

COMMENT

CALLING AN AUDIBLE: THE EQUAL PROTECTION CLAUSE, CROSS-OVER CASES, AND THE NEED TO CHANGE TITLE IX REGULATIONS

INTRODUCTION

Some people think football is a matter of life and death. . . . I can assure them it is much more serious than that.¹

In August 2007, Ivyanne Elborough, a high school girl from Wisconsin, joined the Evansville High School freshman football team.² When Ivyanne arrived at school, her safety pads and helmet were stored in the girls' locker room, which forced her to find an administrator daily to unlock the locker room.³ Even though the football coach had a key that unlocked the girls' locker room, he never unlocked the door for Ivyanne.⁴ The coach made students who were late for practice do push-ups as punishment for tardiness.⁵ He also provided snacks and the practice schedule in the boys' locker room, where Ivyanne was not permitted to enter, and told Ivyanne, "getting her hair cut to look like a boy was a commitment she was going to have to make to be on the football team."⁶ After almost a month of Ivyanne playing on the team, her mother complained to the associate coach, athletic director, and a district administrator about Ivyanne's treatment on the team.⁷ The same day her mother complained to school administration, Ivyanne arrived

¹ Allan Massie, *Only One Winner in Sport Versus Culture*, SUNDAY TIMES, Nov. 5, 2000, at 20 (quoting former Liverpool manager Bill Shankly).

² *Elborough v. Evansville Cmty. Sch. Dist.*, 636 F. Supp. 2d 812, 816 (W.D. Wis. 2009).

³ *Id.* at 816-17.

⁴ *Id.* at 817.

⁵ *Id.*

⁶ *Id.* at 817-18.

⁷ *Id.* at 817.

at practice and was unable to find an administrator to unlock the locker room door.⁸ Consequently, she went to football practice without protective padding.⁹ Without offering to help her find sufficient safety equipment, the football coach gave Ivyanne the option to either participate in drills or watch from the sidelines.¹⁰ Ivyanne opted to participate in drills, which included form-blocking drills, and she consequently fractured her right clavicle.¹¹

Ivyanne's situation falls into an area of sports law called cross-over cases.¹² Cross-over cases are legal claims involving an individual of one gender who wants to play on an athletic team traditionally composed of members of the opposite gender.¹³ More than displaying a gender atypical interest in a sport, cross-over cases, like Ivyanne's, are significant because they fall at a crossroads between conflicting federal regulations and constitutional law.¹⁴ The Contact Sports Exemption, a regulation written based on Title IX, allows educational institutions to field sex-segregated teams in contact sports, including football, basketball, and ice hockey.¹⁵ However, the Equal Protection Clause of the Fourteenth Amendment requires that girls, like Ivyanne, be allowed to try out for the team based on their athletic abilities.¹⁶

This Article focuses on the inefficiency of having a federal regulation allowing education institutions to have exclusionary policies in violation of the Equal Protection Clause. It traces the legislative history of Title IX; the formulation of federal

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 817-18.

¹¹ *Id.* at 818.

¹² Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. 551, 563 (2003).

¹³ *Id.*

¹⁴ Most of the cross-over cases examined in this article involve females attempting to try out or play for a male dominated sport. This does not indicate the author's personal feelings about males attempting to play historically female dominated sports. Rather, it is indicative of jurisprudence behind cross-over claims and the goals of Title IX.

¹⁵ 34 C.F.R. § 106.41(b) (2009).

¹⁶ *Lantz ex rel. Lantz v. Ambach*, 620 F. Supp. 663, 665-66 (S.D.N.Y. 1985).

regulations governing Title IX's application to school sponsored athletics, with special attention to the Contact Sports Exemption; and subsequent judicial contributions to Title IX. The Article then examines cross-over cases, their treatment under the Equal Protection Clause, holdings under Title IX private causes of action, and the constitutionality of the Contact Sports Exemption. It further discusses the inefficiency of having a federal regulation that conflicts with the Equal Protection Clause. It concludes with a critical examination of alternatives to the current formulation of the Contact Sports Exemption.

