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# Gender Identity, Sports, and Affirmative Action: What's Title IX Got to Do With It?

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# ARTICLE

# GENDER IDENTITY, SPORTS, AND AFFIRMATIVE ACTION: WHAT'S TITLE IX GOT TO DO WITH IT?

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In the interest of full disclosure, I represented, in my role at CIR, clients who challenged the termination of male sports teams in various cases. My views have evolved since that time, so suffice it to note that the opinions expressed here should not be attributed to either those clients or CIR.

## I. INTRODUCTION

Recently, state and local jurisdictions have held that schools cannot discriminate against individuals on the basis of gender identity with respect to separate sex sports teams. That is, they have held that biological males who identify as females—whom I will refer to as "trans females"—must be permitted to participate on female sports teams.[1] Some have relied upon Title IX of the Educational Amendments of 1972[2] to justify this position, claiming that Title IX's prohibition of discrimination on the basis of sex requires the policy.[3]

This, in turn, has led others to claim that the policy is both unwise (a point I will not address), not required at all by Title IX, and in fact, illegal discrimination against biological females in violation of Title IX. In essence, opponents argue that males possess unfair biological advantages compared

1. *See* CONN. GEN. STAT. 10-15c (precluding discrimination in schools on the basis of, *inter alia*, gender identity); *Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws, Frequently Asked Questions*, CONN. SAFE SCH. COAL. 1 (Oct. 4, 2012), https://portal.ct.gov/-/media/SDE/TitleIX/Guidelines_for_Schools_on_Gender_Identity_and_Expression2012Oct4.pdf [https://perma.cc/VP32-UX23] (describing Public Act No. 11-55, which amended § 10-15c to include a prohibition on discrimination on the basis of gender identity); *id.* at 10(stating transgender students should be allowed to participate in gym classes and sports consistent with their gender identity).

2. 20 U.S.C. § 1681.

3. *See* B.P.J. v. W. Va. State Bd. of Educ., No. 2:21-cv-00316, 2021 WL 3081883, at *17–19 (S.D. W. Va. July 21, 2021) (holding transgender girl demonstrates a likelihood of success in showing that state rule prohibiting her from playing on female sports team violates Title IX); Soule v. Conn. Ass'n of Schs., Inc., No. 3:20-cv-00201-RNC, 2021 U.S. Dist. LEXIS 78919, at *29–33 (D. Conn. Apr. 22, 2020) (granting motion to intervene to trans females who intend to argue that Title IX requires federal fund recipients to permit them to participate on teams consistent with their gender identity); Adams v. Sch. Bd. of St. John's Cnty., 318 F. Supp. 3d 1293, 1322 n.49 (M.D. Fla. 2018) (noting Florida High School Athletic Association (FHSAA) interprets prohibition against discrimination on the basis of sex in Title IX to include discrimination on the basis of gender identity), *aff'd*, 968 F.3d 1286 (11th Cir. 2020), *vacated and aff'g district court on other grounds*, No. 18-13592, 2021 U.S. App. LEXIS 20777 (11th Cir. July 14, 2021), *vacated*, No. 18-13592, 2021 U.S. App. LEXIS 25183 (11th Cir. Aug. 23, 2021) (en banc); *id.* at 1303 n.22 (noting FHSAA permits students to participate on teams consistent with their gender identity); *see also infra* notes 6, 8.

with females, and that forcing biological females to compete against biological males, including trans females, constitutes sex discrimination against biological females. This second position was the argument of the plaintiffs in a case in the District Court of Connecticut case, *Soule v. Connecticut Association of Schools, Inc.*[4] The plaintiffs in *Soule* received some support from the Department of Justice, which filed a statement of interest supporting plaintiffs, and in a related investigation of the Office of Civil Rights in the Department of Education.[5]

That support was later withdrawn following the change of administrations.[6] In a different lawsuit, the Biden Administration took the position that precluding trans females from participating on female sports teams violates both Title IX and the Equal Protection Clause of the Fourteenth Amendment, a position which prevailed at the preliminary injunction stage.[7] President Biden also issued an Executive Order announcing a general policy against discrimination on the basis of gender identity, stating that it applies to Title IX.[8]

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4. Soule v. Conn. Ass'n of Schs., Inc., No. 3:20-cv-00201-RNC, 2021 U.S. Dist. LEXIS 78919 (D. Conn. Apr. 25, 2021).

5. *See* United States Statement of Interest, Dkt. No. 75 at 10, Soule v. Conn. Ass'n of Schs., Inc., No. 3:20-cv-00201-RNC, 2021 U.S. Dist. LEXIS 78919 (D. Conn. Apr. 24, 2020) (arguing that Connecticut's policy is "in tension" with Title IX's purpose of providing an equal opportunity to participate); *see also* Declaration of Randolph Wills, Dkt. No. 106-1 at ¶ 13, Soule v. Conn. Ass'n of Schs., Inc., No. 3:20-cv-00201-RNC, 2021 U.S. Dist. LEXIS 78919 (D. Conn. May 11, 2020) (declaring that Office of Civil Rights in the Department of Education had investigated an administrative complaint filed by plaintiffs and had notified the Connecticut Interscholastic Athletic Conference and various school districts that they were in violation of Title IX).

6. *See* United States Notice of Case Development, Dkt. No. 172 at 1–2, Soule v. Conn. Ass'n of Schs., Inc., No. 3:20-cv-00201-RNC, 2021 U.S. Dist. LEXIS 78919 (D. Conn. Feb. 23, 2021) (explaining withdrawal of prior letters of impending enforcement action because Department of Education had determined they were issued without the review required by the Office of Management and Budget); Dkt. No. 172-1 (letter dated February 23, 2021 withdrawing prior letters of impending enforcement action). Shortly thereafter, the court dismissed the action on various jurisdictional grounds. *Soule*, 2021 U.S. Dist. LEXIS 78919, at *28–30.

7. *See* U.S. CONST. amend. XIV (promulgating no State shall deny any person within its jurisdiction equal protection of the laws); *see also* United States Statement of Interest, Dkt. No. 42, B.P.J. v. W. Va. State Bd. of Educ., No. 2:21-cv-00316, 2021 U.S. Dist. LEXIS 135943 (S.D. W. Va. Dec. 1, 2021) (advising on the government's view that excluding transgender girls from participating in sports designated for girls is a violation of Title IX and the Equal Protection Clause); *B.P.J. v. W. Va. State Bd. Of Educ.*, No. 2:21-cv-00316, 2021 WL 3081883, at *4–11 (S.D. W. Va. July 21, 2021) (holding transgender girl demonstrates a likelihood of success in showing that state rule prohibiting her from playing on female sports team violates both the Equal Protection Clause and Title IX).

8. *See* Exec. Order 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021) ("Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports."); *id.* ("[L]aws that prohibit sex discrimination—including Title IX . . .—prohibit

These differing views of Title IX start with the same statutory language. One takes that language and concludes that certain conduct (allowing trans females to play on female teams) is *mandatory*, while the other asserts that the same conduct is *prohibited*. The latter group contends that Title IX, a statute that precludes segregation in other contexts, demands it in sports. Indeed, the former group does not really dispute that point, but merely argues that trans females should be treated like cis females. Like "New Shimmer" from the classic Saturday Night Live skit—both a floor wax and a dessert topping[9]—Title IX requires non-discrimination and insists upon a set-aside.

This Article has three main themes. First, the concept of "non-discrimination" as applied to sports under Title IX—where compliance requires a set-aside for biological females because they are at a disadvantage in competing with biological males—is different from virtually every other concept of "non-discrimination," both as to Title IX's application to areas outside sports and most other civil rights laws. Second, this understanding of non-discrimination has never been explicitly and unambiguously adopted either by Congress, the courts, or relevant agencies. Third, if we are to take the "disadvantages require set-asides" understanding of non-discrimination (as opposed to affirmative action, under which disadvantages may permit preferences) seriously, we should be applying it to other areas, like age and disability discrimination, where it is equally applicable.

Are sex-segregated sports teams in general *required* by Title IX or (for government-sponsored schools) the Equal Protection Clause of the Constitution? To my knowledge, the question has never been definitively resolved, or even much addressed.[10] Regulations promulgated by the various agencies with enforcement authority under Title IX—the Department of Health, Education, and Welfare (HEW) and the Department

discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.").

9. *Saturday Night Live* (NBC television broadcast Jan. 10, 1976), https://www.nbc.com/saturday-night-live/video/shimmer-floor-wax/n8625 [https://perma.cc/E45E-XRPC]. In the classic faux advertisement, Dan Aykroyd and Gilda Radner argue over whether New Shimmer is a floor wax or a dessert topping. Chevy Chase steps in to explain that New Shimmer is both. He then sprays some on the floor and on a dessert. (Aykroyd: "Tastes terrific!" Radner: "And just look at that shine!") The skit ends with Chase pitching: "New Shimmer. For the greatest shine you ever tasted." *Id.*

10. As discussed *infra* in notes 131–134 and accompanying text, a very early informal interpretation of the application of Title IX's athletics regulations does address the issue, and suggests that Title IX requires either separate sports teams or a quota within sports teams open to both sexes.

of Education (DOE)[11]—have explicitly stated only that sex-segregated sports teams are permitted.[12] They have provided great detail, with much additional guidance, about how to comply with Title IX if sex-segregated teams are chosen.[13] But the fact that the regulations only permit separate sports teams implies that they are not required; further, the regulations and guidance have provided nothing explicit about what constitutes discrimination if separate sports teams are *not* chosen.[14] Perhaps because that choice is rarely made. Nor do the regulations explain how specific individuals (as opposed to a sex as a whole) may experience discrimination, when sex-segregated teams are the norm, simply by being assigned to one team or the other.[15]

But, in fact, as it has been enforced by the federal government and the courts, Title IX virtually requires separate sports teams and further requires that a minimum percentage of resources be provided to the sports team of each sex. Specifically, a minimum percentage of resources must be provided to female sports teams, a percentage much higher than the percentage of females who would likely be chosen for unisex teams (open to anyone of any sex) based upon athletic skill.

This is somewhat unique and anomalous. At least with respect to race, sex, and ethnicity, our laws against discrimination do not generally *require* that accommodations be made for the less qualified group (however "qualifications" may be measured), although again, in some instances they are permitted.[16] If Title IX requires such accommodation, a valid question then arises regarding what distinguishes the differences that purportedly

11. *See* Biediger v. Quinnipiac Univ., 691 F.3d 85, 96 n.4 (2d Cir. 2012) (noting that educational functions of HEW were transferred to DOE in 1979); Cohen v. Brown Univ., 101 F.3d 155, 165 n.5 (1st Cir. 1996) (explaining how the Department of Education began administration of Title IX when HEW split into two agencies).

12. 34 C.F.R. § 106.41(b) (2021).

13. *Id.*; Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413 (Dec. 11, 1979) (codified at 45 C.F.R. pt. 86); *Dear Colleague Letter*, U.S. DEP'T OF EDUC. OFF. OF CIV. RTS. (Jan. 16, 1996), https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html [https://perma.cc/C6WP-PMQR].

14. *Id.*

15. *Id.*

16. Such accommodations are explicitly required for persons whose religious practices might make them less able to meet the precise requirements of a job, and for those who are disabled in various contexts. *See* 42 U.S.C. § 2000e(j) (defining religion in employment discrimination law to include all religious practices and observances of an individual that can be reasonably accommodated by an employer without undue hardship); *42* U.S.C. § 12111(8) (defining "qualified individual" for purposes of statute prohibiting employment discrimination against the disabled to include individuals who could, with reasonable accommodation, perform the essential functions of the job).

justify such accommodation from other group disadvantages. Do laws prohibiting discrimination against the disabled require separate sports teams (and athletic scholarships) for the disabled? What about laws prohibiting discrimination against older Americans? Suppose it could be shown that height is a significant advantage in some sports, and that some races are generally taller than others. Do laws precluding racial discrimination require that biological fact to be considered in the selection process for those sports? Perhaps disadvantages based on physical differences do not deserve special treatment. The perverse effects of societal discrimination on a minority group, courts have held, not only do not *require* making an accommodation for that group, they fail to justify even *permitting* differential treatment that would support preferences for that group.[17] Why is that group disadvantage so much different from the disadvantages in sports for women, and disabled and older people?

Ultimately, much of the debate centers around words like "discrimination" and "equal opportunity." For most non-discrimination laws, the connection between these words is straightforward: if one does not at all consider a prohibited criterion, one has provided members of the different groups defined by that criterion with equal opportunity. In the context of sex and sports, however, advocates attach different meanings to these words. It is my hope to identify these differences in meaning and explore whether the sports context is so unique that it deserves its own linguistic standards.

Part II of this Article sets forth some of the laws prohibiting sex discrimination in athletics, focusing primarily on Title IX and the Equal Protection Clause, and discusses the commonly used definitions of recurring phrases in non-discrimination laws. After a brief digression exploring sex discrimination issues under Title VII, I examine whether (and why) sex segregation in sports is even permissible under the Constitution and Title IX. Part III describes the evolution of the administrative interpretation of Title IX with an eye toward the question of whether Title IX prohibits unisex sports teams, and if so, when that prohibition became apparent. In Part IV, I note some of the consequences of the view that trans females should be precluded from playing on female teams—which is dependent upon a view of Title IX as a mandatory preference law in athletics—and then explore whether a rule requiring accommodation for women in athletics should cause us to reconsider the proper interpretation

17. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989).

of other anti-discrimination laws in the sports context. In Part V, I first return to the question of gender identity and sports, and I offer a few conclusions in Part VI.

## II. A LEGAL PRIMER

### A. *Relevant Law: Title IX and the Equal Protection Clause*

Title IX of the Education Amendments of 1972 now appears in Chapter 38 of Title 20 of the United States Code and states as follows:

> Section 1681. Sex. Exceptions.
>
> (a) Prohibition against discrimination; exceptions.
>
> 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 receiving Federal financial assistance . . . .
>
> (b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance.
>
> Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.[18]

There are nine exceptions listed after the opening paragraph of Section 1681(a),[19] none of which are particularly important for athletics. Of some interest is the rule for institutions transitioning from having students

18. 20 U.S.C. § 1681(a), (b). Thus, contrary to popular belief, there are more than thirty-seven words in Title IX. *Cf.* SUSAN WARE, TITLE IX: A BRIEF HISTORY WITH DOCUMENTS 3 (Waveland Press Inc. 2007) ("Title IX of the Education Amendments Act of 1972 is only thirty-seven words long . . . .").

19. 20 U.S.C. § 1681(a)(1)–(9).

of only "one sex" to students with "both sexes,"[20] and the exception for father-son or mother-daughter activities,[21] which provides that if such opportunities are provided for members of "one sex," comparable opportunities should be provided for members of "the other sex."[22] The implication of the language in these provisions is that there are two (and only two) sexes.[23]

The opening paragraph of Section 1681(a) is modeled after Title VI of the Civil Rights Act of 1964.[24] Both prohibit recipients of federal funds from exclusion, denial of benefits, and discrimination based on specified grounds. Instead of the phrase "on the ground of race, color, or national origin" in Title VI,[25] Title IX prohibits those things "on the basis of sex."[26] Title IX is also limited to educational programs and activities.[27]

Obviously, it is of some importance to define what discrimination (or exclusion or denial) "on the basis of sex" means. Yet, the definition of "discrimination" gets very little attention in recent Title IX literature, particularly in comparison with words like "sex," "gender identity," "female," "male,"—which, in academic writings at least, are defined with great care, detail, and concern that the definitions might offend someone.[28]

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20. *Id.* § 1681(a)(2).

21. *Id.* § 1681(a)(8).

22. *Id.*

23. Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 925 n.178 (2019).

24. 42 U.S.C. § 2000d; Cannon v. Univ. of Chi., 441 U.S. 677, 694 (1979) ("Title IX was patterned after Title VI of the Civil Rights Act of 1964.").

25. 42 U.S.C. § 2000d.

26. 20 U.S.C. § 1681(a).

27. *Id.*

28. *See* Doriane Lambelet Coleman, *Sex in Sport*, 80 L. AND CONTEMP. PROBS. 63, 67 (2018) (defining "sex," "male," "female," "man," and "woman"); Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL. J. SPORTS AND ENT. L. 1, 10–11 (2011) [hereinafter Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport*] (defining "transgender," "cisgender," and "intersex"); Nancy Leong, *Against Women's Sports*, 95 WASH. U. L. REV. 1249, 1251 n.2 (2018) (defining "female," "woman," and "women's sports"); Michael J. Lenzi, Comment, *The Trans Athlete Dilemma: A Constitutional Analysis of High School Transgender Student-Athlete Policies*, 67 AM. U. L. REV. 841, 851–52 (2018) (defining "transgender," "cisgender," "gender," and "sex"); Chelsea Shrader, Note, *Uniform Rules: Addressing the Disparate Rules that Deny Student-Athletes the Opportunity to Participate in Sports According to Gender Identity*, 51 U. RICH. L. REV. 637, 640 (2017) (defining "transgender" and "gender identity"). *See generally* Doriane Lambelet Coleman, Michael J. Joyner & Donna Lopiano, *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 DUKE J. GENDER L. & POL'Y 69, 73 n.28 (2020) ("We understand that language and word choices are fraught in this discussion. . . . We intend no disrespect."); *id.* at 74 ("Standardizing vocabulary is critical to communication among the different groups concerned with this topic. . . . We have attempted to standardize our use of the language in a way that avoids unnecessary harm or discomfort, but to the extent we cannot always do this, we intend no disrespect.

Fortunately, the Supreme Court has been fairly generous in providing us with a definition of discrimination, albeit in other anti-discrimination statutes like Title VII. Most recently, in *Bostock v. Clayton County*,[29] the Court explained that to "discriminate" (as it was understood in 1964 when Title VII was enacted, as well as today) means to treat differently, and "on the basis of sex" just means that sex is the criteria which distinguishes the individuals whose treatment is different.[30] This seems quite consistent with the explanation that the Court has given over the course of time.[31]

The phrase "equal opportunity" does not appear in Title IX—or, for that matter, in the substantive provisions of most major anti-discrimination statutes—but it is a phrase which has been frequently equated with non-discrimination.[32] Thus, the federal agency that oversees employment discrimination laws is called the Equal Employment Opportunity Commission.[33] Those subject to the Fair Housing Act are required by the

Our goal is to communicate to a broad audience using standard terms, not to demean."); *id.* at 75 ("[I]t is necessary for us clearly to distinguish the operative terms. Again, we intend no disrespect."); *id.* (defining "sex" as based on reproductive organs: "Again, we intend no disrespect."). I should mention that I have tried to use terms like "trans" and "gender identity" in this Article consistent with my understanding of them from this literature. I, too, intend no disrespect. Not being in academia, though, I will just mention that this once.

29. Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731 (2020).

30. *Id.* at 1740 ("To 'discriminate against' a person, then, would seem to mean treating that individual worse than others who are similarly situated . . . . So, taken together, an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.").

31. *See* Babb v. Wilkie, 140 S. Ct. 1168, 1173 (2020) (defining the phrase "free from any discrimination" in a statute prohibiting age discrimination in federal employment: "The phrase 'free from' means 'untainted' or '[c]lear of (something which is regarded as objectionable).' . . . Thus, under § 633a(a), a personnel action must be made 'untainted' by discrimination based on age, and the addition of the term 'any' ('free from *any* discrimination based on age') drives the point home. And as for 'discrimination,' we assume that it carries its 'normal definition,' which is 'differential treatment.'") (citations omitted); Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) ("In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."); City of L.A., Dep't of Water and Power v. Manhart, 435 U.S 702, 711 (1978) (stating sex discrimination occurs where "the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'") (citation omitted).

32. *E.g.*, *Equal Employment Opportunity*, U.S. DEP'T OF LABOR., https://www.dol.gov/general/topic/discrimination [https://perma.cc/WDP3-H9CZ] ("Equal Employment Opportunity (EEO) laws prohibit specific types of job discrimination in certain workplaces.").

33. *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/overview [https://perma.cc/J7BN-HN49] ("The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or

Department of Housing and Urban Development regulations to use posters labelled "Equal Housing Opportunity" that describe the prohibitions against discrimination in housing.[34] "Equal opportunity" is often contrasted with "quotas" or "equal results."[35]

Thus, "equal opportunity" means the absence of discrimination, and "discrimination" based on sex should be construed to mean differential treatment on the basis of sex, i.e., simply considering sex as a factor. At first glance, then, Title IX simply prohibits differential treatment on the basis of sex.

