Spring 1-2020

There’s Nothing Worse than Losing to a Girl: An Analysis of Sex Segregation in American Youth Sports

Julia Konieczny
J.D. 2019, Indiana Univ. Maurer School of Law, juliakonieczny@gmail.com

Follow this and additional works at: https://www.repository.law.indiana.edu/ijlse

Part of the Civil Rights and Discrimination Commons, Education Law Commons, Entertainment, Arts, and Sports Law Commons, Feminist, Gender, and Sexuality Studies Commons, Higher Education Commons, Juvenile Law Commons, Law and Gender Commons, Public Law and Legal Theory Commons, and the Secondary Education Commons

Publication Citation
COMMENT

There’s Nothing Worse than Losing to a Girl: An Analysis of Sex Segregation in American Youth Sports

Julia Konieczny*

INTRODUCTION

When I was in third grade, one of the boys in my class brought in a massive trophy for show-and-tell. I was intrigued. He said his youth wrestling team had recently won a tournament but that this victory and this trophy were just one of many. I went home, and after covertly making plans with my seven-year-old brother, I announced at the dinner table, “We would like to join the wrestling team.” My dad sighed and asked if we knew anything about wrestling (no), if I realized I would be the only girl on our team and, perhaps, in the entire region (yes), and if we would promise to stick it out for one whole season (quitting mid-season was forbidden in our house). Being rather open-minded and laissez-faire about parenting, my dad allowed me, a nine-year-old girl, to join the all-boys youth wrestling team.

I mostly hated wrestling. In a school district where wrestling was the most popular and most successful sport, I was already years behind my teammates. Many of them had fathers who had been state champions, and those men had been teaching their boys to wrestle since the time they could walk, if not sooner. I hated the amount of running and conditioning, I hated that I couldn’t do a pull-up, and I hated that wrestling season was “twelve months a year,” as one coach put it. After the first season, my brother quit, saying he would like to try a sport where he did not “have to be half-naked with [his] head in some guy’s armpit.”

But I stuck it out for a second season. As much as I hated some aspects of wrestling, I loved that I got to feel strong; I loved that my all-male teammates and coaches treated me exactly the same as the other wrestlers; and I loved that everyone constantly looked sweaty and gross in singlets but that it did not matter. I loved that heavyweight wrestlers were respected, rather than mocked, for their size, I loved getting to spend time with just my dad, and I loved that in pictures the whole team would try to look tough while glaring into the camera.

The reason I eventually quit had nothing to do with my ability. When we would go to tournaments, the team would be registered as a whole, but it was up to my dad to register me as an individual. A couple of times during the first season, I received wins because my opponent would forfeit before we ever reached the mat. My dad immediately realized why this was happening and began registering me under just the initial “J” rather than my obviously feminine name of “Julia.” The

* Julia Konieczny, J.D. 2019, Indiana University Maurer School of Law, lives in Columbus, Ohio with her fiancée and puppy. She is a public finance attorney at Dinsmore & Shohl, where her practice touches upon all aspects of project financing for both traditional governmental debt issuance and conduit municipal securities transactions. She enjoys playing hockey and yelling about modern American sports culture.
forfeits stopped for a time, but, by the latter half of the second season, I was eleven, wrestling in a weight class that included eleven- and twelve-year-olds. The forfeits increased, as word had gotten around through most of the region that “J” was a girl.

My dad had explained to me that there were a number of reasons that my gender should cause opponents to quit before even hitting the mat: kids our age were starting to reach puberty, so some people felt uncomfortable with so much bodily contact; some boys (or their parents) had an idea of chivalry that wouldn’t allow them to physically overpower and potentially injure a girl; and for some, the thought of losing to a girl was so embarrassing that the safest thing to do was just forfeit with honor intact.

Had I continued to wrestle when I reached high school, the team would have had the option of prohibiting me from even trying out. Because wrestling is a contact sport under Title IX, schools are not required to provide women an equal opportunity to participate.1 If wrestling was not a contact sport, the school would either have to allow me a chance at the all-boys team, or it could create a separate all-girls team. A number of states have gone beyond what Title IX requires and have begun to create all-girls wrestling teams, even though this opportunity is not legally required.2

To many, this sounds like a welcome development: more women are getting an opportunity to be involved in sports—now female wrestlers even have their own team! But this Comment argues that it is not, in fact, a step forward in gender equality,3 to give women their own teams and leagues to mirror the decades- or centuries-long versions of sports that men enjoy; rather, such segregation is a reinforcement of the status quo.

Title IX, as currently applied, is bolstering one of the last realms of public life where it is acceptable to convey to children that men and women don’t interact, don’t work together, don’t become friends, and don’t get to be considered equals. For the boys who would rather have forfeited than wrestle against me and potentially lose, what message would be sent by shunting me away to a separate league or division that didn’t have the benefit of former state champions and a reputation of being the most successful sport in the school district? Those boys would assume that their league, team, and individual talent was superior to the girls’, and they would never have to be challenged in those assumptions—as my teammates were—by the presence of a girl who was treated as an equal member.

