The Constitutionality of Title IX's Contact Sport Exception: A Proposal for Legislative Change in Modern Times

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INTRODUCTION

> *In the future, there will be no female leaders. There will just be leaders.*[1]

Women and girls have experienced exponential growth in their ability to participate in athletics since the introduction of Title IX, a federal civil rights law that prohibits discrimination on the basis of sex.[2] Before passage in 1972, one in twenty-seven females competed in sports; today, that number has grown to two in five.[3] Despite this significant progress, however, sex discrimination in athletics persists. One explanation is Title IX's contact sport exception.[4]

The contact sport exception expressly permits discriminatory behavior by allowing recipients of federal financial assistance to provide athletics separately on the basis of sex *if* team selection is based on competitive skill, or the activity involved is a contact sport.[5] So, while framed as anti-discriminatory, Title IX has a built-in exception immunizing discrimination by allowing schools to limit female participation opportunities. Although women are deemed strong enough to subject themselves to military combat, they are too fragile to step onto a football field. It is "too risky" to put on a

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1. SHERYL SANDBERG, LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD 172 (2013).
2. NAT'L WOMEN'S L. CTR., TITLE IX BASICS: BREAKING DOWN BARRIERS 13 (2015) (ebook).
3. *Title IX and the Rise of Female Athletes in America*, WOMEN'S SPORTS FOUND. (Sept. 2, 2016), https://www.womenssportsfoundation.org/education/title-ix-and-the-rise-of-female-athletes-in-america [https://perma.cc/VMU4-WERF].
4. *Id.*; 34 C.F.R. § 106.41(b) (2025).
5. 34 C.F.R. § 106.41(b) (2025).

helmet and cleats, yet safe to suit up in full fatigues. The line that has been drawn is contradictory at best.

Consequently, this Comment highlights the unconstitutionality of the contact sport exception and demonstrates its direct conflict with the Equal Protection Clause. Further, this Comment argues that the contact sport exception explicitly undermines the anti-discriminatory objectives of Title IX, and therefore, new legislation is required to remedy this existing policy of exclusion and inequality. Part I reviews Title IX and its application to female participation in sports. An overview of the statute's legislative history, statutory framework, and judicial development is provided to serve as context for analyzing the contact sport exception's constitutionality. Part II illustrates how the Equal Protection Clause has been utilized to redress Title IX's shortcomings. Part III and Part IV expose how the contact sport exception violates the Equal Protection Clause and undermines Title IX's goals, respectively. Part V explains and justifies the call for amending Title IX, and Part VI overviews previously proposed solutions, examining potential objections to a new framework. Lastly, Part VII proposes a new legislative framework to replace the present-day contact sport exception.

I. A REVIEW OF TITLE IX AND ITS APPLICATION TO FEMALE PARTICIPATION IN SPORTS

This Part begins with an overview of Title IX's legislative history, statutory framework, and judicial development. It then explains Title IX's application to female participation in sports and introduces the contact sport exception.

A. Title IX's Legislative History

In response to widespread discrimination against females in educational settings, Congress enacted Title IX of the Education Amendments of 1972.[6] Title IX prohibits discrimination on the basis of sex in education programs or activities that receive federal financial assistance.[7] Put simply, Title IX (the "Act") is enforceable against an "educational institution and all of its educational activities and programs if *any* program within the entire

6. Ethan Brown, *Athletics and Title IX of the 1972 Education Amendment*, 10 GEO. J. GENDER & L. 505, 507 (2009); *see* 118 CONG. REC. 5803 (1972) (statement of Sen. Birch Bayh).

7. NAT'L WOMEN'S L. CTR., *supra* note 2, at 13.

educational institution receives *any* federal funding."[8] The Act provides in pertinent part: "No person in the United States 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."[9]

Title IX was enacted in congressional conference on June 23, 1972, absent any formal hearings or committee reports.[10] The Act's alleged purpose is to mandate gender equality and ensure equal opportunity for males and females,[11] but the statute itself is paved with vague intentions. What does equal opportunity really mean? This ambiguity has resulted in conflicting interpretations of Title IX—and the breadth of its coverage—from advocates and critics alike.[12]

As interpreted by the Department of Health, Education, and Welfare ("HEW"), "[t]he legislative history of Title IX clearly shows that it was enacted because of discrimination that currently was being practiced against women in educational institutions."[13] Senator Birch Bayh further clarified that Title IX was intended to be "a strong and comprehensive measure [that would] provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women."[14] These goals are ostensibly noble, but the vagueness of Congress's underlying intentions have resulted in an interpretive free-for-all concerning Title IX's applicability.[15] At the cornerstone of these debates was the burning desire to understand Title IX's impact on intercollegiate athletics.

B. Title IX Coverage in Athletics

Despite Title IX's broad coverage over *all* educational activities and programs, its impact on intercollegiate athletics has garnered the most public attention and controversy. Ironically, however, the original Title IX

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8. Katlynn Dee, *Strong but Sidelined: A Call for the Elimination of the Contact Sport Exception Through the Lens of Title VII's Disparate Treatment Analysis*, 69 DEPAUL L. REV. 1011, 1013 (2020) (emphasis added).

9. 20 U.S.C. § 1681(a).

10. David Aaronberg, *Crumbling Foundations: Why Recent Judicial and Legislative Challenges to Title IX May Signal Its Demise*, 47 FLA. L. REV. 741, 747 (1995).

11. NAT'L WOMEN'S L. CTR., *supra* note 2, at 13.

12. Aaronberg, *supra* note 10, at 747.

13. NAT'L WOMEN'S L. CTR., *supra* note 2, at 13.

14. *Id.* at 14; *see also* 118 CONG. REC. 5804 (1972) (statement of Sen. Birch Bayh).

15. Aaronberg, *supra* note 10, at 747.

legislation made no mention of college athletics.[16] In fact, sports were only discussed twice throughout the entirety of the relevant congressional conference.[17] It was not until after the Act went into effect that intercollegiate athletics became the focal point of debate.[18]

Because Title IX's impact on sports was largely unknown at the time of its passage, many attempted to quickly constrain the Act's effect on intercollegiate athletics.[19] The NCAA, among others, "implemented extensive lobbying efforts to exempt intercollegiate athletics from Title IX altogether."[20] This was largely due to widespread fear that Title IX would drastically change the nature of college sports.[21]

The first of these attempts was an amendment proposed by Senator John Tower in 1974—known today as the Tower Amendment.[22] The Tower Amendment, swiftly rejected by a Senate-House conference committee, would have exempted revenue-producing sports from the bounds of Title IX.[23] In its place, however, Congress approved and adopted Senator Jacobs Javits's compromise proposal.[24] The Javits Amendment instructed HEW to issue Title IX regulations covering intercollegiate athletics with "reasonable provisions concerning the nature of particular sports."[25] HEW's Office for Civil Rights ("OCR") submitted the first set of these regulations for approval in May of 1975, and on July 21, 1975, they went into effect.[26]

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16. JODY FEDER, CONG. RSCH. SERV., RL31709, TITLE IX, SEX DISCRIMINATION, AND INTERCOLLEGIATE ATHLETICS: A LEGAL OVERVIEW 3 (2012).

17. 118 CONG. REC. 5807 (1972) (statement of Sen. Birch Bayh) (discussing personal privacy in sports facilities); 117 CONG. REC. 30407 (1971) (statement of Sen. Birch Bayh) (discussing intercollegiate football and men's locker rooms).

18. Sarah Whitman, *Title IX: Shift in Focus from Education to Athletics*, TRINITY COLL. (May 3, 2013), https://commons.trincoll.edu/edreform/2013/05/title-ix-shift-in-focus-from-education-to-athletics [https://perma.cc/RYX2-83P9] ("However, women's athletics quickly became one of the most hotly debated topics of the 1970s and 80s shortly after the passing of Title IX.").

19. Dee, *supra* note 8, at 1014.

20. *Id.*

21. *See* Steve Springer, *After 16 Years, Title IX's Goals Remain Unfulfilled*, LA TIMES (Oct. 30, 1988), https://www.latimes.com/archives/la-xpm-1988-10-30-sp-1037-story.html [https://perma.cc/D63M-FYHU] (quoting Walter Byers, the NCAA's executive director at the time, as saying that Title IX could cause the "possible doom of intercollegiate sports").

22. 120 CONG. REC. 15322–23 (1974) (statement of Sen. John Tower).