Another federal law significantly affecting athletics is the Equal Protection Clause of the Fourteenth Amendment.[36] Its relevant provision states: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."[37] The Equal Protection Clause has been interpreted by the Supreme Court to include a general presumption against state classifications on the basis of sex.[38] Unlike Title IX, however, which regulates educational entities receiving federal funds, the Equal Protection Clause regulates only state actors: state officials, municipalities, etc.[39] So generally, private, non-state actors are not subject to the prohibitions of the Equal Protection Clause; on the other hand, state actors need not receive federal funds in order to be subject to them.[40]

Although nothing in either text identifies the scope of any exception to the Equal Protection Clause or Title IX's prohibition on sex discrimination, those prohibitions are not absolute. Thus, classifications or discrimination

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an employee because of the person's race, color, religion, sex (including pregnancy, transgender status, and sexual orientation), national origin, age (40 or older), disability or genetic information.").

34. 24 C.F.R. § 110.25 (providing fair housing poster requirements).

35. Lewis v. Casey, 518 U.S. 343, 375 (1996) (noting *Washington v. Davis* "was a recognition of 'the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results.'" (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979))). *See generally* Gabriël A. Moens, *Equal Opportunities Not Equal Results: "Equal Opportunity" in European Law After* Kalancke, 23 J. LEGIS. 43 (1997) (providing background and analysis on the two different concepts).

36. U.S. CONST. amend. XIV, § 1.

37. *Id.*

38. United States v. Virginia, 518 U.S. 515, 531–33 (1996).

39. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001).

40. A third provision might affect some athletics-related decisions in educational institutions: the Due Process Clause of the Fifth Amendment. That provision has been held to apply the same limitations to the federal government that the Equal Protection Clause of the Fourteenth Amendment applies to the states. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213–18 (1995) (discussing the history of applying the Fifth Amendment and the Fourteenth Amendment similarly for this purpose). Athletic teams at the service academies or at schools in some of the territories would then be subject to this constitutional provision.

on the basis of sex does not violate the Equal Protection Clause if the governmental entity doing the classification or discrimination has "an exceedingly persuasive justification" for it and can show that the classification substantially furthers that justification,[41] a test that is often described as "intermediate scrutiny."[42]

The Supreme Court has not yet addressed whether recipients of federal funds can classify on the basis of sex despite the text of Title IX's seemingly categorical prohibition on such classifications, and if so, under what circumstances. However, the Court has held that Title VI, on which Title IX was modeled, only reaches conduct that would violate the Fourteenth Amendment's Equal Protection Clause as to race.[43] Because of the similarity in language between the two statutes, lower courts have held that any deviations from sex neutrality under Title IX must meet "strict scrutiny," the highest level of scrutiny under the Equal Protection Clause, applicable to racial classifications.[44] That is, they have held that the similarity between Title IX and Title VI's language trumps the more general principal that sex discrimination is only reviewed under intermediate scrutiny under the Constitution; scrutiny of sex classifications under Title IX, the lower courts have held, is higher than the scrutiny of such classifications under the Equal Protection Clause.[45]

So, neither Title IX nor the Equal Protection Clause entirely prohibit any and all consideration of sex. Do they permit separate sports teams and, if so, why?

41. *Virginia*, 518 U.S. at 531–32.

42. *E.g.*, Hayden v. Greensburg Cmty. Sch. Corp., 743 F.3d 569, 577 (7th Cir. 2014).

43. Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978)).

44. *E.g.*, Jeldness v. Pearce, 30 F.3d 1220, 1227–28 (9th Cir. 1994). The courts' reasoning is that (1) the language of Title IX is nearly identical to that in Title VI; (2) Title VI's prohibition against race discrimination by recipients of federal funds is deemed coextensive with the Equal Protection Clause's prohibition on race discrimination; (3) any race classifications under the Equal Protection Clause are subjected to strict scrutiny; and therefore, (4) Title IX's prohibition on sex discrimination should also be interpreted as prohibiting any sex discrimination that does not meet strict scrutiny. *Id.* at 1227–28; *see* Klinger v. Dep't of Corrs., 107 F.3d 609, 614 (8th Cir. 1997) (holding "failure to prove an Equal Protection violation does not preclude" a Title IX claim); Johnson v. Bd. of Regents, 106 F. Supp. 2d 1362, 1367 (S.D. Ga. 2000) (following the *Jeldness* court's reasoning and concluding "the standard for finding gender discrimination under Title IX" is strict scrutiny).

45. *Jeldness*, 30 F.3d at 1227–28; *see also Johnson*, 106 F. Supp. 2d at 1367.

B. *A Brief Digression on Title VII*

Before examining that question, I want to introduce one more statute, Title VII, and digress briefly with a consideration of some situations under that statute. Title VII generally prohibits discrimination in certain aspects of employment on various grounds, viz., race, color, sex, religion, and national origin.[46] Moreover, it would seem that its perhaps most significant exception, unlike those for Title IX and the Equal Protection Clause, is stated explicitly in the text. Employers may discriminate on the basis of sex (and several other otherwise prohibited criteria) if sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[47] Courts have typically characterized this bona fide occupational qualification (BFOQ) defense as a narrow one.[48]

Relatedly, four areas where consideration of sex has been permitted, includes separate physical requirements, separate dress requirements, sex-segregated bathrooms, and women-only sports teams. Not all of these issues have been addressed by courts. Even where they have, the lower court decisions in each of these areas, particularly under Title VII, might be questioned after the strict textualist decision in *Bostock v. Clayton County*,[49] but the Supreme Court there purported not to decide much other than the specific questions before it.[50]

On the first issue, at least one court has said that an employer does not violate Title VII by having separate physical requirements for men and

46. 42 U.S.C. § 2000e-2(a). There are various limitations in Title VII that are not particularly relevant here. For example, it only applies to employers with fifteen or more employees whose business affects interstate commerce. 42 U.S.C. § 2000e(b). Also, religious employers are permitted to favor members of their religion. 42 U.S.C. §§ 2000e-1(a), 2000e-2(e). Slightly more pertinent, "on the basis of sex" is defined to include on the basis of "pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k).

47. 42 U.S.C. § 2000e-2(e). The other prohibited criteria for which the BFOQ defense is available are religion and national origin. *Id.* It is not available for discrimination based on race or color. *Id.*

48. Price Waterhouse v. Hopkins, 490 U.S. 228, 244 (1989) (describing the circumstances for which "gender" could be a BFOQ as "very narrow"). While I have characterized the BFOQ defense as perhaps Title VII's most significant exception, the point is an arguable one. Case law permits employers subject to Title VII to engage in sex-conscious decision-making provided that it is pursuant to an affirmative action plan that, in a time-limited manner, seeks to remedy a manifest imbalance in a traditionally segregated job category in the workforce and that does not unnecessarily trammel the interests of third parties. Johnson v. Transp. Agency, 480 U.S. 616, 630 (1987).

49. Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731 (2020).

50. *Id.* at 1753.

women.[51] Specifically, the Fourth Circuit concluded that the FBI's gender-normed standards for physical fitness for its trainees—in an attempt to set standards that would identify similar levels of "fitness" in men and women—did not violate the version of Title VII applicable to employment by the federal government.[52] It held that the question of whether physical fitness requirements discriminate based on sex "depends on whether they require men and women to demonstrate different levels of fitness."[53]

Curiously, the Fourth Circuit acknowledged that the Supreme Court had set forth, which the district court in the judgment appealed from applied, "a 'simple test' for identifying facial sex discrimination"—where the evidence shows that the treatment of the individual would have been different but for the person's sex.[54] It never quite explained why that test did not apply, though. In *City of Los Angeles, Department of Water & Power v. Manhart*,[55] the Supreme Court concluded that women's advantage in life expectancy did not warrant treating them unfavorably in calculating the contributions they should make to a pension plan.[56] The Court did not dispute that a difference in life expectancy between the sexes existed; to the contrary, that was the first sentence of the opinion: "As a class, women live longer than

51. *E.g.*, Bauer v. Lynch, 812 F.3d 340, 351 (4th Cir. 2016). *But cf.* Zarda v. Altitude Express, Inc., 883 F.3d 100, 134 (2d Cir. 2018) (Jacobs, J., concurring) ("But when the comparator test is used for textual interpretation, it carries in train ramifications that are sweeping and unpredictable: think fitness tests for different characteristics of men and women, not to mention restrooms.").

52. *Bauer*, 812 F.3d at 351 (4th Cir. 2016). Employment discrimination by federal government agencies is covered by 42 U.S.C. § 2000e-16(a). *Id.* at 345 n.3; *see* 42 U.S.C. § 2000e(b) (stating the United States is not an "employer" for purposes of Title VII). While employment discrimination by a federal employer might also be deemed to violate the equal protection component of the Due Process Clause of the Fifth Amendment under *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213–18 (1995), the Supreme Court has held that 42 U.S.C. § 2000e-16 is the exclusive remedy for discrimination in federal employment. Brown v. Gen. Servs. Admin., 425 U.S. 820, 835 (1976).

53. *Bauer*, 812 F.3d at 351. *Bauer* relied upon a district court decision from the District of Columbia and an EEOC administrative decision that also concluded FBI gender-normed standards of physical fitness did not violate Title VII. *Id.* at 348. *Bauer* also relied upon dicta in *United States v. Virginia*, a case regarding admission to a state-operated military academy under the Equal Protection Clause of the Fourteenth Amendment, in which the Court said that women's admission to the academy would require "accommodations, primarily in arranging housing assignments and physical training programs for female cadets." *Id.* at 349 (quoting United States v. Virginia, 518 U.S. 515, 540 (1996)).

54. *Bauer*, 812 F.3d at 348 (quoting City of L.A., Dep't of Water & Power v. Manhart, 435 U.S 702, 711 (1978)).

55. City of L.A., Dep't of Water & Power v. Manhart, 435 U.S 702 (1978).

56. *Id.* at 709–11.

men."[57] It nonetheless held that applying that generalization to each individual member of the class was a form of illegal sex discrimination[58]—and not a factor other than sex (like longevity).[59] The application of different standards for physical fitness appears to be quite similar: applying a generalization about males (e.g., as a class, men can do more push-ups than women) to each individual male, who may or may not fit the generalization. The only possible distinction is that *Manhart* involved differences in the class's potential[60] (i.e., what likely would happen in the future), whereas *Bauer v. Lynch*[61] arguably involved presently existing differences.[62]

Separate dress or grooming requirements have also been upheld by lower courts. Again, whether such rulings will survive, considering the Supreme Court's opinion in *Bostock*, is an open question. Most famously, the Ninth Circuit, sitting en banc, upheld distinct dress requirements for men and women pursuant to an "unequal burdens" test.[63] Applying this test, the court explained that such distinct dress requirements only violate Title VII if they are more burdensome for one sex than for another.[64] In doing so, the majority rejected the proposition that requiring women to wear make-up (part of the company policy at issue in the case) was a "sex stereotype" that violated Title VII.[65]

The "sex stereotype" theory derived from the Supreme Court's opinion in *Price Waterhouse v. Hopkins*.[66] There, the Court concluded that a female employee's failure to make partner at an accounting firm was, at least in part, attributable to her sex, and more specifically, to her failure to conform to

57. *Id.* at 704; *see also id.* at 707–08 ("[This case] involves a generalization that the parties accept as unquestionably true: Women, as a class, do live longer than men. The Department treated its women employees differently from its men employees because the two classes are in fact different.").

58. *Id.* at 708.

59. *Id.* at 712.

60. *Id.* at 708 (commenting on the notion that differences in potential life expectancy between men and women should affect pension benefits).

61. Bauer v. Lynch, 812 F.3d 340 (4th Cir. 2016).

62. *Id.* at 351 (holding that different physical fitness requirements for men and women do not discriminate on the basis of sex).

63. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1110 (9th Cir. 2005) (en banc).

64. *Id.* ("The material issue under our settled law is not whether the policies are different, but whether the policy imposed on the plaintiff creates an 'unequal burden' for the plaintiff's gender."). The Ninth Circuit was hardly alone in adopting this standard. *See generally* Finnie v. Lee Cnty., Miss., 907 F. Supp. 2d 750, 773 (N.D. Miss. 2012) (cataloging numerous authorities in support of the court's position).

65. *Jespersen*, 444 F.3d at 1111–13.

66. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality opinion).

sex stereotypes about women.[67] While the opinion in *Price Waterhouse* is sometimes misconstrued to mean Title VII prohibits all sex (or race, or religion, or national origin) stereotypes,[68] the Court plainly only held that sex stereotypes could be used to show differential treatment: if one trait is rewarded in men and the very same trait is used against women, that is differential treatment and sex discrimination.[69] If, for example, an employer wants all of its employees to be demure, there is no violation of Title VII even though "women should be demure" is a sex stereotype. Further, a woman who is not demure should not be able to win a sex discrimination case by pointing out she was treated less favorably than *other women* who were demure—any more than a white person being paid half the salary of another white person for doing the same work can claim race discrimination.

In identifying the use of sex stereotypes as evidence of discrimination, the *Price Waterhouse* Court quoted its prior decision in *Manhart*.[70] But this seems to raise a difficult quandary: When can differences between men and women justify differences in treatment between them? Women's longer life expectancy is a "stereotype" that cannot be used, whereas expectations

67. *Id.* at 251; *id.* at 272 (O'Connor, J., concurring). It is perhaps ironic that the main issue in *Price Waterhouse* was not the relevance of sex stereotyping, but rather the burdens of proof in cases where there was direct evidence of intentional discrimination (like statements indicating sex stereotyping). *Id.* at 252–53 (plurality opinion) (holding a defendant, against whom there was direct evidence of intentional discrimination, could prevail by showing that it would have made the same decision by a preponderance of the evidence standard). Because the lower court had held that an employer would have to show the "same decision" by clear and convincing evidence, Price Waterhouse actually prevailed on its appeal. Perhaps this is little remembered because Congress amended the law in 1991 to provide that an employer who makes the "same decision" showing by a preponderance of the evidence is nonetheless still liable under Title VII. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B).

68. *See* Erin Buzuvis, *"On the Basis of Sex": Using Title IX to Protect Transgender Students from Discrimination in Education*, 28 WIS. J.L. GENDER &SOC'Y 219, 221 (2013) [hereinafter Buzuvis, *"On the Basis of Sex"*]; Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport*, *supra* note 28, at 31; Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J. L. GENDER & SOC'Y 271, 284 (2013).

69. *See Price Waterhouse*, 490 U.S at 251 (plurality opinion) (noting workplace remarks based on sex stereotypes do not prove a claim under Title VII; "[t]he plaintiff must show that the employer actually relied on her gender in making its decision"); *see also* Wittmer v. Phillips 66 Co., 915 F.3d 328, 339 (5th Cir. 2019) (Ho, J., concurring) ("But here's the problem with this theory: *Price Waterhouse* doesn't make sex stereotyping *per se* unlawful under Title VII.").

70. *Price Waterhouse*, 490 U.S. at 251 (plurality opinion) ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" (quoting City of L.A., Dep't of Water & Power v. Manhart, 435 U.S 702, 707 n.13 (1978))).

regarding women and men having different hair lengths are okay? Is the supposition that female lifeguards are subject to different clothing requirements than their male counterparts a stereotype or a legitimate difference permitting differential treatment?[71]

If any differential treatment constitutes sex discrimination, then distinct sex-specific dress or grooming codes must violate Title VII. Under sex-specific dress or grooming codes, a man wearing a skirt will be treated differently from (and presumably worse than) a woman wearing a skirt; similarly, a woman wearing a (faux) beard will be treated differently from a bearded man. Courts began recognizing this issue when transgender plaintiffs began filing claims. A trans female (biologically male)[72] wearing clothes traditionally worn by women will be treated differently from a cis woman (one whose natal sex matches gender identity)[73] wearing the same clothes, and thus, is being treated differently on the basis of biological sex.[74] But if separate sex-specific grooming and dress standards are consistent with Title VII, then the trans female can be treated less favorably based on her failure to conform to the standards associated with her biological sex.

I am unaware of any cases challenging the mere existence of separate bathrooms under Title VII, as they are so commonly accepted in our society. But a strict differential treatment vision of Title VII, which would prohibit the consideration of sex in evaluating an employee's conduct, would plainly cast doubt upon that commonly accepted practice.[75] Plainly, a male

71. *See* Eline v. Town of Ocean City, Md., 7 F.4th 214, 216 (4th Cir. 2021) (upholding town ordinance that prohibited women, but not men, from publicly showing their bare breasts; "prohibiting females from publicly showing their bare breasts is substantially related to an important government interest—protecting public sensibilities—and satisfies the heightened scrutiny of the Equal Protection Clause").

72. EEOC v. R.G., 884 F.3d 560, 578 (6th Cir. 2018), *aff'd sub nom.* Bostock v. Clayton County., Ga., 140 S. Ct. 1731 (2020); *see also* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 594 (4th Cir. 2020) (defining transgender as "people who 'consistently, persistently, and insistently' express a gender that, on a binary, we would think of as opposite to their assigned sex").

73. *See Grimm*, 972 F.3d at 594 ("[M]ost people are cisgender, meaning that their gender identity . . . aligns with their sex-assigned-at-birth.").

74. *See R.G.*, 884 F.3d at 574 (discussing whether a funeral home "engaged in improper sex stereotyping when it fired Stephens for wishing to appear or behave in a manner that contradicts the Funeral Home's perception of how she should appear or behave based on her sex").

75. *E.g.*, Wittmer v. Phillips 66 Co., 915 F.3d 328, 334 (5th Cir. 2019) (Ho, J., concurring) (stating separate bathrooms "are unlawful under the blindness approach to Title VII, because separate bathrooms are obviously not blind to sex"). Judge Ho compared the "blindness" approach to an "anti-favoritism" approach wherein Title VII only prohibits favoring one sex over the other. *See id.* (comparing the "blindness" and "anti-favoritism" approaches). I have my doubts about Judge Ho's anti-favoritism approach, since it seems inconsistent with Title VII's grant of an individual right of

 

employee using a restroom designated for women will likely be treated differently from a female employee using that same restroom.[76]

Similarly unchallenged, as far as I am aware, are professional female sports teams, like those in the Women's National Basketball Association (WNBA). Put simply, the justification for such female-only teams is being female qualifies as a BFOQ for the job.[77] But this just begs the question: Can an employer create a BFOQ simply by defining the job as requiring one sex, national origin, or religion? Could, for example, employers create a professional basketball league only open to Muslims by simply calling it the Muslim Basketball League? There have been few examples of this in practice, but no definitive answer.[78] Moreover, with respect to female professional sports leagues, the BFOQ is seemingly justified by the contention that women are *not as good* at the employment activity in question, and thus, would be displaced by men if the latter were permitted to compete for jobs, a justification that will crop up in looking at separate sports teams under Title IX. It is, to my knowledge, a contention that has never been

non-discrimination. For example, an employer who asks a woman for sexual favors in exchange for job benefits has not disfavored women as a group, but rather one particular woman, because of her sex.

76. *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 134 (2d Cir. 2018) (Jacobs, J., concurring) ("But when the comparator test is used for textual interpretation, it carries in train ramifications that are sweeping and unpredictable: think . . . restrooms."); *cf.* Hoover v. Meiklejohn, 430 F. Supp. 164, 167 (D. Colo. 1977) ("The Supreme Court has exhibited an obvious reluctance to label sex as a 'suspect' classification because the consequences of the application of the many 'invidious' discrimination precedents to all separations by sex could lead to some absurd results. For example, would the Constitution preclude separate public toilets?").