The sex segregation of school sports has largely not been critiqued for its role in inhibiting a true gender equality in the U.S. Part I of this Comment will overview how Title IX and the Equal Protection Clause have been applied in ways ultimately

---

1 See infra, text accompanying notes 15–17.
3 This Comment will primarily use the term “sex” (which denotes biological differences between male and females) rather than the term “gender,” because the vast majority of sports today are separated on such a basis—an individual’s biological sex (whether assigned at birth or legally determined later in life) is used to assign them to a team, rather than their conformity with socially learned expectations of gender performance. However, because Part II argues that sex-integrated sports will allow for greater acceptance and embrace of various gender identities and expressions, it will occasionally refer to the end goal as “gender equality.”
contrary to the goal of gender equality, and will demonstrate how the law should be correctly interpreted to require an integration of the sexes in sports. Part II will discuss the psychological and social effects of continued sex segregation and highlight the ways in which a change in school sport can lead to a change in the broader culture. Part III will explore various proposed alternatives to the current sex-segregated regime.

I. THE LEGAL LANDSCAPE OF TITLE IX AND THE EQUAL PROTECTION CLAUSE REGARDING SEX SEGREGATION IN YOUTH SPORTS

Title IX of the Education Amendments of 1972 (“Title IX”) states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” The idea for the Amendment began in 1970, when the Special Subcommittee on Education of the House of Representatives “conducted hearings that revealed the existence of pervasive discrimination against girls and women in elementary, secondary, and post-secondary education.” Title IX was later enacted in 1972 as a floor amendment with, consequently, almost no legislative history, though it was widely accepted that “[t]he ultimate goal of Title IX was to mirror the impact that Title VI of the Civil Rights Act of 1964 had on racial discrimination by providing more opportunities for women in the academic environment.”

There was, however, little mention of athletics, and, in fact, “its application to athletic programs was not secured until fifteen years later.” After Title IX’s enactment, it slowly became apparent to some athletes and athletic organizations that there could be a pronounced impact on the sports world; the National


6 Id.

7 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, 852 (2014) (citing Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979)).

8 Dionne L. Koller, Not Just One of the Boys: A Post-Feminist Critique of Title IX’s Vision for Gender Equity in Sports, 43 CONN. L. REV. 401, 408 (2010) [hereinafter Koller, Post-Feminist] (“Title IX was not specifically targeted at nor does it mention athletics programs. Therefore, the statue itself does not provide a vision for equality in athletics.”).

9 B. Glenn George, Miles to Go and Promises to Keep: A Case Study in Title IX, 64 U. COLO. L. REV. 555, 558-59 (1993). For fifteen years, there was debate and litigation as to whether Title IX followed a “program specific” rationale or had an “institution-wide” approach. If “program specific,” Title IX would only apply to very specific programs receiving federal funds—not many athletic programs would thus fall under its purview. If “institution-wide,” any institution receiving federal funds (like a state university) would need to be Title IX compliant in all of its operations. Id. The Supreme Court endorsed the “program specific” rationale in Grove City College v. Bell, 465 U.S. 555 (1984). In response, Congress passed the Civil Rights Restoration Act of 1987, which required Title IX to apply to “the entire institution if any program within the institution was a recipient of federal funds,” thus ensuring Title IX’s application to athletic programs. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28.
Collegiate Athletic Association ("NCAA") aggressively lobbied Congress "to exempt intercollegiate athletics altogether."\(^{10}\)

Amidst this debate, and in the spirit of compromise, Senator John Tower (R-TX) proposed an amendment.\(^{11}\) The Tower Amendment stated "this section shall not apply to an intercollegiate athletic activity to the extent that such activity does or may provide gross receipts or donations to the institution necessary to support that activity."\(^{12}\) In effect, this would have exempted "revenue" sports, primarily if not exclusively football and men’s basketball, from the reach of Title IX.\(^{13}\)

Instead, Congress passed an amendment proposed by Senator Jacob Javits (R-NY). The Javits Amendment effectively diverted the complicated problem elsewhere, by directing "the Secretary of Health, Education and Welfare ("HEW") to prepare implementing regulations for intercollegiate athletics, with 'reasonable provisions considering the nature of particular sports.'\(^{14}\)

In 1975, HEW’s Office for Civil Rights promulgated athletic regulations. The most relevant provisions—and those this Comment addresses—are:

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

(b) 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 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.\(^{15}\)

The latter part of provision (b) is commonly referred to as the “contact sports rule.”\(^{16}\)

An example of its implementation includes the following scenario: A girl at a public

\(^{10}\) B. Glenn George, Fifty/Fifty: Ending Sex Segregation in School Sports, 63 OHIO ST. L.J. 1107, 1113 (2002) [hereinafter George, Fifty/Fifty].

\(^{11}\) Id. at 1113-14.

\(^{12}\) 120 CONG. REC. 15322 (1974).

\(^{13}\) George, Fifty/Fifty, supra note 10, at 1113–14.

\(^{14}\) Id. (quoting Gender and Athletics Act, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974)).

\(^{15}\) 34 C.F.R. § 106.41(a)–(b) (2020).

\(^{16}\) See, e.g., George, Fifty/Fifty, supra note 10, at 1114–15.
high school wants to be on the swim team. Her school does not offer a women’s swim team. Because she is of the sex for whom opportunities “have previously been limited,” she would be entitled to try out for the men’s team. However, if she were hoping to play ice hockey and there was no women’s ice hockey team, the school would be permitted to deny her the opportunity to try out because ice hockey is a contact sport.

The contact sports rule has often been a target of litigation. In 1978, in *Yellow Springs v. OHSAA*, an Ohio school district challenged the statewide athletic association’s rule that “prohibit[ed] mixed gender interscholastic athletic competition in contact sports, such as basketball” (two female students had successfully tried out for and made the otherwise all-male team). The district court stated that the Ohio High School Athletic Association’s exclusionary rule “deprives physically qualified girls of liberty without due process of law” and “[t]he consequences of this determination carry beyond the State level.” The court held that the contact sports rule of the Title IX regulations violated the Fifth Amendment Due Process Clause.

