³⁷ Senator Dominick's response is insightful: "If I may say so, I would have had much more fun playing

27. Bernice Sandler, at <http://bernicesandler.com> (last visited Feb. 24, 2005).

28. JESSICA GAVORA, *TILTING THE PLAYING FIELD: SCHOOL, SPORTS, SEX AND TITLE IX* 21 (2002).

29. *Id.* Congresswoman Green wished to add "sex" to the protections of Title VI. See Sangree, *supra* note 22, at 410.

30. GAVORA, *supra* note 28, at 22.

31. *Id.*

32. See Sangree, *supra* note 22, at 410.

33. See *id.*

34. See GAVORA, *supra* note 28, at 22.

35. See 20 U.S.C. § 1681(b) (2000).

36. 117 CONG. REC. 30,407 (1971) (statement of Sen. Dominick).

37. *Id.* (statement of Sen. Bayh).

college football if it had been integrated.”³⁸ As Professor Suzanne Sangree points out and as Senator Dominick’s response shows, talk of integrated football was a straw man, so little conceived of that its mere mention obscured the statute’s potential to reach other areas of intercollegiate athletics.³⁹

Title IX does not mention athletics, and its language is, depending on one’s perspective, either broad enough to include sports or narrow enough to exclude them.⁴⁰ The statute applies to “any education program or activity receiving Federal financial assistance.”⁴¹ Most athletic programs do not receive direct federal financial assistance, but on the other hand, all money is fungible. Thus the question of whether Title IX included athletics is a matter of statutory interpretation. While HEW viewed Title IX as applicable to athletics,⁴² the considerable ambiguity as to its scope demanded further legislative action.

Leading the camp of those who would have athletics exempted from the statute’s coverage were the National Collegiate Athletic Association (NCAA) and Texas Senator John Tower, who twice introduced an amendment to the law that would exempt “revenue-producing sports.”⁴³ According to the language of the proposed amendment, any intercollegiate activity that “provide[s] gross receipts or donations to the institution necessary to support that activity” would be exempt from Title IX.⁴⁴ The idea apparently was that revenue-producing sports such as football and basketball do not rely on federal funding and thus should not have to comply with Title IX.⁴⁵ Even assuming it were true that basketball and football are self-supporting—and by and large they are not⁴⁶—the Tower Amendment limited itself neither to profit-making

38. *Id.* Bayh later said that the regulations would allow different treatment of female and male athletes on the basis of sex only in unusual circumstances, such as when “sports facilities or other instances where personal privacy must be preserved.” 118 CONG. REC. 5807 (1972) (statement of Sen. Bayh).

39. See Sangree, *supra* note 22, at 413 n.209.

40. See 20 U.S.C. § 1681(a) (2000).

41. *Id.*

42. See Sangree, *supra* note 22, at 413 n.212.

43. See GAVORA, *supra* note 28, at 60.

44. 120 CONG. REC. 15,322 (1974).

45. See Sangree, *supra* note 22, at 414.

46. See Daniel L. Fulk, *Revenues and Expenses of Divisions I and II Intercollegiate Athletics Programs: Financial Trends and Relationships—1999* (2000), available at http://www.ncaa.org/library/research/i_ii_rev_exp/2000. Seventy-eight percent of NCAA football programs and seventy-three percent of NCAA basketball programs run budget deficits. Nat’l Coalition for Women & Girls in Educ., *Title IX Athletics Policies: Issues and Data for Education Decision Makers* 16 n.11 (2002), available at http://www.womenssportsfoundation.org/binary-data/WSF_ARTICLE/pdf_file/914.pdf [hereinafter NCWGE]. Among Division IA schools, these numbers

activities nor even to those that receive gate receipts. It was broad enough on its face to encompass nearly all intercollegiate sports. The House-Senate conference committee struck the Tower Amendment after it passed in the Senate.⁴⁷

The Javits Amendment emerged in its place. Proposed by New York Senator Jacob Javits, it required HEW to publish within thirty days "proposed regulations implementing the provisions of Title IX . . . which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports."⁴⁸ HEW's initial proposal in response to the Javits Amendment did not mention contact sports. Specifically, it provided that:

athletic programs must be operated without discrimination on the basis of sex. Such activities for which participation or selection is premised on factors other than skill may not be conducted separately on the basis of sex. Athletics for which selection is based on competitive skill may be provided through separate teams for males and females to the extent that such teams comply with the requirements of §§ 86.38 (b) through (e).⁴⁹

Subsections (b) through (d) provided, variously, that recipients of federal monies were to make "affirmative efforts" to inform students of a sex whose opportunities to participate in particular sports "have previously been limited" of the availability of equal opportunities, to provide "support and training" to enable them to participate, and to provide athletic opportunities in those sports.⁵⁰ Subsection (e) disclaimed any right to equal expenditures for athletics for members of each sex.⁵¹

The final regulations published one year later were notably different, containing the language that remains law today: "[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

are much lower: thirty-six percent for football and twenty-nine percent for basketball.
Id.

47. S. 1539, 93d Cong., 2d Sess. § 535 (1974); see Christopher Paul Reuscher, Comment, *Giving the Bat Back to Casey: Suggestions to Reform Title IX's Inequitable Application to Intercollegiate Athletics*, 35 AKRON L. REV. 117, 124 (2001).

48. Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484 (1974).

49. Education Programs and Activities Receiving or Benefiting From Federal Financial Assistance, 39 Fed. Reg. 22,230 (June 20, 1974) (codified at C.F.R. pt. 86).

50. *Id.*

51. *Id.*

involved is a contact sport.”⁵² Whether the change resulted from political compromise or a good faith effort to cabin Title IX within “reasonable” limits remains difficult to discern, since HEW’s official explanatory notes do not address why the contact sports provision was added.⁵³

The pre-regulation case law dealing with sex segregation in athletics provides little guidance as to the impetus behind the regulation. It was hardly a settled matter whether categorically excluding women from contact sports could satisfy the heightened scrutiny traditionally afforded state-sponsored sex discrimination. In *Clinton v. Nagy*,⁵⁴ a federal district court in Ohio claimed to be applying only rational basis review in refusing to dismiss a claim that a city of Cleveland regulation unconstitutionally denied twelve-year-old Brenda Clinton the opportunity to play football—a “contact sport”⁵⁵—solely based on sex. The court noted that “there was no indication that defendants planned to assert . . . that Miss Clinton does not meet those standards required of the other members of the [team], except for the fact that she is a female.”⁵⁶

In perhaps the most well-known case discussing sex discrimination in sports prior to the 1975 regulations, the Court of Appeals for the First Circuit reversed a lower court ruling that the Darlington Little League, which held games in the public parks of Pawtucket, Rhode Island, could discriminate against girls.⁵⁷ The court in *Fortin v. Darlington Little League, Inc.* held that the district court’s finding that “material physical differences between boys and girls in the 8 to 12 age bracket . . . could undoubtedly result in serious injuries to girls in said age bracket who participated in a contact sport such as baseball”⁵⁸ was not supported in the record.⁵⁹ Although the *Fortin* court limited its holding to the eight-to-twelve age bracket, the case makes clear that a contact sports exemption from Title IX seems premised on an understanding of female physical limitations that was already contestable in 1975.

What is known is that the initial proposal in response to the Javits Amendment garnered more than 9,700 public comments,⁶⁰ the bulk of which concerned intercollegiate athletics, and that the NCAA did more

52. 34 C.F.R. § 106.41(b) (2004).

53. See Nondiscrimination on the Basis of Sex, 40 Fed. Reg. 24,128–45 (June 4, 1975).

54. 411 F. Supp. 1396 (N.D. Ohio 1974).

55. *Id.* at 1397.

56. *Clinton*, 411 F. Supp. at 1398.

57. See *Fortin v. Darlington Little League, Inc.*, 514 F.2d 344 (1st Cir. 1975).

58. *Fortin v. Darlington Little League, Inc.*, 376 F. Supp. 473, 479 (D.R.I. 1974).

59. *Fortin*, 514 F.2d at 349–50.

60. See 40 Fed. Reg. 24,128 (June 21, 1975).

than its share of lobbying.⁶¹ As HEW Secretary Caspar Weinberger said before Congress:

With regard to athletics . . . [l]et's look first at what the regulation does not require because there seems to be substantial misunderstanding about that. . . . It does not require women to play football with men; . . . it will not result in the dissolution of athletic programs for men; . . . and it does not mean the [NCAA] will be dissolved and will have to fire all of its highly vocal staff.⁶²

The staff of the NCAA was more than just highly vocal. In 1976, a year after the new regulations went into effect, the NCAA filed a complaint against HEW alleging, *inter alia*, that in applying Title IX to intercollegiate athletics it had exceeded its authority under the statute.⁶³ While the suit eventually failed,⁶⁴ it further demonstrated the organization's desire to limit the reach of Title IX as much as possible. Among the comments filed after the initial rule proposal were several by other athletic associations that complained about the impossibility of complying with the proposed rule's broader prohibitions on sex discrimination in athletics.⁶⁵

The concerns of the collegiate athletics establishment mirrored the concerns of the Court of Appeals for the Fourth Circuit in the Mercer case. Judge Luttig suggested in his opinion for the court that subsection (a) of the 1975 Regulation, flatly forbidding sex discrimination in athletics, would have "radically altered the face of intercollegiate athletics" without additional qualifying language.⁶⁶ Subsection (b) apparently seeks to avoid this result by allowing schools to segregate their teams when selection is based on competitive skill or when the sport is a contact sport.⁶⁷ When a school offers a sport for one sex but not the other, members of the excluded sex must be allowed to try out only if athletic opportunities for members of that sex have previously been limited or if

61. See Reuscher, *supra* note 47, at 124; Sangree, *supra* note 22, at 415.

62. Sangree, *supra* note 22, at 416.

63. See Nat'l Collegiate Athletic Ass'n v. Califano, 444 F. Supp. 425 (D. Kan. 1978), *rev'd*, 622 F.2d 1382 (10th Cir. 1980).

64. Califano, 622 F.2d at 1382.

65. See Judith Lee Oliphant, *Title IX's Promise of Equality of Opportunity in Athletics: Does It Cover the Bases?*, 64 Ky. L.J. 432, 454 (1976); Comment, *Implementing Title IX: The HEW Regulations*, 124 U. Pa. L. Rev. 806, 833 (1976).