77. In *Bostock*, Justice Alito suggested the Court's holding would mean trans women might be able to play on female professional sports teams. *See* Bostock v. Clayton County, Ga., 140 S. Ct. 1731, 1780 (2020) (Alito, J., dissenting) ("Under the Court's holding that Title VII prohibits employment discrimination because of transgender status, an athlete who has the physique of a man but identifies as a woman could claim the right to play on a woman's professional sports team."). Justice Alito correctly noted the BFOQ defense is a narrow one that might not ultimately succeed. *Id.* ("The owners of the team might try to claim that biological sex is a bona fide occupational qualification . . . but the BFOQ exception has been read very narrowly."). However, he did not acknowledge a failed BFOQ defense would open these teams up to all biological men, not just trans women. *Id.*

78. The Canadian Football League had a player quota rule of a minimum of twenty Canadian players per team. Smith v. Pro Football, Inc., 593 F.2d 1173, 1222 (D.C. Cir. 1978) (MacKinnon, J., concurring and dissenting). When they briefly expanded into the United States in the 1990s, the league felt it could not apply that rule to the U.S.-based teams because of Title VII. *See Around the NFL*, Washington Post, Feb. 28, 1993, at D13 (noting that a California law firm told the CFL that its Sacramento-based team could not legally abide by that rule); Saul Wisnia, *Grey Cup is a U.S.-Canada Border War; Baltimore-BC Battle Today*, Washington Post, Nov. 27, 1994, at D9 (highlighting that Canadian teams are "allowed 17 American players on its 37-man roster" but that "Baltimore and other U.S. teams have no limits").

tested in any other context: A religion, sex, or national origin can be declared a BFOQ if a particular religion, sex, or national origin is, as a whole, not as skilled at a particular job.[79]

Perhaps the sex restriction in women-only sports can be justified as a BFOQ by "consumer demand" because customers truly want to see who the best female basketball players are, and thus, restricting the teams by sex is a BFOQ.[80] Normally, of course, Title VII does not permit customer demand to justify discrimination.[81] But perhaps the all-female sports team can be analogized to female actresses getting preference in playing female characters or restaurants hiring only females to be restroom attendants for the female restroom—some customer preferences seem sufficiently reasonable that the law permits them to justify what might otherwise be illegal discrimination.[82] Whether a preference for seeing female basketball players is sufficiently reasonable to justify sex discrimination is not entirely clear under current BFOQ case law.[83]

A few general observations about these Title VII examples are helpful. First, if one accepts the propriety of sex segregation, it becomes quite difficult to identify a case of *individual* sex discrimination. Rather, discrimination then results from treating one sex as a whole better or worse than the other, e.g., having fewer restrooms for women. For example, if an employer decided to require one person from each sex to use the restroom designated for the opposite sex—perhaps as an effort to sensitize the persons involved to the difficulties of being a member of the opposite sex—

79. In a modestly-related context, the Supreme Court has recently held that the "procompetitive business justification" in antitrust cases does not permit the National Collegiate Athletic Association to declare that not paying the athletes is the defining characteristic of the sports it oversees. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2163 (2021) (quoting American Needle Inc. v. Nat'l Football League, 560 U.S. 183, 199 n.7 (2010)) ("[A] party can[not] relabel a restraint as a product feature and declare it 'immune from [Sherman Act] § 1 scrutiny.'"); *id.* at 2168 (Kavanaugh, J., concurring) ("Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product."); *id.* at 2169 ("Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate.").

80. *But see id.* at 2152–53 (noting the Court is skeptical that customer demand to see who the best amateur basketball team might be would justify not paying the players).

81. *E.g.*, Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388–89 (5th Cir. 1971) (holding that an airline could not justify hiring only female flight cabin attendants based on the preference of their mostly male customers).

82. 29 C.F.R. § 1604.2(a)(2) ("Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.").

83. I am grateful to Eugene Volokh for suggesting the possibility discussed in this paragraph.

it is hard to call anyone so treated a victim of sex discrimination. Sex discrimination is when one is treated differently from someone of the opposite sex because of sex. Under this hypothetical, the designated restroom switchers are not being treated differently from someone of the opposite sex; they are being treated *exactly the same* as someone of the opposite sex. They are using the restroom designated for the opposite sex. While they are being treated differently from members of their own sex, that, as previously mentioned, is not sex discrimination.

The same holds true if the designated restroom switcher is a trans male or female. Assuming that trans persons' sex is their gender identity, a trans man being forced to use a restroom designated for women is not being treated differently from people whose gender identity is female; he is being treated exactly the same as those individuals.[84] Of course, if the trans man's "sex" is his biological sex (female) rather than his gender identity, then he is being treated differently from those whose biological sex is male.[85] But so is every other person whose biological sex is female. And, by hypothesis (that sex-segregated restrooms do not violate Title VII), this differential treatment is permissible.

Of course, there is discrimination going on when a trans man is required to use a female restroom: It is discrimination based on transgender status because trans men are being treated differently from cis men.[86] But to make that into a Title VII violation, one would have to show that "sex" includes not only biological sex *and* gender identity, but also transgender status, and

84. Buzuvis, *"On the Basis of Sex," supra* note 68, at 241 (noting a trans man excluded from a male dormitory could not argue that he was discriminated against on the basis of gender identity: "It won't work for him to argue that he is excluded because of his *male* identity, because that would identify him as similar, not different, from the men who are accepted to the dormitory, and thus obscure gender identity as the basis for exclusion").

85. In an effort to squeeze the fact pattern under the *Price Waterhouse* sex stereotype rubric discussed earlier, some have argued that a trans man forced to use a female restroom is being discriminated against by failing to conform to the male "stereotype" of having male genitalia or male natal sex. *See* Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport, supra* note 28, at 31; Buzuvis, *"On the Basis of Sex," supra* note 68, at 230; Shrader, *supra* note 28, at 643–44 (discussing the view of sex discrimination based on failing to conform to stereotypes). Skipping over whether having male genitalia or natal sex is a "stereotype" of males, the problem is that people of the opposite "gender identity" without male genitalia or natal sex—that is, cis females—are being treated in exactly the same way. Thus, unlike *Price Waterhouse*, where aggressive males were treated better than aggressive females, the element of sex discrimination is missing.

86. B.P.J. v. W. Va. State Bd. of Educ., 2021 U.S. Dist. LEXIS 135943, at *11 (S.D. W. V. July 21, 2021) (holding a law prohibiting those born male, including transgender females, from participating on sports teams designated for females discriminated on the basis of transgender status).

that may be a difficult hill to climb. At first glance, at least, transgender status is no more a "sex" than "convert" is a "religion."

The foregoing demonstrates that *Bostock* had overstatements (and just plain misstatements) on both sides. The Court in *Bostock* held that the homosexual and transgender plaintiffs suffered sex discrimination, where "sex" is understood as biological (natal) sex, when they were treated differently because of their sexual orientation and transgender status. The facts in *Bostock* fit easily into the sex-blind version of Title VII; in each instance, a plaintiff was fired by an employer that hired both men and women. Taking the subset of people attracted to men, discrimination on the basis of sexual orientation invariably treats men worse than woman. Similarly, discrimination on the basis of transgender status treats (biological) men who wear dresses differently from (biological) women who wear dresses.

But the Court in *Bostock* also stated that discrimination on the basis of sexual orientation or transgender status *invariably* involves discrimination on the basis of biological sex.[87] As we have seen, that may not be true. To adduce another example, suppose a male sports team hires a locker room attendant, a position for which it can successfully be argued that male sex is a BFOQ.[88] If the sports team also refuses to hire homosexual or transgender males, it has plainly discriminated against those individuals on the basis of those statuses, but it is more difficult to see how it has violated Title VII (since females are not eligible for the position) if "sex" in the statute means only biological sex and only the sex of the applicant.[89] Males attracted to men are being treated exactly the same as females attracted to

87. Bostock v. Clayton County., Ga., 140 S. Ct. 1731, 1741 (2020) ("That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."); *id.* at 1747 ("[D]iscrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."). The Court in *Bostock* assumed without deciding that "sex" in Title VII meant only biological sex. *Id.* at 1739 ("[W]e proceed on the assumption that 'sex' signified what the employers suggest, referring only to biological distinctions between male and female.").

88. *E.g.*, EILEEN MCDONAGH & LAURA PAPPANO, PLAYING WITH THE BOYS 100 (Oxford Press 2008).

89. One possibility is the homophobic locker room attendant employer is discriminating on the basis of the sex of someone else other than the applicant: those to whom the applicant is married or attracted to. Most cases invoking "associational discrimination," though, conclude that the employer is discriminating on the basis of the employee's sex. *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 124–28 (2d Cir. 2018) (discussing associational discrimination); *id.* at 126 n.28 ("The basis of the Title VII claim in [case involving miscegenation discrimination] was not the race of the plaintiff's wife; rather the plaintiff, who was white, 'suffer[ed] discrimination because of his *own* race' as a result of the employer's 'disapprov[al] of interracial association.'").

men: Both are ineligible for hiring. The same is true with trans males compared to females.[90]

But, of course, this also cuts against the use of subsequent legislative history—failed proposals to amend Title VII to include sexual orientation, gender identity, or transgender status, which the dissent relied upon in *Bostock*.[91] Why bother with these proposals, the dissent argued, if Title VII, as passed in 1964, already covered such discrimination? But amending Title VII to reach discrimination on the basis of sexual orientation and transgender status *would* amend the statute to reach discrimination on those bases in situations where, if sex is limited to biological sex, it currently does not.

### C. *Why Are Sex-Segregated Sports Permissible?*

The traditional rationale for sex-segregated sports teams is that females are not as skilled as males at many (but perhaps not all) sports and would be able to obtain few places on unisex teams.[92] The precise reasoning behind this rationale has been the subject of debate. One theory is that past discrimination against women has limited their opportunities compared to men.[93] As women's scholastic sports have grown over the last fifty years, the strength of this argument has probably waned somewhat.[94] A typical

90. *See also Bostock*,140 S. Ct. at 1759 (Alito, J., dissenting) (noting that employees had conceded that "blanket policy against hiring gays, lesbians, and transgender individuals implemented . . . without knowing the biological sex of any job applicants" would not be sex discrimination).

91. *Id.* at 1755.

92. *See* Ronald S. Katz & Robert W. Luckinbill, *Changing Sex/Gender Roles and Sport*, 28 STAN. L. & POL'Y REV. 215, 241 (2017) ("Separate but equal teams are also necessary to ensure that women's sports are not dominated by men . . . ."); B. Glenn George, *Fifty/Fifty: Ending Sex Segregation in School Sports*, 63 OHIO ST. L. REV. 1107, 1144 (2002) (citation omited) ("While the proposal [of merit tryouts] has a superficial egalitarian appeal, it has been widely rejected because of the assumption that most teams would end up with few or no women."); Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sports*, *supra* note 28, at 8 (stating sports organizers justify separate teams by asserting they "ensure a fair playing field and preserve opportunities for female athletes who would be squeezed out or dominated by superior male athletes if boys and girls competed together").

93. MCDONAGH & PAPPANO, *supra* note 88, at 141 ("The common rationale for prohibiting boys from playing on girls' teams is that schools must guarantee athletic opportunities to females to make up for past sex discrimination in sports."); Karen L. Tokarz, *Separate but Unequal Educational Support Program: The Need for a New Theory of Equality*, 1 BERKELEY WOMEN'S L.J. 201, 215 (1985) ("[C]ourts have preserved the separate but equal model to the extent necessary to promote affirmative action goals for the purpose of redressing past disparate treatment against females."); *id.* at 244 (proposing that schools have one team open to members of both sexes and one reserved for females "[b]ecause of past inequities in funding, training, competitive opportunities, and social support").

94. *See* MCDONAGH & PAPPANO, *supra* note 88, at 65–66 (noting the high level of training by modern female athletes); Coleman, Joyner, & Lopiano, *supra* note 28, at 88 (noting "substantial parity

woman entering college today had her athletic training in the last decade (at most) and is less likely to have been affected by attitudes and maltreatment of the mid-20th century. While there are still Title IX suits out there, they do not generally involve the men's track, swimming, tennis, or basketball teams being given priority over the women's versions of those same teams in terms of training and support.

Another rationale some mention is that the choice of sports reflects sexist attitudes and/or are designed for men. These advocates note that women can compete with men in a number of sports, some of which are not usually scholastic sports.[95] While a number of sports do reward speed and strength, and perhaps put women at a disadvantage vis-à-vis men, it is difficult to believe that running and swimming were chosen as sports *because* men are better at them.[96] People have been engaged in these activities for millennia. That is, it would be hard to argue that the selection of sports is a form of intentional discrimination, and the Supreme Court has said intentional discrimination is a requirement of an Equal Protection Clause challenge and has hinted that it may be a requirement of Title IX.[97]

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in training and competition, especially at the elite level"); Brenda L. Ambrosius, Note, *Title IX: Creating Unequal Equality Through Application of the Proportionality Standard in Collegiate Athletics*, 46 VAL. U. L. REV. 557, 583 (2012) ("In today's society, women have arguably the same opportunities as men throughout their development, especially when it comes to athletics.").

95. *See* Leong, *supra* note 28, at 1265–70 (noting women's achievements in endurance sports, shooting, dogsled racing, wrestling, and rock climbing); *id.* at 1280 (arguing men's relative success at American Ninja Warrior competitions reflect the design of the sport); *id.* at 1286–87 (2018) (arguing unisex gymnastics and figure skating competitions could be designed to equally reflect men's and women's different strengths, and that rhythmic gymnastics and synchronized swimming could be opened to men); *see also* MCDONAGH & PAPPANO, *supra* note 88, at 51–52 (suggesting sports in which women might have a physical advantage).

96. *Cf.* Tokarz, *supra* note 93, at 232 (identifying running, swimming, martial arts, and weight-lifting as "sex neutral" sports).

97. *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (citing Akins v. Tex., 325 U.S. 398, 403–04 (1945)) (suggesting the Equal Protection Clause only prohibits intentional discrimination); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (holding the "discriminatory purpose" required to show an Equal Protection violation "implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"). Although the Supreme Court has not directly addressed the issue under Title IX, it has held that its race-based analogue, Title VI, permits only claims of intentional discrimination. *E.g.*, Alexander v. Sandoval, 532 U.S. 275, 280 (2001) (Section 601 "prohibits only intentional discrimination"). Recently, the Fifth Circuit, in a case modestly relevant here, held that a gym teacher's use of "ceiling jumps" as punishment for those who failed to wear proper gym clothes to class did not state a violation of Title IX under a theory that the punishment had a disparate impact on females. Poloceno v. Dallas Indep. Sch. Dist., 826 Fed. Appx. 359, 363 (5th Cir. 2020) (holding disparate impact claims could not be asserted under Title IX). *But see* Doe v. Univ. of Denver, 952 F.3d 1182, 1193 n.8 (10th Cir. 2020) (noting the Tenth Circuit had previously stated that a disparate impact

The possibility of consumer demand supporting the permissibility of separate sports teams runs into the same difficulties that it had under Title VII, and perhaps an additional one.[98] Title IX may be responsible for creating that demand rather than responding to it.

Finally, it is argued that men have natural advantages that preclude women from competing successfully with them. Professor Doriane Coleman, in two recent articles (one with two co-authors), has emphasized this rationale, arguing male testosterone gives men an advantage in sports that women cannot overcome.[99] Others push back on this rationale, arguing that while men may perform better than woman on average, the variation within each sex is larger than the variation between males and females.[100]

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claim under Title IX might be viable, but finding no need to address the issue) (citing Mabry v. State Bd. of Cmty. Colls. & Occupational Educ., 813 F.2d 311, 316 n.6, 318 (10th Cir. 1987)); Biediger v. Quinnipiac Univ., 691 F.3d 85, 98 n.5 (2d Cir. 2012) (stating in *dicta* that a claim that coed sports teams led to women participating at a lower rate than men "would be premised on a theory of disparate impact rather than disparate treatment").

98. *See* discussion *supra* accompanying notes 79–83.

99. *See* Coleman, *supra* note 28, at 75 ("[T]here is no scientific doubt that testosterone is the reason that men as a group perform better than women in sports. Indeed, this is why men and women dope with androgens."); Coleman, Joyner, & Lopiano, *supra* note 28, at 92 (noting men and women are different because of male's exposure to testosterone during puberty); Will Hobson, *The Fight for the Future of Transgender Athletes*, WASH. POST (April 17, 2021, 9:00 AM), https://www.washingtonpost.com/sports/2021/04/15/transgender-athletes-womens-sports-title-ix/ [https://perma.cc/PF7P-J2VB] (describing the work of Benjamin Levine, cardiology professor at the University of Texas Southwestern Medical Center and a world-leading expert on athletic performance, showing "people who go through puberty with male levels of testosterone, on average, grow taller and stronger than cisgender girls and women, with more muscle mass, larger hearts and advantages in several other physiological factors that affect athleticism"); *see also* Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport*, *supra* note 28, at 35 (describing physical differences between males and females). *But cf.* Williams v. Sch. Dist. of Bethlehem Pa., 998 F2d 168, 175 (3d Cir. 1993) (noting "[t]here was conflicting evidence" on the question of whether "there are real and significant physical differences between boys and girls in high school").

100. *See* Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport*, *supra* note 28, at 38 (citation omitted) ("Science . . . does not support the conclusion that a natal male has an innate and absolute athletic advantage when competing against a natal female, or that a natal female would have an innate and absolute athletic disadvantage when competing against a natal male."); *id.* at 55 ("[S]ex is an imperfect proxy for physical differences that might create advantages in sports."); MCDONAGH & PAPPANO, *supra* note 88, at 254 ("We must challenge the stereotype that males are naturally superior athletes and consider the individual first. There are more athletic difference among individuals than between athletes which are based only on gender."); Tokarz, *supra* note 93, at 220 ("Within either sex at any given age, there is a wide range of individual physiological differences. The average physiological differences among members of the same sex far exceed the average differences *between* the sexes."); Morgan Shell, Comment, *Transgender Student Athletes In Texas School Districts: Why Can't The UIL Give All Students Equal Playing Time?*, 48 TEX. TECH L. REV. 1043, 1069 ("[W]hile the average height of a

The differences between the discrimination and biology rationales for separate sports teams are of some consequence.[101] Those relying on past discrimination must accept, and generally have accepted, that the advantages it permits to members of the group previously discriminated against are supposed to be temporary.[102] Not so with biology. Plainly, if a permanent biological difference cannot be overcome with equal training and support, and differences in outcome warrant a deviation from non-discrimination under heightened scrutiny, separate teams for females need not be time-limited.

Curiously, courts have not been particularly picky about choosing a theory. When cis males have sued seeking an opportunity to play on teams reserved for females, even when no male team exists for that sport, they

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postpubescent male is greater than that of a postpubescent female, many females are still taller than many males. The same findings are true for postpubscent upper-body strength; on average, males have more upper-body strength, but there are many females who score higher on these physical characterization tests."); Skinner-Thompson & Turner, *supra* note 68, at 286 (differences "within each sex is far broader than the average differences between men and women"); *see also* Hoover v. Meiklejohn, 430 F. Supp. 164, 166 (D. Colo. 1977) (noting males have an advantage over females as a class in strength and speed, but "the range of differences among individuals in both sexes is greater than the average difference between the sexes"); Petrie v. Ill. High Sch. Ass'n, 394 N.E.2d 855, 867 (Ill. App. Ct. 1979) (Craven, J., dissenting) (disputing the argument that boys should be excluded from a school's only volleyball team and noting "the differences in size and strength [w]ithin each sex are shown by the evidence to be greater than the differences [b]etween the averages for the two sexes").

The academic proponents of this view tend to be advocates for either (1) allowing trans women to compete on teams reserved for females (like Buzuvis and Shell) or (2) allowing women to compete on sports teams that had been reserved exclusively for males (such as McDonagh, Pappano, and Tokarz). *See* Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport*, *supra* note 28, at 3 (noting trans women should be allowed to play on teams reserved for females as there is no "innate" athletic advantage to a natal male playing against a natal female); Shell, *supra* note 100, at 1048 (emphasizing the athletic differences between males and females are not clear cut); *see also* MCDONAGH & PAPPANO, *supra* note 88, at 8; Tokarz, *supra* note 93, at 204 (noting the range of "physiological differences" intrasex is much more drastic than the intersex differences).

101. Coleman, Joyner, & Lopiano, *supra* note 28, at 78–79 (noting the two schools of thought around the time of Title IX's passage).