That district court opinion was reversed on appeal, and the contact sports rule remains in effect today. Most recently, in *Mercer v. Duke University*, Heather Sue Mercer, an all-state place kicker on her high school football team, tried out as a walk-on for Duke’s NCAA Division I football team. Although she did not initially make the team, she was allowed to attend practices with the kickers, take part in winter and spring conditioning programs, and serve as a team manager.

In 1995, “the team’s seniors selected Mercer to participate in an intra-squad scrimmage game, and Mercer kicked a field goal that won the game for her squad.

---

17 34 C.F.R. § 106.41(b) (2020).
19 *Id.* at 758, 759.
20 *Id.* at 759. In his decision, the district court judge went on to say, in what amounted to a very progressive vision for his time, that:

> It has always been traditional that “boys play football and girls are cheerleaders.” Why so? Where is it written that girls may not, if suitably qualified, play football? There may be a multitude of reasons why a girl might elect not to do so. Reasons of stature or weight or reasons of temperament, motivation or interest. This is a matter of personal choice. But a prohibition without exception based upon sex is not. It is this that is both unfair and contrary to personal rights contemplated in the Fourteenth Amendment to the United States Constitution. It may well be that there is a student today in an Ohio high school who lacks only the proper coaching and training to become the greatest quarterback in professional football history. Of course the odds are astronomical against her, but isn’t she entitled to a fair chance to try?

*Id.*
24 *Id.* at 200–01.
Shortly thereafter, [Duke Head Coach Fred] Goldsmith announced that Mercer was a member of the team."25 The ensuing onslaught of media attention caused Goldsmith to second-guess his decision, and after months of decreasing Mercer’s involvement with the team, Goldsmith officially cut her from the roster, an action he had never taken with a male player.26 Mercer brought suit, alleging that Duke had violated Title IX in discriminating against her on the basis of sex.27 The court of appeals held that, while Duke could have avoided liability by not allowing Mercer on the team in the first place (as permitted by the contact sports rule), the school was not allowed to discriminate against her based on her sex after she was on the team.28 While Mercer was awarded attorney’s fees and nominal damages, the decision served to reinforce the continued legitimacy of the contact sports rule.29

The contact sports rule has been successfully challenged on Equal Protection grounds in a number of cases. Courts have generally rejected arguments that women should be prevented from contact sports for safety reasons,30 “fear of sexual harassment litigation, potential disruption of the school setting, [or] student and parent objections based on moral beliefs.”31 In Adams v. Baker, a female student successfully challenged her high school’s refusal to let her try out for the all-male wrestling team.32 And in Leffel v. Wisconsin Interscholastic Athletics Association, regarding a high school baseball team,33 the district court held:

The state public schools are under no constitutional compulsion to provide interscholastic competition in any sport, but once they choose to do so,
this educational opportunity must be provided to all on equal terms. Although the plaintiffs do not have a constitutional right to compete on boys teams in contact or noncontact sports, the defendants may not afford an educational opportunity to boys that is denied to girls.34

The Leffel court made clear that creating all-girl teams in a given contact sport would be an acceptable remedy and that making a team coeducational would not be necessary; but by invoking Brown, the opinion inadvertently highlighted the possibility of future arguments against sex segregation on a “separate is inherently unequal” basis.35 In Brown, the Court considered intangible factors of segregated schools and looked at the effect on children in the racial or minority group or previously discriminated against.36 The Court found that “[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”37 How these conclusions regarding feelings of inferiority can be applied to gender discrimination is further explored in Part II.

While the Court in Brown subjected racial distinctions to strict scrutiny, laws and regulations that treat people differently based on sex are only required to pass intermediate scrutiny or heightened scrutiny.38 One of the main effects of this—and a pointed contrast to racial distinctions—is that “providing equal opportunity for women” and “redressing past discrimination” have been accepted by courts as important governmental interests that justify excluding boys from girls’ sports.39 While the Court long ago rejected “remedying past discrimination” as a compelling governmental interest in cases of racial affirmative action,40 the relative flexibility afforded by intermediate scrutiny should allow for a wider range of regulatory regimes to increase women’s participation in sports. One commentator has described using the flexibility of intermediate scrutiny (and a rationale of remedying past discrimination) to create a “one-way ratchet that allows women to

35 See Brown, 347 U.S. at 495.
36 See id. at 494.
37 Id.
39 In United States v. Virginia, the Court stated:

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

   518 U.S. 515, 533–34 (1996 (citations omitted). For an athletic-specific context see, for example, Clark v.
Ariz. Interscholastic Ass’n, 695 F.2d 1126, 1131 (9th Cir. 1982) (excluding boys from the girls’ volleyball
team); Kleczek v. R.I. Interscholastic League, 768 F. Supp. 951, 955 (D.R.I. 1991) (excluding boys from the
girls’ field hockey team).
participate in male-only sports without extending the same opportunity to males who wish to participate in female-only sports.”41 While this would be impermissible under a strict scrutiny standard (as is used in race-based analysis), it would potentially withstand intermediate scrutiny.