66. Mercer v. Duke Univ., 190 F.3d 643, 646 (4th Cir. 1999).

67. 34 C.F.R. § 106.41(b) (2004).

the sport is a non-contact sport.⁶⁸ The first limitation—the competitive skill provision—aims to prevent schools from having to eradicate all-female teams. Without this proviso, schools would have to integrate any non-contact sport involving competitive skill. It is difficult to think of a sport that does not involve competitive skill, and it is difficult to imagine a team that no male athletes would have sufficient skill to make. The resultant death of all-female teams indeed would have radically altered the face of intercollegiate athletics.⁶⁹ The *Mercer* court did not, however, elaborate on why the second limitation, the contact sports exemption, was also required to prevent radical change. Nothing in the statute or the Regulation, after all, forbids a school from discriminating on the basis of skill, and it is ability, not sex discrimination, that remains far and away the biggest obstacle to integrated athletics. That is, it is quite easy to imagine an ostensibly integrated team that no female athletes would have sufficient skill to make. Such as they were, any fears of women getting tackled by three hundred-pound linemen or dunked upon by seven-foot centers were greatly exaggerated. The competitive skill provision goes a long way—no shorter than necessary, at least—towards avoiding this result.

If the NCAA feared any change at all, then its fears were well-grounded. Title IX's reach is beyond the scope of this Article, but let it suffice here to say that it is nothing short of revolutionary. From the 1971–72 academic year to 2000–01, the number of collegiate varsity female athletes increased by 411% (compared to 36% for male athletes), and the number of high school female varsity athletes increased 847% (compared to 6.9% for males).⁷⁰ From 1981–82 to 1998–99, the number of female college teams rose 66%, compared to .4% for male teams.⁷¹ These gains notwithstanding, the contact sports exemption has become an anomaly, among the last remnants of official *de jure* sex discrimination.⁷²

The language of the provision limiting it to “contact sports” belies its breadth. The HEW Regulation itself specifies basketball as a contact sport—perhaps, and one can only speculate, a nod to Senator Tower

68. *Id.*

69. See *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 658 (6th Cir. 1981) (holding the regulations regarding separate teams constitutional to prevent “male dominance of all teams”).

70. NCWGE, *supra* note 46, at 6 tbl.3.

71. *Id.* at 10 tbl.6.

72. Others include military combat and public bathrooms, two of the areas that helped to defeat the Equal Rights Amendment. See, e.g., Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755, 808 (2004).

and the NCAA⁷³—and courts have used its extension to “other sports the purpose or major activity of which involves bodily contact”⁷⁴ to potentially exempt the likes of field hockey and baseball.⁷⁵ In holding that whether field hockey was a contact sport was a matter of fact and not law, the Court of Appeals for the Third Circuit relied on the testimony of a college field hockey coach who testified that running up and down the field “inevitably produce[s] and involves bodily contact,” even though such contact violates the rules.⁷⁶ If a sport in which bodily contact will incidentally occur but is nonetheless prohibited may constitute a contact sport for the purposes of Title IX, then the term “contact sport” loses its practical significance in any team setting. A qualified girl excluded from just about any all-male team sport at a private school may be without legal recourse.⁷⁷

The one check in place on overt discrimination is the third prong of the 1975 Regulation, requiring funding recipients to “provide equal athletic opportunity for members of both sexes.”⁷⁸ This provision has been interpreted by both HEW and the courts as limiting the discrimination permitted under the contact sports exemption to situations in which equal opportunity has otherwise been provided.⁷⁹ As I will discuss in Part III, the presence of the equal opportunity provision bears little on whether the contact sports exemption undermines gender equity. If anything, the equal opportunity provision effects an administrative *chiaroscuro*, providing evidence that even HEW knew that separate was not altogether equal.

73. See Sangree, *supra* note 22, at 397.

74. 34 C.F.R. § 106.41(b) (2004).

75. See *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168 (3d Cir. 1993) (holding whether field hockey was a contact sport to be a disputed issue of fact); cf. *Carnes v. Tenn. Secondary Sch. Athletic Ass'n*, 415 F. Supp. 569 (E.D. Tenn. 1976) (holding it questionable whether baseball was a contact sport under a high school athletic association's rules).

76. *Williams*, 998 F.2d at 172.

77. To be sure, the same is true of a qualified boy. For a discussion of why this may be justified even independent of the “athletic opportunities” language of the 1975 Regulations, see *infra* Part II.

78. 34 C.F.R. § 106.41(c) (2004).

79. See, e.g., *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 655–56 (6th Cir. 1981); Thomas A. Cox, *Intercollegiate Athletics and Title IX*, 46 GEO. WASH. L. REV. 34, 45 (1977).

II. THE REQUISITES OF THE EQUAL PROTECTION CLAUSE

Barely forty years have passed since the Supreme Court upheld a Florida statute that automatically exempted women, but not men, from jury service.⁸⁰ Effectively applying a rational basis test, the Court concluded that because a "woman is still regarded as the center of home and family life," Florida's sex-based classification was constitutional.⁸¹ The modern Equal Protection Clause is a bit more searching. As developed through *Mississippi University for Women v. Hogan*,⁸² which compelled a public, all-female nursing school to admit men, and *VMI* more recently,⁸³ the doctrine requires that a state actor wishing to classify on the basis of sex demonstrate an "exceedingly persuasive justification" for doing so.⁸⁴ These and similar cases employ the language of so-called intermediate scrutiny, requiring a state to justify sex-based discrimination with "important governmental objectives" and means "substantially related" to those objectives.⁸⁵

While purportedly applying the same test as *Hogan*, *VMI* is notable because it elevates "exceedingly persuasive justification" from a description of the *Hogan* test into a separate, parallel test.⁸⁶ The distinction is not trivial. Chief Justice Rehnquist decried the shift as introducing too much uncertainty into the test.⁸⁷ It may be more apt to say that the word "exceedingly" makes the test easier, not harder, for judges to apply, but more difficult for defendants to meet. While one person's "persuasive" is indeed another's "unpersuasive," one is reluctant to declare anything "exceedingly" so. The traditional contours of intermediate scrutiny permit reasonable disagreement as to the deference due the state actor;⁸⁸ the *VMI* test makes clear that no deference is due whatsoever. The state unquestionably bears a heavy burden.

80. See *Hoyt v. Florida*, 368 U.S. 57 (1961).

81. *Hoyt*, 368 U.S. at 62. The Supreme Court did not uphold an Equal Protection challenge alleging unconstitutional gender-based discrimination until *Reed v. Reed*, 404 U.S. 71 (1971). See *VMI*, 518 U.S. 515, 532 (1996).

82. *Hogan*, 458 U.S. 718 (1982).

83. *VMI*, 518 U.S. 515.

84. *VMI*, 518 U.S. at 524; *Hogan*, 458 U.S. at 724.

85. *VMI*, 518 U.S. at 524; *Hogan*, 458 U.S. at 724; *Craig v. Boren*, 429 U.S. 190, 197 (1976).

86. See *VMI*, 518 U.S. at 559 (Rehnquist, C.J., concurring).

87. See *VMI*, 518 U.S. at 559 (Rehnquist, C.J., concurring).

88. See, e.g., *Kahn v. Shevin*, 416 U.S. 351 (1974) (upholding a Florida statute that gave widows but not widowers a property tax exemption).

VMI attempted to justify its exclusion of women on two grounds.⁸⁹ First, single-sex education contributed to "diversity in educational approaches."⁹⁰ Second, the school would have to alter its "adversative approach" in order to accommodate women.⁹¹ The Court rejected the first rationale as either disingenuous or ill-served by the school's exclusionary policy.⁹² Justice Ginsburg noted that not only had the state of Virginia shown little commitment to educational diversity in its hundreds of years of male-only education,⁹³ but also that such diversity was not served by conferring a unique educational benefit on one sex alone.⁹⁴ As for the second rationale, the fact that "[s]ome women . . . would want to attend the school if they had the opportunity,"⁹⁵ and that "*some* women can meet the physical standards . . . imposed on men"⁹⁶ undermined any argument that the school's adversarial approach required substantive alteration. Said Justice Ginsburg for the Court, "[G]eneralizations about 'the way women are,' estimates of what is appropriate for *most* women, no longer justify denying opportunity to women whose talent and capacity places them outside the average description."⁹⁷

Public schools attempting to exclude qualified women and girls from contact sports solely because of sex have generally met a fate similar to VMI's.⁹⁸ Most federal courts, particularly in recent years, have held that justifications offered by schools and athletic associations failed even the deferential intermediate scrutiny of *Hogan*.⁹⁹ As the HEW

89. *VMI*, 518 U.S. at 534–35.

90. *VMI*, 518 U.S. at 535.

91. *VMI*, 518 U.S. at 535.

92. *VMI*, 518 U.S. at 540.

93. *VMI*, 518 U.S. at 535–37.

94. *VMI*, 518 U.S. at 539–40.

95. *VMI*, 518 U.S. at 523.

96. *VMI*, 518 U.S. at 525.

97. *VMI*, 518 U.S. at 550.

98. Courts have, on the other hand, accepted providing equal opportunity to women and redressing past discrimination as acceptable justifications for the exclusion of boys from girls sports. See, e.g., *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982) (volleyball); *Kleczek v. R.I. Interscholastic League*, 768 F. Supp. 951 (D.R.I. 1991) (field hockey).

99. See, e.g., *Adams v. Baker*, 919 F. Supp. 1496 (D. Kan. 1996) (high school wrestling); *Lantz v. Ambach*, 620 F. Supp. 663 (S.D.N.Y. 1985) (high school football); *Leffel v. Wisc. Interscholastic Athletic Ass'n*, 444 F. Supp. 1117 (E.D. Wisc. 1978) (high school baseball, inter alia); *Hoover v. Meiklejohn*, 430 F. Supp. 164 (D. Colo. 1977) (high school soccer); cf. *Brenden v. Indep. Sch. Dist.* 742, 477 F.2d 1292 (8th Cir. 1973) (various non-contact sports). But see *O'Connor v. Bd. of Educ. of Sch. Dist.* 23, 449 U.S. 1301 (1980) (allowing sex discrimination in junior high school

Regulations themselves furnish no official justification for the contact sports exemption, institutions facing challenges to exclusions of women from contact sports have had to submit their own rationales to judicial scrutiny. In *Adams v. Baker*, in which a female sought a preliminary injunction compelling her high school wrestling team to grant her a tryout, the judge dismissed a typical panoply of official justifications in typical fashion.¹⁰⁰ The school offered several reasons for its sex-based exclusion: safety, fear of sexual harassment, disruption of the school setting, moral objections, and "inconveniences" ranging from having to employ different coaching techniques to providing different locker room facilities.¹⁰¹ I consider each of these reasons in turn.