23. *Id.*

24. Marielle Elisabet Dirkx, *Calling an Audible: The Equal Protection Clause, Cross-over Cases, and the Need to Change Title IX Regulations*, 80 MISS. L.J. 411, 414 (2010).

25. S. Rep. No. 1026, at 1 (1974) (Conf. Rep.). The Javits Amendment later became part of the Education Amendment of 1974, Pub. L. No. 93-308, § 844, 88 Stat. 484, 612 (1974).

26. Aaronberg, *supra* note 10, at 752.

Specifically, these regulations provide that "[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient."[27] Note, however, that the period at the end of the preceding sentence is not a declarative end to these approved regulations. There are a number of caveats that function as qualifiers and completely alter discrimination analyses under Title IX—most notably, the contact sport exception.

To clarify, there are three distinct parts to the 1975 regulations released by the OCR. First, there is the general provision outlined above.[28] Second, there is the contact sport exception,[29] which is the focus of this Comment. And third, there is the equal opportunity provision.[30]

1. The Contact Sport Exception

As a result of the congressional mandate to consider "the nature of particular sports," the 1975 regulations effectively endorsed discrimination in intercollegiate athletics. Section 106.41(b), the contact sport exception, provides:

> (b) Separate Teams. Notwithstanding the requirement 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 skills 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.[31]

Accordingly, reading its language plainly, the contact sport exception explicitly limits female participation opportunities. Educational institutions

27. 34 C.F.R. § 106.41(a) (2024).
28. *Id.*
29. *Id.* § 106.41(b).
30. *Id.* § 106.41(c).
31. *Id.* § 106.41(b) (emphasis added).

are only required to provide female participation opportunities on an equitable basis with their male counterparts if (1) there is no parallel women's team; and (2) the sport involved is non-contact. These are the aforementioned caveats that function as qualifiers within Title IX. Regardless of a female's ability or skill, she can be barred from membership on a team if the sport is classified as a contact sport.[32]

2. Equal Opportunity / Treatment

The final and third part of the 1975 regulations embodies the principle of equal treatment.[33] Section 106.41(c) provides, "[a] recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes."[34] To ensure the existence of equal treatment between males and females, the regulations provided ten factors for evaluation:

> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) The provision of equipment and supplies; (3) Scheduling of games and practice time; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutoring; (6) Assignment and compensation of coaches and tutors; (7) Provision of locker rooms, practice and competitive facilities; (8) Provision of medical and training facilities and services; (9) Provision of housing and dining facilities and services; (10) Publicity.[35]

For the most part, these factors are relatively straightforward to evaluate. It is not overly complicated to compare how much time a women's basketball team spends practicing versus a men's basketball team at the same institution. Likewise, there is little ambiguity in analyzing what equipment is made available to male teams as opposed to their female counterparts. However, how an institution would determine whether the selection of sports and levels of competition effectively accommodate the interests and abilities of both

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32. The author stipulates that women can be barred from membership in contact sports because historically, women are the sex whose athletic opportunities have previously been limited. *See Title IX and the Rise of Female Athletes in America*, *supra* note 3.

33. Although the regulations utilize the term equal "opportunity" as opposed to equal "treatment," the author utilizes equal treatment because it is ultimately more accurate. In practice, equal opportunity means that males and females are treated equally *after* opportunities have been provided.

34. 34 C.F.R. § 106.41(c) (2024).

35. *Id.*

sexes (the first of the ten factors) is less clear-cut. What does it mean to effectively accommodate interest? Is there a threshold level of satisfaction that must be met?

C. Title IX's Statutory Framework: Regulatory Compliance Policy

Following the release of the 1975 regulations, schools were given three years to comply with Title IX or risk divestment of all federal funding.[36] Additionally, in *Cannon v. University of Chicago*, the Supreme Court recognized that individuals have an implied private right of action against any institution for noncompliance.[37] With little guidance and understanding as to what compliance actually required, institutions feared facing repercussions for inadvertent defiance.[38] The severity of the repercussions "gave universities a substantial interest in determining exactly what was required to ensure compliance."[39] In response to pleas for clarification, the OCR issued a 1979 Policy Interpretation that aimed to elucidate the regulations released four years prior.[40]

1. The 1979 Policy Interpretation

The 1979 Policy Interpretation was released to resolve the ambiguity of the equal treatment requirement[41] within the 1975 regulations. Because institutions were unsure what it meant to effectively accommodate the interests and abilities of both sexes, the OCR's Policy Interpretation established a three-part test to simplify Title IX compliance:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
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> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program

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36. *Id.* § 106.41(d); 20 U.S.C. § 1682.
37. *See* 441 U.S. 677 (1979).
38. Aaronberg, *supra* note 10, at 754.
39. Jill K. Johnson, *Title IX and Intercollegiate Athletics: Current Judicial Interpretation of the Standards for Compliance*, 74 B.U. L. REV. 553, 558 (1994).
40. Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 MARQ. SPORTS L. REV. 11, 14 (2003).
41. 34 C.F.R.§ 106.41(c) (2024).

> expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
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> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.[42]

The first alternative is known today as the substantial-proportionality test and requires that the ratio of women among an institution's athletes be "substantially proportionate" to the ratio of women among an institution's students.[43] In theory, 25% of the athletes at an institution should be female if 25% of the student population is female. In terms of effectively accommodating the interests and abilities of both sexes, substantial proportionality focuses on the discrepancy between female participation on collegiate sports teams and their presence at these institutions generally.[44] A university will not be held to have effectively accommodated interests if these quantitative measures are not roughly equivalent.

The second alternative holds an institution in compliance with Title IX if that institution can demonstrate program expansion in response to female athletes' growing desires to participate.[45] This option was likely included as an alternative to provide institutions with more latitude considering the limited women's teams that existed when regulations were initially released.[46] It gave institutions the much needed time to work towards expansion.[47] Predictably, however, universities that rapidly added women's teams in the 1970s to meet this benchmark have long since continued this practice of expansion.[48]

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42. Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71418 (Dec. 11, 1979) (codified at 45 C.F.R. pt. 86 (2024)).

43. Dee, *supra* note 8, at 1018.

44. Mary W. Gray, *The Concept of Substantial Proportionality in Title IX Athletics Cases*, 3 DUKE J. GENDER L. & POL'Y 165, 172 (1996).

45. B. Glenn George, *Fifty/Fifty: Ending Sex Segregation in School Sports*, 63 OHIO ST. L.J. 1107, 1117 (2002).

46. *Id.*

47. *Id.*

48. *Id.*; *see* Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996) (holding that Brown failed to satisfy the "continuing practice of expansion" requirement under the second alternative because the institution had only added one women's team since the 1970s).

The third alternative, which is no less ambiguous than the original standard, allows a school to satisfy Title IX if they can prove effective accommodation.[49] This test "looks at the different levels of athletic interests to determine if the imbalanced gender representation in athletes is a product of impressible discrimination or simply a result of disinterest."[50] In other words, if a university can prove that the lack of female representation in sports is due to an absence of genuine interest and not a result of ineffective accommodations, the institution will be deemed compliant.

Notably, however, even if an institution satisfies one of these three alternative modes for compliance, the OCR reserved the right to make an overall determination of compliance.[51] As explained in their policy interpretation, despite adherence to one or more of the three prongs described above, courts can base their final compliance determination upon any of the following equality measures: (1) the discriminatory language or effect of an institution's policies; (2) substantial and unjustified disparities "in the benefits, treatment, services, or opportunities afforded" to males and females in an institution's program as a whole; or (3) "disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities" if those disparities "are substantial enough in and of themselves to deny equality of athletic opportunity."[52]

It is also important to highlight that institutions are required to provide equal opportunities to *both* sexes. Title IX's language is gender neutral, and while this Comment predominantly focuses on the female perspective, male athletes have also used its statutory protections. For example, in *Neal v. Board of Trustees*, male wrestlers brought a Title IX claim after their university reduced the number of spots on the men's wrestling team.[53]

Nonetheless, this Comment concentrates on female athletes because despite Title IX's gender-neutral language, its application disproportionally impacts women. In the vast majority of cases, the underrepresented sex that Title IX seeks to protect is females. And as the court in *Neal* recognized, "a university may bring itself into Title IX compliance by increasing athletic opportunities for the underrepresented gender . . . or by decreasing athletic opportunities for the overrepresented gender."[54]

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49. George, *supra* note 45, at 1117–18.