In 1980, the case O’Connor v. Board of Education presented the only Equal Protection challenge to sex segregated teams to reach the Supreme Court.42 It is notable because, unlike in Adams or Leffel, the challenge was not an attempt to join the only wrestling team or only football team. Instead, it was an attempt by a female athlete to play on the boys’ basketball team rather than the girls’ basketball team. Karen O’Connor was a standout eleven-year-old basketball player in junior high school. She wished to play on the boys’ basketball team, as the level of competition would be higher and better suited to her talents.43 In fact,

[for at least four years she ha[d] successfully competed with boys in various organized basketball programs. A professional basketball coach who witnessed her play with boys and girls aged 10 to 13 during the summer of 1980 rate[d] her ability as equal to or better than a female high school sophomore player and equal to that of a male eighth-grade player.44

However, the junior high school belonged to a conference for area interscholastic athletics, and the conference rules required “separate teams for boys and girls for contact sports,” with basketball being included in that category.45 O’Connor’s junior high school fielded both boys’ and girls’ basketball teams, and following conference rules, school officials denied O’Connor a chance to try out for the boys’ team.46 She challenged the regulations as violations of the Equal Protection Clause.

The district court granted a preliminary injunction for O’Connor and refused to grant a stay pending appeal; however, the Court of Appeals for the Seventh Circuit entered the stay.47 O’Connor then submitted an application to Supreme Court Justice John Paul Stevens in his capacity as Circuit Justice to vacate the stay.48 Justice Stevens gave great deference to the lower court and declined to vacate the stay, as would be expected for a Circuit Justice considering a stay issued

41  Jamal Greene, Article, Hands Off Policy: Equal Protection and the Contact Sports Exemption of Title IX, 11 Mich. J. Gender & L. 133, 136 (2005). Greene argues that an “affirmative action” for female athletes would be both over- and under-inclusive, but a simple acknowledgement of the average physiological differences between males and females justifies an asymmetry that would withstand Equal Protection analysis, as sex is the only practical and “feasible classification to promote the legitimate and substantial state interest of providing for interscholastic athletic opportunity for girls.” Id. at 154, (quoting Petrie v. Ill. High Sch. Ass’n, 394 N.E.2d 855, 864-55 (Ill. Ct. App. 1979)).


43  Id. at 1302.

44  Id.

45  Id.

46  Id. at 1302–03.

47  Id. at 1303–04.

48  Id. at 1301–02.
by an en banc court of appeals. In his ruling, Justice Stevens found quite persuasive the defendant’s reason for the sex-segregation, stating, “Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls’ programs and deny them an equal opportunity to compete in interscholastic events.”

On remand, O’Connor eventually lost, with summary judgment being granted for the defendant school district. But the district court judge, in his decision granting that summary judgment, seemed to highlight a path forward, stating that:

Defendants’ policy of providing separate teams for boys and girls is bottomed on a generalization about the relative basketball skills of boys and girls. . . . The Supreme Court has repeatedly indicated that even where generalizations about the differences between sexes enjoy a substantial basis in fact, they nevertheless tend to be overbroad, and therefore constitute forbidden sex discrimination.

The assumption that men and boys are at a size and skill advantage, and thus would dominate women’s teams if given the chance, cannot be used to justify the important government interest of maximizing women’s participation in sports because “the generalization, while having substantial validity, should not be given conclusive weight in light of the Supreme Court’s suspicion of such usually but not always valid generalizations about sex.”

Amidst all this, Massachusetts provides an interesting case study. Because Massachusetts has an Equal Rights Amendment (“ERA”), which states that “equality under the law shall not be denied or abridged on account of sex,” the Massachusetts Supreme Court determined that sex-based classifications would be subject to strict scrutiny. Thus, banning boys from joining girls’ teams when that team was the only one offered for that sport would violate the ERA.

This ruling has resulted in an ongoing controversy around high-school-aged boys playing with and against teams that are made up almost entirely of women, most notably in sports like field hockey. In the 2017-18 school year, thirty-six boys competed in the contact sport of field hockey in Massachusetts. These players

---

49 Id. at 1304, 1308; see also Daniel M. Gonen, Judging in Chambers: The Powers of a Single Justice of the Supreme Court, 76 U. CIN. L. REV. 1159, 1173, 1189 (2008) (discussing deference paid by Circuit Justices to lower court decisions, particularly on staying proceedings).
50 O’Connor, 449 U.S. at 1307.
52 Id. at 379.
53 Id. at 380.
54 MASS. CONST. Pt. 1, Art. 1 (LexisNexis through Oct. 8, 2018).
faced criticism, because field hockey is a contact sport.57 Some opponents of male inclusion in field hockey have urged the Massachusetts Interscholastic Athletic Association (“MIAA”) to craft strict criteria for the inclusion of boys in order to drastically decrease participation without facing the legal hurdle of implementing an outright ban.58 Others have pushed for the creation of a parallel boys’ league.59 However, one field hockey expert has argued that a bigger, stronger, or faster boy is not automatically better than a smaller player who has developed more refined skills like dribbling and positioning.60

Present in all this debate is the question of whether the MIAA policy allowing boys to play on these teams violates Title IX, and if so, what is to be done about it.61 Some commentators have argued the MIAA should craft a policy more in line with the federal law by limiting boys’ participation, yet keep the policy “narrowly tailored to the state interest of protecting and fostering female participation in athletics” to avoid being struck down under strict scrutiny analysis and running afoul of the ERA.62 Others have argued that “given their shared intellectual foundation and goals, Title IX should not be used to promote gender segregation and reinforce gender stereotypes by invalidating an interpretation of a state ERA.”63

One thing is clear from the debate in Massachusetts: given comments like “I don’t enjoy watching boys compete against girls in any kind of athletic competition,”64 and “[a]ny self-respecting boy would never compete under these conditions, law or no law,”65 the legal and cultural question of sex-segregated sports is far from settled.