102. *Id.* at 78 (citing a letter from HEW Secretary Casper Weinberger to President Gerald Ford setting out the position of the National Organization of Women) ("One group took the position that sex segregation and thus the sports exception in the regulations would be necessary only for a period, until females were afforded the (equal) training and competition opportunities that would be required eventually to close the performance gap; after that, sport could be co-ed."); Tokarz, *supra* note 93, at 244–45 ("Under an affirmative action approach, all-female teams could be maintained *for a period of time*, parallel to teams open on a competitive basis to both sexes. Because of past inequities in funding, training, competitive opportunities, and social support, affirmative action is justified and may be necessary to enable females to realize their athletic potential.") (emphasis added).

usually lose.[103] The courts so holding will mention both justifications.[104] When females seek to participate on a team reserved for males, and an equivalent team (in level and resources) exists for females, they usually lose as well, although the justification tends to focus on physical differences and

103. *See* Clark v. Ariz. Interscholastic Ass'n, 695 F.2d 1126, 1131—32 (9th Cir. 1982) (affirming rejection of suit under Fourteenth Amendment by males seeking to play on schools' only volleyball team, reserved for females); B.C. *ex rel.* C.C. v. Bd. of Educ., Cumberland Regional Sch. Dist., 531 A.2d 1059, 1066 (N.J. Super. Ct. App. Div. 1987) (affirming decision of the Commissioner of Education precluding male from playing on girls' field hockey team and holding that the preclusion did not violate male's rights under N.J. Constitution and anti-discrimination law); Mularadelis v. Haldane Central Sch. Bd., 74 A.D.2d 248, 256–57 (N.Y. App. Div. 2d 1980) (reversing trial court's determination permitting male to play on the girls' tennis team where there was no boys' team and holding that Fourteenth Amendment requires only equal "overall athletic opportunities" as required under Title IX regulations); Petrie v. Ill. High Sch. Ass'n, 394 N.E.2d 855, 865 (Ill. App. Ct. 1979) (affirming trial court judgment dismissing challenge to rules that prohibited males from participating on the only volleyball team sponsored by the school). *But see* Gomes v. R.I. Interscholastic League, 469 F. Supp. 659, 665–66 (D.R.I.) (granting male preliminary injunction permitting male to play on school's sole volleyball team), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979); Att'y Gen. v. Mass. Interscholastic Athletic Ass'n, 393 N.E.2d 284, 290, 296 (Mass. 1979) (holding exclusion of males from girls' teams prohibited under state equal rights amendment); *Petrie*, 394 N.E.2d at 866 (Craven, J., dissenting) ("Though the defendants in this case have made much of the fact that most of the athletic cases involve suits by girls who have been excluded from boys' teams, there can no longer be any question but that freedom from discrimination is a two-way door.").

104. *See Clark*, 695 F.2d at 1127 (noting the Arizona policy was justified at the time of its adoption as a means "to compensate for the girls['] historical lack of opportunity in interscholastic athletics," and the parties stipulated at trial that "high school males are taller, can jump higher and are stronger than high school females"); *id.* at 1128 (relaying trial court finding that policy of excluding males from volleyball team was substantially related to the important governmental objectives of "1) promoting equal athletic opportunities for females in interscholastic sports, and 2) redressing the effects of past discrimination"); *id.* at 1131 (stating "[t]he record makes clear that due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team. Thus, athletic opportunities for women would be diminished[,]" and holding that "there is clearly a substantial relationship between the exclusion of males from the team and the goal of redressing past discrimination and providing equal opportunities for women"); *B.C.* ex rel. *C.C.*, 531 A.2d at 1064 (holding the right of a male excluded from field hockey not to be discriminated against because of sex had to be balanced with "the public need to promote equalization of athletic opportunities and to rectify past discrimination against women in athletics"); *Petrie*, 394 N.E.2d at 863 ("Both because of past disparity of opportunity and because of innate differences, boys and girls are not similarly situated as they enter into most athletic endeavors.").

the possibility of reduced female participation in interscholastic sports.[105] With few exceptions, almost all agree.[106]

But to say that sex segregation in scholastic sports is permissible under Title IX or the Equal Protection Clause is not to say it is required. As a general rule, deviations from strict equality, whether falling under the loosely-defined rubric of "affirmative action" or something else, are not required even when they are permitted.[107] Although there has been an occasional suggestion that the Equal Protection Clause does require sex-

105. *See* O'Connor v. Bd. of Educ. of Sch. Dist. 23, 449 U.S. 1301, 1307–08 (1980) (Stevens, J.) (affirming stay of a trial court injunction that had ordered school to permit a sixth-grade girl to play on the boys basketball team because the girls team had players of substantially lesser skill; "[w]ithout 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 in interscholastic events"); Ruman v. Eskew, 343 N.E.2d 806, 810 (Ind. Ct. App. 1976) (affirming denial of preliminary injunction motion by female seeking to play on varsity boys' tennis team); Ritacco v. Norwin Sch. Dist., 361 F. Supp. 930, 932 (W.D. Pa. 1973) (stating, in case brought by female seeking to play on male teams, separate teams were proper given the physiological differences between males and females in high school); Bucha v. Ill. High Sch. Ass'n, 351 F. Supp. 69, 75 (N.D. Ill. 1972) (applying rational basis scrutiny and upholding rule that prohibited competition between the sexes in case brought by female swimmers seeking to swim on boys' team, concluding defendants were rational in concluding "that unrestricted athletic competition between the sexes would consistently lead to male domination of interscholastic sports and actually result in a decrease in female participation in such events"). *But see* Commonwealth by Packel v. Pa. Interscholastic Athletic Ass'n, 334 A.2d 839, 842 (Pa. Commw. 1975) (holding that separate teams violated Pennsylvania's Equal Rights Amendment; such teams may still deny "the most talented girls . . . the right to play at that level of competition which their ability might otherwise permit them. For a girl in that position, who has been relegated to the 'girls' team,' solely because of her sex, 'equality under the law' has been denied"); Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 666 (6th Cir. 1981) (Jones, J., concurring and dissenting) (stating the Fourteenth Amendment "requires schools to give qualified female competitors the opportunity to play on the 'male' interscholastic varsity team").

106. *But see* Tokarz, *supra* note 93, at 205–06 (arguing that separate but equal sports teams cannot survive intermediate scrutiny). Tokarz would permit female-only teams, but only for a limited period of time to overcome past discrimination. *Id.* at 244–45. Tokarz's 1985 article promises a future article addressing that issue, but I have not seen one published. *Id.* at 206 n.16.

107. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 379 (1978) (Brennan, J, concurring and dissenting) ("[A]ny State . . . is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program."); Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068, 1088 (Cal. 2000) ("To hold that a democratically enacted affirmative action program is constitutionally permissible because the people have demonstrated a compelling state interest is hardly to hold that the program is constitutionally required. The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits.") (quoting Coal. for Econ. Equal. v. Wilson, 122 F.3d 692, 709 (9th Cir. 1997)); *see also* Donald C. Mahoney, Comment, *Taking A Shot at the Title: A Critical Review of Judicial and Administrative Interpretations of Title IX as Applied to Intercollegiate Athletic Programs*, 27 CONN. L. REV. 943, 968 (1995) ("Similar to Title VII, Title IX is not retrospective. A school is not required to go back and remedy past wrongs by engaging in affirmative action.").

based deviations from neutrality, they have not been holdings and have been rather vague.[108] Yet, it seems generally accepted at this time that separate sports teams *are* required by Title IX.[109] Title IX does not measure "opportunities" as the opportunity to try out for a team, but rather the actual fact of participating in the sport, and "participation opportunities" must be substantially equivalent between males and females.[110] Schools must give females their proper share of athletic spots.

How did this happen, especially in a statute that has a specific provision stating that nothing in it should be interpreted to require statistical balance?[111] The next section turns to this question.

## III. INTERPRETATION AND HISTORY

On its face, Title IX is a non-discrimination statute akin to others of its kind, like Title VI and Title VII. If a recipient of federal funds chose to have unisex sports teams, with available slots going to the most qualified athletes, this would not seem, on its face, any more illegal than selecting students for admission based on who had the best credentials. If having unisex sports teams, with selection based on competitive skill in the athletic endeavor, violates Title IX, then why is that so, and when did it become clear that it was so?[112] It turns out the answers to these questions are

108. *See* United States v. Virginia, 518 U.S. 515, 540 (1996) (concluding the single-sex, state-operated military school violated the Fourteenth Amendment and suggesting admission of women to military academy might require adjustments to its physical training program); Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 657 (6th Cir. 1981) ("However, in order to measure equal opportunity, present relevant differences cannot be ignored. When males and females are not in fact similarly situated and when the law is blind to those differences, there may be as much a denial of equality as when a difference is created which does not exist.").

109. *See* Katz & Luckinbill, *supra* note 92, at 225 (citation omitted) ("[H]aving female teams may well be necessary to preserve the rights granted by Title IX."); Coleman, Joyner, & Lopiano, *supra* note 28, at 77 ("In sport . . . if an institution can meet its sex equality obligations using a sex-blind approach—without taking sex into account—it need not use these sex-affirmative tools; they are formally permissive not mandatory. But they become mandatory in effect if these obligations are not or cannot be met otherwise."); *id.* at 82 (noting very few women would be selected for unisex teams chosen on the basis of athletic skill).

110. *See* Mansourian v. Bd. of Regents of the Univ. of Cal., 816 F. Supp. 2d 869, 923, 926 (E.D. Cal. 2011) (noting if a talented female made the football team, it would be reflected by a female participation opportunity which would "likely . . . be eliminated" upon her graduation).

111. 20 U.S.C. § 1681(b).

112. The Eastern College Athletic Conference announced in September 1972 that females would be eligible for all varsity teams at its 214-member institutions. MCDONAGH & PAPPANO, *supra* note 88, at 186.

unclear. There has been no dispositive ruling by a court or an agency determining that a school that has only unisex teams is violating Title IX.

Title IX has been described as a generally "sex-blind" statute but nonetheless has "sex equality obligations" in sports, which, if they cannot be met using a sex-blind approach, must be met with the mandatory use of "sex-affirmative tools."[113] Here, too, it is reminiscent of "New Shimmer," a product that was both a floor wax and a dessert topping.[114] So, too, Title IX is both a prohibition on the consideration of sex and a mandatory preference law; all based on the same traditional anti-discrimination language.

Leading scholars claim the requirement of separate teams to attain some kind of balance in sports is "clear in the statute's legislative history, in the original 1975 regulations[,] and in the original 1979 Policy Interpretation."[115] With respect, these matters, and the history in general, are not nearly so clear.

### A. *Legislative History*

What virtually everyone agrees about the legislative history of Title IX is (1) the text said nothing about sports, and (2) virtually no discussion of sports occurred in Congress.[116] The "legislative history" some rely upon

113. Coleman, Joyner, & Lopiano, *supra* note 28, at 77 ("In sport . . . if an institution can meet its sex equality obligation using a sex-blind approach—without taking sex into account—it need not use these sex-affirmative tools; they are formally permissive not mandatory. But they become mandatory in effect if these obligations are not or cannot be met otherwise."); *supra* text accompanying note 108; *see also* Coleman, *supra*, note 28, at 111 n.251 ("Title IX . . . permits sex segregation as a means to assure females equal treatment under this law."). Of course, Coleman and her colleagues are quite clear that mandates *cannot* be met with a sex-blind approach. *See* Coleman, Joyner, & Lopiano, *supra* note 28, at 82 (noting there would be very few women on a team if boys and girls competed against one another after puberty). So, in their view, the "formally permissive" nature of the rule is a façade. Thus, the title of their article: "The Sports Exception to Title IX's General Non-Discrimination Rule." *Id.* at 69; *see also id.* at 121 (referring to "[t]he carve-out that is the sports exception to Title IX's general, sex-blind nondiscrimination rule").

114. *See supra* note 9.

115. Coleman, Joyner, & Lopiano, *supra* note 28, at 77 n.39; *see id.* at 80 (determining "the legislative history also confirms this commitment" to ensure that girls and women would be able to compete on an equal basis with boys and men). These authors apparently also rely on the text of the statute itself, despite its apparent emphasis on non-discrimination. *See id.* at 132 ("Notwithstanding our general preference for sex neutral measures, the sports exception to Title IX's general nondiscrimination rule has long been one of the *statute's* most popular features.") (emphasis added).

116. *See* Katz & Luckinbill, *supra* note 92, at 224 ("Ironically . . . the text of Title IX does not even mention athletics . . . ."); *see also* George, *supra* note 92, at 1113 ("Title IX itself makes no mention of sports, nor was the issue a focus of the debate preceding its enactment."); MCDONAGH & PAPPANO, *supra* note 88, at 78 (Title IX was "never envisioned as addressing athletics in the first place."); Suzanne

to show Title IX requires sex-segregated sports is a rather cryptic conversation involving the Senate floor leader for the legislation, Birch Bayh, in which he said he did not think the law would "mandate[] the desegregation of football fields."[117] But he did not say *why* the law would not do that. There are at least two possibilities: First, the law would not require schools to play qualified women on the football team; or second, women are not sufficiently talented to make the football team, and Title IX would not require the selection of less qualified athletes. The latter appears to be the position adopted by the National Organization of Women.[118] The legislative history is hardly "clear." Indeed, the most obvious means of complying with the text of the statute would be unisex teams.[119]

B. *The Regulations*

The story of the regulations has been told at length elsewhere.[120] After Senator John Tower unsuccessfully proposed an amendment to exempt college basketball and football from Title IX's scope, Congress passed a statute requiring the Department of Health, Education, and Welfare to propose regulations for athletics.[121] The regulations were promulgated in 1975. They have remained unchanged since then, and currently appear at 34 C.F.R. § 106.41, and state as follow:

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Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 387 (2000) (citation omitted) ("[T]he statute's application to athletics was barely mentioned before it was enacted in 1972."); *id.* at 400 ("Athletics were barely considered during its enactment."); WARE, *supra* note 18, at 4 ("barely mentioned").

117. 117 CONG. REC. 30,407 (1971).

118. *See* Coleman, Joyner, & Lopiano, *supra* note 28, at 78–79 n.42 (quoting Letter from Caspar Weinberger, Sec'y of the Dep't of Health, Education, & Welfare to the President (Feb. 28, 1975)) (noting the National Organization of Women generally advocated unisex teams except where open competition would result in the complete exclusion of women: "[W]here skill in the given sport is the criteria, it is still conceded by all that open competition for a tackle football team would result in an all-male team.").

119. Earl C. Dudley, Jr., & George Rutherglen, *Ironies, Inconsistencies, and Intercollegiate Athletics*: *Title IX, Title VII, and Statistical Evidence of Discrimination*, 1 VIA. J. SPORTS & L. 177, 181 (1999) (citation omitted) ("The simplest and most obvious way to satisfy the command of the statutory language would be to have unisex teams in all sports, with men and women equally eligible to compete for roster spots, athletic scholarships, and playing time."); *cf.* Jamal Greene, *Hands Off Policy*: *Equal Protection and the Contact Sports Exemption of Title IX*, 11 MICH. J. OF GENDER & L. 133, 142 (2005) ("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.").

120. *E.g.*, George, *supra* note 92, at 1113–14.

121. Education Amendments of 1974, Pub. L. 93-380, § 844, 88 Stat. 484, 612.

(a) General. No 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 recipient, and no recipient shall provide any such athletics separately on such basis.

(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 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.

(c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider among other factors:

(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.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for

> teams for one sex in assessing equality of opportunity for members of each sex.[122]

Did these regulations require separate sports teams? Not at first glance. Section (a) states that a recipient of federal funds shall *not* provide athletics separately on the basis of sex.[123] Section (b) then immediately steps this assertion back and says recipients *may* provide separate sports teams if either (a) competitive skill is a criteria for selection or (b) the sport is a contact sport.[124] Thus, there is a permissive rule ("separate teams are permissible"), an exception to this rule (where there is only one team that purports to include only one sex, and the excluded sex has previously had limited opportunities, the team *must* be unisex), and then an exception to the exception (but not where the sport is a "contact sport").

What of cryptic Section (c)? Does it apply only if a school sponsors separate teams? Some of the "factors" used to assess "equal athletic opportunity" seem to suggest it: most of the factors seem difficult to apply to (or would just be unnecessary to state for) unisex teams.[125] A unisex golf team in which only the men (or only the women) received coaching (section 106.41(c)(5)) would seem so obviously illegal that one would not need a regulation to say so.

But then, the paragraph following the ten "factors" states that (1) unequal aggregate expenditures for members of each sex will not constitute noncompliance and (2) unequal expenditures for male and female teams, *if* a recipient operates or sponsors separate teams, also will not constitute noncompliance. It goes on to say that (3) the Director may consider the failure to provide necessary funds *for teams for one sex* in determining compliance. The first part of this paragraph must apply to unisex teams because it would seem redundant of the second part if it did not. But, again, it seems rather obvious. If the unisex golf team has four women and six

122. 34 C.F.R. § 106.41(a)–(c). 34 C.F.R. § 106.41(d) provided for an adjustment period.

123. 34 C.F.R. § 106.41(a) ("[N]o recipient shall provide any such athletics separately on such basis.").

124. One ambiguity in the regulation is whether it prohibits sex-segregated all-comer (where all can participate) intramurals in non-contact sports like tennis and swimming. Section 106.41(c) states that it applies to "intramural athletics," but the exception to the prohibition of separate athletics in Section 106.41(a) only applies if the teams are based on competitive skill or the activity is a contact sport. It is equally unclear who would have standing to challenge a violation if it did.

125. *See* Kelley v. Bd. of Trs., Univ. of Ill., 35 F.3d 265, 268 (7th Cir. 1994) (quoting 34 C.F.R. § 106.41(c)) ("[T]he pertinent regulation allows schools to field single-sex teams in certain circumstances but requires that they 'provide equal athletic opportunity for . . . both sexes.'").

men, and an equal amount is spent on each golfer, is it not obvious that the unequal *aggregate* expenditure is not a violation of Title IX? And the post-list paragraph certainly seems to state unisex teams are permissible because the second part of the "unequal expenditures" rule only applies "if" a recipient operates separate teams.

Courts have generally granted the regulations deference.[126] Academics have generally agreed. Some have pointed out that Congress specifically asked HEW to promulgate regulations to deal with the unique aspects of athletics and the regulations were approved by the President and offered to Congress for possible rejection, which Congress did not do.[127] Any criticism of the current interpretations seems more aimed at various interpretations of the regulations than the regulations themselves.[128] Part of the problem for critics may be that none of the official interpretations (the regulation, Policy Interpretation, the Clarification) make plain that there must be separate sports teams.[129]

Despite the language in the regulation seemingly authorizing (or, at least, contemplating) unisex teams, HEW did not view its own regulation as being indifferent to the unisex- versus separate-teams question. In a letter to state

126. *E.g.*, Neal v. Bd. Of Trs. Of the Cal. State Univs., 198 F.3d 763, 771 (9th Cir. 1999) (recounting case law where regulations were given deference).

127. *See* Coleman, Joyner, & Lopiano, *supra* note 28, at 69–70 (citation omitted) ("[R]egulations were specifically required by Congress, they have traditionally been accorded heightened deference by the courts and are tightly woven into Title IX's legal fabric."); *id.* at 84 n.67; Greene, *supra* note 119, at 164 (citation omitted) (noting the Javits Amendment "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"); 44 Fed. Reg. 71413 (Dec. 11, 1979) (noting the regulation "was signed by President Ford on May 27, 1975, and submitted to the Congress for review pursuant to Section 431(d)(1) of the General Education Provisions Act (GEPA)").

128. *See* Dudley & Rutherglen, *supra* note 119, at 195 ("It is important to distinguish between the Regulations themselves and the[] subsequent explanatory statements."); *id.* at 192 (referring to the "broad requirement of equal treatment, found in both the statute and its implementing regulations"); *see also* Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 933 (D.C. Cir. 2004) ("[A]ppellants challenge only the three-part test enunciated in the 1979 Policy Interpretation and the 1996 Clarification on the grounds that they violate the Constitution, Title IX, the 1975 regulations, and the Administrative Procedure Act . . . Appellants do not challenge the 1975 regulations or any other regulations promulgated pursuant to Title IX."); *id.* at 935 ("Appellants do not challenge Title IX itself or the 1975 Regulations."); *Kelley*, 35 F.3d at 271 ("Plaintiffs . . . concede the validity of 34 C.F.R. § 106.41 [but] argue that the substantial proportionality test contained in the agency's policy interpretation of that regulation established a gender-based quota system . . . .").