The *Adams* court agreed that student safety is an important governmental objective but concluded, "The defendants' only evidence that plaintiff's safety is at greater risk because of her gender is based on generalized assumptions about the differences between males and females regarding physical strength."¹⁰² Since "the evidence shows that some females are stronger than some males . . . [t]he school can take into account differences of size, strength, and experience without assuming those qualities based on gender."¹⁰³ In short, using sex as a proxy for propensity towards injury is both over- and underinclusive: unusually robust girls are prohibited from sports that particularly fragile boys are allowed to play.

Courts considering claims in this area are fond of noting that between-sex physical differences are smaller than within-sex differences; that is, the difference between the weakest boy and the strongest boy is greater than the difference between the average boy and the average girl.¹⁰⁴ This disposes of little. Even if between-sex differences were greater than within-sex differences, it is not clear that excluding an otherwise qualified female based on sex would pass muster under the Equal Protection Clause. Indeed, it may strengthen the case of women's advocates to concede that, on average, between-sex differences in propensity towards injury as well as in strength and skill are anything but trivial. Depending on the sport and the study, women are anywhere from two to eight times more likely than men to tear the anterior cruciate liga-

basketball); *Lafler v. Athletic Bd. of Control*, 536 F. Supp. 104 (W.D. Mich. 1982) (allowing sex discrimination in amateur boxing).

100. 919 F. Supp. 1496.

101. *Adams*, 919 F. Supp. at 1504.

102. *Adams*, 919 F. Supp. at 1504.

103. *Adams*, 919 F. Supp. at 1504.

104. See, e.g., *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 656 (6th Cir. 1981); *Hoover*, 430 F. Supp. at 169.

ment of one of their knees.¹⁰⁵ The precise cause of this disparity remains unknown, though research has suggested reasons ranging from differences in balance, hormonal profile, knee joint laxity, muscular strength and fatigue, and neuromuscular activation.¹⁰⁶ Female athletes also tend to have lower bone mass than their male counterparts and are thus more susceptible to fractures.¹⁰⁷

Anthropologist David Geary, who studies sex-related developmental differences, has found large and intractable differences between boys and girls in a host of areas related to athletic performance.¹⁰⁸ During puberty, boys develop larger hearts, skeletal muscles, and lungs than girls, a greater capacity for carrying oxygen, and a greater ability to neutralize "the chemical products of muscular exercise."¹⁰⁹ By age seventeen, three out of four boys have better visual acuity, throwing accuracy, and ability to block thrown objects than the average girl.¹¹⁰ Before puberty, boys have better grip strength, run faster, and jump higher.¹¹¹ More than nine out of ten boys between the ages of two and four outperform the average girl in throwing distance, and more than nine out of ten boys between the ages of four and seven outperform their female peers in throwing speed, even though girls of that age are more physically mature than boys; by age twelve, the two distributions are almost entirely separate.¹¹²

These findings are hardly indisputable. The plaintiffs challenging the Darlington Little League in the *Fortin* case¹¹³ introduced evidence from a pediatrician who testified that girls in the eight to twelve age

105. See Edward M. Wojtys, et al., *The Effect of the Menstrual Cycle on Anterior Cruciate Ligament Injuries in Women as Determined by Hormone Levels*, 30 AM. J. SPORTS MED. 182, 182 (2002).

106. See *id.*; Susan L. Rozzi, et al., *Knee Joint Laxity and Neuromuscular Characteristics of Male and Female Soccer and Basketball Players*, 27 AM. J. SPORTS MED. 312, 312 (1999); Laura J. Huston & Edward M. Wojtys, *Neuromuscular Performance Characteristics in Elite Female Athletes*, 24 AM. J. SPORTS MED. 427 (1996); see also AM. MED. ASS'N, COMPLETE GUIDE TO WOMEN'S HEALTH 90-91 (Ramona I. Slupik ed., 1996) (discussing differences in estrogen levels between athletic and non-athletic females).

107. See Lavenija A.J.L.M. Braam, et al., *Factors Affecting Bone Loss in Female Endurance Athletes*, 31 AM. J. SPORTS MED. 889, 889 (2003) (quoting J. M. TANNER, FETUS INTO MAN: PHYSICAL GROWTH FROM CONCEPTION TO MATURITY 74 (1990)).

108. See DAVID C. GEARY, MALE, FEMALE 209 (1998).

109. *Id.* at 213.

110. *Id.* at 214.

111. *Id.* By age seventeen, nine out of ten boys outperform the average girl in these areas. *Id.*

112. *Id.* at 213-14.

113. See discussion *supra* Part I.

bracket are "generally larger and as strong or stronger than boys of a similar age, . . . are no more subject to fractures or other injuries, no more unstable on their feet, are neurologically similar, and have the same amount of fat."¹¹⁴ Moreover, to whatever extent large physical differences do exist between boys and girls, at least some of these differences result from socialization: The average seventeen-year-old boy has blocked more thrown objects than his female peer.¹¹⁵ As noted by Dr. Crane, the defendants' medical expert in *Fortin*, it is "the normal activity of a young lady to keep off baseball fields and play with dolls . . ."¹¹⁶ That Dr. Crane's statement is appallingly patronizing does not diminish the point that part of the observed difference between the physical skills of boys and girls comes from practice. For example, while acknowledging certain innate differences in muscle size, height, and fat distribution, biologist Anne Fausto-Sterling has suggested that the hormonal differences essential to height and strength may depend in part on exercise.¹¹⁷

Of course, if group differences are at all important to the Equal Protection inquiry—and one must assume for the sake of the "safety" argument that they are—then the particular reason for the sex-linked difference is of little consequence. To one who believes large average differences in size, strength, and skill justify use of a sex proxy, that those differences were caused by socialization is, standing alone, no argument. There is no a priori reason why an individual female is more likely to be a "social" outlier than a "genetic" outlier, whether or not it is so empirically.

More apposite but perhaps less convincing than the socialization argument is the one advanced by Professor Sangree, among others, that there is a danger even among the most careful of scientists to produce, inadvertently or not, results that justify pre-conceived notions.¹¹⁸ Says Sangree:

The notion that physical contact and unfettered play is inappropriate for fragile females is one deeply ingrained in our culture. . . . Whereas in the nineteenth century medical science viewed women as the fainting and hysteria prone,

114. *Fortin v. Darlington Little League, Inc.*, 514 F.2d 344, 349 (1st Cir. 1975).

115. Geary's hypothesis is that these differences result from sexual selection. See GEARY, *supra* note 108, at 214–15.

116. *Fortin*, 514 F.2d at 350.

117. See ANNE FAUSTO-STERLING, MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT WOMEN AND MEN 215–16 (1989).

118. See Sangree, *supra* note 22, at 404–10.

"physiologically inferior sex," contemporary questions about female athletic participation dwell upon females' assertedly weak knees, distorted pelvic structure, inadequate muscle mass, and the damaging effect of strenuous exercise upon menstruation and childbearing. These concerns look suspiciously like the same old wolf dressed in modern sheep's clothing.¹¹⁹

Whatever the credibility of studies purporting to demonstrate the physical weakness of girls relative to boys, one of the take-home lessons of *VMI* is that it does not especially matter: Whether or not girls generally are more injury-prone does not answer the Equal Protection inquiry. The Supreme Court has made abundantly clear that it views Equal Protection guarantees as addressing individuals, not groups.¹²⁰ According to Doug Reese, the head wrestling coach at the University of Minnesota at Morris, "Once you have had the opportunity to see a well conditioned female athlete with technical skills you will be sold [on women's wrestling]." ¹²¹ The test for a violation of the Equal Protection clause is whether a *qualified* woman is denied opportunity; so long as the "But what about me?" question lingers, average differences are irrelevant. The state bears the concededly heavy burden of showing that the excluded woman is herself unqualified, physically unfit, or more susceptible to injury than her male counterparts, and may not bar her on the basis of sex alone.¹²²

One might respond by arguing that propensity toward injury may be immeasurable and unseen, and so reliance on statistical probability is permissible. But schools by and large are unable to shoulder the burden of proving that similar concerns animate their treatment of potentially injury-prone boys. The *Adams* court noted evidence of injury to male

119. *Id.* at 409–10. The late anthropologist Stephen Jay Gould has suggested a similar mechanism at play with respect to perceived racial differences. Gould, who discredited the nineteenth-century "science" of craniometry by redoing the skull-size experiments of the leading scientists of the day, believed that preconceived notions about racial differences in intelligence inadvertently biased their experimental method. See generally STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* (2d ed. 1996).

120. See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995).

121. Doug Reese, *Womens Wrestling*, at <http://www.wrestlegirl.com/barn1.htm> (last visited Dec. 5, 2004).

122. See *Clinton v. Nagy*, 411 F. Supp. 1396 (N.D. Ohio 1974) (granting a temporary restraining order to compel a municipal football league to allow a twelve-year-old girl to be on a team where the league did not present evidence that the girl herself was unfit).

wrestlers and declared it "certainly improper to subject boys to greater danger than girls."¹²³ In *Hoover v. Meiklejohn*,¹²⁴ in which a federal court held unconstitutional a Colorado High School Athletic Association rule limiting soccer to males, the court rejected an injury prevention rationale in part because it was paternalistic. The court said, "[T]o the extent that governmental concern for the health and safety of anyone who knowingly and voluntarily exposes . . . herself to possible injury can ever be an acceptable area of intrusion on individual liberty, there is no rationality in limiting this patronizing protection to females"¹²⁵ The parents of girls and girls themselves have at least as great an interest in their physical well-being as do schools. Of course, a state's interest in public safety often overcomes the protestations of those being protected; seatbelt laws are one obvious example. The difference is that exercises of a state's police power are not typically subject to heightened scrutiny. It is difficult for a state to argue that the *margin* of its interest in public safety is so high above the interest of the athlete herself in making decisions about her athletic involvement and tolerance for potential injury as to constitute an "exceedingly persuasive justification" for a policy of per se discrimination.