58 Pennsylvania field hockey has also been affected by an Equal Rights Amendment. In that state, rules adopted by the state athletic association include tough-to-meet criteria:

[B]oys cannot displace girls or create an increased injury risk for opponents. Also, a school’s sports offerings for boys would have to provide fewer overall opportunities to participate than the offerings for girls. And if a principal decides a boy can play on a girls team, that team would be reclassified as a boys team. The upshot: Pennsylvania made it virtually impossible for boys to play on girls.


59 See Smith, supra note 56.

60 Id.


62 See Grant, supra note 7, at 869.

63 Marquis, supra note 61, at 109 (arguing for a solution that is “gender-neutral . . . [and] does not rely on paternalistic protections or outdated stereotypes of women as the ‘weaker sex’”).


65 CapePeanut, Comment to Springer, supra note 58 (Nov. 28, 2015, 3:26 PM).
II. CHANGING SEX-SEGREGATED SPORTS TO CHANGE A SEX-SEGREGATED SOCIETY

The world of sports cannot be dismissed as trivial or unimportant. Sports and politics, and even our national identity, have long mixed:

Sports have been the site of some of our most potent civil rights battles, from the racial desegregation of baseball to the trademark battle over the controversial name of Washington D.C.’s football team. And athletes have initiated some of the most powerful and controversial protests against injustice; from the 200-meter medalists at the 1968 Mexico City Olympic games protesting racial inequality by raising their fists in a black power salute, to Muhammed Ali’s principled refusal to enlist in the Vietnam War, to the recent decision of individual football players and other athletes to kneel for the national anthem as a protest of state violence against black people.66

In fact, some scholars have argued that sports, football in particular, have “replaced formal religion as a dominant force in the lives of many Americans.”67 At youth and interscholastic levels, “sports participation provides significant and well-documented life-time benefits.”68 For girls, in particular,

participation in athletics correlates to greater educational attainment, lower teen pregnancy rates, lower substance abuse rates, greater self-esteem, more positive body image, and a host of other indicators of physical and psychological health. . . . Moreover, benefits touted to justify large expenditures on male athletic opportunities—the emphasis on character building, leadership development, learning teamwork, learning to excel in highly competitive environments—would equally advantage female citizens in this competitive market economy.69

But increases in rates of female participation in sports, due in large part to Title IX,70 is not an unmitigated good. Although more girls and women participate in sports, they are joining a male-dominated institution that “has been used to

---

66 Leong, supra note 2, at 1252.
69 Sangree, supra note 31, at 382–83.
70 Lily Rothman, How Title IX First Changed the World of Women’s Sports, TIME (June 23, 2017), https://time.com/4822600/title-ix-womens-sports/.
construct a dominant male sexuality.”71 Some have argued that the conception of equality in Title IX is based on the fundamentally flawed assumption that women will be interested in assimilating into the model for sport created by and for men. As a result, women who might be interested in athletics are forced to either assimilate into the male-constructed model for sport which emphasized elite ability, commercial appeal, and a win-at-all-costs mentality, or not play at all.72

The construction of this male model of sports can be easily traced through history. In the 1880s, industrialization was beginning to take men away from the home to earn wages, leaving women in the private sphere with domestic duties and responsibility for raising the children.73 This included raising male children whose fathers were away at work and led to a fear that society was becoming “feminized.”74 These fears of “feminization” and its connotations of weakness stretched to concerns about America’s military and tactical advantages around the world, and imperialist-minded politicians, Theodore Roosevelt among them, “advocated the ‘strenuous life’ of manly sport as a way to counteract the feminizing diminution of importance of physical labor in the new corporate economy.”75 At the turn of the century, sports also became a tactic “for integrating male immigrants and pacifying the growing industrial working class,” and “creat[ing] male unity across classes at a time when the wealth gap between rich and poor was huge.”76

All of this coincided with a growing feminist movement.77 Men were faced with a changing economy that was destabilizing gender roles and traditional notions of manual labor at the same time that women were no longer willing to take it for granted that men were their natural social and biological superiors.78 In the face of this social upheaval, “athletics offered an arena in which brute strength mattered. In order to serve its role as a site for masculinization and for demonstrating male physical superiority, the sports that developed mass appeal at this time largely emphasized physical size, strength and speed, and often involved violence.”79 While female fragility had been used in the Victorian Era to deny

---

72 Koller, Post-Feminist, supra note 8, at 406.
73 See Sangree, supra note 31, at 402.
74 MICHAEL A. MESSNER, POWER AT PLAY: SPORTS AND THE PROBLEM OF MASCULINITY 14 (1992) (“With no frontier to conquer, with physical strength becoming less relevant in work, and with urban boys being raised and taught by women, it was feared that males were becoming ‘soft,’ that society itself was becoming ‘feminized.’”).
75 Sangree, supra note 31, at 402–03.
76 Id. at 403.
77 Id.
78 Id. at 404.
79 Id.
women even the chance of a post-secondary education, this flimsy excuse was an even more natural fit for the world of physical activity, where fears of injury and interference “with the development of girls’ reproductive organs” were used to curb female participation in sports. Thus the idea that female fragility requires constant accommodations and protection became the corollary to sport as a platform for masculinization. In this light, some feminist scholars argue that modern-day discussion over “females’ assertedly weak knees, distorted pelvic structure, inadequate muscle mass, and the damaging effect of strenuous exercise upon menstruation and childbearing” are just updates on nineteenth century rationalizations that women were physiologically inferior and hysteria prone.