129. 34 C.F.R. § 106.41; Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71415 (Dec. 11, 1979); Letter on *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, OCR (Jan. 16, 1996) [https://perma.cc/JVH5-FFV3].

school officers shortly after the regulations were promulgated, HEW wrote that a school could not open up its men's teams to women (i.e., make all teams unisex) if it resulted in few women actually succeeding in making the teams.[130] That, the letter concluded, would not be "effectively accommodating" the interests and abilities of women as required by Section 106.41(c)(1) of the regulation. So, HEW interpreted its list in Section 106.41(c)—or at least the first item in the list—as applying to unisex teams as well as separate-sex teams. And "accommodating" the "abilities" of one sex meant supplying members of that sex with a team of their own even if they were not as skilled as others.[131] Or, in short, a quota of available slots, although the letter did not identify the size of the quota.

There are three notable aspects to this letter, though. First, there is no reference in the letter to Section 1681(b) and how an interpretation that more or less requires a certain—admittedly unidentified—number of varsity spots to be filled by women can be reconciled with a provision that says nothing should be interpreted to require statistical balance. Second, the letter seems to have flown under the radar; it is never cited for the proposition that I have just noted, and is barely cited at all.[132] Third, and perhaps related, some courts at least still suggested that maintaining unisex teams was a permissible method of complying with Title IX (and the Constitution).[133]

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130. Letter from Peter Holmes to Chief State School Officers, Title IX Obligations in Athletics (Nov. 11, 1975), https://www2.ed.gov/about/offices/list/ocr/docs/holmes.html [https://perma.cc/7T36-TJCZ ] ("For example an institution would not be effectively accommodating the interests and abilities of women if it abolished all its women's teams and opened up its men's teams to women, but only a few women were able to quality for the men's teams.").

131. *Cf.* Greene, *supra* note 119, at 168 (arguing that "skill level" is a criterion "that discriminates against women"). I take it that this means that skill has a disparate impact against women, not that it is tantamount to intentional discrimination against women.

132. Indeed, my Lexis search for the letter identified only two decisions (in one case) where the Holmes letter was cited, and that for the proposition that cheerleading is not a sport. Biediger v. Quinnipiac Univ., 928 F. Supp.2d 414, 445 n.37 (D. Conn. 2013); Biediger v. Quinnipiac Univ., 728 F. Supp. 2d 62, 91 n.23 (D. Conn. 2010). This also seems to be the sole focus of the letter in academia. *E.g.*, Ephraim Glatt, *Defining "Sport" under Title IX: Cheerleading,* Biediger v. Quinnipiac University *and the Proper Scope of Agency Deference*, 19 SPORTS L.J. 297, 308 n.84 (2012) (referencing Holmes letter).

133. *See* Cohen v. Brown Univ., 101 F.3d 155, 177 (1st Cir. 1996) ("While the Title IX regime *permits* institutions to maintain gender-segregated teams, the law does not require that student-athletes attending institutions receiving federal funds must compete on gender segregated teams."); Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 655 (6th Cir. 1981) ("The first way this [achieving equal athletic opportunity under the regulations] may be achieved is by providing coeducational sports."); Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978) (holding that an athletic association's rule prohibiting boys and girls from competing against one another was unconstitutional and noting that "coeducational

Curiously, though, the regulations themselves have not received much criticism for their possible (albeit cryptic) requirement of separate teams, perhaps because separate teams have been the norm. Rather, the focus of much criticism has been the so-called Contact Sports Exception (CSE), which permits recipients of federal funds to have a separate team in a "contact sport," excluding "members of that sex" that "have previously been limited."[134] The origins of this CSE have been the subject of much speculation, as has the inclusion of basketball as a "contact sport."[135] It

teams are . . . one possible remedy for the defendants' constitutional violation"); Hoover v. Meiklejohn, 430 F. Supp. 164, 172 (D. Colo. 1977) (holding that a rule precluding any female participation in soccer violated the constitution, and noting that the school could "decide to permit both sexes to compete on the same team"); *see also* Tokarz, *supra* note 93, at 205–06 (arguing separate but equal sports teams cannot survive intermediate scrutiny). These are, to be sure, not overwhelming precedents. *Yellow Springs*, as already noted, also stated that "present relevant differences cannot be ignored" and failing to take those differences into account might be a "denial of equality." *Yellow Springs*, 647 F.2d at 651. *Leffel* and *Hoover* involved violations of the Fourteenth Amendment, not Title IX, although courts have generally used constitutional standards elsewhere in determining whether Title IX has been violated. *See* discussion *supra*, in text accompanying notes 43–44.

134. 34 C.F.R. § 106.41(b) (2021). *E.g.*, Sangree, *supra* note 116, at 430 (showing the interpretation of the phrase "athletic opportunities for members of that sex have previously been limited," has not been uniform). In *Gomes v. Rhode Island Interscholastic League*, the district court concluded it should determine whether the "opportunities" for males were "limited" in the particular sport in question (volleyball) and rejected the interpretation that males could not receive the benefits of that provision because their overall opportunities were not limited. *See* Gomes v. R.I. Interscholastic League, 469 F. Supp. 659, 663–64 (D.R.I. 1979) (concluding the latter interpretation would raise serious constitutional questions), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979). Other courts have disagreed. *See* Williams v. Sch. Dist. of Bethlehem, Pa., 998 F.2d 168, 174–75 (3rd Cir. 1993); Kleczek *ex rel.* v. R.I. Interscholastic League, Inc., 768 F. Supp. 951, 955 (D.R.I. 1991); *In re* Mularadelis v. Haldane Cent. Sch. Bd., 74 A.D.2d 248, 253 (App. Div. 2d Dept. 1980). Moreover, as noted previously, exclusion of males from female-only teams, even when there is no equivalent male team, has generally been upheld. *See supra* note 103. At this time, at least, the interpretation in *Gomes* seems to be an outlier.

135. *See* Sangree, *supra* note 116, at 397 (recognizing HEW wanted to "exempt 'revenue producing' men's sports—basketball and football— from the anti-discrimination principle"); *cf.* Katz & Luckinbill, *supra* note 92, at 225 n. 43 (stating "[w]hy the Department of Health, Education, and Welfare created the CSE is not well known" and noting the argument that basketball was included because Senator John Tower wanted to "protect" it); *see also* George, *supra* note 92, at 1129 ("This assumption [that Congress wished to protect popular male sports] is bolstered by the questionable inclusion of basketball in the regulation's list of 'contact sports.'"); MCDONAGH & PAPPANO, *supra* note 88, at 138 (suggesting that basketball was included as a contact sport because of "ferocious lobbying by the NCAA"); Greene, *supra* note 119, at 142–43 ("The HEW regulation itself specifies basketball as a contact sport—perhaps, and one can only speculate, a nod to Senator Tower and the NCAA . . . "). It seems quite unlikely that basketball was included as a "contact sport" to "protect" it. The CSE only comes into play if a school does not have separate teams for a contact sport. Basketball was and is a very popular sport, and most schools had and still have separate school basketball teams for each sex. *See Your Complete List of Women's Basketball* Colleges, NEXT COLL. STUDENT ATHLETE, https://www.ncsasports.org/womens-basketball/colleges [https://perma.cc/FWE5-GP4G]

does seem a rather odd interpretation of a statute calling for non-discrimination, and the critics probably have a good point in saying it is hard to derive its substance from Title IX.[136] At the same time, though, the statute's effect in public institutions is limited; almost every case considering the matter has held that women have a constitutional right to participate in a contact sport on the men's team if the school does not have a women's team.[137] As noted, the CSE is actually an exception to an exception and perhaps has gotten more attention than it deserves. Even if the CSE did

(showing 1800 college and junior college women's basketball teams)*; cf.* Mahoney, *supra* note 107, at 943 (noting the 1994 NCAA women's basketball final four played to a sellout crowd of nearly 12,000 and appeared on national television). All of the high schools in the area in which I grew up (northern New Jersey) had female basketball teams in the mid-1970s. Although there are several cases where female athletes successfully challenged their exclusion from all-male teams where there was no female team at the school, *see infra* note 138, none of them involved basketball. Separate teams for girls or women preclude any need to rely on the CSE to exclude females from boys' or men's teams. George, *supra* note 92, at 1114–15. Another possibility for basketball's inclusion in the regulation as a contact sport is to permit sex-segregated intramural basketball leagues at schools receiving federal funds. *See supra* note 124.

136. *See* Sangree, *supra* note 116, at 388 ("[T]he regulation exempting contact sports is indeed 'capricious' and 'manifestly contrary to the statute.'"); Katz & Luckinbill, *supra* note 92, at 225 ("Put simply, Title IX, which was intended to eliminate sex discrimination, had an exception that expressly allowed sex discrimination against females who wanted to play certain traditionally all-male sports like football . . . .").

137. *See* Beattie v. Line Mountain Sch. Dist., 992 F. Supp. 2d 384, 397 (M.D. Pa. 2014) (granting preliminary injunction pursuant to claim under Equal Protection Clause and Pennsylvania Equal Rights Amendment to parents of a junior high school girl seeking to try out for the school's wrestling team); Adams *ex rel.* Adams v. Baker, 919 F. Supp. 1496, 1505 (D. Kan. 1996) (granting preliminary injunction under Equal Protection Clause to a female plaintiff seeking to try out for her high school's wrestling team); Saint v. Neb. Sch. Activities Ass'n, 684 F. Supp. 626, 630 (D. Neb. 1988) (issuing temporary restraining order requiring a school association to allow a female to try out for the school wrestling team); Lantz by Lantz v. Ambach, 620 F. Supp. 663, 666 (S.D.N.Y. 1985) (holding a state regulation precluding mixed competition in football was unconstitutional as applied to high school female when there was no female football team); Darrin v. Gould, 540 P.2d 882 892–93 (Wash. 1975) (holding association rules prohibiting girls from participating in interscholastic football violated Washington Equal Rights Amendment). *See generally* Katz & Luckinbill, *supra* note 92, at 226 ("[P]rohibiting females from trying out for contact sports . . . has been consistently found by the courts to be unconstitutional"). These cases are similar to others outside of the "contact sports" area; if there is no opportunity for females to compete in a sport in question sponsored by a public school, then they must be allowed to try out for the male team. *See* Bednar v. Neb. Sch. Activities Ass'n, 531 F.2d 922, 923 (8th Cir. 1976) (affirming preliminary injunction enjoining association from precluding a girl from competing in cross-country because of sex); *see also* Brenden v. Indep. Sch. Dist. 742, 477 F.2d 1292, 1302 n.8 (8th Cir. 1973) (affirming the same for tennis, cross-country skiing, and cross-country running).

not exist, chances are that not many women would successfully make a unisex football team.[138]

But the CSE, and the ability of women attending public institutions to work around it by using the Constitution, illuminates a critical point in understanding Title IX generally. Technically, every football and wrestling team in a public institution, assuming there is only a nominally "male" one of each, is a unisex, coed team. So too are so-called "male" non-contact sports teams, where there is no female team in that sport, at any educational institution receiving federal funds. All the spots are equally open to male and females. How, then, should one count the "athletic opportunities" these sports provide?

### C. *The Policy Interpretation/Clarification*

In 1979, HEW issued guidance on the regulation;[139] that guidance was clarified by its successor in overseeing education programs, the Department of Education, in 1996.[140] The Policy Interpretation describes how the Department would interpret its own regulations. The Policy Interpretation is divided into three parts: (1) Athletic Financial Assistance,[141] (2) "Equivalence in Other Athletic Benefits and Opportunities,"[142] and

138. Greene, *supra* note 119, at 157 ("[T]he 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, . . . athletic programs run by public entities are beholden to the Equal Protection Clause.").

139. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413 (Dec. 11, 1979). The Policy Interpretation states it was promulgated because, "[b]y the end of July 1978, [HEW] had received nearly 100 complaints alleging discrimination in athletics against more than 50 institutions of higher education." *Id.* at 71413. It was not, as one author has suggested, a result of "continued confusion" after passage of the Civil Rights Restoration Act of 1987, which, of course, was passed eight years after the Policy Interpretation. Ambrosius, *supra* note 94, at 561.

140. *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, OCR (Jan. 16, 1996), https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html [https://perma.cc/JVH5-FFV3].

141. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71415. This was an interpretation of the regulation that now appears at 34 C.F.R. § 106.37(c) (2021) providing that recipients of federal funds must provide reasonable opportunities for awards of financial assistance for members of each sex in proportion to the number of students of each sex participating in intercollegiate athletics. *Id.*

142. *Id.* at 71415–17. This was an interpretation of 34 C.F.R. § 106.41 (c)(2)–(10) and also addressed recruitment of student athletes. The Policy Interpretation justified adding "recruitment" on the ground that the paragraph preceding the enumeration in Section 106.41(c) stated that the Director (of the Office of Civil Rights) would consider the listed matters "among other factors." *Id.* at 71413, 71415–17; 34 C.F.R. § 106.41(c).

(3) "Effective Accommodation of Student Interests and Abilities."[143] The last of these has received the most attention because it identifies how to assess the "effective accommodation" of each sex's interests and abilities as a near-dispositive factor in determining whether the fund recipient was providing equal athletic opportunities for each sex.[144] The now famous (or infamous) "three-part test" identified three ways federal fund recipients could comply with that requirement of "effective accommodation": fund recipients (1) could provide "intercollegiate level participation opportunities" to men and women in proportion to the undergraduate population at the institution; (2) could provide continuing expansion of athletics opportunities for the underrepresented sex—the one whose proportional participation opportunities were less than its proportion of the student population; or (3) could provide athletic opportunities completely satisfying the interests of the underrepresented sex.[145]

But another part of the "effective accommodation" section deserves attention as well because it speaks to the unisex versus separate-teams issue. The Policy Interpretation, like the regulations, does not specifically preclude unisex teams; to the contrary, it says that the "regulation does not require institutions to integrate their teams,"[146] which certainly suggests

143. 44 Fed. Reg. at 71417–18. This section interpreted Section 106.41(c)(1) and also assessed "competitive opportunities," relying on the same "other factors" language to include the latter. *Id.* at 71417.

144. 34 C.F.R. § 106.41(c)(1). Although Section 106.41(c) lists nine other factors that should be considered in determining whether fund recipients have provided equal opportunities, at least some courts have held the failure to effectively accommodate the interests and abilities of each sex is sufficient to find a violation of Title IX. Kelley v. Bd. of Trs., Univ. of Ill., 35 F.3d 265, 268 (7th Cir. 1994) ("Although § 106.41(c) lists nine other factors, an institution may violate Title IX solely by failing to accommodate effectively the interests and abilities of student athletes of both sexes."). The 1996 Clarification seems to support that view. *See Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, OCR (Jan. 16, 1996), https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html [https://perma.cc/JVH5-FFV3] (stating "[i]t is important to note that under the Policy Interpretation the requirement to provide nondiscriminatory participation opportunities is only one of many factor that OCR examines to determine if an institution is in compliance with the athletics provision of Title IX," but acknowledging "[a]n institution's failure to provide nondiscriminatory participation opportunities usually amounts to a denial of equal athletic opportunity because these opportunities provide access to all other athletic benefits, treatment, and services"). *But see* Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 934 (D.D.C. 2004) (describing the guidance in the 1996 clarification thusly: "[I]nstitutions may comply with the Three-Part Test by meeting any one of the three prongs[,] and . . . the Three-Part Test is only one of many factors the Department examines to assess an institution's overall compliance with Title IX and the 1975 Regulations").

145. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71418.

146. *Id.* at 71417–18.

"integration" is permissible.[147] But in determining whether a recipient of federal funds "effectively accommodated" the interests and abilities of a sex in a non-contact sport, the Policy Interpretation said a recipient *must* create a single-sex team in a sport, presumably for women, when there is only one team, presumably for men, and (1) there is reasonable interest and ability among women, and (2) "[m]embers of the excluded sex do not possess sufficient skill to be selected for a single integrated team[] or to compete actively on such a team if selected."[148] That is, a team selecting among both men and women by "skill" does not "effectively accommodate" the abilities or "skills" of women, assuming they are the less-skilled group.[149] Again, it seems hard to see how a school that provides opportunities for women through unisex teams could meet the requirements of the Policy Interpretation.[150] But nothing in the Policy Interpretation specifically precludes unisex teams and, as just noted, other parts suggest they are allowed.

The Clarification focuses on the three-part test. The key provision, for our purposes, is how to determine whether "participation opportunities" are substantially proportionate to undergraduate enrollment under the first part of the test.[151] The provision defines "participation *opportunities*" as "participants"—those who made the team and are actually playing or are injured and still receiving an athletic scholarship.[152] The "Dear Colleague"

147. United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 205–06 (1979).

148. 44 Fed. Reg. at 71418. The Policy Interpretation states that a team must be created for the sex excluded from the existing team if "[t]he opportunities for members of the excluded sex have historically been limited", and thus will most likely be applicable where there is a men's team. *Id.*

149. 34 C.F.R. § 106.41(b), (c)(1).

150. It is also not clear how this interprets a regulation which says that, in non-contact sports, women have to be permitted to try out for the men's team if there is only one team. 34 C.F.R. § 106.41(b). Greene, *supra* note 119, at 168 (noting the "1979 Policy Interpretation . . . cleans up the language of the Regulation" to require separate teams rather than making them optional).

151. *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, OCR (Jan. 16, 1996), https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html [https://perma.cc/JVH5-FFV3].

152. *Id.* The Clarification takes the definition of "participants" from the *first* part of the Policy Interpretation, which focuses on financial aid, and states that "scholarship aid made available to men and women must be substantially proportionate to their [participation rates]." *Id.*; 44 Fed. Reg. at 71415. It then applies that definition in clarifying the *third* part of the Policy Interpretation, which is focused on effective accommodation of interests and abilities and provides that a recipient will be in compliance if the proportion of "participation opportunities" for each sex is substantially similar to each sex's proportion of the undergraduate population. *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, OCR (Jan. 16, 1996), https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html [https://perma.cc/JVH5-FFV3]. Notably, this understanding of "participation opportunities" was also reached by the district court the previous year, and affirmed by the First Circuit, in an early and well-known Title IX athletics litigation. Cohen v. Brown Univ., 101 F.3d 155, 164

letter accompanying the Clarification noted, "Title IX's athletic provisions are unique in permitting institutions—notwithstanding the long history of discrimination based on sex in athletics programs—to establish separate athletic programs on the basis of sex, thus allowing institutions to determine the number of athletic opportunities that are available to students of each sex."[153] The letter compared Title IX to Title VI, which "forbids institutions from providing separate athletic programs on the basis of race or national origin."[154]

The Clarification—like the Regulation[155] and the Policy Interpretation[156]—does not explicitly address what should happen if a recipient chooses *not* to control the number of "participation opportunities" by operating separate teams.[157] Arguably, the equating of "participation opportunities" with "participants" does that work for it. If participants are only those who make the team, and the proportion of participants for each sex must approximate the proportion of each sex in the undergraduate population, then a recipient would still have to ensure those proportions lined up by having a specified number of slots for each sex on a unisex team.[158]

Many have called the current system (statute, regulations, Policy Interpretation, and Clarification) a "quota" system; others, including OCR, have disagreed.[159] But even those who refer to the system as a quota system

(1st Cir. 1996) ("[T]he 'participation opportunities' offered by an institution are measured by counting the *actual participants* on intercollegiate teams.") (quoting Cohen v. Brown Univ., 879 F. Supp. 185, 202 (D.R.I. 1995)).

153. Letter from Norma V. Cantu, Assistant Secretary for Civil Rights, to Colleagues of the Office for Civil Rights (Jan. 16, 1996), [https://perma.cc/JVH5-FFV3].

154. *Id.*

155. 34 C.F.R. § 106.41.

156. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,415.

157. *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, OCR (Jan. 16, 1996), https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html [https://perma.cc/JVH5-FFV3].