50. Dee, *supra* note 8, at 1018.

51. Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71418 (Dec. 11, 1979).

52. *Id.* at 71418.

53. 198 F.3d 763, 765 (9th Cir. 1999).

54. *Id.* at 770 (emphasis omitted) (finding in this case that the underrepresented gender was women and the overrepresented gender was men).

2. Title IX Enforcement

Following the release of OCR's 1979 Policy Interpretation and subsequent supplemental clarifications,[55] schools were well-equipped to comply with Title IX's provisions. The ambiguity that originally left universities feeling uneasy had been replaced with clearly defined requirements for compliance. Accordingly, Title IX could be effectively enforced and gender discrimination in intercollegiate athletics would cease to exist—or so we thought.

In theory, courts would use the 1979 Policy Interpretation and OCR's three-part test to ensure institutions were conforming to one of the three alternatives for compliance. But, in practice, the contact sport exception terminates all discrimination analyses before they even begin.[56] The reality is that "[a] court's inquiry into discrimination halts once it is determined that the sport qualifies as a contact sport under Title IX."[57]

II. UTILIZING THE EQUAL PROTECTION CLAUSE TO REDRESS TITLE IX'S SHORTCOMINGS

The following Part of this Comment illustrates how the Equal Protection Clause has been utilized to redress Title IX's shortcomings. It overviews the legislative history and standards of review, offering examples of how female athletes have employed the Equal Protection Clause as an alternative remedy.

Largely due to the contact sport exception, Title IX has failed to adequately protect female students from gender discrimination in sports. In fact, "[t]o the extent women . . . have had any success in gaining access to segregated teams, that success has been found by eschewing Title IX altogether."[58] In other words, female athletes stopped bringing Title IX claims because a court's discrimination analysis terminated as soon as a sport was labeled a contact sport. Serving as an alternative remedy, female athletes quickly and strategically recognized that they would have more luck asserting

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55. *See Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, U.S. DEP'T EDUC. (Jan. 16, 1996), https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html [https://perma.cc/A2S9-VYJN] (discussing OCR's 1996 Clarification which further attempted to clarify nondiscrimination in the context of college sports); *see also* U.S. DEP'T OF EDUC., OCR-00034, ADDITIONAL CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY: THREE-PART TEST—PART THREE (2005), https://www2.ed.gov/about/offices/list/ocr/letters/200503017-additional-clarification-three-part-test.pdf [https://perma.cc/MZX3-6VYV] (describing OCR's 2005 Clarification).

56. Dee, *supra* note 8, at 1016.

57. *Id.*

58. George, *supra* note 45, at 1123.

an Equal Protection Claim than one under Title IX. To that effect, the Equal Protection Clause of the Fourteenth Amendment has granted students protections where public[59] institutions are involved.[60]

A. Legislative History and Standards of Review

The Equal Protection Clause states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[61] Although initially intended to combat racial disparities,[62] the Supreme Court subsequently expanded its application to gender discrimination.[63] In the landmark case *Reed v. Reed*, the Court established that gender classifications were subject to scrutiny under the Equal Protection clause.[64] Accordingly, state actors (i.e., federally funded schools) that discriminated solely on the basis of gender would be in violation of the Equal Protection Clause.[65]

There are different levels of constitutional scrutiny afforded to different types of classifications.[66] On one end of the spectrum, there are classifications based on race, national origin, or other fundamental rights that are given the most exacting scrutiny.[67] On the other end of the spectrum, there is the rational basis review in which "a statutory classification must be rationally related to a legitimate governmental purpose."[68]

Where gender classifications are concerned, the courts have found a middle ground: "Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy."[69] The

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59. Notably, private institutions are not immune from constitutional scrutiny. While the focus of this Comment is on public institutions, private institutions will face constitutional scrutiny if a private institution's actions constitute state action. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 288 ("State action may be found only if there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'").

60. U.S. CONST. amend. XIV, § 1.

61. *Id.*

62. *See* Loving v. Virginia, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the states.").

63. Reed v. Reed, 404 U.S. 71, 75 (1971) (holding that the Fourteenth Amendment also applies to gender discrimination).

64. *Id.*

65. *Id.* at 75–76.

66. Clark v. Jeter, 486 U.S. 456, 461 (1988).

67. *Id.*

68. *Id.*

69. *Id.*

pivotal case, *Mississippi University for Women v. Hogan*, clarified what it meant to satisfy intermediate scrutiny: "[T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification."[70] To do so, that party must demonstrate that "the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"[71]

Moreover, the Court explained that if the cited governmental objective perpetuated or reflected archaic gender stereotypes that the gender classification would be deemed unconstitutional.[72] In *Hogan*, a federally funded nursing program strictly limited its enrollment to women.[73] The institution justified doing so using an affirmative action argument and asserting that their policy of exclusion compensated for discrimination against women.[74] The Court found little credibility in its justification and rendered the exclusion of male applicants unconstitutional because it "perpetuate[d] the stereotyped view of nursing as an exclusively woman's job."[75]

In 1966, the Court in *United States v. Virginia* held that any proffered justification for discriminatory behavior must be exceedingly persuasive.[76] In this case, the Virginia Military Institute ("VMI") had employed an exclusively male admissions policy.[77] When the Fourth Circuit deemed this practice unconstitutional, VMI responded and remedied their constitutional violation by proposing a parallel women's program.[78] The District Court and Fourth Circuit regarded VMI's remedial efforts as satisfying the Equal Protection Clause of the U.S. Constitution.[79]

In reviewing this decision, the Supreme Court reversed and determined that a parallel women's program failed to cure the constitutional defect.[80] VMI had cited two justifications in defense of their discriminatory policy: (1) that single-sex education provides important educational benefits and

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70. 458 U.S. 718, 724 (1982) (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)).
71. *Id.* (citation omitted).
72. *Id.* at 725.
73. *Id.* at 718.
74. *Id.*
75. *Id.*
76. 518 U.S. 515, 533 (1996).
77. *Id.* at 515.
78. *Id.*
79. *Id. See generally* U.S. CONST. amend. XIV, § 1.
80. *Virginia*, 518 U.S. at 534.

diversity in educational approaches; and (2) that the school's adversative training would have to be modified to accommodate women.[81] The Court did not find either of these defenses "exceedingly persuasive."[82]

For one, VMI's male-only admissions policy could not be in furtherance of a state "diversity" policy because all other public colleges and universities within the state had moved away from single-sex education.[83] One institution cannot effectuate a state policy alone.[84] Second, although there are undisputed biological differences between the sexes, state actors "may not exclude qualified individuals based on 'fixed notions concerning the roles and ability of males and females.'"[85] Using overbroad generalizations to defend exclusionary policies and perpetuate historical patterns of exclusion will not qualify as an exceedingly persuasive justification.[86]

B. The Commonly Cited Governmental Objectives

Prior to an elevated standard of review (i.e., requiring an exceedingly persuasive justification), courts historically held that gender classifications served "important" governmental objectives.[87] Commonly, these objectives included protecting females from injury, redressing the past discrimination against females, and preventing male domination.[88]

In *Lafler v. Athletic Board of Control*, a female athlete sought injunctive relief which would have permitted her to compete in a male boxing competition.[89] The court denied her such relief, explaining that gender classifications "will be upheld if they are based on real differences between the sexes, rather than sexual stereotypes, and if they bear a substantial relationship to an important governmental objective."[90] Here, the gender classifications were based on allegedly "real differences"—namely, the dissimilarities in male and female bodies.[91] Supposedly, these differences bore a substantial relationship to an important governmental interest (i.e., the

81. *Id.* at 534–35.
82. *Id.* at 534.
83. *Id.* at 539.
84. *Id.*
85. *Id.* at 541 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).
86. *Id.* at 541–42, 546.
87. Dee, *supra* note 8, at 1021.
88. *Id.* at 1021–22.
89. 536 F. Supp. 104, 105 (W.D. Mich. 1982).
90. *Id.* at 106.
91. *Id.* at 106–07.

protection of women).[92] As the court noted, given that body weight is a proxy for strength in boxing, it was "unrealistic" for people to assume that women could participate without a detrimental effect on their safety.[93] Since female participation would require the implementation of new rules to ensure their protection, the Athletic Board's discriminatory policy was deemed constitutional under the Equal Protection Clause.[94]