Today’s sports landscape seems to have improved drastically, but the contact sports rule and sex-segregation undermines the goals of Title IX and “signifies female subservience.” It causes a two-fold harm: “female athletes are stigmatized as second-class athletes and, at the same time, sex segregation reinforces the exclusivity of the male role in sports as aggressive, violent, and combative.”

Insistence on the creation of more contact sports teams for women, rather than attempts at integration, is misguided for numerous reasons. Male teams are assumed to be the “real” or elite squad for a given sport; this can be seen in team names (the boys’ soccer team at my high school was called the “Rockets” and the girls’ soccer team was called the “Lady Rockets”), rule modifications, and uniform requirements. These differences serve to sexualize women, or at the very least enforce the boundary line of acceptable femininity that allows hegemonic masculinity to flourish as its contrast. Hegemonic masculinity is primarily defined by three traits: “men are not feminine, are heterosexual, and are physically

---

80 Id. at 405; see also Leong, supra note 2, at 1256 (In 1874, a professor at Harvard Medical School stated “both muscular and brain labor must be reduced at the onset of menstruation”).
82 See generally Sangree, supra note 31, at 402.
83 Id. at 402–03.
84 Id. at 409–10.
85 Id. at 436.
86 Brake, Struggle, supra note 71, at 67.
87 See, e.g., Leong, supra note 2, at 1275 (women’s tennis plays best of three sets while men play best of five).
88 Id. at 1276 (gymnastics requires women wear leotards, and regulates everything from the styling of hair, jewelry and make-up, while the regulations for men merely require long pants and a tank top).
89 Id. (“In a society already hyperfocused [sic] on women’s appearance, rules mandating or encouraging short skirts, tight leotards, highly styled hair, and heavy makeup reinforce the idea that even women whose bodies are highly trained to perform extraordinary feats must also present themselves for the visual consumption of the audience.”); see also Brake, Struggle, supra note 71, at 118 (“The emphasis on female cheerleaders’ physical attractiveness and the culturally feminine display of their athletic skills contains important assumptions not only about the sex of the players and the role of women in sport, but also about the gender of the spectators - and by implication, the gender of sport itself.”).
There’s Nothing Worse than Losing to a Girl

While “there is no single masculinity, many have argued that there is a contextually contingent idealized masculinity that exerts normative power over men to conform.”

Hegemonic masculinity and the so-called “masculinization of sport” have very real consequences. Because sport is viewed, at least subconsciously, as a male activity, athletes—both men and women—say they prefer that their coaches be male. And in fact, as of 2017, only 6.9% of the athletic directors of FBS level colleges were women, and at that same level, women were the head coaches for only 39.8% of women’s teams and a mere 4.7% of men’s teams. Some have argued that this widespread male control over female athletes have made sports “another arena where men exert control over women” and that “female athletes may be more vulnerable to abuse of the disparate power inherent in the coach-athlete relationship when they are coached by men.” Although he was a team doctor rather than coach, the crimes of Larry Nassar illustrate how this power dynamic can be toxic.

When sports are kept segregated on the basis of sex, teams made up entirely of young men are not only taught lessons of teamwork and discipline; male sports culture also “provides an avenue for learning and practicing a dominant masculinity and gaining status as a male by distancing from, and establishing superiority over, females.” This includes a sense of sexual dominance over women and “expectation of access to women’s bodies.” At least one study has shown that “other than fraternities, male athletes are more likely than any other social group in college to participate in gang rape.” An emphasis on masculinity and team loyalty fosters an environment where gang rape is used by male athletes to “solidify bonds with one another by using the woman’s body as the object of sexual dominance, while

---

92 Id. at 523.
93 Brake, *Struggle*, supra note 71, at 83.
94 Id. at 88.
95 FBS, or the Football Bowl Subdivision, is the top level of college football in the United States, and is a good proxy for the colleges with the largest or highest pressure athletic departments. RICHARD E. LAPCHICK, 2017 COLLEGE SPORT RACIAL AND GENDER REPORT CARD 15 (Brett Estrella & Nataliya Bredikhina, eds., 2018), https://www.insidehighered.com/sites/default/server_files/media/2017%20College%20Sport%20Racial%20and%20Gender%20Report%20Card.pdf.
96 Id. at 26.
97 Brake, *Struggle*, supra note 71, at 90.
99 Brake, *Struggle*, supra note 71, at 94.
100 Id.
101 Id. at 95 (citing Todd W. Crosset et al., *Male Student-Athletes Reported for Sexual Assault: A Survey of Campus Police Departments and Judicial Affairs Offices*, 19 J. SPORT & SOC. ISSUES 126, 137 (1995)).
seemingly distancing themselves from the homoerotic implications of a group sexual experience.” 102

Women are not the only ones harmed by the widespread and toxic hegemonic masculinity in sport. In fact, “the culture of male dominance in sport is complex and multi-dimensional; it may be constructed and reinforced through sexual abuse and dominance by males over other males as well as over females.” 103 The tragic case of Seamons v. Snow demonstrates this pattern. 104 A high school football player, Brian Seamons, was assaulted by five of his teammates as he got out of the shower in the locker room. 105 He was taped to a towel rack while still naked and the teammates brought a girl he had dated into the locker room to “view” him and presumably humiliate him. 106 Seamons reported the incident to his coaches and other school officials. In response, the officials blamed him for complaining, and the football coach demanded he stand in front of the team and apologize for reporting the incident and for his betrayal of his teammates. 107 When he refused to apologize, he was dismissed from the team. 108 After public criticism caused the school to cancel the one remaining football game in the season, Seamons faced so much harassment from classmates that he transferred school districts. 109