158. George, *supra* note 92, at 1145 (proposing unisex teams with 50% men and 50% women, "a concept not so very different from the current use of proportionality to establish Title IX compliance."); *see also id.* at 1155 ("Title IX already imposes a quota system as currently interpreted by OCR and the courts."). As George notes, there would be a need to regulate playing time under his 50/50 proposal. *Id.*

159. *See, e.g.*, George, *supra* note 92, at 1155 n.228 (noting different views by various authors). OCR points out that the second and third parts of the three-part test do not require a specific number of participants of either sex. Letter from Norma V. Cantu, Assistant Secretary for Civil Rights, to Colleagues of the Office for Civil Rights (Jan. 16, 1996) https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html [https://perma.cc/JVH5-FFV3] ("Institutions have flexibility in providing nondiscriminatory participation opportunities to their

do not envision replacing it with unisex teams in which skill would be used to select the participants. Rather, they simply think OCR chose the wrong baseline for its quota when it chose the undergraduate population. If it had chosen a baseline that more accurately takes into account the differing interests in intercollegiate sports of the two sexes, the critics argue, that would be an appropriate interpretation of Title IX.[160] These proposals may or may not be an improvement over the current system, but they would hardly constitute a world without preferences. Unlike the typical employment situation, in which abilities are compared throughout the entire population of potential employees to determine the appropriate comparator subgroup, the critics would only compare the abilities of members of a sex to other members of their own sex to determine if the "interests and abilities" should count for inclusion in the appropriate comparator subgroup. Even under the critics' proposals, female lacrosse players' abilities are not compared to male lacrosse players' abilities, but only to other females to determine if their "abilities" should warrant inclusion in the

students, and OCR does not require quotas."); Cohen v. Brown Univ., 101 F.3d 155, 176 (1st Cir. 1996) ("We think it clear that neither the Title IX framework nor the district court's interpretation of it mandates a gender-based quota scheme."); Kelley v. Bd. of Trs., Univ. of Ill., 35 F.3d at 271 (7th Cir. 1994) ("[T]he policy interpretation does not . . . mandate statistical balancing. Rather, the policy interpretation merely creates a presumption that a school is in compliance with Title IX and the applicable regulation when it achieves such a statistical balance."). The critics of the current regime point out that the first part sets both a safe-harbor quota and the standard for determining which of the two sexes is the "underrepresented" sex and receive the benefits (either increasing or completely fulfilled satisfaction of interests and abilities) of the second and third parts. Dudley & Rutherglen, *supra* note 119, at 197–98. Others argue that the second and third parts are not practical over the long haul. George, *supra* note 92, at 1117; Ambrosius, *supra* note 94, at 589.

160. *See* Dudley & Rutherglen, *supra* note 119, at 198–99 ("[N]othing would be objectionable about the Policy Interpretation and the Clarification if OCR had adopted the right baseline for determining compliance with Title IX."); *id.* (college athletes are more akin to skilled workers under Title VII, and should be the comparator population against which participation is measured); Ambrosius, *supra* note 94, at 598–99 (proposing test that measures proportionality to interests); Mahoney, *supra* note 107, at 972 (suggesting courts "look to the percentage of persons of each sex who are unaccommodated before finding a violation of Title IX); *see also* Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 941 (D.D.C. 2004) (noting challengers to the Policy Interpretation and Clarification "embrace th[e] regulations, which they characterize as properly requiring schools to provide 'equal opportunity based on interest'"). The opposing view is that interests are not set in stone. A school that has a varsity sports team in men's volleyball will probably get more men interested in that sport than a school that does not. *Cf.* Miami Univ. Wrestling Club v. Miami Univ., 195 F. Supp. 2d 1010, 1019 (S.D. Ohio 2001) ("Calculations of relative interest in athletic participation will often be skewed by imbalances in the number of students recruited to the institution specifically for their athletic ability and interest."), *aff'd*, 302 F.3d 608 (6th Cir. 2002); Greene, *supra* note 119, at 160 ("'[I]nterest and ability,' the talismanic touchstones of Title IX compliance, are not wholly exogenous; both may be created from within.").

comparator subgroup. This is why, I think, Professor Coleman correctly analogizes the women's category in sports as an "affirmative action . . . set aside."[161]

D. *The Civil Rights Restoration Act of 1987*

In *Grove City College v. Bell*,[162] the Court concluded Title IX applied only to specific programs at colleges and universities receiving federal funds.[163] This cast doubt on the continuing applicability of Title IX to athletics.[164] Congress responded by passing the Civil Rights Restoration Act of 1987, which included all the activities of a college or university in the definition of a "program" receiving federal funds.[165]

Because the Policy Interpretation, albeit not the Clarification, was promulgated in 1979, some suggest Congress implicitly approved the Policy Interpretation by reviving Title IX's application to athletics.[166] While some evidence suggests equality in athletics was a concern in Congress, there does not seem to be much evidence showing the Policy Interpretation itself was discussed or adopted.[167] Like Congress's general acquiescence to a regulation, it is a dangerous form of statutory interpretation to assume Congress is aware of administrative interpretations and its failure to modify such an interpretation is tantamount to its approval.[168] The general desire

161. Coleman, *supra* note 28, at 69; *see also* Coleman, Joyner, & Lopiano, *supra* note 28, at 87 (referring to "[t]he [s]ports [e]xception."); *id.* at 121 (referring to "[t]he carve-out that is the sports exception to Title IX's general sex-blind nondiscrimination rule . . . .").

162. Grove City Coll. v. Bell, 104 S. Ct. 1211 (1984).

163. *Id.* at 1220–21.

164. *See* Deborah Blake & Elizabeth Catlin, *The Path of Most Resistance: Long Road Toward Gender in Equity Intercollegiate Athletics*, 3 DUKE. J. GENDER L. & POL'Y 51, 58 (1996) ("The impact of Grove City on efforts to eradicate discrimination in athletics programs was substantial. DOE's OCR immediately dropped or narrowed almost forty pending Title IX athletics investigations.").

165. 20 U.S.C. § 1687(2)(A) (2016); Nat'l Collegiate Athletic Ass'n v. Smith, 119 S. Ct. 924, 928 n.4 (1999).

166. *See, e.g.*, Cohen v. Brown Univ., 991 F.2d 888, 894 (1st Cir. 1993) ("Although the Restoration Act does not specifically mention sports, the record of the floor debate leaves little doubt that the enactment was aimed, in part, at creating a more level playing field for female athletes."); *see also* Coleman, Joyner, & Lopiano, *supra* note 28, at 83 (discussing *Grove City College v. Bell*) (citing email from Nancy Hogshead-Makar, Chief Exec. Officer, Champion Women, to Doriane Lambelet Coleman, Professor of L., Duke L. Sch. (Feb. 19, 2020, 3:17 PM)).

167. S*ee* Coleman, Joyner, & Lopiano, *supra* note 28, at 83 (citing general hype surrounding women in sports as driving narrative behind Congress extending Title IX without reference to the Policy Interpretation).

168. *See generally* Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engs., 531 U.S. 159, 169-70 (2005) ("Although we have recognized congressional acquiescence to administrative

to have Title IX apply to athletics may not be sufficient to warrant approval of the specific means the Policy Interpretation applied. This seems particularly so for a statute specifically stating that statistical balance is not required;[169] Congress did not amend Section 1681(b) either, so its failure to amend may cut both ways. And as noted, the subsequent Clarification did a non-trivial amount of work in equating "participants" and "participation opportunities."[170]

E. *Some Talk of Language*

As the administrative interpretation of Title IX developed, phrases we commonly use in other contexts have been interpreted in unique ways. We have already identified one such phrase: "equal opportunity." The distinct meaning Title IX gives this phrase is illuminated when the same phrase is used in a Fourteenth Amendment Equal Protection challenge by a woman challenging a school's exclusion of women from a football or wrestling team.[171] So, for example, in *Adams ex rel Adams v. Baker*,[172] a female high school student sued to try out for the wrestling team. When she moved for a preliminary injunction, the court quickly concluded she was unlikely to succeed on her Title IX claim for relief because wrestling is a paradigmatic, and enumerated, "contact sport."[173] The court then held this conclusion did not preclude a likelihood of success on plaintiff's Equal Protection claim, and it rejected the theory that Title IX was the exclusive remedy for such constitutional violations.[174] Title IX, the court held, did not simply limit remedies for constitutional equal protection violations, but defined "equal opportunity"; further, the "the definition provided under Title IX is substantively different than the definition of equal protection, as set forth

interpretations of a statute in some situations, we have done so with extreme care. 'Failed legislative proposals are "a particularly dangerous ground on which to rest an interpretation of a prior statute.").

169. 20 U.S.C. § 1681(b).

170. *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, OCR (Jan. 16, 1996), https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html [https://perma.cc/JVH5-FFV3].

171. *See supra* note 137 and accompanying text.

172. Adams *ex rel.* Adams v. Baker, 919 F. Supp. 1496 (D. Kan. 1996).

173. *Id.* at 1503.

174. *Id.* (citing Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981)). The issue was whether Congress established a comprehensive remedial scheme for equal protection violations in public entities receiving federal funds by enacting Title IX, thus precluding a separate claim under the Equal Protection Clause. The Supreme Court eventually decided (unanimously) that it had not. Fitzgerald v. Barnstable Sch. Comm. 129 S. Ct. 788, 797 (2009).

by the controlling case law."[175] This seems only partly true—that is, only to the extent that Title IX addresses athletics. It is unclear whether Title IX's application to admissions policies, for example, is substantially different from the principles that would govern under the Equal Protection Clause.

More generally, "[w]here female athletes have sought the opportunity to be a part of a men's team, courts have consistently held that there is no legal entitlement to a position on such a team; rather, Equal Protection merely requires an equal opportunity to compete for such a position."[176] Thus, a common refrain in such cases is that the female student is being denied, and only wants, an opportunity to try out.[177] This is obviously a different concept of "equal opportunity" than the nose-counting formula of equal "participation opportunities" under Title IX.

In ruling against Brown University, the First Circuit gave us this cryptic message on the topic:

> Whether or not the institution maintains gender-segregated teams, it must provide "gender-blind equality of opportunity to its student body." While this case presents only the example of members of the underrepresented gender seeking the opportunity to participate on single-sex teams, the same analysis

175. Adams *ex rel.* Adams, 919 F. Supp. at 1503; *see also* Ronnie Wade Robertson, *Tilting at Windmills: The Relationship Between Men's Non-Revenue Sports and Women's Sports*, 76 MISS. L.J. 297, 305 (2006) (noting Title IX works much differently in engineering because "it simply requires that no person be denied an opportunity to major in engineering because of his or her sex"); Hearing before the Subcommittee on Postsecondary Education, Training and Life-long Learning of the Committee on Economic and Education Opportunities (May 9, 1995), Statement of Charles M. Neinas, Executive Director of the College Football Association) ("Although Title IX is an education act, the focus on strict proportionality rests solely on athletics and there is no investigation about the percentage of females enrolled in business or engineering or males enrolled in nursing or education.").

176. Mansourian v. Bd. of Regents of the Univ. of California at Davis, 816 F. Supp. 2d 869, 931 (E.D. Cal. 2011).

177. *See id.* at 931 ("Courts have repeatedly emphasized that 'the mandate of equality of opportunity does not dictate a disregard of differences in talents and abilities among individuals. There is no right to a position on an athletic team. There is a right to compete for it on *equal terms*.'") (quoting Hoover v. Meiklejohn, 430 F. Supp. 164, 171 (D. Colo. 1977)); Lantz by Lantz v. Ambach, 620 F. Supp. 663, 665–66 (S.D.N.Y. 1985) ("Jacqueline Lantz 'obviously has no legal entitlement to a starting position' on the Lincoln High School Junior Varsity football squad, 'since the extent to which she plays must be governed solely by her abilities, as judged by those who coach her. But she seeks no such entitlement here. Instead[,] she seek simply a chance, like her counterparts, to display those abilities. She asks, in short, only the right to try.'") (quoting Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1031 (W.D. Mo. 1983)).

> would apply where members of the underrepresented gender sought opportunities to play on co-ed teams.[178]

The "same analysis"? Effecting gender-blind equality of opportunity? It would seem hard to do both for unisex teams unless "gender-blind equality of opportunity" means a quota for each sex.

In a similar vein, in Title IX cases, what is the consequence if a school allows women to try out for the men's teams; that is, it has only unisex teams and women-only teams, thus allowing it to contend it gives women *more* "opportunities" than men.[179] In *Williams v School District of Bethlehem, Pa.*,[180] a male seeking to play on the school's female field hockey team argued that this feature made males the sex whose "opportunities . . . have previously been limited" under Section 106.41(b) of the regulations, which, under the regulation, would mean men would be eligible for the field hockey team if it is not a contact sport.[181] The district court adopted that argument, but the court of appeals disagreed.[182] "'Athletic opportunities' means real opportunities, not illusory ones."[183] The court did not explain the distinction between a "real" opportunity and an "illusory" one, but its discussion suggests that it depends upon whether there was a significant chance of making the team.[184] The court held the question might turn on whether there were "real and significant physical differences between boys and girls in high school," an issue on which it held there was an issue of fact.[185]

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178. Cohen v. Brown Univ., 101 F.3d 155, 177 n.14 (1st Cir. 1996) (citation omitted) (quoting Cohen v. Brown Univ., 991 F.2d 888, 896 (1st Cir. 1993)).

179. Of course, this might present a different Title IX problem if women who make the unisex team end up having twice the opportunity to practice and receive coaching as men in the same sport—say, if the unisex and female tennis teams competed in different seasons.

180. Williams v. Sch. Dist. of Bethlehem, Pa., 998 F.2d 168 (3rd Cir. 1993).

181. 34 C.F.R. § 106.41(b) (2021).

182. Williams v. Sch. Dist. of Bethlehem, Pa., 998 F.2d 168, 175 (3rd Cir. 1993).

183. *Id.*

184. *Id.*

185. *Id.*; *see also* Haffer v. Temple Univ. of the Commonwealth Sys. of Higher Educ., 678 F. Supp. 517 (E.D. Pa. 1987) In *Haffer*, Temple argued that all its teams were open to women and that certain teams were open only to women. *Id.* at 524. The court concluded that Temple had conceded that it had separate men's and women's teams on the motion for a preliminary injunction before the court, but said that Temple was not precluded from attempting to prove at trial that all of its teams were open to women. *Id.* at 524, 525 n.4. It did not identify what consequence would flow from a conclusion that they were so open, but it recognized that "[s]ponsoring separate men's and women's teams . . . appears to expand substantially the opportunity for women to participate in intercollegiate athletics." *Id.* at 525.

This does not appear to be a satisfactory, or even well considered, position. Would an excellent female tennis player or golfer have a "real" chance to make the unisex team, but an average player only have an "illusory" chance? If so, would the existence of excellent female athletes be enough for each of the positions on the unisex tennis and golf teams to be "opportunities" for women? The point at which a disadvantage becomes dispositive is not entirely clear. A short basketball player, of any sex, with a good outside shot might be at a significant disadvantage against taller competitors; at what point would that player's opportunity to make a team become "illusory"?

Other phrases commonly used in anti-discrimination law are "affirmative action" and "preference."[186] These common phrases have received an equally confused reception in Title IX jurisprudence. The *Cohen v. Brown University*[187] court forcefully asserted that Title IX does not involve "affirmative action" or mandate a "preference."[188]

> Title IX is not an affirmative action statute; it is an anti-discrimination statute modeled explicitly after another anti-discrimination statute, Title VI. No aspect of the Title IX regime at issue in this case—inclusive of the statute, the relevant regulation, and the pertinent agency documents—mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals.[189]

But if separate sports teams are, in fact, a mandate of Title IX, and their purpose is to ensure that women have the opportunity to play varsity sports regardless of their abilities viz-a-viz men, then this statement simply ignores

186. I have expressed elsewhere my concerns about the phrase "affirmative action." *See* Michael E. Rosman, *Thoughts on Bakke & Its Effect on Race-Conscious Decision-Making*, 2002 U. CHI. LEGAL F. 45 n.1 (2002). My opinion seems to have had little effect on the frequency of its usage.

187. Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996).

188. *Id.* at 169 ("[N]otwithstanding Brown's persistent invocation of the inflammatory terms 'affirmative action,' 'preference,' and 'quota,' this is not an affirmative action case.").

189. *Id.* at 170. The *Brown* court's rationale for this assertion was that Title IX and its regulations (1) do not require a quota, and (2) do not mandate a finding of discrimination based "solely upon a gender-based statistical disparity." *Id.* at 171. It also held that the possibility of a gender-based remedy for a violation of anti-discrimination law does not transform a statute into an affirmative action statute. *Id.* at 171–72.

the commonly understood meaning of "preference." Indeed, another part of the same opinion suggests as much.[190]

Moreover, the First Circuit treated the district court's order—requiring Brown University to promote four women's teams to varsity status to comply with the third prong of the three-part test (complete fulfillment of interests and abilities)—as a gender-conscious remedy it assessed under the Fifth Amendment.[191] The court did not explain how a factor used to assess compliance with a non-discrimination statute becomes a gender-conscious remedy—which would presumably be a form of "affirmative action" if adopted voluntarily—only when it is ordered by the court.[192]

The Seventh Circuit, in contrast, assessed Title IX's requirement to consider gender-distributed opportunities under the Fifth Amendment, concluding it passes muster because "Congress has broad powers under the Due Process Clause of the Fifth Amendment to remedy past discrimination," and meets intermediate scrutiny under the Fifth Amendment.[193] Since sex-neutral, non-discrimination measures by government agencies are not subjected to heightened scrutiny,[194] the court, at least implicitly, held Title IX, despite its innocuous text, is actually a

190. *See id.* at 175 ("Title IX's remedial focus is, quite properly . . . on the underrepresented gender; in this case, women. Title IX and its implementing regulations protect the class for whose special benefit the statute was enacted."). The implication, of course, is that Title IX protects women *more* than it protects men, which one would think comes fairly close to a statute that mandates a preference. *See* Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608, 615 (6th Cir. 2002) ("Title IX . . . focuses on opportunities for the underrepresented gender[] and *does not bestow rights on the historically overrepresented gender*.") (emphasis added).

191. *Cohen*, 101 F.3d at 181–85.

192. After concluding the remedy imposed by the district court was consistent with the Fifth Amendment, the First Circuit then concluded that it unnecessarily hamstrung Brown's options in complying with Title IX. *Id.* at 187–88.

193. Kelly v. Bd. of Trs, Univ. of. Ill., 35 F.3d 265, 272 (7th Cir. 1994); *see also* Miami Univ. Wrestling Club v. Miami Univ., 195 F. Supp. 2d 1010, 1017 (S.D. Ohio 2001) ("The objective explicitly underlying . . . Title IX . . . is the elimination of the effects of past discrimination against women in publicly funded athletic programs, particularly those administered by public educational institutions. That objective is borne out in the legislative history of Title IX . . ."), *aff'd*, 302 F.3d 608 (6th Cir. 2002); *cf.* George, *supra* note 92, at 1156 (arguing both the First and Seventh Circuit "rejected equal protection arguments . . . reasoning that Congress has broad powers to address past discrimination"). As noted previously, there was very little in the legislative history of Title IX having anything to do with athletic programs.

194. *Cf.* Wisconsin v. City of New York, 517 U.S. 1, 18 n.8 (1996) ("Strict scrutiny of a classification affecting a protected class is properly invoked only where a plaintiff can show intentional discrimination by the Government.").

statute that (*contra* the First Circuit) mandates gender-conscious preferences as a form of (legal) "affirmative action" to remedy past discrimination.[195]

The difficulty in language is surely understandable. In athletics, Title IX has been interpreted to not merely permit, but mandate a system providing women with "opportunities" different from, and likely greater than, they would have if athletic teams could have members of any sex on them and if choices were made solely by skill. But nothing in the language of the statute suggests any similarity to laws that explicitly provide benefits for members of groups defined by race, national origin, or sex.[196] Indeed, outside of athletics, its language has not generally been deemed to require a preference.[197] Like SNL's New Shimmer, Title IX can be both an affirmative-action-that-mandates-preferences statute, remedying the present effects of past discrimination, *and* a non-discrimination statute only mandating equality.