In *B.C. v. Board of Education*, C.C., a male athlete, participated on his high school's female hockey team during the 1984–1985 academic year.[95] However, on April 15, 1985, the Athletic Association[96] adopted a resolution that effectively revoked C.C.'s membership rights.[97] The resolution stated, "[m]ales shall be excluded from female athletic teams although there are no teams for boys in the same sport until such time as both sexes are afforded overall equal athletic opportunities."[98] The Association justified doing so for two primary reasons: (1) to promote equal athletic opportunities for females, and (2) "to *redress the effects of past discrimination* and disparate treatment relating to girls' athletics."[99] Further, the Association feared that male participation on girls' interscholastic athletic teams would present "a *substantial risk that boys would dominate the girls' program* and thus cause a displacement of girls from participating on those teams."[100] Lastly, the Association found the policy constitutionally sound because "males have historically enjoyed greater athletic opportunities than girls" and "currently have ample opportunity for participation in interscholastic sports."[101]

Similarly, in *Kleczek v. R.I Interscholastic League*, Brian Kleczek was denied the opportunity to play on a female field hockey team.[102] The court concluded that the exclusion of men from female sports was substantially related to an important governmental objective—redressing past discrimination.[103] Because it is females who have historically been denied

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92. *Id.*
93. *Id.* at 107.
94. *Id.*
95. 531 A.2d 1059, 1061 (N.J. Super. Ct. App. Div. 1987).
96. The Athletic Association is an organization responsible for regulating interschool sports activities in public and nonpublic high schools. *Id.* at 1061.
97. *See id.*
98. *Id.*
99. *Id.* (emphasis added).
100. *Id.* (emphasis added).
101. *Id.*
102. 768 F. Supp. 951, 953 (D.R.I. 1991).
103. *Id.* at 956.

participation opportunities—not males—it was not unconstitutional to preclude male membership.[104]

Clearly some of these governmental objectives work in women's favor (e.g., redressing past discrimination and preventing male domination). In an affirmative action fashion, these objectives have effectively obstructed males from opening the door both ways and taking over female sports. Conversely, the "protection of women" objective has worked against women. It has served as a basis for exclusion without any individualized assessment of a woman's abilities or talents.[105] In an overly paternalistic manner, this objective has allowed courts to presume that women are less capable and in need of protection simply because of their sex.[106] As Professor B. Glenn George explains, "[s]uch claims often were supported by generalized evidence or stereotypes about the size and strength of males versus females."[107]

1. The Legitimacy of Protecting Women: What Now Qualifies as Exceedingly Persuasive

After the standard of review was elevated and courts required an exceedingly persuasive justification, female athletes began finding more success with their Equal Protection claims.[108] Courts reexamined the legitimacy of protecting women and more carefully scrutinized the constitutional challenges in front of them.[109]

In *Hoover v. Meikeljohn*, a female athlete was granted membership on her high school's male soccer team.[110] While acknowledging the innate biological advantages the males tend to possess over females as a class, the court rejected the argument that women inherently need protection.[111] The court highlighted the hypocrisy of the defendant's argument: "[T]he evidence also shows that a range of differences among individuals in both sexes is greater than the average differences between the sexes."[112] Without any measures in place "to protect small or weak males from the injurious effects of competition with larger or stronger males," the defendant's justification lacks

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104. *Id.*
105. *See* George, *supra* note 45, at 1126.
106. *Id.*
107. *Id.*
108. Dee, *supra* note 8, at 1021.
109. *See id.*
110. 430 F. Supp. 164, 172 (D. Colo. 1977).
111. *See id.* at 169, 172.
112. *Id.* at 169.

credibility.[113] Further, the court called out the notion that women are fundamentally in need of protection as archaic and outdated.[114]

The court in *Force v. Pierce City R-VI School District* came to a similar conclusion.[115] In rejecting the contact sport exception as substantially related to women's safety, the court criticized gender classifications that perpetuate stereotypic notions concerning the roles of men and women.[116] The court pointed out that while a typical female might be at a biological disadvantage to a typical male, not all females are typical.[117] In other words, a physically fit woman might be more qualified than the weakest man on the team and should be assessed on an individualized basis.

The courts in *Darrin v. Gould* and *Packel v. Pennsylvania Interscholastic Athletic Ass'n* expanded upon requiring individualized assessments.[118] In *Darrin*, two sisters were excluded from playing on their high school football team.[119] The court upheld their constitutional challenge, stating, "If any individual girl is too weak, injury-prone, or unskilled, she may, of course, be excluded from competition on that basis but she cannot be excluded solely because of her sex without regard to her relevant qualifications."[120] In short, sex must be taken out of the equation when evaluating women for membership on men's teams. In *Packel*, the Pennsylvania Interscholastic Athletic Association maintained a By-Law that banned females from competing against males in any athletic contest.[121] The court determined that such a blanket provision was in violation of the Equal Protection clause because "[t]he notion that girls as a whole are weaker and thus more injury-prone, if they compete with boys, especially in contact sports, cannot justify the By-Law."[122] The court also rejected the argument that boys are generally more skilled because "[t]he existence of certain characteristics to a greater degree in one sex does not justify classification by sex rather than by the particular characteristic."[123]

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113. *Id.*

114. *See id.*

115. *See* 570 F. Supp. 1020, 1029 (W.D. Mo. 1983).

116. *Id.*

117. *Id.* at 1028–29.

118. Darrin v. Gould, 540 P.2d 882 (Wash. 1975); Packel v. Pa. Interscholastic Athletic Ass'n, 334 A.2d 839 (Pa. Commw. Ct. 1975).

119. *Darrin*, 540 P.2d at 884.

120. *Id.* at 891.

121. *Packel*, 334 A.2d at 840.

122. *Id.* at 843.

123. *Id.*

In *Adams v. Baker* and *Leffel v. Wisconsin Interscholastic Athletic Ass'n*, the courts followed suit and similarly rejected the proffered safety justifications.[124] The *Adams* court focused on the inconsistent application of the safety justification between men and women, and the *Leffel* court focused on the availability of non-discriminatory alternatives.[125] These alternatives included eliminating varsity competition and/or establishing parallel contact sport teams for women.[126]

C. Shortcomings of the Equal Protection Clause

With more and more courts accepting females' constitutional challenges, one would assume that the Equal Protection Clause adequately redressed Title IX's shortcomings—unfortunately, this is not entirely accurate. Although females have typically found more success utilizing the Equal Protection Clause over Title IX, Equal Protection claims have their own limitations.

For one, Equal Protection challenges have not yet succeeded in eliminating the contact sport exception.[127] While courts have rejected generalizations that perpetuate gender stereotypes due to their unconstitutionality, they have not yet held the contact sport exception unconstitutional.[128] Ironically, however, the contact sport exception itself is a classification that works to preserve gender classifications.[129]

The first case to address the issue of Title IX's constitutionality was *Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Ass'n*.[130] In *Yellow Springs*, two female athletes qualified for their middle school boys' basketball team.[131] While their membership was in accordance with the school district's encouragement of coed teams, it was inconsistent with the Ohio High School Athletic Association's rules.[132] Under the association's rules, coed teams were strictly prohibited in contact sports.[133]

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124. Adams v. Baker, 919 F. Supp. 1496, 1504 (D. Kan. 1996); Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978).

125. Dee, *supra* note 8, at 1023–24.

126. *Leffel*, 444 F. Supp. at 1122.

127. George, *supra* note 45, at 1127 & n.93.

128. *Id.*

129. *See infra* Part III.

130. 647 F.2d 651 (6th Cir. 1981).

131. *Id.* at 652.