Nearly all boys and men, not just the boys and men in prominent cases like Seamons’s, are harmed, as “subordinate masculinities that fail to live up to [the ideals of hegemonic masculinity are] anxiety-producing.” 110 The aspirational ideal of hegemonic masculinity is nearly impossible to attain, yet men must constantly prove that they are aggressive, and not exhibiting characteristics traditionally thought of as gay or feminine, or they risk becoming the subject of another man’s domination. 111 For those men who are gay, feminine, or lack the requisite aggression and embrace of violence, sports can be a nearly impossible place to exist without completely hiding one’s identity (as evidenced by the dearth of openly gay or queer male athletes in major sports). 112 There is an alternative though:

The all-male enclave of men’s sports creates an environment rife for hegemonic masculinity to take hold: All-male settings tend to be more

---

102 Brake, Struggle, supra note 71, at 95.
103 Id. at 102.
104 206 F.3d 1021 (10th Cir. 2000).
105 Id. at 1223.
106 Id.
107 Id. at 1024 (“Coach Snow intervened and told Brian he needed to ‘forgive and forget and apologize’ to the team captains. When Brian refused, Coach Snow told him to ‘take the weekend and think about this,’ because without an apology he couldn’t play with the team. This ended the meeting.”).
108 Id.
109 Brake, Struggle, supra note 71, at 104.
110 Brake, Pride, supra note 90, at 293.
111 See id.
homophobic and to promote masculine performances that denigrate homosexuality and flaunt sexual conquests of women. A recent study... also showed the converse of this trend: Moving male athletes from all-male sports settings to gender-integrated sport settings reduced their performances of hegemonic masculinity.113

III. ALTERNATIVES TO THE CURRENT SYSTEM OF SEX-SEGREGATION AND SEX-BASED LIMITS ON OPPORTUNITY FOR PARTICIPATION IN SCHOOL SPORTS

Given the current landscape of sports and the wide acceptance of sex segregation, changing the status quo would seem a nearly impossible task. However, more than a few suggestions have emerged in the scholarship, with varying degrees of feasibility. Any combination or variation of any of these ideas would be a welcome improvement to the current and largely unexamined regime.

One possible path explored would use sex discrimination law and a recent Seventh Circuit Court of Appeals case holding that sex stereotyping is discrimination that encompasses discrimination based on sexual orientation114 to break down hegemonic masculinity in sports and create an athletic environment and teams welcoming to women and LGBTQ+ people.115

Others strongly advocate for an elimination of the contact sports rule.116 While some argue that the rule can be eliminated but still aim to prevent men from playing on women’s teams,117 others would use it to eliminate gendered bars to participation all together.118

113 Id. at 296 (citing Eric Anderson, “I Used to Think Women Were Weak”: Orthodox Masculinity, Gender Segregation, and Sport, 23 SOC. F. 257, 258 (2008)).
114 See Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017).
115 See Brake, Pride, supra note 90. A sports program with men and women competing with and against one another would likely lead either to and environment accepting of an array of gender expression and performance or would result in a doubling down of toxic masculinity, as men try to demonstrate their “manliness.” Which outcome may be more likely is beyond the scope of this Comment.
116 See, e.g., Brake, Struggle, supra note 71.
117 The concern over males dominating females in sports attaches only to those males who would not dominate but for their sex. It is simply not possible to conduct an individualized inquiry, the equivalent of a tryout, into the extent to which a particular male’s skills would be diminished but for his sex. Given the size of average sex-linked physical differences between males and females, it is therefore perfectly reasonable to presumptively exclude a male from a female sport, at least after puberty. On the other hand, these same average differences in performance-related physical skills make entirely unreasonable a presumption that sex is motivating any advantages a female may demonstrate.

Greene, supra note 41, at 154

118 Like Title IX, the Equal Protection doctrine validates remedial measures to counteract historic discrimination against women. Thus, it is permissible to maintain all-female teams and exclude males because females have historically been deprived athletic opportunities. This historic deprivation has resulted in female athletic abilities being underdeveloped relative to males. Females must be allowed all-female teams because open teams would result in male domination. Males can claim no similar historic deprivation and thus can make no recognized claim to needing all-male teams to avoid female domination.

Multiple proposals question the purpose of sport altogether and critique both the male model of sport, which has forced women to assimilate and develop skills that are not a natural fit for their physiology,119 and the conception of sport as a competition amongst the elite—a pursuit of excellence, with no patience for mere participation.120 Presumably these proposals would encourage more girls and women to try athletic activities at an earlier age, and eventually the influx of women would cause a re-evaluation of what type of skills and sports are valued.

Others take a more top-down approach that would replace the commercial model of college sports with a participation model.121 A participation model would end athletic scholarships, cut revenues,122 and require any remaining revenues to enter a college’s general funds, instead of staying within the athletic department.123 Student-athletes would just be “students” and those athletes interested in pursuing sports professionally could forgo college and instead join a minor league or development team affiliated with the governing body for their professional sport.124 As traditional “revenue sports” no longer fit that description, fiscal pressures will encourage varsity coeducational teams, rather than separate teams for men and women, and the lack of the most elite male athletes will open up opportunities for talented women.125

Another proposal builds on these ideas, but instead of using a patchwork of tactics to reach the desired end, it would press for an elimination of the contact sports rule combined with a new policy interpretation requiring that team rosters and the players on the field adhere to a rule of “fifty/fifty” based on the percentage of players of each gender represented.126 This change would then result in a de-commercialization of college athletics, as professional leagues would create development levels of competition for those elite athletes who only wished to play with and against people of their own gender.127 In addition to entrenching the problems transgender athletes face,128 this proposal seems impossible in light of the