## IV. CONSEQUENCES AND ANALOGIES

Whatever an initial interpretation of Title IX's language might lead to, the fact is the administrative interpretations strongly support the preference interpretation, and this interpretation has been given deference by the courts. The plaintiffs' position in federal district court in Connecticut in the *Soule* case, arguing that transgender athletes should not be allowed to compete as females, then, has some appeal precisely because Title IX *has* been interpreted to require separate sports teams, and a separate "female" sports team requires some rule as to who qualifies as "female."[198] This section briefly explores some potential consequences of that interpretation. First, should the principle invoked to support the exclusion of trans females from women's sports not be applied in places, like Massachusetts, where

195. *See Kelley*, 35 F.3d at 272 ("There is no doubt but that removing the legacy of sexual discrimination—including discrimination in the provision of extra-curricular offerings such as athletics—from our nation's educational institutions is an important government objective."). Of course, in the very next paragraph, the court stated Title IX's purpose was not to"remov[] the legacy of sexual discrimination," but rather "to prohibit educational institutions from discriminating on the basis of sex." *Id.*

196. *See Cohen*, 101 F.3d at 170 (citing cases addressing laws that called for explicit preferences and distinguishing such laws from Title IX).

197. *See, e.g., id.* ("No aspect of the Title IX regime at issue in this case . . . mandates gender-based preferences or quotes, or specific timetables for implementing numerical goals.").

198. Soule v. Conn. Ass'n of Schs., Inc., No. 3:20-cv-00201, 2021 U.S. Dist. LEXIS 78919, at *8–11 (D. Conn. April 5, 2021).

males are allowed to compete on female teams?[199] Second, are no other groups physiologically disadvantaged in sports?[200] Should they not also receive their "fair share" of sports' benefits?[201]

### A. *Please Come to Boston* [202]

Professors Coleman, Joyner, and Lopiano believe that the position taken by the Trump Administration during the *Soule* case (and the related administrative investigation), supporting the challenge to transgender women participation on female sports teams, was correct even if some would question the Administration's motive.[203] Perhaps that questioning is because this seems an odd place to start worrying about protecting women's sports. Pursuant to a state judicial ruling from 1979, Massachusetts has been permitting males—not just trans females, but cis men—to participate in women's sports.[204] Shortly after that ruling, the Executive Director of the Massachusetts Interscholastic Athletic Association testified in a proceeding in New Jersey that the result was a "disaster," which "permitted male dominance in volleyball, softball, soccer and field hockey," "displac[ing] [girls] in sports where they had previously participated," and causing "other girls . . . [to] quit[] girls' teams as a direct result of boys' participation."[205]

Admittedly, that witness was the chief of the organization whose rule was invalidated by the Massachusetts state court and who, accordingly, may not

199. *See* Attorney General v. Mass. Interscholastic Athletic Ass'n, 393 N.E.2d 284, 287–88 (Mass. 1979) (holding blanket exclusion of males from a female sports team violated state's equal rights amendment since it applied even when there was no male team in a sport).

200. *See, e.g.*, 42 U.S.C. § 6102 (providing an example of other groups who may possess a physiological disadvantage in sports).

201. *See* discussion *infra* Sections III.B, III.C, III.D

202 Dave Loggins, *Please Come To Boston*, on Apprentice (In A Musical Workshop) (1974).

203. Coleman, Joyner, & Lopiano, *supra* note 28, at 87 ("Regardless of the Trump Administration's motivation for taking up this complaint, as a doctrinal matter it is on sound footing.").

204. *See Mass. Interscholastic Athletic Ass'n*, 393 N.E.2d at 296 (holding that an absolute ban of boys playing on girls' interscholastic teams violates the state equal rights amendment). Curiously, Katz and Luckinbill support a change in the Title IX regulations, specifically 34 C.F.R. § 106.41(b), that would explicitly grant anyone a right to try out for a team in a given sport if there is only one such team. Katz & Luckinbill, *supra* note 92, at 240–41. This would make the rest of the nation look much like Massachusetts. At the same time, they argue that "[s]eparate but equal teams are also necessary to ensure that women's sports are not dominated by men, so that compliance with Title IX is possible." *Id.* at 241. It is not clear how they reconcile these views.

205. B.C. *ex rel.* C.C.v. Bd. of Educ., Cumberland Reg'l Sch. Dist., 531 A.2d 1059, 1062 (N.J. Super. Ct. App. Div. 1987)*; see also* Coleman, *supra* note 28, at 97 n.173 (citing many articles describing the effects of having males swim in female high school competitions in Massachusetts).

have been entirely objective on the subject. But the rationale for excluding males from female sports in Massachusetts is very similar to the arguments for excluding trans females: not that there will be so many males that it will substantially reduce the opportunities for females, but rather that the policy would block females from the top echelons of their chosen sport.[206] And the rationale for *not* excluding trans females—that there are too few to make a difference in total "participation opportunities"—is similar to the rationale underlying Massachusetts's policy.[207]

As far as I can tell, though, there has been no reported case challenging the application of the Massachusetts Equal Rights Amendment (ERA) to sports under Title IX. However, the problem has not gone unnoticed.[208] In a fairly well-publicized incident, a female goal keeper suffered a concussion in a 2010 Division I field hockey championship game when a male player collided with her while scoring the winning goal.[209] Top female swimmers have been beaten out for championships by male swimmers whose times would not have placed them among the top males in that sport.[210] As with the debate over trans female participation in female sports, law review articles also provide varied discourse regarding whether Massachusetts's ERA is consistent with Title IX.[211] A complaint was filed

206. *Compare* Coleman, Joyner, & Lopiano, *supra* note 28, at 115 ("[I]f we care about seeing females in finals and on the podium[,] . . . competitive sport has to be segregated on the basis of sex"), *with* Raymond Grant, Note, *ERA v. Title IX*: *Should Male-Student Athletes Be Allowed to Compete on Female Athletic Teams*?, 47 SUFFOLK U. L. REV. 845, 846 n.8 (2014) ("Not only do male swimmers knock female participants off the awards podium, but they also make it far more difficult for female swimmers to qualify for all-star honors.").

207. *See* Shrader, *supra* note 28, at 648 & n.65 (arguing that permitting some males to participate on female sports teams would not undermine female sports and "[t]he same logic holds true for transgender participation on sports teams"); *see also Mass. Interscholastic Athletic Ass'n*, 393 N.E.2d 284, 294 (1979) (same).

208. *See generally* Mike Cullity, *Equal Rights v. Title IX*, ESPN (June 15, 2012), https://www.espn.com/high-school/girl/story/_/id/8055704/massachusetts-era-allows-boys-compete-girls-sports-such-field-hockey-swimming-volleyball-gymnastics [https://perma.cc/C65H-QD3S] (reporting on various issues in Massachusetts caused by allowing male athletes to pay female sports).

209. *Id.*; Christopher Marquis, *An Equal Playing Field*: *The Potential Conflict Between Title IX & The Massachusetts Equal Rights Amendment*, 34 B.C. J. L. & SOC. JUST. 77, 77–78 (2014); Grant, *supra* note 206, at 845. The goalkeeper apparently had serious headaches for six months. Cullity, *supra* note 208.

210. *See* Cullity, *supra* note 208 (noting a twenty-six-year-old girl's record in the fifty-meter freestyle was broken by a male swimmer); *see also* Grant, *supra* note 206, at 846; Coleman, *supra* note 28, at 97 n.173; *id.* at 97–98 n.176 (identifying various instances when female swimmers have been negatively affected by male swimmers competing on female teams).

211. *Compare* Marquis, *supra* note 209 at 96–97 (arguing that too few boys play in girls' sports to substantially affect the proportion of participation opportunities afforded to girls), *with* Grant, *supra*

with OCR,[212] but there seems to have been no action taken as a consequence because males continue competing in female sports.[213]

Of course, the ultimate equitable remedy that would be available if allowing boys to play on girls' teams was deemed to violate Title IX is unclear.[214] As William Van Alstyne, the late esteemed legal scholar and professor at Duke University School of Law, famously wrote many years ago, even if a federal court would have the authority to enjoin a state law based on a spending clause statute, a state court would be obligated to preclude state agencies from accepting money that would require them to violate state law—particularly, as in Massachusetts, a provision of the state constitution.[215]

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note 206, at 866–67 (arguing that Massachusetts law interferes with the Title IX goal of building female participation and providing "overall equal opportunities").

212. Marquis, *supra* note 209, at 79; Letter from Thomas J. Hibino, Regional Director, U.S. Department of Education to Richard Neal, Executive Director of the Massachusetts Interscholastic Athletic Association (Sep. 12, 2012) (noting receipt of Complaint 01-12-4015, alleging that MIAA member schools were violating Title IX "by allowing boys to participate on girls' field hockey teams") (on file with author).

213. Rule 43.2 of the Massachusetts Interscholastic Athletic Association now reads that a school with a single team in a given sport cannot exclude anyone on the basis of gender unless it is "necessary" to comply with Title IX. Massachusetts Interscholastic Athletic Association, *Rules and Regulations Governing Athletics: A Handbook for Principals and Athletic Directors* 41 (2021), https://miaa.net/wp-content/uploads/2022/03/MIAA-Handbook-21-23revised.pdf [https://perma.cc/Z69C-6C6Q]. This appears to be a change instituted around 2019—some seven years after the complaint was filed—as a result of the complaint. Redlined Copy of Rule 43.2 Received by Author in Response to FOIA Request to U.S. Department of Education (on file with author). Males still seem to be participating in female-denominated sports. *See* Jody Quill, Letter to the Editor, *Male Opponents Are Blocking Girls' Path to Field Hockey Championship*, BOS. GLOBE (Nov. 24, 2019), https://www.bostonglobe.com/2019/11/24/opinion/male-opponents-are-blocking-girls-path-field-hockey-championships/ [https://perma.cc/G4NK-Q6VB] (noting that winning field hockey team in 2019 had two boys who "have an unfair physical advantage in speed, quickness, and strength").

214. A girl denied a spot on a team because it was taken by a boy might have a claim for damages, but the proof of damages might be quite difficult.

215. William Van Alstyne, *"Thirty Pieces of Silver" For the Rights of Your People*: *Irresistible Offers Considered as A Matter of State Constitutional Law*, 16 HARV. J. L. & PUB. POL'Y 303, 307 (1993) (arguing "state and local governments may not accept federal funds when, were they do so, they would at once put at risk such rights as they are forbidden by state constitutional law to abridge"). Of course, this would hold equally true if state law required schools to allow trans females to play on female teams and Title IX prohibited it. Conversely, if Title IX *required* recipients of federal funds to allow trans females to participate on female teams but state law prohibited it. *E.g.*, Complaint in B.P.J. v. W. Va. Bd. of Educ., No. 2:21-cv-00316, 2021 U.S. Dist. LEXIS 135943, at *6 (S.D. W. Va. July 21, 2021) (describing plaintiff's complaint alleging that West Virginia law prohibiting trans females from participating on female sports teams violates Title IX and the U.S. Constitution). On the other hand, if such laws violate the Constitution as well as Title IX, then they would be preempted under the Supremacy Clause. U.S. CONST. art. VI.

B. *Age Discrimination*

Much like Title IX, the Age Discrimination Act (ADA) states that "no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[216] There are an increasingly large number of older Americans who are attending post-secondary institutions (that presumably receive federal funds).[217] And age is a significant factor in athletic performance. For men, testosterone levels peak at age eighteen or nineteen, and then decline throughout adulthood, approximately one percent per year after age thirty.[218] Maximum heart rate, essential for training, reduces with age.[219] "[F]or sports in which strength (both muscular strength and bone density), oxygen uptake, and cardiovascular efficiency are vital to success, the aging process may be slowed, though never halted or reversed."[220]

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216. 42 U.S.C. § 6102. Unlike Title IX, but like Title VI, the Age Discrimination Act is not limited to educational programs receiving federal financial assistance. The introductory phrase of Section 6102, perhaps somewhat gratuitously, states that the general prohibition quoted in the text is "pursuant to" properly-promulgated regulations and "except" for statutorily-identified exceptions. 42 U.S.C. § 6102. Unlike the Age Discrimination in Employment Act (29 U.S.C. § 621), the Age Discrimination Act does not limit by age its protections. *See* 29 U.S.C. § 631(a) (stating prohibitions "shall be limited to individuals who are at least 40 years of age").

217. According to the National Center for Education Statistics, seven percent of full-time undergraduates at public universities, and twelve percent of full-time undergraduates at private non-profit universities, are forty or over. *Characteristics of Postsecondary Students*, NAT'L CTR. EDUC. STAT., https://nces.ed.gov/programs/coe/indicator/csb [https://perma.cc/37E9-ZHL6].

218. Alexia Severson, *Testosterone Levels by Age,* HEALTHLINE (Apr. 1 2019), https://www.healthline.com/health/low-testosterone/testosterone-levels-by-age [https://perma.cc/T24L-Y9MF]; *see also* John Briley, *You're Never Too Old to Regain That Lost Muscle—Even at Home*, WASH. POST (June 9, 2020), https://www.washingtonpost.com/lifestyle/wellness/youre-never-too-old-to-regain-that-lost-muscle-and-you-can-do-it-at-home/2020/06/05/b221ccc4-a5d1-11ea-bb20-ebf0921f3bbd_story.html [https://perma.cc/J765-WP3R] ("Starting sometime in our 30s (the data aren't precise), we lose up to 8 percent of our muscle mass per decade, a decline called sarcopenia, along with up to 30 percent of our strength and power. This leaves us weaker, less mobile and—especially after we cross age 50—more vulnerable to injury from falls and similar accidents.").

219. *Aging and Athletic Performance*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/sports/sports-fitness-recreation-and-leisure-magazines/aging-and-athletic-performance [https://perma.cc/V9TY-WCEE].

220. *Id.* There are, of course, exceptional older athletes. Phil Mickelson just recently won a major golf tournament at the age of fifty. Cameron Morfit, *Phil Micklelson Wins PGA Championship at Euphoric Kiawah,* PGATOUR (May 23, 2021), [https://perma.cc/XY79-KSQ2]. And for certain positions, like a quarterback in football or a goaltender in ice hockey, where mental performance is as important as physical performance, experience may compensate for the loss of physical skills. *Aging and Athletic Performance*, *supra* note 219. But it is hard to argue with the proposition that the average fifty-year-old (of any sex) is at a significant disadvantage in competing with the average twenty-year-

If Title IX requires that space be reserved for females in athletics, is there any reason why the Age Discrimination Act should not similarly require some space—say five percent of athletic opportunities and scholarships—for older Americans in collegiate sports?[221] If there is enough interest among students ages thirty-five or forty and over in a varsity basketball team, should schools not be obligated to create such a team (and a separate "seniors" sporting division), as well as offer athletic scholarships similar to those for their younger compatriots?

There are differences, to be sure, but they hardly seem so compelling that the argument for separate senior varsity teams should be dismissed out of hand. The ADA has a provision that protects actions taken "based upon reasonable factors other than age."[222] But the Supreme Court has told us that the analogous provision in the Age Discrimination in Employment Act is essentially surplus for purposes of intentional discrimination.[223] If one is using a factor other than age, then one has not engaged in intentional age discrimination. So, if failing to provide females with "participation opportunities" is intentional discrimination under Title IX, it is hard to understand why the failure to do so for older Americans is not intentional discrimination under the ADA.

To be sure, the elaborate set of administrative interpretations underlying the application of Title IX to sports does not exist for the ADA. But that just begs the question: why not? And even if there is a technical legal distinction to be made, why is our understanding of discrimination in athletics any different for sex and age discrimination?

If "equal opportunity" in sports means something different from its meaning elsewhere, why should that distinct meaning not apply for any prohibited criteria?

### C. *Disability*

A variety of different federal laws prohibit discrimination against the disabled. Section 504 of the Rehabilitation Act states that "[n]o otherwise

old, particularly at educational institutions where, we assume, the athletes are spending significant time going to classes and not training.

221. As to scholarships, see Dudley & Rutherglen, *supra* note 119, at 227 ("There is no obviously good reason why, if 40% of the participants in intercollegiate athletics are women, they should not receive 40% of the scholarship dollars.").

222. 42 U.S.C. § 6103(b)(1)(B). The statute also protects any action that takes age into account "necessary to the normal operation or the achievement of any statutory objective" of the program or activity. *Id.* § 6103(b)(1)(A).

223. Smith v. City of Jackson, 544 U.S. 228, 238–39 (2005).

qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."[224] The Americans with Disabilities Act similarly prohibits disability-based discrimination in the "services, programs, or activities of a public entity"[225] or by "public accommodations,"[226] which includes an "undergraduate . . . private school, or other place of education."[227]

In considering the application of these laws to sports, most of the interpretations discuss the obligations that schools at the K-12 level have to make "reasonable accommodations" to permit individuals with disabilities to participate in regular sporting activities with the able-bodied.[228] But plainly there are some disabled individuals for whom no reasonable accommodations can be made to play in normal athletic activities. Variations on common sports, like wheelchair tennis or basketball, have been created to accommodate such individuals and have become increasingly popular at the college level.[229]

If Title IX defines "equal opportunity" to include making sure that certain spots and financial rewards like scholarships are as available to females as they are to males, should there be similar opportunities for the disabled? Such similar opportunities would include not only providing facilities and chances to participate in athletic programs, but *intercollegiate varsity* opportunities with *athletic scholarships* available as well.

It may be, of course, that the proportion of the disabled among undergraduates as a whole is sufficiently small that there are pragmatic

224. 29 U.S.C. § 794(a).

225. 42 U.S.C. § 12132.

226. 42 U.S.C. § 12182.

227. 42 U.S.C. § 12181(7)(J).

228. Ian Forster, *Fair Play for Those Who Need It Most*: *Athletic Opportunities for High School Student Athletes with Disabilities*, 22 JEFFREY S. MOORAD SPORTS L.J. 693, 700 (2015); *see also Dear Colleague Letter*, U.S. DEP'T OF EDUC. OFF. OF CIV. RTS. (Jan. 25, 2013), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.html [https://perma.cc/ENT7-4EWS] (providing guidance to public elementary and secondary schools with respect to extracurricular athletics under Section 504).

229. *See Collegiate Adaptive Sports,* CHALLENGED ATHLETES FOUND., (identifying colleges with adaptive sports programs) https://www.challengedathletes.org/collegiate-adaptive-sports/ (identifying colleges with adaptive sports programs) [https://perma.cc/YEV2-3CTN]; *see also 21 Colleges with Adapted Sports Programs*, UNITED SPINAL ASS'N (Jan. 6, 2017), https://unitedspinal.org/21-colleges-adapted-sports-programs/ [https://perma.cc/4GZM-HMQ5] (naming specific programs for disabled athletes at the various schools listed).

problems in creating an entire team with only a small percentage of the varsity participation opportunities.[230] But should that be dispositive? Casey Martin, a golfer with a degenerative circulatory disorder that made it difficult for him to walk, successfully argued that the ADA required the PGA tour to permit him to compete while using a golf cart.[231] That kind of accommodation, permitting direct competition between the disabled and non-disabled, might be difficult in other sports, but rules in certain team sports can be changed in different ways. The rules of collegiate tennis could just as easily be modified so that team matches include competition in singles, doubles, and wheelchair tennis (or, if there is enough demand, both singles and doubles wheelchair tennis).[232] So, too, dual meets in track and field could include an event using wheelchairs, and dual meets in swimming could include events for the disabled.[233]

If, as Professor Coleman argues, "insurmountability ought to be the dividing line"[234]—and I presume she means the dividing line between permissible set asides and mandatory ones—surely the disabled should be the first in line.

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230. There may also be more difficulty counting the number of disabled and determining whether the "disabled" is really one undifferentiated group in the same way that females or even older individuals might be. (The latter, to be sure, requires an arbitrary age cut-off.) Vision-impaired individuals and those who cannot easily run or walk may have completely different athletic interests. On the other hand, if Attention Deficit Disorder, Attention Deficit Hyperactivity Disorder, insomnia, or apnea are considered disabilities that make it more difficult in general to achieve in sports, there might be enough undergraduates with these conditions to constitute a non-trivial proportion of the undergraduate population.

231. PGA Tour, Inc. v. Martin, 532 U.S. 661, 668, 690–91 (2001).

232. Currently, collegiate dual matches involve six singles matches and three doubles matches. Dominic Tinodi, *College Tennis Rules—Dual Match Formats*, SMARTHLETE (Mar. 11, 2017), https://www.smarthlete.com/article/82/college-tennis-rules-dual-match-formats [https://perma.cc/X3EX-4GWJ]; *see also* Aaron Credeur, *Unified Tennis, Which Pairs Students With and Without Disabilities, Is Inclusive and Competitive*, WASH. POST (Nov. 23, 2021), https://www.washingtonpost.com/sports/2021/11/23/unified-tennis-which-pairs-students-with-without-disabilities-is-inclusive-competitive https://perma.cc/H6SL-NU26] (describing "unified tennis" doubles as competed in Maryland high schools, which pairs one student with intellectual disabilities and one without on a doubles team).