132. *Id.*

133. *Id.*

The school district sued to prevent enforcement of the association's exclusionary rule, alleging that it violated the Equal Protection Clause.[134] More specifically, the school district asked the district court to "declare a rule of the [association's] proscribing coeducational teams in contact sports a violation of Title IX . . . and unconstitutional."[135] The district court sided with the school district, finding the association's exclusionary rule unconstitutional.[136] Their triumph was short-lived, however, as the Sixth Circuit reversed the district court's judgment on the constitutionality of the association's prohibition.[137]

In a lengthy opinion, the Sixth Circuit explained that the trial judge got it right as far as Title IX is concerned.[138] The contact sport exception is permissive and allows each educational institution to decide how they will comply with Title IX regulations.[139] In other words, every school has the choice as to whether or not girls can compete with boys in contact sports—if they restrict female participation, they can choose another method of compliance. Because the association's exclusionary rule was a strict prohibition against female participation in male contact sports (i.e., the school district did not have a choice), it conflicted with Title IX and was properly enjoined by the trial judge.[140] Accordingly, "the permissive federal regulation superseded the compulsory state regulation."[141]

Conversely, the Sixth Circuit clarified that the constitutionality of the association's exclusionary rule was never implicated and should not have been decided.[142] No party to the case "urged that position and no evidence was offered on that issue."[143] The court also explained that not only was the discussion unnecessary to the issue at hand, but the record was "wholly inadequate to answer the difficult questions raised by the constitutional issue."[144]

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134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 658.
138. *Id.* at 656.
139. *Id.*
140. *Id.*
141. Elizabeth J. Henley, *Irrebuttable Presumption Doctrine: Applied to State and Federal Regulations Excluding Females from Contact Sports*, 4 U. DAYTON L. REV. 197, 200 (1979).
142. *Yellow Springs*, 647 F.2d at 658.
143. *Id.*
144. *Id.*

III. THE CONTACT SPORT EXCEPTION VIOLATES THE EQUAL PROTECTION CLAUSE

As established above, the Equal Protection Clause works to eradicate classifications that reinforce archaic stereotypes concerning gender roles and women's "proper place" in society. The contact sport exception is at odds with this initiative—in fact, the exception creates such a classification by excluding females from male contact sports under the guise that female athletes need protection. By categorizing all females as weak and in need of protective measures solely because they are female, the contact sport exception impermissibly discriminates on the basis of sex.

The next Part of this Comment analyzes the contact sport exception through an Equal Protection lens. This analysis illustrates that the exception is unconstitutional and that the discriminatory means employed by educational institutions do not serve governmental interests.

The Equal Protection Clause holds unconstitutional any classification that perpetuates gender stereotypes and overly broad class generalizations.[145] It is unconstitutional to discriminate solely on the basis of sex *unless* such discrimination is substantially related to an important governmental interest.[146] The proffered justification must be exceedingly persuasive.[147]

The contact sport exception is, in its simplest form, discrimination on the basis of sex. Females are excluded from playing on male contact teams exclusively because of their gender. To survive constitutional scrutiny, such discrimination needs to be substantially related to an important governmental objective.[148] While safeguarding female athletes is an important governmental interest, as illustrated in *Hoover* and *Packel*, the contact sport exception bears no substantial relationship to it.[149] This is largely because the proffered safety justification is based on class generalizations and "is inconsistent with the inclusion of weaker, smaller male athletes that are similarly prone to injury."[150]

The belief that women and girls need protection is based on patriarchal stereotypes that females are inherently weak. Even if it holds true that the average female is weaker than the average male, we cannot label an entire

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145. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

146. *Id.* at 724.

147. Miss. Univ. for Women, 458 U.S. at 724 (citing Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)).

148. *Id.*

149. *See* Hoover v. Meikeljohn, 430 F. Supp. 164, 169 (D. Colo. 1977); *see also* Packel v. Pa. Interscholastic Athletic Ass'n, 334 A.2d 839, 843 (Pa. Commw. Ct. 1975).

150. *Packel*, 334 A.2d at 843; Dee, *supra* note 8, at 1039.

class as weak based on characteristics of individual members within the class. Such overgeneralizations have previously fallen to Equal Protection challenges.[151] For example, statutes that placed restrictions on women's working hours and their ability to work night shifts have ultimately crumbled under Equal Protection analyses.[152] Why? Because these statutes were based on archaic notions that females needed protection from their own choices.

The contact sport exception, as illustrated by Katlynn Dee, is both underinclusive and overinclusive.[153] In other words, it is inconsistently applied to males and females. While the exception protects females from injury by restricting their ability to participate in male contact sports, it does not protect weaker men from competing against stronger men.[154] Surely, however, smaller men are prone to the same harm that women would allegedly face if allowed to participate.[155] In this respect, the contact sport exception is underinclusive. On the other hand, the contact sport exception is overinclusive because it lumps all females together as inherently weak.[156] It fails to account for the strong, talented woman that may be more qualified and in need of less protection than the smaller, weaker man.[157] The contact sport exception allows institutions to utilize class-based evaluations, rather than individual assessments.[158]

Again, to be constitutional, the contact sport exception must be substantially related to an important governmental interest (i.e., athletic safety).[159] If one accepts that the contact sport exception is necessary to protect female athletes, why would this safety rationale not be similarly applied to injury-prone male athletes? This inconsistency accentuates the possibility that the proffered safety justification is merely pretextual. In reality, as it stands, the contact sport exception cannot be substantially related to athletic safety unless we can prove that every last female athlete is more susceptible to harm than the most vulnerable male athlete.[160]

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151. George, *supra* note 45, at 1130.
152. *Id.*
153. Dee, *supra* note 8, at 1039.
154. *Id.*
155. *See id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (citations omitted).
160. Dee, *supra* note 8, at 1040.

Moreover, as established in *Gould* and *Packel*, gender classifications that prevent individualized assessments violate the Equal Protection Clause.[161] "[N]otions of equity dictate that talented and qualified females should be given the opportunity to compete at a potentially higher level (for example, on a men's team)."[162] Accordingly, because the contact sport exception evaluates athletes based on their sex (rather than their individual abilities), it is at odds with the Equal Protection Clause.

In sum, under an Equal Protection analysis, the contact sport exception is unconstitutional for three main reasons: (1) it discriminates on the basis of sex, perpetuating gender stereotypes that females are fragile and inferior; (2) the purported governmental objectives are applied on a sex-based basis; and (3) it does not provide for individualized assessments of an athlete's talent and abilities.

IV. THE CONTACT SPORT EXCEPTION UNDERMINES TITLE IX'S GOALS

The following Part of this Comment exposes the realities of the contact sport exception, revealing how it ultimately undermines Title IX's anti-discriminatory objectives.

Aside from the contact sport exception's unconstitutionality, there are additional compelling reasons why it must be amended. First and foremost, the contact sport exception hinders Title IX compliance. Second, while institutions claim that the objective behind female exclusion is athletic safety, the true motivation is to protect revenue producing sports. And lastly, the contact sport exception actually bars Title IX liability. The next section of this Comment explores these realities.

A. The Contact Sport Exception Hinders Compliance

In addition to violating the Equal Protection Clause of the Constitution, the contact sport exception is ironically at odds with Title IX itself. As clarified in OCR's 1979 Policy Interpretation, there are three primary ways in which an institution can comply with Title IX: (1) substantial

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161. Darrin v. Gould, 540 P.2d 882 (Wash 1975); Packle v. Pa. Interscholastic Athletic Ass'n, 334 A.2d 839 (Pa. Commw. Ct. 1975).

162. Blake J. Furman, *Gender Equality in High School Sports: Why There Is a Contact Sport Exemption to Title IX, Eliminating It, and a Proposal for the Future*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1169, 1178 (2007).

proportionality, (2) program expansion, and (3) effective accommodation.[163] Further, as previously highlighted, even if an institution satisfies one of the three alternatives, the OCR still maintains the right to make an overall determination of compliance.[164] The contact sport exception, by prohibiting females from participating in male contact sports, actually makes it more difficult for institutions to comply in one of these three named ways.

All three methods of compliance require an institution to accommodate female athletes by expanding the athletic opportunities available to them. While most would presumably agree that female athletes should be afforded the same opportunities available to men, we are not taking the easiest route to achieve such equality. Whether it be substantial proportionality, program expansion, or effective accommodation, institutions can only be compliant with Title IX if they add additional female teams and/or sports.

To achieve substantial proportionality, the participation opportunities available to female students must be roughly equivalent to their enrollment numbers.[165] Put another way, additional athletic opportunities will need to be added to match the female representation at these institutions generally. To demonstrate a history of program expansion, institutions similarly must increase the number of female teams available.[166] Lastly, to prove effective accommodation, schools will have to illustrate that they created opportunities for female athletes in response to expressed interest.[167] Again, regardless of the chosen method of compliance, institutions wind up having to allocate additional resources and money to effectively abide by Title IX.[168]

In practice, there is a much more cost-effective way to guarantee equal opportunity: simply allow females to participate in male contact sports if they can meet the skill requirements. Surely, it would be less expensive and require fewer resources than creating new teams altogether. Institutions claim their motive is athletic safety, but as previously discussed, the exclusion of female athletes is not substantially related to that governmental objective.