---

119 See Koller, Post-Feminist, supra note 8 at 417–18.
120 See Koller, Expressive Power, supra note 68; see also B. Glenn George, Forfeit: Opportunity, Choice, and Discrimination Theory Under Title IX, 22 YALE J.L. & FEMINISM 1 (2010) (emphasizing a need to focus on the health and social benefits of exercise and sport at a younger age and at lower competition levels, rather than focusing time and resources on those young people considered to have potential as future college athletes).
121 See, e.g., Porto, supra note 5.
122 For example, by having the Internal Revenue Service reclassify college sports revenues as taxable income from unrelated businesses and by no longer allowing athletic booster donations to be deductible. The Tax Cuts and Jobs Act of 2017 was a significant step in this direction. See Pub. L. No. 115-97, 131 Stat. 2054.
123 Porto, supra note 5.
124 Id.
125 See id.
126 See George, Fifty/Fifty, supra note 10.
127 See id.
current congressional landscape and a presidential administration that has been
antagonistic to the inclusion of transgender people in institutions like the military.\textsuperscript{129} It does, however, have roots in a particular level of college sports—
imtramurals—where oftentimes players have the option of joining a team of all one
gender or a coeducational team, with the coeducational teams having strict rules
about equal numbers of men and women participants.

The most compelling and realistic proposal would require individual
consideration of each sport and each age division.\textsuperscript{130} Wrestling, rock climbing, long-
distance swimming, and ultra-marathons are all sports in which women have
demonstrated an ability to compete at the same, or higher, level than men.\textsuperscript{131} Instead of automatic sex-segregation, every division of sport should be
presumptively coeducational and must pass a true intermediate scrutiny standard
if the administrators of each sport wish to keep it sex-segregated.\textsuperscript{132} Some sports
will meet this burden: for things like weightlifting, which is based on little more
than an objective measure of brute strength, it could likely be shown that women
will never be able to beat men of comparable size and experience level. Sports for
senior or prepubescent individuals would likely have a more difficult time meeting
the burden, as physical differences between the sexes are diminished at those ages.
Certain levels of competition, like those in which the primary goal is to promote “a
way to have fun, make friends, stay active, or learn a new skill,”\textsuperscript{133} would also have
a more difficult time meeting the burden of intermediate scrutiny, as physical
prowess is not as prevalent or important. This adjustment would be easy to make,
and a version can already been seen in many university intramural sports
programs, where “co-IM” soccer teams, for instance, require that a team of nine
have no fewer than three women and no fewer than three men on the field at a
time.\textsuperscript{134} Additionally, sports like wrestling would not be able to respond to increased
female interest and skill by creating a separate division for women. “[D]uring the
2010–2011 school year, there was . . . a 19.8 % increase in the number of female
wrestlers” at the high school level.\textsuperscript{135} Several high school girls have won state

\textsuperscript{129} Lola Fadulu, Trump’s Rollback of Transgender Rights Extends Through the Entire Government, N.Y. TIMES
Berg & Moiz Syed, Under Trump, LGBTQ Progress is Being Reversed in Plain Sight, PROPUBLICA (Nov. 22,

\textsuperscript{130} See Leong, supra note 2, at 1264.

\textsuperscript{131} Id. at 1264–70.

\textsuperscript{132} Id. at 1284–85.

\textsuperscript{133} Intramural Sports, IND. UNIV. BLOOMINGTON, http://recsports.indiana.edu/intramural-sports/index.php (last
visited Mar. 11, 2019).

\textsuperscript{134} Intramural Sports Rules, IND. UNIV. BLOOMINGTON,
http://www.recportal.indiana.edu/~public/intramurals/sport_rules/CURRENT/CH_rules.htm (last visited
Mar. 11, 2019).

\textsuperscript{135} Leong, supra note 2, at 1269.
championships in all-boys divisions.\textsuperscript{136} The response to this has been to create all-girls divisions and all-girls state championships.\textsuperscript{137} Why? The infrastructure for the male programs could have simply absorbed the increased interest of women. Instead, the masculine world of wrestling had to shield itself from the threat of losing to a girl. The creation of separate women’s teams is just a large-scale version of boys choosing to forfeit rather than wrestling against me and risking defeat.

**CONCLUSION**

While the status quo of sex-segregated sports seems a natural, preferred, and deeply ingrained fact of our culture, sports, like nearly all societal institutions, have been shaped by and for the advantages of men. While other areas of the law have ceased to allow stereotypes and generalizations about gender roles and expectations to justify legal asymmetries,\textsuperscript{138} the regulations promulgated under Title IX still do exactly that. This does not need to be the case. Consider how far women have already come:

\begin{quote}
[A]t various points in our nation’s history, it was unimaginable that women would vote with men, or attend college, or become lawyers, or own property, or serve in combat positions in the military, or hold elected office. Likewise, it was once unimaginable that men would stay at home with children, or otherwise take a supporting role to their wives’ careers. Features of our society that today seem commonplace were once deemed radical as well. There is no reason to think that sports are different.\textsuperscript{139}
\end{quote}

There are myriad ways to make sports, like the rest of life, more integrated on the basis of sex; it will not be a short or easy process, but it can be done.

\textsuperscript{136} Id. at 1269–70. It is hypothesized that women’s lower center of gravity and greater flexibility can overcome the superior upper-body strength of their male opponents. Id. at 1270.

\textsuperscript{137} Id. at 1270.


\textsuperscript{139} Leong, supra note 2, at 1290.