The *Adams* court disposed of the other proffered justifications for female exclusion with still greater alacrity. Avoiding sexual harassment claims, while an important interest, said the court, is best served by taking measures to directly prevent such harassment, not by denying athletic opportunities to women.¹²⁶ The court further did not consider moral objections of parents and various administrative inconveniences to be important state interests, noting that even if they were, "these problems could be overcome with minimal effort."¹²⁷ As to the potential for disruption of the school setting, the *Adams* court refused to assume any important governmental interest was at stake where no evidence had been introduced to that effect.¹²⁸ To allow rationales such as moral

123. *Adams v. Baker*, 919 F. Supp. 1496, 1504 (D. Kan. 1996); see *Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020, 1029 (W.D. Mo. 1983) ("[T]he 'safety' factor which defendants would utilize to prevent any female from playing eighth grade football—including those who could play safely—is not applied to males at all, even to those who could not play safely."). Recent research has suggested potentially *greater* incidence of intra-articular injuries among male as opposed to female athletes. See Dana P. Piasecki, et al., *Intraarticular Injuries Associated With Anterior Cruciate Ligament Tear: Findings at Ligament Reconstruction in High School and Recreational Athletes: An Analysis of Sex-Based Differences*, 31 AM. J. SPORTS MED. 601 (2003).

124. 430 F. Supp. 164 (D. Colo. 1977).

125. *Hoover*, 430 F. Supp. at 169.

126. *Adams v. Baker*, 919 F. Supp. 1496, 1504 (D. Kan. 1996).

127. *Adams*, 919 F. Supp. at 1504.

128. See *Adams*, 919 F. Supp. at 1504.

objections, disruption, and fear of sexual harassment claims to succeed would be to sanction the sex discrimination analog of a heckler's veto, long disfavored under another species of heightened scrutiny—that employed in First Amendment jurisprudence.¹²⁹

At bottom, the *Adams* court and courts considering similar claims seem concerned not with whether legitimate interests might be advanced by excluding women from contact sports, but rather with whether excluding women from contact sports is either sufficient or necessary to effectuate that interest. To return to the subtle distinction between “exceedingly persuasive justification” being a description of the heightened scrutiny test and it being the test itself, Justice Scalia may be quite right in saying that the effect is to convert the “substantial relation” test into a “narrow tailoring” test.¹³⁰ Given that *Adams* relied on *Hogan* and was decided before *VMI*, it may be fair to say that in at least a few corners of the federal judiciary, the conversion had already been made.

The one rationale for excluding girls from playing sports with boys that has gained any currency with federal judges is the symmetry dilemma: If courts do not allow sex segregation in sports, so it goes, they cannot uphold a regulation that prevents boys from playing, and thereby eliminating, girls' sports.¹³¹ Although Justice Stevens sat in the majority in *VMI*, while sitting as a circuit justice sixteen years earlier he relied on Title IX in denying a preliminary injunction to a public high school girl who was barred from trying out for the boys' basketball team.¹³² “Without a gender-based classification,” Justice Stevens wrote in *O'Connor v. Board of Education of School District 23*, “there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete.”¹³³ This argument would seem to provide the rationale for the HEW Regulations' other allowance for discrimination in tryouts: Schools may deny interested and able students a tryout on the basis of sex if the sport involved is a contact sport or “athletic opportunities for members of that [included sex] have previously

129. See, e.g., *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 134–35 (1992) (“Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.”).

130. See *VMI*, 518 U.S. at 570–71 (1996) (Scalia, J., dissenting).

131. See, e.g., *O'Connor v. Bd. of Educ. of Sch. Dist. 23*, 449 U.S. 1301 (1980); *Carnes v. Tenn. Secondary Sch. Athletic Ass'n*, 415 F. Supp. 569 (E.D. Tenn. 1976).

132. *O'Connor*, 449 U.S. 1301.

133. 449 U.S. at 1307.

been limited.”¹³⁴ The crutch of historical discrimination is something of a sine qua non of Title IX, considered necessary to prevent the obviously unintended result of effectively eradicating women’s teams by allowing men to try out.

The idea that broad past “societal” discrimination can justify specific present discrimination in the “opposite” direction has been rejected as logically sloppy in the race context because it is both over- and under-inclusive.¹³⁵ A race-based affirmative action program premised on “societal discrimination” inevitably fails to capture those who are not members of the preferred minority group but nonetheless face systematic disadvantage—such as Asian Americans or poor whites—and includes some perceived to have faced lesser hurdles, namely wealthier African Americans.¹³⁶ The Supreme Court has generally required a government actor defending an affirmative action program on the grounds of prior discrimination to bear the heavy burden of demonstrating that the institution has itself discriminated.¹³⁷

While this evidentiary burden would seem to be less of an obstacle for schools wishing to offer preferential treatment to female athletes than for a city wishing to offer a minority set-aside in a particular industry (virtually every coed school in the country can show past intentional discrimination against women in its sports programs), there remains a troubling element of both overinclusiveness and underinclusiveness in using this justification for “reverse” discrimination in the context of sex-segregated athletics and other activities. Past discrimination is underinclusive because it allows a school to exclude men from a sport that they do not threaten to dominate physically. A public school that sponsored

134. 34 C.F.R. § 106.41(b) (2004); see *Mercer v. Duke Univ.*, 190 F.3d 643, 646 (4th Cir. 1999).

135. See, e.g., *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496–97 (1989). The Court’s opinion in *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003), does nothing to upset this holding.

136. See, e.g., *DeFunis v. Odegaard*, 416 U.S. 312, 339–40 (1974) (Douglas, J., dissenting) (“Or, alternatively, the Court could attempt to assess how grievously each group has suffered from discrimination, and allocate proportions accordingly; if that were the standard the current . . . policy would almost surely fall, for there is no Western State which can claim that it has always treated Japanese and Chinese in a fair and evenhanded manner. . . . Nor obviously will the problem be solved if next year the Law School included only Japanese and Chinese, for then Norwegians and Swedes, Poles and Italians, Puerto Ricans and Hungarians, and all other groups which form this diverse Nation would have just complaints.”). But see Deborah C. Malamud, *Diversity of Opinions: Affirmative Action, Diversity and the Black Middle Class*, 68 U. COLO. L. REV. 939 (1997) (arguing that the black middle class faces greater economic hurdles than initial appearances might suggest).

137. See *Croson*, 488 U.S. at 498.

a female-only chess team would, I contend, be immune from challenge under Title IX¹³⁸ but susceptible to challenge under the Equal Protection Clause. Past discrimination is overinclusive because it invites legal challenges against a school that excludes men from a sport, such as field hockey, volleyball, or gymnastics, that they might well dominate because of their sex but for which their opportunities have not been limited.

Indeed, the strained relationship between field hockey, the contact sports exemption, and the historical discrimination exemption has been the impetus of numerous Title IX and state and federal constitutional challenges.¹³⁹ In *Williams v. School District of Bethlehem*, a challenge to the girls-only field hockey program at Liberty High School in Bethlehem, Pennsylvania, the Court of Appeals for the Third Circuit held that the language of the policy interpretation relating to limited opportunities was school-wide rather than sport-specific.¹⁴⁰ That is, for the plaintiff to prevail, he would have to show that the school's athletic offerings as a whole were weighted against boys, not simply that boys were being denied the opportunity to play field hockey.¹⁴¹ Although the *Williams* court dodged the constitutional question,¹⁴² justifying discrimination against men in a specific sport on the basis of a general limitation on female athletic participation in the past employs the same tortured reasoning rejected in race-based affirmative action cases.¹⁴³

138. See 34 C.F.R. § 106.3(b) (2004) ("In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex.").

139. See, e.g., *Williams v. Sch. Dist. Of Bethlehem*, 998 F.2d 168 (3d Cir. 1993); *Kleczek v. R.I. Interscholastic League, Inc.*, 768 F. Supp. 951 (D.R.I. 1991); see also Rick Reilly, *Not Your Average Skirt Chaser*, *SPORTS ILLUSTRATED*, Nov. 26, 2001, at 100 (discussing co-ed field hockey in western Massachusetts).

140. 998 F.2d 168 (3d Cir. 1993).

141. See *Williams*, 998 F.2d at 174.

142. See *Williams*, 998 F.2d at 176; see also discussion *infra* Part III (discussing whether avoiding the constitutional question was proper).

143. See *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1130–31 (9th Cir. 1982) ("[W]hile a lack of overall equality of athletic opportunity certainly raises its own problems, the presence of such equality cannot by itself justify specific inequality of opportunity in any given sport."); *Petrie v. Ill. High Sch. Ass'n*, 394 N.E.2d 855, 860 (Ill. Ct. App. 1979) ("The [lower] court reasoned that if a State governmental unit had a volleyball team limited to girls but none upon which boys might play, when boys had actually had less volleyball playing opportunities than girls, even though boys had had more general athletic opportunity, a violation of the fourteenth amendment due process clause might occur.").

Alas, neither Title IX nor the Constitution requires that the concept of historical discrimination avoid the unseemly result of men running roughshod over women's athletic programs. One could instead justify asymmetry in the application of the Equal Protection Clause to sex distinctions in athletics by reference to the very demonstrated physiological differences upon which many women's advocates would rather not dwell. The concern over males dominating females in sports attaches only to those males who would not dominate but for their sex. It is simply not possible to conduct an individualized inquiry, the equivalent of a tryout, into the extent to which a particular male's skills would be diminished but for his sex. Given the size of average sex-linked physical differences between males and females, it is therefore perfectly reasonable to presumptively exclude a male from a female sport, at least after puberty. On the other hand, these same average differences in performance-related physical skills make entirely unreasonable a presumption that sex is motivating any advantages a female may demonstrate.

This relatively straightforward rationale for asymmetry, though rarely invoked, has not gone entirely unnoticed by courts. In *Petrie v. Illinois High School Association*,¹⁴⁴ the Illinois Court of Appeals rejected a sixteen-year-old's challenge under the state and federal constitutions to his high school volleyball team's exclusion of boys. Even under the strict scrutiny required by the Illinois Constitution, the court upheld an assumption that sex-based physical differences could justify an application of the Equal Protection Clause that was not sex-neutral:

The classification of public high school athletic teams upon the basis of gender in sports such as volleyball is itself based on the innate physical differences between the sexes. It is not based on generalizations that are "archaic," nor does it represent an attitude of "romantic paternalism." Like all systems of classifications for competition, it is overbroad and underbroad in that it includes females who are athletically superior to many males and excludes males who are less well-endowed athletically than most females. However, we are convinced that it is the only feasible classification to promote the legitimate and substantial state interest of providing for interscholastic athletic opportunity for girls.¹⁴⁵

144. See *Petrie*, 394 N.E.2d at 864-65; see also *Clark*, 695 F.2d at 1126.

145. *Petrie*, 394 N.E.2d at 862 (citations omitted).