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163. Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71418 (Dec. 11, 1979). Additionally, it is important to remember that even where institutions comply with one of the three prongs, courts can make a final compliance determination based on equality. *See supra* Section I.C.1.

164. *See supra* Section I.C.1.

165. Dee, *supra* note 8, at 1018.

166. *See* George, *supra* note 45, at 1117.

167. Dee, *supra* note 8, at 1018.

168. *See* discussion *supra* Part I. *But see Neal v. Bd. Trustees*, 198 F.3d 763 (9th Cir. 1999) (holding that a university's decision to reduce the number of roster spots open to male students did not violate Title IX where the purpose of the reduction was to remedy gender imbalances in sports participation).

The reality is that there is a much more plausible explanation behind why the contact sport exception even exists—that is, to protect revenue producing sports from female encroachment. However, as explained in the proceeding section, this logic is counterintuitive because female participation might actually attract more viewers and fans.

B. Why the Contact Sport Exception Actually Exists

While there is no definitive answer as to why the contact sport exception was adopted, the history surrounding its implementation points to the protection of revenue-producing sports. As previously discussed, the NCAA engaged in extensive lobbying efforts to preclude Title IX from impacting intercollegiate athletics.[169] The director of the NCAA even claimed that the statute would lead to the demise of college sports.[170]

In response to the NCAA's concerns, Senator Tower specifically proposed an amendment that would have exempted revenue-producing sports from Title IX's scope.[171] In explaining his proposal, Senator Tower stated the following: "I want to emphasize that one of the prime reasons for my wanting to preserve the revenue base of intercollegiate activities is that it will provide the resources for expanding women's activities in intercollegiate sports."[172] However, during the congressional debates, Senator Tower exposed his true motivation "to protect ticket sales produced by men's football and basketball in order to preserve the viability of those athletic programs."[173] In other words, Senator Tower and many others feared that female encroachment would ruin sports as we know and love them.

There is additional support which bolsters the conclusion that the contact sport exception was implemented to protect revenue producing sports. First, let's assume that Senator Tower really did want to exclude revenue producing sports from Title IX's grasp to preserve revenue bases and provide resources for female activities. This logic fails for two main reasons: (1) institutions would not need additional resources to expand female activities if female athletes were simply allowed to participate on male teams, and (2) no evidence supports the conclusion that female participation would result in harm to revenue bases in the first place. In fact, evidence exists that supports

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169. *Id.* at 1014.
170. Springer, *supra* note 21.
171. 120 Cong. Rec. 15322–23 (1974).
172. *Id.* at 1523.
173. Dee, *supra* note 8, at 1014.

the opposite conclusion.[174] If female athletes have the requisite skills and can play the sport at the same level as males, their participation might enhance revenue-generating abilities by attracting a newer, untapped base of fans. Consider the *Taylor Swift effect*:

> A study found that Swift's association with the NFL has added the equivalent of around $330 million in brand value to the Chiefs and the League. Additionally, after Swift attended a Chiefs game in September, Fanatics reported a surge in Kelce jersey sales by 400% that week. While there are a lot of Swift critics, her presence has opened a growing market for the NFL. Women and girls aged 8 and above make up 46% of the NFL fan base, the most in men's professional sports in the United States. NBC reported a significant 53% increase in viewership among girls aged 12 to 17 compared to previous games when Taylor Swift did not attend.[175]

Moreover, the inclusion of basketball as a contact sport evidences the true intent behind the contact sport exception.[176] Institutions claim that the contact sport exception was implemented to protect female athletics, but "excessive contact is against the rules and constitutes a foul."[177] Contact is not central to the game, so what then are we protecting females from? More accurately, we are protecting basketball (and other moneymaking sports) from female encroachment. Female participation, assuming that the female demonstrates the requisite skills, will not harm revenue-producing sports.

C. The Contact Sport Exception Bars Title IX Liability

In each of the following cases, courts have treated the contact sport exception "as a complete bar to Title IX liability."[178] In *Barnett v. Texas Wrestling Association*[179] and *Adams v. Baker*,[180] female athletes sued their respective institutions for being excluded from participating on their schools' wrestling teams. Both courts held that because wrestling is an enumerated contact sport under the contact sport exception, these institutions could

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174. *See* Katie Sveinson, *The Real Score: You Need to Calm Down, Embracing the Taylor Swift Effect on the NFL*, GREENFIELD RECORDER (Feb. 15, 2024), https://www.recorder.com/The-Real-Score-You-need-to-calm-down-Embracing-the-Taylor-Swift-Effect-on-the-NFL-Katie-Sveinson-54054223 [https://perma.cc/48N5-GJ98].

175. *Id.*

176. Dee, *supra* note 8 at 1116.

177. *Id.*

178. *Id.*

179. 16 F. Supp. 2d 690 (N.D. Tex. 1998).

180. 919 F. Supp. 1496 (D. Kan. 1996).

continue their practices of exclusion without fear of facing repercussions.[181] Likewise, in *Kleczek ex rel. Kleczek v. Rhode Island Interscholastic League*, the court discontinued its discrimination inquiries once it deemed field hockey a contact sport using the blanket provision of the contact sport exception.[182] Although not an enumerated contact sport, field hockey's "purpose or major activity . . . involves bodily contact."[183]

To date, there has only been one time that a court has prevented the contact sport exception from barring Title IX liability. In *Mercer v. Duke University*, a female all-state kicker tried out for her high school men's football team.[184] After making the team and enduring sexist behavior from her coach, Mercer was cut from the roster.[185] Soon thereafter, Mercer filed suit claiming exclusion on the basis of sex.[186] She highlighted that less qualified male players had retained their roster spots.[187]

While football is one of the enumerated contact sports, the court held that the contact sport exception ceases to apply "[o]nce an institution has allowed a member of one sex to try out for a team operated by the institution for the other sex."[188] This holding may deceptively appear to be a victory for female athletes, but it actually operates as a liability loophole.[189] Educational institutions will simply prevent females from trying out for men's contact sports from the outset, rather than exposing themselves to potential liability down the line.[190]

V. TITLE IX MUST BE AMENDED TO EFFECTUATE ITS GOALS AND BRING IT INTO COMPLIANCE WITH THE U.S. CONSTITUTION

As previously indicated, the Equal Protection Clause does not fully redress Title IX's shortcomings. Equal Protection challenges have failed to expose the contact sport exception's unconstitutionality, and even where female athletes have found success, relief is limited.[191] The Equal Protection Clause

181. *Barnett*, 16 F. Supp. 2d at 694–95; *Adams*, 919 F. Supp. at 1503.
182. 768 F. Supp. 951, 955–56 (D.R.I. 1991).
183. 34 C.F.R. § 106.41(b) (2024).
184. 190 F.3d 643 (4th Cir. 1999).
185. *Id.* at 645.
186. *Id.*
187. *Id.*
188. *Id.* at 648.
189. Dee, *supra* note 8, at 1017.
190. *Id.*
191. George, *supra* note 45, at 1127; Dee, *supra* note 8, at 1024.

only allows for injunctive relief, and Title IX limits its applicability.[192] In short, Title IX has effectively superseded the Equal Protection Clause.[193] If the challenge could have been brought under Title IX, but is alternatively brought under the Equal Protection Clause, the constitutional challenge will fail.[194] Accordingly, female athletes are left with Title IX claims (which, as we have established, are almost always barred by the contact sport exception).

So, what safeguards do women and girls actually have? Because the Equal Protection Clause provides female athletes with inadequate protections, and the contact sport exception bars Title IX liability, there is only one way to sufficiently combat sex discrimination in sports: the law must change. Title IX must be amended to effectuate its goals and bring it into compliance with the Constitution.

A. Additional Justifications to Amend the Contact Sport Exception

Amending the contact sport exception goes far beyond eradicating the status quo that women and girls are second-class athletes. While equal opportunity alone is enough reason to amend the statute, it is not the only reason. As illustrated by Professor Nancy Leong and Emily Bartlett, participation in sports has profound benefits on female health.[195] They explain that "[e]ngagement in athletics affects physical fitness, disease prevention, self-esteem, mental wellness, eating disorders, and many other health-related issues."[196]

Because sex segregation in athletics is the default, females are denied the choice to participate in traditionally male sports.[197] This denial can result in a myriad of harmful consequences: not only do these women and girls lose the opportunity to reap the health benefits associated with the specific sport, but they often forgo participating in sports altogether due to feelings of exclusion.[198] Consequently, female athletes end up sacrificing the aforementioned physical and mental health benefits.