233. In Paralympic Swimming, individuals are classified by the degree of activity limitation caused by the disability. *Classification In Para Swimming*, PARALYMPIC.ORG https://www.paralympic.org/swimming/classification [https://perma.cc/5XQL-4X9V]. It is complicated, as I suspect it is for other sports. I do not mean to suggest that the complications will necessarily be easy, or even possible, to resolve in the context of any collegiate team sport. I simply point out that, as a theoretical matter, the philosophy behind separate teams for women in sports should have consequences for other groups, including the disabled.

234. Coleman, *supra* note 28, at 109. That is, she argues that it is simply impossible for "non-doped females [to] compete for the win because they don't have the testes and bioavailable testosterone associated with this sex characteristic . . . ." *Id.*

In any event, the principle from Title IX is straightforward: even if only one percent of the undergraduate population qualified as disabled, that percentage of athletic opportunities should be reserved for the disabled.[235] Either with an entire team in a sport specifically designed for the disabled, or with the modification of a rule or events in an existing sport, the disabled should have the same "equal opportunity" for "participation opportunities" in varsity athletics and athletic scholarships as able-bodied students.

McDonagh and Pappano complain that the rationale for women-only sports "parallel[s] the rationale for the Special Olympics, thereby reflecting the assumption that to be 'female' is to be 'disabled,' while to be 'male' is to be 'abled.'"[236] This colorful analogy may be a bit of an overstatement, but there is more than a germ of truth in it. The philosophy behind Title IX is that sex-segregated teams are necessary because women cannot fairly compete with men. *A fortiori*, one would think, for those who are substantially limited in one or more major life activities.[237]

### D. *Other Groups, Other Disadvantages*

We might also think about the possibility that groups defined by race or national origin might be at a disadvantage. Some groups so defined, for example, might have a lower average height than the norm.[238] Height is

235. Given the smaller numbers and disparate types of disability involved with the disabled, the second and third prongs of the three-part test used to assess compliance with Title IX—growth in varsity sports opportunities for the disabled, or complete fulfillment of interests and abilities of the disabled in those opportunities—might be more difficult to achieve.

236. MCDONAGH & PAPPANO, *supra* note 88, at 23; *see also id.* at 145 ("Thus we can consider coercively sex-segregated sports policies as a kind of same-sex Special Olympics."). McDonagh and Pappano, though, argue that females should be permitted to try out for "male" teams *and* have their own teams that males are prohibited from playing on. *See id.* at 27 (arguing that women should be permitted, but not forced, to play on gender-integrated teams; "courts have supported voluntary segregation if it is requested by the historically less powerful group"); *id.* at 224 ("Those women who, as the traditionally subordinated group in sports programs, wish to play only on same-sex teams or within same-sex sports arenas should be able to do so. But this should be voluntary (rather than coercive) sex segregation."). They refer to this segregation as "voluntary," but it presumably would not be voluntary for the recipients of federal funds to support these same-sex teams and the exclusion of males would surely be coercive. McDonagh and Pappano base their position that females can be eligible for more teams than males on past discrimination against women in sports. As noted previously, *supra* note 94, that position will be more difficult to defend in specific circumstances where women's sports receive substantial support.

237. *See* 42 U.S.C. § 12102(1)(A) (defining "disability" as "a physical or mental impairment that substantially limits one or more major life activities").

238. Jerome J. Suich, Note, Height Standards in Police Employment and the Question of Sex Discrimination: The Availability of Two Defenses for a Neutral Employment Policy Found Discriminatory Under Title VII, 47 S. CAL. L. REV. 585, 589 n.16 (1974) (showing that height minima

considered to be a significant advantage in many sports,[239] just as higher levels of testosterone and greater muscle mass are considered advantages in many sports. Should an ethnic group whose average height is shorter be given the opportunity to have their own sports teams, free from competition from groups whose average height is significantly higher?

Perhaps this is taking the principle too far. In height, average differences can hide a wide array of individual measurements; even the groups with the lowest averages will have some very tall individuals. With respect to testosterone, there is scientific evidence that the distribution is bimodal—all women have less testosterone than even below-average males.[240] But that only raises the question of when group differences are large enough to support a *requirement* of separate teams in order to provide the physically disadvantaged group the opportunity for equal results.[241] Many women are very strong and very fast, if not quite as strong and fast as the strongest and fastest men.[242] No one has clearly defined the line where group differences require the abandonment of the principle that selections should be blind to a prohibited criteria.

Finally, physical differences are not the only differences between groups, and sports are not the only form of competition. It is fairly well established that certain racial and ethnic groups, on average, do not do as well on standardized tests as others.[243] Many would attribute these differences to egregious forms of societal discrimination those groups had to endure, precluding them from the kinds of advantages in material wealth and early school environment (so it is argued) that lead to better achievement on those tests.[244] And the scores on standardized tests have a significant effect on

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of 5' 7" has disparate impact on Spanish-surnamed American, Japanese-American, and Chinese-American males).

239. The phrase "you can't teach height" is often repeated by basketball coaches. *Mark Eaton*, WIKIPEDIA, https://en.wikipedia.org/wiki/Mark_Eaton) [https://en.wikipedia.org/wiki/Mark_Eaton].

240. Coleman, Joyner, & Lopiano, *supra* note 28, at 93 ("[B]eginning at puberty, testosterone distributes bi-modally . . . .").

241. Greene, *supra* note 119, at 141–42 (exploring circumstances under which sports teams are encouraged to segregate by sex, including "when selection is based on competitive skill or when the sport is a contact sport").

242. *Id.* at 146 ("[T]he evidence shows that some females are stronger than some males.")

243. *See* Wayne J. Camara & Amy Elizabeth Schmidt, *College Board Report No. 99-5 Group Differences in Standardized Testing and Social Stratification*, COLL. BD. REP. NO. 99-5 (1999), https://files.eric.ed.gov/fulltext/ED562656.pdf [https://perma.cc/C6X6-EH7R] (analyzing standardized testing scores among difference racial groups).

244. Camara & Schmidt, *supra* note 243, at 13; *see also* Daniel Laroche, *For the Sake of Racial Justice and Equity, Time to Eliminate Standardized Testing*, J. BLACKS IN HIGHER EDUC. (July 21, 2021),

the chances that individual students have to gain admission to certain elite educational institutions.

Few would dispute that there are real differences in the amount of societal disadvantages that racial and ethnic groups, on average, have experienced over an extended period of time. Of course, they are much harder to measure than differences in testosterone level or height. And, as with height, there would be substantial differences in the degree to which individual members of the group experienced those societal disadvantages. So, again, as with height, perhaps the differences are not so large, and so well-defined, as to require mandatory advantages for the groups with higher average experience of these disadvantages.

But the Court has gone further; not only do group societal disadvantages not warrant mandatory group advantages (in, say, admissions to elite educational institutions), they do not even warrant a government *voluntarily* adopting group advantages.[245] Schools cannot voluntarily set aside some places for a group it deems to have been disadvantaged; such action would be illegal race discrimination. How is it, then, that group sex differences not just warrant, but mandate, the complete segregation of sports?

## V. TRANS FEMALES AND SPORTS REVISITED

Having reviewed the interpretations of Title IX in the executive branch and the courts, and having considered the possible ramifications of the conclusion that "equal opportunity" under Title IX requires separate sports teams, we now return to the question of Title IX and gender identity in sports.

The argument that Title IX *requires* schools to allow "trans females" to compete as women is dependent upon the term "sex" being interpreted to mean something more than biological sex or gender identity. Assuming the sex of a "trans female" is her gender identity (female), she would not be treated differently from those of a different gender identity (male) if she had to compete on the men's team; she would be treated exactly like those males (who also have to compete on the men's team). Assuming that her sex is her biological or natal sex (male), then the trans female *is* being treated differently from those of the opposite biological sex (females) by being

https://www.jbhe.com/2021/07/for-the-sake-of-racial-justice-and-equity-its-time-to-eliminate-standardized-testing/ [https://perma.cc/M62J-T2RD] ("We cannot reasonably believe that outdated textbooks and underpaid, under-resourced teachers in crumbling schools can provide the same instruction that affluent students receive from private tutors and test prep courses.").

245. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989).

forced to participate on the men's team—but so is every other biological male. If she has a sex discrimination claim under Title IX, so does every cis male who is precluded from participating on female teams. Indeed, if we assume her sex is "male" instead of "female," one needs to make an argument against sex-segregated sports generally.

On the other hand, the argument that Title IX *prohibits* "trans females" from competing in women's sports is very much dependent on the interpretation that Title IX is a set aside statute that not merely permits, but requires separate sports teams for females because females should not have to compete against "men" for available participation "opportunities."[246] Accordingly, this argument goes, at least some trans females, like men, have physiological advantages over cis females, and the latter should not be forced to compete against them.[247]

246. *Title IX Frequently Asked Questions*, NCAA, https://www.ncaa.org/sports/2014/1/27/title-ix-frequently-asked-questions.aspx [https://perma.cc/8WX8-PXQJ].

247. This is, as a factual matter, an extraordinarily complex issue and I am glossing over many subtleties. For example, some argue that any advantage trans females might have is eliminated through hormone therapy; others disagree. *Compare* Coleman, *supra* note 28, at 105 (asserting removal of testes and estrogen therapy does not eliminate all of the performance advantages); *id.* at 119 (arguing that women's sports should "be open to all athletes who are biologically female, that is, to everyone with ovaries and not testes," including those who had gonadectomies before the passage of puberty, but not those who had testes and testosterone in the male range through puberty); Coleman, Joyner, & Lopiano, *supra* note 28, at 97 (asserting trans trans females have advantages that do not dissipate with use of hormone blockers, including muscle mass, bone density and airway size), *and* Joanna Harper et al., *How Does Hormone Transition in Transgender Women Change Body Composition, Muscle Strength and Haemoglobin? Systematic review with a focus on the implications for sport participation*, BR. J. SPORTS MED. 1 (Mar. 1, 2021), https://bjsm.bmj.com/content/55/15/865 [https://perma.cc/6FLK-LKWQ] (summarizing findings of other studies and finding that, although data is still sparse, values for strength, lean body mass, and muscle area are still higher for trans females, as compared to cis women, after three years of hormone therapy), *with* Lenzi, *supra* note 28, at 845 ("Transgender girls who have received [cross-gender] hormone treatments for more than a year . . . enjoy no significant competitive advantage over cis girls . . . ."); *id.* at 854 (cross-gender hormone therapy "greatly reduce[s]" any prior biological edge although "some physiological differences persist"); Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport*, *supra* note 28, at 38 ("Science . . . does not support the conclusion that a natal male has an innate and absolute athletic advantage when competing against a natal female," and any differences are reduced or eliminated by hormone-based transitions); Skinner-Thompson & Turner, *supra* note 68, at 276 ("For K-12 students in particular, the physical differences between male and female students are not so significant as to justify forbidding transgender students from participating in sports consistent with their gender identity or for imposing any medical requirements before allowing such participation."). The NCAA, for example, apparently requires testosterone-suppressing hormones for at least one year before permitting trans females to compete in female sports. *Id.*; *see also* Hobson, *supra* note 99 (stating NCAA adopted policy after report published by the Women's Sports Foundation and the National Center for Lesbian Rights in 2010). This last-cited article also describes studies showing that some advantages of having gone through puberty as a male may remain for longer than one year even with hormone suppression therapy. *Id.*

Note that this latter argument probably goes beyond the frequently-litigated issue in Title IX cases of whether the proportion of "participation opportunities" for each sex is roughly proportionate to the underlying student population.[248] The match need not be exact.[249] Chances are that the number of trans females seeking to compete in female sports competitions will not be so great that the proportions at any one school will be greatly affected.[250] Rather, the argument against permitting some trans females to compete in the women's category extends the argument; it claims that biological females should have the same opportunity to be winners and champions.[251] But it is not much of a stretch from the argument that females should be able to make varsity sports teams and compete in interscholastic and intercollegiate sports as such without competing against males.

Previous sections have explored whether this interpretation—that Title IX is a preference statute that not merely permits, but mandates separate sports teams for females—is an appropriate interpretation of Title IX. It is, I have suggested, an odd interpretation of language that looks quite similar to language in other statutes that have never been interpreted to require preferences of any kind.[252] If it is not a correct interpretation, of course, then the position that the plaintiffs (and, for a while, the

248. *See generally* Paul Anderson & Barbara Osborne, *A Historical Review of Title IX Litigation*, 18 J. LEGAL ASPECTS SPORT 127 (2008) (breaking down the top ten categories of Title IV lawsuits).

249. *Dear Colleague Letter*, *supra* note 13 ("However, because in some circumstances it may be unreasonable to expect an institution to achieve exact proportionality—for instance, because of natural fluctuations in enrollment and participation rates or because it would be unreasonable to expect an institution to add athletic opportunities in light of the small number of students that would have to be accommodated to achieve exact proportionality—the Policy Interpretation examines whether participation opportunities are 'substantially' proportionate to enrollment rates."). In *Soule*, the court dismissed the case in part because the trans females that had been the subject of the suit had graduated from high school and plaintiffs could not identify any trans females against whom they would compete in their time remaining in high school. Soule v. Conn. Ass'n of Schs., Inc., No. 3:20-cv-00201-RNC, 2021 U.S. Dist. LEXIS 78919 (D. Conn. Apr. 25, 2021).

250. Lenzi, *supra* note 28, at 881–82 (arguing athletic policies precluding trans females from participating on female teams is not necessary to preserve athletic opportunities for females because there are so few trans females); Shrader, *supra* note 28, at 648 (stating a small number of transgender individuals "does not pose a substantial risk to Title IX's goal of providing opportunities for female students to participate in sports").

251. Coleman, Joyner, & Lopiano, *supra* note 28, at 115 (suggesting Title IX should be concerned with females making "finals" and being "on the podium"); *see also* Lenzi, *supra* note 28, at 853 (comparing times at the 2017 Maryland High School Class 4A track and field championships, and noting that every non-disqualified male competitor outperformed every female competitor).

252. *See supra* note 193 (distinguishing laws with language addressing specific preferences from Title IX).

government) took in the District Court of Connecticut in *Soule* is meritless.[253] If that is the case, and the assumption previously made (that "sex" in Title IX is either biological sex or gender identity) is also correct, Title IX may not have much of anything to say about gender identity and sports.[254] Neither would the Equal Protection Clause's presumption against sex discrimination, although, of course, that does not answer whether discrimination on the basis of transgender status might be prohibited by that clause.[255]

## VI. CONCLUSION

There is much talk these days of promoting "equity" rather than "equality."[256] When applied outside athletics, Title IX promotes non-discrimination, usually associated with equality. As it has been applied to sports, though, it may be our most prominent "equity" statute, making sure each sex gets its fair share.

Let me be clear. As the father of a young woman who has spent the last ten years in age-group swimming, I would be deeply saddened by the demise of sex-segregated sports. As a policy to achieve the goals of bettering the lives of young females in this nation, I am all in favor. Whether that policy should include trans females in the women's category, I profess ignorance.

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253. *Soule*, 2021 U.S. Dist. LEXIS 78919 at *1 (setting forth plaintiffs' argument that "the CIAC policy puts non-transgender girls at a competitive disadvantage in girls' track").

254. This appears to be the position Professor Coleman staked out in her earlier article. *See* Coleman, *supra* note 28, at 66 (stating "individual states and the private sector remain largely free to choose their own course"); *id.*, at 112 ("Whether the set-aside is legally required or not, . . . it is the best policy choice . . . ."); *see also* Lenzi, *supra* note 28, at 871 (suggesting transgender access to sex-segregated facilities may be better resolved at the state or local level). In her later article, Professor Coleman and her co-authors appeared to support the position, taken by the plaintiffs in *Soule*, that Title IX prohibited participation by trans females. *See* Coleman, Joyner, & Lopiano, *supra* note 28, at 87 (stating the position of the Trump Administration supporting plaintiffs was "as a doctrinal matter . . . on sound footing.").

255. B.P.J. v. W. Va. State Bd. of Educ., No. 2:21-cv-00316, 2021 U.S. Dist. LEXIS 135943, at *17–19 (S.D. W. Va. July 21, 2021) (granting preliminary injunction to transgender female plaintiff who had not yet reached puberty and holding that law prohibiting biological males (including transgender females) from participating on female sports teams discriminated on the basis of transgender status, was accordingly subject to intermediate scrutiny under the Equal Protection Clause, and that plaintiff had demonstrated a likelihood of success on her constitutional claim).

256. Kamala Harris, Equality vs. Equity (twitter post) (available at https://reason.com/2020/11/02/kamala-harris-equality-equity-outcomes/); Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of the City of Bos., 2021 U.S. Dist. LEXIS 189566, at *13 (D. Mass. Oct. 1, 2021) (describing a school system's equity planning tool that "explains the difference between equity and equality and how the two 'can in fact stand in opposition to each other'").

I suspect that the correct answer probably lies in some compromise concerning the time spent transitioning, but I do not know.[257]

The questions I have tried to address in this article are legal ones that the debate about trans females seems to bring to the fore. How did we start with a statute whose language looks very similar to every other civil rights statute—and, indeed, that acts just like every other civil rights statute outside of the sports arena—and end up with mandatory preferences?

Part of the answer seems obvious. The statute is in the language of non-discrimination, which is generally understood to preclude the decision-makers from using the prohibited criteria.[258] In short, it is a statute that was simply not designed for sports, which have traditionally been segregated by sex.[259] It had to be "interpreted" by administrative exposition to achieve a different goal: equal results (or, if you prefer, equity).[260]

But the administrative interpretations (at least the ones well known to the public) and court decisions could not be explicit and clear about this. They do not specifically prohibit unisex sports teams in which skill is the criteria for selection and determines the number of men and women on the teams. Only as phrases like "equal athletic opportunity," "effectively accommodate the interests and abilities" of members of both sexes, and "participation opportunities," are explained over time does it become a bit clearer that that is the message[261] In a world in which Title IX's language was interpreted in the same fashion as other similarly-worded satutes, any sex-segregated sports system that provided "varsity opportunities" for females above what they would achieve in a nondiscriminatory unisex sports universe—or any female-only teams at all if females could compete for spots on any set of

257. This appears to be the position of the Women's Sports Policy Working Group, of which Professor Coleman and Ms. Lopiano are members. They advocate federal legislation requiring transgender girls and women to suppress testosterone for at least one year before competing in the female category. Hobson, *supra* note 99. Their group includes several former Olympic swimmers, such as Donna de Varona and Nancy Hogshead-Makar. *Id.*

258. *Supra* note 124.

259. Dudley & Rutherglen, *supra* note 119, at 181–82 ("This plausible interpretation [or allowing unisex teams] founders on the widely accepted obstacles—cultural as well as physical—that stand in the way of most forms of direct athletic competition between women and men.").

260. Coleman, Joyner, & Lopiano, *supra* note 28, at 132 ("The structure of the Title IX regulatory scheme makes clear that the goal is sex equality, not sex neutrality . . . . Notwithstanding our general preference for sex neutral measures, the sports exception to Title IX's general nondiscrimination rule has long been one of the statute's most popular features."); WARE, *supra* note 18, at 2 ("What Title IX meant in the 1970s is quite different from what it meant in the 1990s or what it means in the twenty-first century, in part because of the incremental changes in the law's implementation, but also because of changes in the broader political climate.").

261. *See supra* Part III.

reasonably selected sports teams for which males were eligible—would be deemed a system of discriminatory preferences (albeit most likely meeting heightened scrutiny and thus legal) *for* females. In our world, it is considered discrimination *against* females unless it meets one part of the three-part test for effective accommodation of interests and abilities of both sexes.[262]

The principle is an interesting one, and perhaps one, as I have suggested, that should be adopted in sports—and maybe other areas—where group differences are stark. Congress could pass laws to that effect. But that would require Congress (and us) to face the fact that the law it passed is not, at least insofar as sports are concerned, the law we have.

262. *See Dear Colleague Letter*, *supra* note 13 (describing the parameters of the test itself).