The court concluded that other means of screening boys and girls for skill were impractical.¹⁴⁶ While, as I have noted, the evidence of sex-linked physical differences is in some dispute, the only evidence that a reviewing court would require to uphold "reverse" discrimination in athletics is a substantial likelihood of a non-de minimis average disparity. A boy playing with girls carries with him such a strong presumption that, but for his sex, he would be less skilled that the use of sex as a proxy for *excess* skill is permissible. Such fairness considerations do not come into play for girls participating in boys' sports, since any "excess" skill is presumptively just that, and not a sex-based advantage.

One potential objection to any assertion that a presumption of unfair sex-linked advantage may satisfy heightened scrutiny is courts' traditional concern over irrebuttable presumptions. The Supreme Court held in *U.S. Department of Agriculture v. Murry* that the Department could not declare a household presumptively ineligible for food stamps solely based on their having declared dependents on their previous two years' tax returns.¹⁴⁷ Writing for the Court, Justice Douglas called the determination "an irrebuttable presumption often contrary to fact,"¹⁴⁸ and thus a violation of due process. Might it be argued, in accordance with the *Murry* line of cases, that an agency determination that male athletes are using sex to their advantage is unconstitutionally rigid? The answer is an unqualified no. First of all, the irrebuttable presumption doctrine seems to have vanished from the Supreme Court's administrative law jurisprudence.¹⁴⁹ Secondly, the test for when a statutory classification qualifies as overbroad coincides nicely with the test for when an asserted state interest is sufficiently tailored to survive heightened scrutiny.¹⁵⁰ If I am correct in arguing that a court applying the Equal Protection Clause could exclude males from trying out for female teams based on their physical attributes, then the irrebuttable presumption doctrine poses no obstacle.

146. See *Petrie*, 394 N.E.2d at 862. Other means included segregation by height, weight, or age.

147. 413 U.S. 508, 514 (1973).

148. *Murry*, 413 U.S. at 514; accord *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (overturning school board rules requiring disability leave for teachers after the fourth month of pregnancy); *Bell v. Burson*, 402 U.S. 535 (1971) (invalidating a Georgia law providing for automatic drivers' license suspension of uninsured motorists who were involved in auto accidents, prior to a liability determination).

149. See Kenneth W. Simons, *Overinclusion and Underinclusion: A New Model*, 36 UCLA L. REV. 447, 514 (1989) (calling the irrebuttable presumption doctrine "moribund").

150. See JERRY L. MASHAW, ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 133 (5th ed. 2003).

III. DOES THE CONTACT SPORTS EXEMPTION MATTER?

In June of 2002, the Department of Education created a commission of professional athletes and educators to make recommendations for reforming Title IX.¹⁵¹ In the much-ballyhooed report the commission issued in February 2003, it made twenty-three recommendations to Secretary of Education Rod Paige.¹⁵² Not one mentioned the contact sports exemption.¹⁵³ Neither was it mentioned in a minority report issued by dissatisfied commission members.¹⁵⁴ The exemption has received relatively little popular attention, even from gender equity advocates.¹⁵⁵ There are reasons for this apparent apathy, even beyond a lingering, perhaps latent, disconnect between athletic scrums and traditional notions of femininity,¹⁵⁶ and even beyond any decisions to pick one's battles.

For one, Title IX's implementing regulations are anything but silent on the question of providing athletic opportunity to female athletes. In 1979, HEW issued an additional regulation to "provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs."¹⁵⁷ The 1979 Interpretation established, among other things, Title IX's now-notorious "proportionality test." In brief, under one of three tests for compliance, recipients of federal funding must demonstrate that athletic participation opportunities for members of each sex "are provided in numbers substantially proportionate to their respective enrollments."¹⁵⁸

151. See U.S. Dep't of Education, Secretary's Commission on Opportunity in Athletics, at <http://www.ed.gov/about/bdscomm/list/athletics/index.html> (last visited Mar. 5, 2004).

152. THE SECRETARY OF EDUCATION'S COMMISSION ON OPPORTUNITY IN ATHLETICS, OPEN TO ALL: TITLE IX AT THIRTY 33-40 (2003), available at http://www.ed.gov/pubs/titleixat30/title9_report.pdf [hereinafter OPEN TO ALL].

153. See *id.*

154. See DONNA DE VARONA & JULIE FOUDY, MINORITY VIEWS ON THE REPORT OF THE COMMISSION ON OPPORTUNITY IN ATHLETICS (2003), available at <http://www.savetitleix.com/minorityreport.pdf>.

155. In a comprehensive sixty-six page report on Title IX produced in August 2002 by two leading female athlete advocacy groups, the contact sports exemption is never mentioned. See NCWGE, *supra* note 46.

156. See SHIRLEY CASTELNUOVO & SHARON R. GUTHRIE, FEMINISM AND THE FEMALE BODY 92 (1998) ("The [feminist] essentialists' dismissal of sports requiring the direct use of one's body to overcome an opponent is based on the belief that the limitations of the female body make it unsuitable for physical contact.").

157. Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (proposed Dec. 11, 1979) (codified at 45 C.F.R. pt. 86).

158. *Id.* at 71,418.

The other two tests are a bit more nebulous. The second requires an institution to "show a history and continuing practice of program expansion which is demonstrably responsive to developing interest and abilities of the members" of an historically excluded sex.¹⁵⁹ The third asks an institution to show that "the interests and abilities of the members of that sex have been fully and effectively accommodated"¹⁶⁰ Because their amorphous contours invite increased litigation, these second two tests are less emphasized.¹⁶¹ Schools typically defend against Title IX lawsuits by showing a measure of substantial proportionality.¹⁶² Thus, institutions looking for ways to comply with Title IX want nothing more than a groundswell of skilled female athletes to count towards that proportionality.

This statutory incentive to provide women's teams, combined with the simple fact that very few female athletes have either the physique or the skill to compete with male athletes at a high level of competition, sharply narrows the number of people aggrieved by the contact sports exemption. Moreover, as I have discussed, athletic programs run by public entities are beholden to the Equal Protection Clause. Since college-aged female athletes are far less likely than younger ones to qualify to compete with male athletes in contact sports, the women most injured by the contact sports exemption seem to be high school-aged or younger girls attending private schools that choose to exclude them from sports for which they have sufficient skill to compete with boys.¹⁶³ It is a distinct minority, to say the least.

Whatever harm the contact sports exemption effects, it may run deeper than outward appearances suggest. First, Title IX's dizzying complex of regulations may in some cases act to pre-empt constitutional claims. Equal Protection relief is sought under section 1983, which provides a remedy for violations of civil rights by those acting under color of state law.¹⁶⁴ But under *Middlesex County Sewerage Authority v. National*

159. *Id.*

160. *Id.*

161. See OPEN TO ALL, *supra* note 152, at 23.

162. See *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993).

163. Private athletic programs were briefly exempted from Title IX after the Supreme Court held in 1984 that the specific program in question, not the school generally, must directly receive federal funding to be covered by the statute. See *Grove City Coll. v. Bell*, 465 U.S. 555, 573 (1984). University athletics do not typically receive direct federal assistance. See *id.* at 601 (Brennan, J., dissenting). Congress responded by passing the Civil Rights Restoration Act of 1987, which restored the Title IX analysis to an institution-wide approach. See Pub. L. No. 100-259, § 3(a), 102 Stat. 28, 28-29 (1988) (codified as amended at 20 U.S.C. § 1687 (2000)).

164. 42 U.S.C. § 1983 (2000).

Sea Clammers Association,¹⁶⁵ Congress may constructively preclude reliance on section 1983 by creating a comprehensive enforcement scheme within the ostensibly right-granting statute.¹⁶⁶ Title IX does provide for administrative enforcement. Not only does an aggrieved party have a right under the statute to file a complaint with the Department of Education, but the Department itself has the power to conduct compliance reviews *sua sponte*.¹⁶⁷ Moreover the Supreme Court decided in *Cannon v. University of Chicago* that there is an implied private right of action under Title IX itself.¹⁶⁸ The federal circuits are split on Title IX's preclusive effect on section 1983 actions. While the Second, Third, and Seventh Circuits have held that constitutional claims are subsumed within Title IX,¹⁶⁹ the Sixth, Eighth, and Tenth Circuits have held the opposite.¹⁷⁰ While never addressing the issue directly, the Supreme Court has implied that there are at least some cases in which Title IX does not automatically preclude section 1983 claims.¹⁷¹

Of course, an athlete who alleges that she has been discriminated against unconstitutionally, but who does not allege a violation of Title IX, states a different claim than one who alleges conduct that violates both the Constitution and the statute. It strains common sense to suggest that a claim based on a constitutional violation that is not also a violation of Title IX should be barred by *Sea Clammers*. To apply the *Sea Clammers* doctrine to an Equal Protection claim that Title IX is simply unable to recognize would be to eviscerate a constitutional right by statute. As the Supreme Court noted in *Hogan*, "Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment."¹⁷² Yet Justice Stevens refused to give more than lip service to this judicial canon in his *O'Connor* opinion. In holding that reliance on Title IX was highly persuasive in deciding the

165. 453 U.S. 1 (1981).

166. *Id.* at 20.

167. See 34 C.F.R. § 100.7 (2004).

168. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 709 (1979).

169. See *Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 758 (2d Cir. 1998); *Waid v. Merrill Area Publ. Schs.*, 91 F.3d 857, 862–63 (7th Cir. 1996); *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3d Cir. 1990).

170. See *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997); *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996); *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716 (6th Cir. 1996). For similar opinions in federal district courts, see *Jennings v. Univ. of N.C. at Chapel Hill*, 240 F. Supp. 2d 492 (M.D.N.C. 2002); *Carroll K. v. Fayette County Bd. of Educ.*, 19 F. Supp. 2d 618 (S.D. W.Va. 1998); *Alston v. Va. High Sch. League*, 176 F.R.D. 220 (W.D. Va. 1997).

171. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

172. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732–33 (1982).

constitutional issue of whether a girl could be barred from trying out for a contact sport, he wrote, "Although [Title IX] compliance does not confer immunity on . . . defendants, it does indicate a strong probability that the gender-based classification can be adequately justified."¹⁷³ Although rejected repeatedly by lower courts,¹⁷⁴ this line of reasoning in support of the contact sports exemption has never been repudiated by the Supreme Court.¹⁷⁵ In the *Williams* case, the Court of Appeals for the Third Circuit used *Sea Clammers* to avoid an Equal Protection inquiry into whether a public high school could discriminate against boys field hockey players even though one of the plaintiff's claims was that boys had been the victims of past discrimination.¹⁷⁶ As discussed in Part II, it is far from clear that the Title IX standard for when remedial discrimination is permissible coincides with the constitutional standard. Whether or not *O'Connor* and *Williams* got it right, there is sufficient murkiness in this area for differences between Title IX and the Equal Protection Clause to be abundantly relevant to public school athletes.

The effect of the contact sports exemption on older athletes also may be greater than appearances suggest. In March 2003, the Florida High School Activities Association approved girls flag football as an official sport,¹⁷⁷ with teams fielded by ninety-two schools across the state.¹⁷⁸ Stan Goldstein, the head flag football coach at Lawton Chiles High School in Tallahassee explains the sport's beginnings:

The evolution of this sport began three years ago . . . as an experimental sport, stemming from the ever controversial Title IX issue of providing equitable opportunities for females in high school sports. It was another avenue of opportunity for girls to proudly represent their school(s), while participating in an activity that has proven to be very popular amongst the

173. *O'Connor v. Bd. of Educ. of Sch. Dist. 23*, 449 U.S. 1301, 1307–08 (1980).

174. See cases cited *supra* note 99.

175. Compare *O'Connor v. Bd. of Educ. of Sch. Dist. 23*, 645 F.2d 578, 582 (7th Cir. 1981), with *Barnett v. Texas Wrestling Ass'n*, 16 F. Supp. 2d 690, 695 (N.D. Tex. 1998) ("The lack of a Title IX violation . . . does not mean that the defendants' actions were in all respects lawful").

176. *Williams v. Sch. Dist.*, 998 F.2d 168, 176 (3d Cir. 1993).

177. See News Release, Fla. High Sch. Athletic Ass'n, *Clearwater High To Host First-Ever Flag Football Finals* (Feb. 24, 2003), at <http://www.fhsaa.org/news/2003/030224.asp>.

178. See Fla. High Sch. Athletic Ass'n, 2003 Flag Football District Assignments, at http://www.fhsaa.org/programs/classes/2002_03/ffg.asp (last updated Feb. 24, 2003).

girls whose only experience with football was the annual "Powder Puff" tournament¹⁷⁹

Chiles had 102 girls try out for the team in 2003; it now offers both varsity and junior varsity teams and has a girls flag football booster club.¹⁸⁰ The Chiles experience illustrates not that football is a particularly popular sport among girls—it is not¹⁸¹—but that “interest and ability,” the talismanic touchstones of Title IX compliance, are not wholly exogenous; both may be created from within. The 1975 and 1979 Policy Interpretations expressly address Title IX as working towards “effectively accomodat[ing] the interests and abilities of members of both sexes.”¹⁸² To that end, the second and third prongs of the proportionality test refer, respectively, to developing and to accommodating the interests and abilities of an historically excluded sex (read: women).¹⁸³ The contact sports exemption, even if it directly affects only younger athletes, eventually affects the interest and abilities of older ones. The fewer their opportunities to play contact sports at a young age, when gender-linked differences are less profound, the less women will have either the interest or the ability to play such sports at an older age. If fewer women have the interest and ability to play contact sports at the college level, the impetus to create college teams will be diminished, and the number of women who will play in college and professionally will be smaller. The fewer women who play contact sports in college and professionally, the fewer the number of young girls who will be inspired to try out for their grade school teams. And so the cycle continues. Assuming that there is some benefit to participating in contact sports, the exemption may do its greatest damage in future generations.

Whatever benefit there is to athletic participation in fact furnishes a further reason why the exemption matters. Limitations on contact

179. Stan Goldstein, *Football: It's Not Just a Man's Sport Anymore* (2003) (online editorial, on file with author).

180. *Id.*

181. Only Florida offered girls' high school flag football in 2003. See NAT'L FED'N OF STATE HIGH SCH. ASS'NS, 2002-03 PARTICIPATION SURVEY 12 (2003), available at http://www.nfhs.org/Participation/2003/2002_03_Participation.pdf. In the 2002-03 academic year, 1,477 high school girls in thirty-three states played eleven-person football, twenty-six played six-player, and thirty-nine played eight-player. *Id.* Thus fewer girls played high school football in the entire country than boys played in the state of Vermont alone. See *id.* at 2. The relative popularity of women's rugby at the collegiate and club level may suggest, however, that girls don't play football only because they are not expected to do so.

182. Athletics, 34 C.F.R. § 106.41(c)(1) (2004).

183. See 44 Fed. Reg. 71,418 (1979).

sports limit the number of teams in which women can be involved, and therefore limit the number of girls involved in athletics. According to research commissioned by the President's Council on Physical Fitness and Sport, the regular exercise that sport provides for young women may reduce obesity, make them less susceptible to certain cancers, enhance mental health, reduce stress and depression, and increase academic achievement.¹⁸⁴ Other studies have suggested a negative correlation between female athletic participation and indices of eating disorders and other unhealthy neuroses.¹⁸⁵ Research by the Tucker Center for Research on Girls & Women in Sport even suggests that female athletes become particularly skilled drivers.¹⁸⁶ There is more broadly, it is commonly believed, a certain "physical and psychological empowerment that comes from being skillful in the use of the body."¹⁸⁷ Those who play sports learn to work as part of a team and to excel in a competitive environment, which is assumed to transfer into success in the job market later in life. As Judge Lambros observed thirty years ago in *Clinton v. Nagy*, "Organized contact sports have generally been thought of as an opportunity and means for a young boy to develop strength of character, leadership qualities and to provide competitive situations through which he will better learn to cope with the demands of the future."¹⁸⁸ These claims, particularly as they concern the psycho-social rather than the physical effects of sport, are not wholly undisputed.¹⁸⁹

184. See PRESIDENT'S COUNCIL ON PHYSICAL FITNESS & SPORT, PHYSICAL ACTIVITY & SPORT IN THE LIVES OF GIRLS: PHYSICAL & MENTAL HEALTH DIMENSIONS FROM AN INTERDISCIPLINARY APPROACH 14-15 (1997), available at <http://www.fitness.gov/girlssports.pdf> [hereinafter COUNCIL].

185. See Patricia Marten DiBartolo & Carey Shaffer, *A Comparison of Female College Athletes and Nonathletes: Eating Disorder Symptomatology and Psychological Well-Being*, 24 J. SPORT & EXERCISE PSYCHOL. 33, 38 (2002); Janet A. Wilkins, et al., *A Comparison of Male and Female University Athletes and Nonathletes on Eating Disorder Indices: Are Athletes Protected?*, 14 J. SPORT BEHAV. 129, 139 (1991).

186. See MARY JO KANE & KIM D. PEARCE, TUCKER CTR. FOR RESEARCH ON GIRLS & WOMEN IN SPORT, INVESTIGATING DIFFERENCES IN DRIVER ACCIDENT INVOLVEMENT: THE INFLUENCE OF PERCEPTUAL MOTOR COMPETENCE, COMPETITIVE ATHLETICS, AND GENDER (1999), available at <http://www.its.umn.edu/pdf/cts9903.pdf>.

187. CASTELNUOVO & GUTHRIE, *supra* note 156, at 108.

188. 411 F. Supp. 1396, 1399-1400 (N.D. Ohio 1974).

189. See, e.g., Donna J. Kuga & Gaylene Douctre, *Athletic Participation and Self-Image: Are Male and Female Athletes Reaping Similar Benefits?*, 51 PHYS. EDUCATOR 194 (1994) (comparing conflicting literature on the effect of athletic participation on "personal social-psychological characteristics"). It is worth noting that the anti-sports lobby is not particularly strong, and so much of the research in this area is commissioned by those with an interest in encouraging sports participation. The President's

Some research, for example, has suggested that both male and female athletes may be more likely to have "maladaptive" behavior tendencies such as gambling addictions, alcoholism, and drug abuse,¹⁹⁰ and that participation in high- and medium-contact sports may negatively affect athletes' moral functioning.¹⁹¹

Even if those who herald the benefits of sport were to rely solely on supposition and common assumptions, one might ask if it is particularly relevant whether the benefits of contact sports are "real" or not. In *VMI*, Justice Ginsburg quotes the school's mission statement early in the opinion—"to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service . . ."¹⁹²—to persuade readers that certain public rents should not be restricted to only one sex.¹⁹³ Whether with good reason or not, sports—and "contact sports" like football and basketball in particular—have been exalted to a similar position of civic importance. As sociologist Michael Messner notes, "[T]he armored male bodies of football players are elevated to mythical status . . ."¹⁹⁴ The gladiatorial, heroic image of the contact-sport athlete resonates enough that there is, I suggest, a harm in being told that it is out of reach solely because of one's sex.

More than a decade ago, Richard Pildes and Richard Niemi coined what is known in the voting rights world as "expressive harm."¹⁹⁵ It is, simply, a harm "that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about."¹⁹⁶ While Pildes and Niemi used the concept to refer to the constitutional injury at issue in

Council, for example, admits a bias in favor of promoting fitness. See COUNCIL, *supra* note 184, at 13.

190. See Stephen M. Weiss, *A Comparison of Maladaptive Behaviors of Athletes and Nonathletes*, 133 J. PSYCHOL. 315 (1999).

191. See Maria Kavussanu & Nikos Ntoumanis, *Participation in Sport and Moral Functioning: Does Ego Orientation Mediate Their Relationship?*, 25 J. SPORT & EXERCISE PSYCHOL. 501, 514 (2003). Earlier studies in this area have found that "athletes who have participated extensively in medium or high contact sports display aggressive tendencies, judgments that injurious acts are legitimate, or low levels of moral reasoning." *Id.*

192. *VMI*, 518 U.S. 515, 521 (1996).