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192. Dee, *supra* note 8, at 1024.

193. *Id.* at 1024–25.

194. *Id.*

195. Nancy Leong & Emily Bartlett, *Sex Segregation in Sports as a Public Health Issue*, 40 CARDOZO L. REV. 1813, 1813 (2019).

196. *Id.*

197. *Id.* at 1837.

198. *Id.* at 1840.

Further, sex segregation in sports communicates females' inferiority.[199] The constant reminder that women and girls are second to men impacts more than just our participation in sports. These feelings of inferiority bleed into other areas of life: "Girls who see themselves as unfit to play sports with boys grow into women who may see themselves as unable to compete with boys in other areas," whether that be "academically, professionally, [or] politically."[200] This is not merely a cry for equal treatment—this is a cry to address an ongoing public health crisis. The contact sport exception must be amended to mitigate its negative impact on females' overall well-being.

VI. PREVIOUSLY PROPOSED SOLUTIONS AND THEIR SHORTCOMINGS

The next section of this Comment reviews previously proposed solutions to address sex discrimination in sports. This examination highlights the strengths and weaknesses of alternative approaches, thereby showcasing what has worked and what could be improved to better protect female athletes. A new legislative framework will be developed based on this analysis.

A. The Fifty/Fifty Approach

Professor B. Glenn George proposes a "Fifty/Fifty" approach.[201] In sum, this approach calls for the complete elimination of segregation by requiring that all teams be half male and half female.[202] This includes contact sports that are traditionally associated with one sex (i.e., football, baseball, field hockey).[203] To ensure equal treatment, Professor George suggests that playing time be regulated: "Not only would half the team need to be female, but half of the players on the court or field at any given time must also be equal."[204]

Where athletes compete as individuals, such as in track and wrestling, separate heats or events would still be offered for males and females.[205] However, overall team performance would be judged by combining these individual athletes' scores.[206] George explains that this model acknowledges

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199. *Id.* at 1846.
200. *Id.*
201. *See* George, *supra* note 45, at 1145.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*

the biological advantages males have while simultaneously providing schools with an incentive to recruit strong females.[207]

While this proposal offers tangible benefits such as quality coaching and improved facilities for all athletes,[208] it also ignores the realities of contact sports. For one, it assumes that there are enough female athletes that wish to play traditionally male sports. George's Fifty/Fifty approach only succeeds if there is enough female interest to fill fifty percent of the spots now available under this framework.

Additionally, membership on teams would be based less on talent and more on reaching quotas. As it currently stands, athletes try out for team membership and are typically selected based on their performance. Under George's approach, however, teams would likely have to sacrifice talent to meet proposed quotas (i.e., half male/half female).[209] In other words, George's Fifty/Fifty approach could lead to the more deserving player being denied membership, effectively resulting in the elimination of sports meritocracy.

B. The Expressed Interest Approach

Professor Deborah Brake proposes a more radical "Expressed Interest" approach.[210] She suggests that schools be required to offer a female team in a contact sport where just one female athlete expresses interest.[211] While this approach would guarantee females' ability to participate, many weaknesses undermine its practicability and effectiveness.

First, this approach reinforces the ideal that females need to be kept separate from male athletes. The end goal is to eliminate archaic gender stereotypes, not perpetuate them. Second, this approach would result in a lack of consistency and dependability—especially at the collegiate level. Competitive athletes often choose which institutions to attend based on the sports offered there.[212] However, under this approach, the sports programs offered will constantly be changing based on any one female athlete who

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207. *Id.*

208. Furman, *supra* note 162, at 1189.

209. *See id.* at 1193.

210. *See* Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 140 (2001).

211. *Id.*

212. *See* Nat'l Collegiate Athletics Ass'n, GOALS Study: Understanding the Student Athlete Experience, slides 13–14 (2020), https://ncaaorg.s3.amazonaws.com/research/goals/2020AWRES_GOALS2020con.pdf [https://perma.cc/67HZ-QXU3] (reporting that at least 80% of males and females prioritize athletics when choosing a college).

expresses interest in a male contact sport. Third, this approach has limited practicability. Let's imagine that one female athlete expresses interest in field hockey, so her institution establishes a women's field hockey team (as they would be required to do). What would then happen if there were no other interested female athletes that also wished to play field hockey? Field hockey is not a one-woman sport.

Lastly, there is a major cost issue under this proposal. An Expressed Interest approach assumes that schools have adequate resources to fuel new teams and provide them with quality equipment, facilities, coaches, etc.[213] It would be significantly easier (and much more cost-efficient) to just permit females to play on male contact sport teams.

C. The Formality Approach

A "Formal Equality" approach, as explained by Blake J. Furman, is essentially a one-size-fits-all proposal.[214] It rejects the innate biological differences between men and women, and instead embodies the principle of assimilation.[215] Assimilation is "based on the notion that women, given the chance, really are or could be just like men."[216]

Under this approach, women would be treated exactly how men are treated, and the contact sport exception would cease to exist.[217] There would be no separate teams for male and female athletes.[218] Instead, each team would be fielded with the most deserving and talented athletes—irrespective of gender.[219] Furman refers to this concept as "gender-blind meritocracy."[220]

At first glance, this approach may seem ideal because it eliminates segregated sports altogether. However, upon closer inspection, it actually creates an entirely new set of problems that would be difficult to navigate. The biggest problem this approach presents is the potential it has to eliminate

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213. S*ee* Brake, *supra* note 210, at 76–77; *see also* Michael T. Nietzel, *Several Big Ten Universities Bleed Red Ink in Their Athletics Budgets*, FORBES (Jan. 8, 2025), https://www.forbes.com/sites/michaeltnietzel/2025/01/28/several-big-ten-universities-bleed-red-ink-in-their-athletics-budgets [https://perma.cc/GFG7-YTKW].

214. *See* Furman, *supra* note 162, at 1185.

215. *Id.*

216. Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1292 (1987).

217. Furman, *supra* note 162, at 1185.

218. *Id.*

219. *Id.*

220. *Id.*

female athletic opportunities.[221] There is a balance that must be struck between acknowledging the natural differences females have from males and being completely ignorant to them. As Justice Stevens explains: "Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete . . . ."[222] We must acknowledge that the typical male is stronger than the typical female, but that there are exceptions to this broad generalization.

D. The Olympic Model Approach

The "Olympic Model" approach—otherwise known as an "acceptance" model[223]—is essentially the opposite of the Formal Equality approach. Rather than ignoring gender differences, this proposal focuses on what institutions can do to offset the biological advantages males typically have over females.[224] Christine Littleton illustrates this approach with an example: "I remember a feminist lawyer walking up to a podium to deliver a speech. The podium was high enough that she could not reach the microphone. . . . Acceptance is a podium whose height is adjustable."[225] In other words, this model encourages institutions to take measures that compensate women and girls for the biological disadvantages they endure (e.g., using an adjustable podium because the average women is shorter than the average male).

Specifically, under an Olympic Model approach, institutions would have to establish a male and female team for every sport.[226] Each team, irrespective of gender, would be allocated the same amount and quality of resources to guarantee equal treatment.[227] On one hand, this approach is a step in the right direction because it accounts for the undeniable gender differences between males and females. A separate team requirement eliminates the risk that males would dominate female programs and deny them the opportunity to compete. On the other hand, this model again perpetuates the stereotype that women and girls need to be kept separate from males.[228] Moreover, similar to

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221. *Id.*
222. O'Connor v. Bd. of Educ. of Sch. Dist. 23, 449 U.S. 1301, 1307 (1980).
223. Furman, *supra* note 162, at 1186.
224. *Id.*
225. Littleton, *supra* note 216, at 1314.
226. Furman, *supra* note 162, at 1186.
227. *Id.*
228. *Id.* at 1187.

George's Fifty/Fifty approach, this approach also assumes that there are enough female athletes who want to play traditionally male sports.

VII. PROPOSAL TO AMEND THE CONTACT SPORT EXCEPTION TO COMPLY WITH THE U.S. CONSTITUTION AND FULFILL TITLE IX'S MISSION

The first and most obvious step in adequately addressing sex discrimination in sports is the amendment of the contact sport exception. Not only is it incompatible with the Equal Protection clause, but as previously explained, it is also at odds with Title IX. It hinders Title IX compliance, protects revenue producing sports, and bars Title IX liability.

If we take a moment to block out the gender stereotypes that inundate the sports world, it is almost shocking that the contact sport exception actually still exists. In almost all other arenas of life (i.e., school admissions, hiring decisions, voting, combat, bus and truck driving, race car driving, construction, etc.), society has accepted and endorsed females' right to participate. Women are now seen as capable of doing things that were traditionally reserved for men due to the activities' physical requirements. However, for unsatisfactory reasons, society is unwilling to recognize that same right when it comes to female participation in contact sports.

So why then, you may ask, do I call for the amendment of the contact sport exception rather than its elimination? As explained by Professor George, the elimination of the contact sport exception effectively eliminates all sex-segregation in sports.[229] Without any rule in place, males would be permitted to try out for female teams just as females would be permitted to try out for male teams.[230] If males prove to be better overall athletes than females, then this could lead to a possibility of male domination and the eradication of female participation opportunities.

Instead, we need an amendment to the contact sport exception that considers the biological differences between males and females but does not perpetuate the stereotype that women and girls must be kept separate. There must be measures in place to bar male domination. Thus, the following subsection details a proposed legislative framework that would better comply with Title IX and the policy goals of gender inclusivity.

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229. *See* George, *supra* note 45, at 1143.
230. *Id.*

A. A New Legislative Framework

To begin, the contact sport exception should be modified to allow females to try out for male contact sports; the reverse (males trying out for female contact sports) should be explicitly barred. This is acceptable because male athletic opportunities have never previously been limited and will not be limited moving forward. Accordingly, regardless of whether an equivalent women's or girls' team exists, a female athlete will be permitted to try out for whatever male sports team she wishes to. A provision of this kind acknowledges our biological differences by preventing males from trying out for female-dominated sports.

However, this provision is not gender blind—it does not grant a female athlete automatic membership on any male contact sport team. This provision would merely allow a female athlete to try out and demonstrate her skill. As clarified in *Gould*, "[i]f any individual girl is too weak, injury-prone, or unskilled, she may, of course be excluded from competition on that basis but she cannot be excluded solely because of her sex without regard to her relevant qualifications."[231] If, however, a female demonstrates that she can compete competitively with the male athletes on a team, then the "protection of women" will no longer be sufficient to sustain discriminatory practices. This amendment is also cost-conscious in that it doesn't automatically require institutions to create entirely new teams for females.

Moreover, *if* there is sufficient interest, institutions should then (and only then) be required to create a separate and equivalent team for females. For example, if enough females express interest in playing football at an institution, that institution should then be required to create a female football team. Of course, the institution will also be required to allocate the same money and resources to this female counterpart. This amendment is similarly cost-conscious considering that institutions only have to establish new female teams when demand is demonstrated. The overall goal is to create consistency with the Constitution and Equal Protection Clause.

After application of the above-described amendments, the contact sport exception would read as follows:

> (b) 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 *males, females must be allowed to try-out for the*

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231. Darrin v. Gould, 540 P.2d 822, 891 (Wash. 1975).

> *team offered, even if the sport involved is a contact sport. Conversely, male athletes do not need to be given the same participation opportunities; males can be barred from female teams. Further, if female athletes demonstrate sufficient interest in a male-dominated sport, a recipient must then create a separate and equivalent counterpart for female athletes.*[232]

This proposed legislative framework better complies with Title IX, creating consistency with the Constitution and Equal Protection Clause, while also remaining mindful of the biological differences between males and females.

B. Potential Objections to New Framework

The first major objection, which has been thoroughly discussed above, is the concern for safety. As a result of differences in physical strength, size, and endurance between males and females, critics of amending the exception argue that contact sports are innately more dangerous for females. In other words, critics assert that the contact sport exception is a tool for protection as opposed to a tool for discrimination. However, this objection and its justification fail when we compare a physically fit female to a physically weak male. If the contact sport exception were really about protecting athletes from injury, why would it not similarly protect weaker males from competing against stronger males? Unless every strong, physically fit female is weaker than the weakest male participating in contact sports, this objection's justification fails.

Similarly, a second objection revolves around fairness in competition. Again, due to physiological disparities between the sexes, critics argue that eliminating the exception would result in an unlevel playing field.[233] If females were allowed to participate in contact sports, they would not only be disproportionately injured, but they would ultimately undermine the integrity of the competition. The competition's quality and fairness would likely be reduced because females would be physically overpowered by males. For the same reasons stated above (i.e., comparing weak males to physically fit females), however, this objection fails because a weak male's participation could likewise result in an unlevel playing field. Further, contact sports require more than physical strength. They require mental toughness, discipline, focus, resilience, and more—all of which can balance an otherwise unlevel playing field.

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232. Language differing from the original has been indicated using italics.

233. *See* Furman, *supra* note 162, at 1185–86.

A third potential objection to the amended contact sport exception concerns dual equality. In other words, if we open the door to females participating on male-dominated teams, the door needs to be opened for males to participate on female-dominated teams. There is little merit to this argument because there are no consequences from denying men or boys the same opportunity because males have historically had unlimited opportunities. As the overrepresented sex, males are not being deprived of the chance to participate. Rather, we are creating opportunity for a class who has been deprived for far too long. In an affirmative action manner, these amendments redress the past discrimination against women and girls. Further, from a sociological perspective, it's debatable whether males would even want the opportunity to participate on female teams. If you don't feel deprived of opportunity, what would incentivize you to go looking elsewhere for it?

The final foreseeable objection involves the possible elimination of male teams. Put differently, if we require institutions to create separate female teams after a threshold level of interest is met, will male teams be effectively eliminated? As explained by Megan K. Starace, with more resources being devoted to female athletic programs, "the indirect result is that budgetary restrictions force universities to reduce the number of roster spots available on men's athletic teams or, in the alternative, eliminate these teams completely."[234] This is a nonissue for two reasons: (1) reverse discrimination is not a Title IX violation, and (2) big-budget sports are more to blame.

For one, as discussed in *Neal,* institutions can comply with Title IX "by increasing the opportunities available for the underrepresented gender or by decreasing the opportunities for the overrepresented gender."[235] Title IX is not offended when institutions eliminate male teams or cut roster spots because they are doing so to achieve substantial proportionality.[236] In *Boulahanis v. Board of Regents*, the court further explained that Title IX is not violated because despite the elimination of men's athletic programs, "men's participation in athletics continue[d] to be 'substantially proportionate' to their enrollment."[237]

Second, big-budget sports such as football and basketball are more to blame for the elimination of male teams. To reveal the cause of the reduction in male sports teams, a study was conducted that analyzed where the budget

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234. *See* Megan K. Starace, *Reverse Discrimination Under Title IX: Do Men Have a Sporting Chance?*, 8 VILL. SPORTS & ENT. L.J. 189, 190 (2001).

235. *Id.* at 212.

236. *Id.* at 213.

237. 198 F.3d 633, 638 (7th Cir. 1999) (citations omitted).

resources of a men's Division 1 team were reallocated to after that team was cut.[238] Were the resources actually being reallocated to women's athletic programs? The answer was no: "Analyses indicated . . . the budget resources of the eliminated program were reallocated primarily to the budgets of men's basketball and football rather than to the women's athletics budget."[239] So, while objectors would like to blame women's sports for the elimination of men's programs, the reality is that the money is being absorbed by the powerhouse, revenue-producing sports.

VIII. CONCLUSION

In sum, the contact sport exception must be amended to bring it into compliance with the Constitution and fulfill Title IX's mission (i.e., the prohibition of discrimination on the basis of sex). As it stands, the contact sport exception operates as a discriminatory measure within an anti-discriminatory statute; it is incompatible with the Equal Protection Clause, hinders Title IX compliance, and bars Title IX liability.

For far too long, we have turned a blind eye while governmental objectives (e.g., female safety) have been used as pretext to conceal the contact sport exception's true purpose: the protection of revenue producing sports. It is time to strip away the pretext and eradicate the status quo that women and girls are second-class athletes. Just as females have the right to participate in almost every other arena of life, females should have the unfettered right to participate in male contact sports if they so desire.

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238. Anne Marx & Joel Cormier, *Cutting Men's Teams and Title IX: Where Does the Money Go?*, ADU, https://athleticdirectoru.com/articles/cutting-mens-teams-and-title-ix [https://perma.cc/XSF5-5FQA].

239. *Id.*