193. See *VMI*, 518 U.S. at 557.

194. Michael A. Messner, *Sports and Male Domination: The Female Athlete as Contested Ideological Terrain*, 5 SOC. SPORT J. 197, 202 (1988).

195. See Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 485 (1993).

196. *Id.* at 506–07.

Shaw v. Reno,¹⁹⁷ which condemned race-conscious districting, I find it equally applicable where the remedial scheme Congress establishes to promote gender equality creates a safe haven from which females may remain excluded. As Professor Deborah Hellman has noted, the idea that the “social meaning” of state action—the message it conveys to the citizenry—is as important as its substantive effects has jurisprudential roots in *Brown v. Board of Education*.¹⁹⁸ The constitutional sin of school segregation was not merely that it led in practice to inferior educational outcomes for black schoolchildren, but that, in the words of Charles Black, “the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority”¹⁹⁹ Similarly, to insist upon sex segregation whose obvious purpose is to keep “men’s sports” for men and “women’s sports” for women offends regardless of whether schools can claim broadly, as Title IX’s implementing regulations demand, “to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes.”²⁰⁰ The injury dealt to Heather Mercer and to those with similar stories to tell is real, both as a blow to them personally and as an expressive harm to actual and potential female athletes everywhere.²⁰¹

IV. BRINGING THE CONSTITUTION AND THE CONTACT SPORTS EXEMPTION INTO BALANCE

The contact sports exemption is not for courts to trifle with, which is not to say that it is not unconstitutional. If the Equal Protection Clause forbids public institutions from denying opportunities to women solely because they are women, then a congressional regulation that expressly provides for such discrimination should perhaps be struck down

197. 509 U.S. 630 (1993); see Pildes & Nicmi, *supra* note 195, at 507.

198. See Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 2–3 (2000).

199. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1959).

200. 44 Fed. Reg. 71,417 (1979).

201. See Brake, *supra* note 23, at 142–43; CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 121 (1987) (“For women, when we have engaged in sport, when we have been physical, it has meant claiming and possessing a physicality that is our own. . . . In other words, athletics can give us our bodies as a form of being rather than as a form of appearance, or death-likeness.”); see generally PRECILLA CHOI, FEMININITY AND THE PHYSICALLY ACTIVE WOMAN (2000) (discussing cultural barriers to female participation in sport).

on direct challenge.²⁰² Congress probably could not, one imagines, pass a law conditioning federal funding on non-discrimination but exempting discrimination against blacks from Mississippi. But the issue of institutional competence, cemented by *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*,²⁰³ is difficult to overcome. In the language of the now familiar formulation, an agency's constructions of a statute it administers "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute,"²⁰⁴ provided congressional intent is not clear with respect to a particular issue. As Title IX itself did not originally mention athletics, congressional intent was anything but clear. Through the Javits Amendment, Congress expressly left to HEW the task of striking a balance between the mandates of equality and the unique challenges athletics programs present to those mandates.²⁰⁵

Courts considering the question have tended to assume without much argument that the contact sports exemption is a reasonable regulation. In *Kelly v. Board of Trustees*,²⁰⁶ for example, an unsuccessful challenge to the elimination of the men's swimming team at the University of Illinois, the Court of Appeals for the Seventh Circuit declared the regulation containing the contact sports exemption to be "not at odds with the purpose of Title IX,"²⁰⁷ and therefore deserving of *Chevron* deference. The court added in a footnote that "Congress would indeed be surprised to learn that Title IX mandated co-ed football teams."²⁰⁸ Barriers to women's participation in contact sports were not the ones at which Congress was taking aim. In *Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletics Association*,²⁰⁹ a successful challenge to the state of Ohio's rule forbidding schools from offering sex-integrated contact sports, the Court of Appeals for the Sixth Circuit overruled a lower court ruling that the contact sports exemption was unconstitutional. The court held that because the regulation gives schools the discretion of providing equal athletic opportunities either by integrating their contact sports teams or through other means and does not outright forbid integrated teams, it passes constitu-

202. See Sangree, *supra* note 22, at 388.

203. 467 U.S. 837 (1984).

204. *Chevron*, 467 U.S. at 844.

205. See *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1993) ("The degree of deference is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX.").

206. 35 F.3d 265 (7th Cir. 1994).

207. *Id.* at 270.

208. *Kelly*, 35 F.3d at 270 n.5.

209. 647 F.2d 651 (6th Cir. 1981).

tional muster.²¹⁰ This distinction is akin to distinguishing between a regulation that requires discrimination against blacks from Mississippi and one that merely allows it en route to compliance with an overall non-discrimination mandate. The same institutions whose histories of discriminatory behavior inspired Title IX are given the discretion to decide precisely how to discriminate. With this level of judicial latitude, lawsuits are not the answer to the contact sports exemption.

As such, it is incumbent upon the Department of Education or, failing that, upon Congress, to update Title IX's understanding of athletic equality to approximate, at least, that of the federal courts. I do not aspire, as Professor B. Glenn George hypothesizes in evaluating various proposals for confronting sex segregation conundrum, to "forget the legal parameters for a moment" and design "a perfect sports world in equality terms."²¹¹ My goal is far more modest: to bring Title IX into twenty-first century jurisprudence.

One commentator has said that "although the overall team-structure requirements [of the 1975 regulation] might appear to encompass neutral standards that disregard distinctions between sexes, in fact they result in continued discrimination."²¹² This, I contend, is not sex-neutrality as we presently understand it. The *VMI* Court would not allow the state of Virginia to remedy its discrimination against women by leaving VMI's exclusionary admissions policy in place and establishing the Virginia Women's Institute for Leadership (VWIL), which the Court called "different in kind from VMI and unequal in tangible and intangible facilities."²¹³ VWIL, Justice Ginsburg protested, "'deemphasize[s]' military education and uses a 'cooperative method' of education" rather than "the rigorous military training for which VMI is famed."²¹⁴

What if, instead of creating an emasculated sister institution and maintaining segregated admissions tracks, Virginia had created a parallel sister school and opened the admissions policies of both VMI and the new school to members of both sexes? Further, what if the adversative model of both schools were truly identical to that of VMI? All indications are that the *VMI* Court would have struck down this remedy as insufficiently attentive to the differences between men and women.

210. See *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d at 656.

211. B. Glenn George, *Fifty/Fifty: Ending Sex Segregation in School Sports*, 63 OHIO ST. L.J. 1107, 1142 (2002).

212. Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254, 1270 (1979).

213. *VMI*, 518 U.S. 515, 547 (1996).

214. *VMI*, 518 U.S. at 548 (citations omitted).

Justice Ginsburg acknowledged that "[a]dmitting 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."²¹⁵ While it is far from obvious why privacy is a requisite of formal equality,²¹⁶ requiring an adjustment in physical standards is eminently defensible given "physiological differences between male and female individuals."²¹⁷ To give women a parallel "opportunity" without accounting for this difference is to give them no opportunity at all.²¹⁸

Indeed in some ways establishing VWIL, but with a rigorous, adversative approach that nonetheless fell short of the physical standards required for VMI, would have been a superior solution to simply opening VMI to female admissions. If the Court were to apply the principles announced in *VMI* more consistently, it might have required this solution. The opinion itself recognizes that

[s]ex classifications may be used to compensate women for "particular economic disabilities [they have] suffered," to "promote equal employment opportunity," to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.²¹⁹

It takes but a small leap of logic—calling a physical standard that only men can reach a "sex classification"—to require a two-school solution. *VMI*'s vision of formal equality does not preclude "affirmative action"; it permits a recognition that group differences can justify disparate treatment of individuals so long as an exceedingly persuasive justification underlies such treatment.²²⁰ Thus a formal equality model

215. *VMI*, 518 U.S. at 550 n.19.

216. Cf. Dianne Avery, *Institutional Myths, Historical Narratives and Social Science Evidence: Reading the "Record" in the Virginia Military Institute Case*, 5 S. CAL. REV. L. & WOMEN'S STUD. 189 (1996). "Neither VMI nor Virginia has articulated a public mission . . . to protect 'decency' between the sexes." *Id.* at 351.

217. *VMI*, 518 U.S. at 550 n.19 (quoting 10 U.S.C. § 4332 (2000)).

218. Some commentators have argued persuasively that while the *VMI* Court recognized physiological differences, it remained distressingly blind to equally potent social differences. See Vojdik, *supra* note 24. I agree wholeheartedly, which emphasizes the limits of this article's argument. I do not argue here for a new theory of the Equal Protection Clause.

219. *VMI*, 515 U.S. at 533–34 (alteration in original) (citations omitted).

220. See Christopher D. Totten, *Constitutional Precommitments to Gender Affirmative Action in the European Union, Germany, Canada, and the United States: A Compara-*

need not militate in favor of either fully open athletics²²¹—potentially to the permanent detriment of female athletes²²²—or athletics segregated by regulations akin to the contact sports exemption,²²³ particularly when athletic segregation itself limits the social standing of women.

Although perhaps, at first blush, sounding in an affirmative, substantive vision of the Equal Protection Clause,²²⁴ formal equality can therefore be used to justify the following revision to the regulations respecting the establishment of separate teams for interscholastic athletics:

Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient must operate or sponsor separate teams for members of each sex where sufficient interest and ability exists to support such teams and where selection for such teams is based upon athletic skill. However, where a recipient operates or sponsors a team in a particular sport for males, females must be allowed to try out for the team offered.²²⁵

Five changes are proposed. First, there is no contact sports exemption. As I have argued, the exemption cannot persuasively be defended.

tive Approach, 21 BERKELEY J. INT'L L. 27, 56 n.176 (2003); Tokarz, *supra* note 23, at 206.

221. See, e.g., *Petrie v. Ill. High Sch. Ass'n*, 394 N.E.2d 855, 865–68 (Ill. Ct. App. 1979) (Craven, J., dissenting); MARTINE ROTHBLATT, *THE APARTHEID OF SEX: A MANIFESTO ON THE FREEDOM OF GENDER* 73–77 (1995); Tokarz, *supra* note 23, at 239.

222. *But see* FAUSTO-STERLING, *supra* note 117, at 218–19 (suggesting that if the gap between highly skilled male and female athletes were to continue to close at the present rate, they would be substantially equal in thirty to forty years).

223. See, e.g., *O'Connor v. Bd. of Educ.*, 449 U.S. 1301 (1980).

224. See Robin West, *The Meaning of Equality and the Interpretive Turn*, 66 CHI.-KENT L. REV. 451, 469 (1990).

225. For the sake of ready comparison, the current regulation reads as follows:

Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

34 C.F.R. § 106.41(b) (2004).

The one purpose that has been addressed and approved of as a matter of equal protection—preventing the integration of contact sports—is rather ably served by the competitive skill exemption.

Second, separate teams are required rather than optional where selection for teams is based on athletic skill and sufficient interest and ability exists to support two teams. A careful reading of the 1979 Policy Interpretation suggests that this change simply cleans up the language of the Regulation to reflect what is already required. Under the Regulation, a recipient's selection of teams in contact sports must "effectively accommodate" the interests and abilities of its students.²²⁶ For contact sports, "effective accommodation" means that a school may not offer just one team if the excluded sex meets a threshold level of interest and ability such that a viable team with a reasonable expectation of intercollegiate competition could be formed, and if opportunities for members of that sex have historically been limited.²²⁷ I agree with HEW that is not clear why, if both women and men are interested in playing a sport and are able to play it—football, say—a school should be able to effectively limit its offerings to men by having just one, skill-based team.

Such a rule raises the specter that has received the most attention in discussions of Title IX: the perceived need to eliminate men's teams in order to have the financial wherewithal to support women's teams. While intelligent arguments abound on both sides of this debate,²²⁸ I find it persuasive that the decision of which sports an institution receiving federal funding offers its students should not be made using a criterion—skill level—that discriminates against women.²²⁹ Although the Supreme Court has not had to consider whether it is constitutional

226. 34 C.F.R. § 106.41(c)(1) (2004).

227. *See id.* *See also* Application of the Policy-Determination of Athletic Interests and Abilities, 44 Fed. Reg. 71,417, 71,418 (Dec. 11, 1979). For non-contact sports, a recipient need only provide a separate team if the same two conditions are met along with the additional condition that members of the excluded sex lack the skill to play on an integrated team.

228. *See generally* College Sports Council, at <http://www.savingsports.org> (last visited Mar. 31, 2005) (arguing that Title IX's proportionality test is an effective quota that unduly harms men's programs such as wrestling); Women's Sports Foundation, at <http://www.womenssportsfoundation.org> (last visited Mar. 31, 2005) (arguing that big-budget sports like football and men's basketball are more to blame than Title IX for squeezing out men's programs).

229. Although equally at odds with the purpose behind Title IX, discrimination based on revenue does not likely qualify as intentional discrimination against women. Thus, such discrimination might survive under the theory of equality animating the present equal protection doctrine. Although discrimination based on skill is also, technically, disparate impact, I am suggesting by implication that because the inevitability of the connection between sex and skill is decisive enough to warrant judicial notice, skill-based discrimination could qualify as intentional.

for public schools to constructively limit opportunities for female athletes by providing just one team in a given sport, the VMI case suggests the possibility that, at least if practiced on a broad enough scale, such *sub rosa* discrimination is impermissible.²³⁰

Professor Deborah Brake has suggested a more radical change in the regulation. She floats a proposal that would require a school to offer a woman's team in a contact sport when just one female student requests it, and then make an affirmative commitment to providing the necessary resources to see if a women's team could be formed.²³¹ Professor Brake argues that this change would prevent the "interest and ability" test from undermining Title IX's commitment to substantive equality.²³² Whatever the substantive merits of this proposal, it would exacerbate the concern over traditional men's sports being displaced even absent any groundswell of interest among campus females. More important for the purposes of this Article, I do not find such a proposal defensible as a matter of formal equality.

The third change I propose is to address directly the concern over men's domination of women's sports by stating baldly that Title IX requires that women be allowed to try out for men's sports.²³³ By implication, Title IX does not require that men be allowed to try out for women's sports. The redacted language, allowing schools to discriminate in tryouts where opportunities for the excluded sex have not previously been limited, is an unnecessary cover. If this qualifier would never pass muster as an Equal Protection matter, it is perplexing that it is relied upon in Title IX. As I have noted, the size of the skills gap between men and women leads to a different presumption when a male competes in an otherwise all-female sport than in the inverse case. The skills gap, then, is the only justification that should be needed for any asymmetry in tryouts, either under the Constitution or under Title IX.²³⁴

230. See Julia Lamber, *Gender and Intercollegiate Athletics: Data and Myths*, 34 U. MICH. J.L. REFORM 151, 201 n.330 (2001).

231. Brake, *supra* note 23, at 140.

232. See *id.* at 139–40.

233. For a similar proposal, see Abigail Crouse, Comment, *Equal Athletic Opportunity: An Analysis of Mercer v. Duke University and a Proposal to Amend the Contact Sports Exception to Title IX*, 84 MINN. L. REV. 1655, 1684 (2000).

234. Again, Professor Brake has proposed a different, more radical approach. She suggests that the regulations allow men to play "women's" sports "where the denial of the sport to males rests on cultural assumptions about the sport's femininity." Brake, *supra* note 23, at 145. This solution, while interesting, strikes me as hopelessly standardless. See George, *supra* note 211, at 1112 n.25 (finding it "difficult to visualize . . . athletic directors or NCAA administrators making such abstract decisions").

Fourth, "athletic" skill rather than "competitive" skill is the trigger for required sex segregation. The rationale for asymmetric discrimination I have offered does not allow discrimination based on disparate mental or experiential skills. Reliable evidence suggesting any difference in the intellectual capacities of males and females is at best hard to come by, at worst apocryphal, and in any event far too controversial to be relied upon either by a government agency or by courts.²³⁵ Returning to the all-female chess team discussed in Part II, a set of Title IX implementing regulations fully attentive to current Equal Protection jurisprudence would not allow such arbitrary segregation, justifiable only on the basis of past discrimination. Of course, chess is not an athletic activity and so does not fall under Section 106.41 of the implementing regulations, but the analogy remains apt should a school for whatever reason offer a "sport"—sailing or pool, perhaps²³⁶—for which selection is not based on athletic skill. The regulations plainly contemplate "athletic" activities in which selection is not based upon competitive skill. Changing "competitive" to "athletic" merely covers "competitive" activities not based on athletic skill, to whatever extent such activities are offered in practice.

Finally, whether women are allowed to try out for a "men's" sport does not depend on whether a women's team exists. If a woman is so qualified, then she should be allowed to test her skills by competing with and against men. Limiting such a woman to the all-women's team places an artificial ceiling on her development. Justice Stevens' opinion in *O'Connor*, allowing a school to refuse to permit a qualified girl from trying out for a basketball team,²³⁷ is unacceptably anachronistic.

The present Regulations seem premised on the idea that the spirit of Title IX must be followed without upsetting the status quo on athletic fields. The idea that males must be free to exclude females from contact sports is treated as the province of natural law, biological dogma not to be upset by the laws of men. Moreover, the thinking seems to go, a woman excluded from a team because she lacks the skills has but learned the same lesson that male athletes learn all the time: Life doles out ability with an uneven hand. Gender equity, however, means that women may not be denied opportunities *because they are women*. Allowing men to segregate sporting opportunities by sex—either formally through a contact sports exemption or informally by basing membership on competitive skill—risks such impermissible denial.

235. See ROTHBLATT, *supra* note 221, at 49–51; FAUSTO-STERLING, *supra* note 117, at 13–60.

236. See Robinson, *supra* note 26, at 351.

237. *O'Connor v. Bd. of Educ. of Sch. Dist.* 23, 449 U.S. 1301 (1980).

It must be acknowledged that men who cannot try out for women's teams are similarly being denied an opportunity because of sex. The difference is that when men try out for and make women's teams they are simultaneously denying an opportunity to an otherwise qualified woman. Depending on the size of sex-based differences, either the presumption that the man would not make the team but for his sex advantage, or the less ambitious presumption that his sex makes him better than he otherwise would be, is unavoidable. Either presumption strikes me as an exceedingly persuasive reason to allow female-only, but not male-only sports. When a school allows a woman to try out for a men's team, it is only denying an opportunity to a man who lacks sufficient skill, independent of sex. This brand of discrimination is permissible, even welcomed, in the sports context. That men are, by and large, better at sports than women is thus an argument for favoring *women* in providing athletic opportunity. We may call it a species of affirmative action, but it is in fact what simple equality requires.

CONCLUSION

Heather Mercer is still making headlines, in a way. Under the eventual disposition of her case, institutions regulated by Title IX cannot discriminate on the basis of sex against a student granted a tryout. If the sport is a contact sport, however, they need not allow the student to try out in the first place.²³⁸ Thus after *Mercer*, schools have a strong incentive not to grant women tryouts for fear of being tied into anti-discrimination laws once they do.

Mary Nystrom, a junior place kicker at Cooper High School in Robinsdale, Minnesota, saw an advertisement in a local paper in spring 2003.²³⁹ The University of Minnesota was looking for a "quality kicker/punter."²⁴⁰ Mary says she's comfortable kicking from thirty-five yards, and her brother, Dan, is the Big Ten's career leader in field goals made, so she decided to show up for tryouts.²⁴¹ Nystrom was rebuffed because football "is not a co-ed sport."²⁴² School officials mentioned the Heather Mercer case to her when they denied her.²⁴³

238. See *Mercer v. Duke Univ.*, 190 F.3d 643, 647–48 (4th Cir. 1999).

239. Dennis Brackin, *'U' Says No to Nystrom: Football Team Denies Tryout to Female Place-kicker*, MINNEAPOLIS STAR TRIB., Apr. 18, 2003, at 9C.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

Newspaper reports describing Nystrom's rejection dutifully mentioned that Title IX does not require schools to allow women to try out for contact sports.²⁴⁴ None mentioned that the University of Minnesota is a public school, and thus beholden to the Equal Protection Clause. Nystrom says she will not fight it.²⁴⁵

Title IX's contact sports exemption thus affects both private and public schools. It affects the way we think about the proper role of gender equity in intercollegiate athletics. It casts in stone attitudes about women that were at best fresh in 1975, at worst already stale by then. One day, I suspect, Title IX will be in better harmony with the Constitution. For Heather Mercer, Mary Nystrom, and those who may have looked up to them, however, it will be too late. ♣

244. See *id.*; Associated Press, *Kicker Told She Can't Try Out*, CHI. TRIB., Apr. 19, 2003, at 7.

245. Brackin, *supra* note 239.