I. THE HISTORY AND DEVELOPMENT OF TITLE IX

Legislative History

Congress enacted Title IX in 1972 to combat sex discrimination in the American educational system by targeting all federally-funded educational institutions.¹⁷ A congressional conference adopted the statute without formal hearing or committee report.¹⁸ Title IX provides in pertinent part: No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance¹⁹ During the congressional conference, one of the areas most greatly affected by the statute—sports and intercollegiate athletics—was barely the subject of debate.²⁰ In fact, its impact on sports

¹⁷ David Aaronberg, *Crumbling Foundations: Why Recent Judicial and Legislative Challenges to Title IX May Signal Its Demise*, 47 FLA. L. REV. 741, 747-51 (1995). Senator Birch Bayh from Indiana, the sponsor of Title IX legislation, articulated that the purpose of the legislation was to “guarantee that women, too, enjoy the educational opportunity every American deserves.” *Id.* at 748 (quoting Senator Birch Bayh). He further highlighted the issue of “sex discrimination that reaches into all facets of education—admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales.” *Id.* at 750 (quoting Senator Birch Bayh).

¹⁸ *Id.* at 747.

¹⁹ 20 U.S.C. § 1681(a) (2006).

²⁰ Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254, 1255 (1979).

was only mentioned twice.²¹ In the years following the passage of Title IX, there were efforts to limit the statute's effects on athletic programs, including Senator John Tower's proposed amendment excluding revenue producing sports from the statute's coverage.²² As an alternative to the Tower Amendment, Congress passed an amendment sponsored by Senator Jacob Javits, requiring the Department of Health, Education and Welfare (HEW)²³ to prepare and publish regulations implementing Title IX.²⁴ The Javits Amendment urged HEW to take into consideration "reasonable provisions considering the nature of particular sports."²⁵

*Administrative Regulations and the "Contact Sports
Exemption"*

Title IX is a general prohibition against sex discrimination in schools and does not contain any standards for identifying sex discrimination in athletics or in any other context.²⁶ Therefore, any standards governing the enforcement of Title IX have been developed by HEW.²⁷ The original regulations issued in 1975 are still effective today under the auspices of the Department of Education.²⁸ The regulations provide that, "No

²¹ *Id.* at 1255 n.11 (citing 118 CONG. REC.5807 (1972) (Sen. Bayh) (personal privacy to be respected in sports facilities); 117 CONG. REC. 30,407 (1971) (Sen. Bayh) (intercollegiate football and men's locker rooms)). Some scholars point to the content of the debate as Senator Bayh offering assurances that the statute would not affect athletics. EILEEN McDONAGH & LAURA PAPPANO, PLAYING WITH THE BOYS: WHY SEPERATE IS NOT EQUAL IN SPORTS 103 (2008).

²² Aaronberg, *supra* note 17, at 751.

²³ The Department of Health, Education and Welfare has since been divided into the Department of Education and the Department of Health and Human Services. *See generally* 20 U.S.C. § 3401-3510 (2000). The Department of Education's Office of Civil Rights (OCR) is responsible for enforcement of Title IX. *Id.* § 3401.

²⁴ Ann Scales, *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*, 15 MICH. J. GENDER & L. 205, 221-22 (2009).

²⁵ Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1972) (amended 1974).

²⁶ Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 46 (2000).

²⁷ *Id.*

²⁸ *Id.* at 46-47. HEW received 9,700 comments on the proposed Title IX regulation, an unprecedented response. *Cohen v. Brown Univ.*, 101 F.3d 155, 165 n.6 (1st Cir. 1996). Former HEW Secretary Caspar Weinberger reacted, "I had not realized until the comment period that athletics is the single most important thing in the United States."

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”²⁹

HEW determined that the equality called for in the Title IX statute does not require allowing for males and females to try out for the same teams.³⁰ Instead, the Regulations permit schools to have separate-sex sports teams “where selection for such teams is based upon competitive skill or the activity involved is a contact sport.”³¹ Because most intercollegiate and interscholastic teams are chosen on the basis of competitive skill or are classified as contact sports, most school athletic teams are sex-segregated.³² Conversely, if one gender has been traditionally excluded from a non-contact sport, members of that gender must be allowed to try out for the team if no team is sponsored for members of the other gender.³³ A large number of interscholastic athletics are defined as contact sports by the Regulations, including, “boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.”³⁴ Under the regulations, the dispositive factor determining membership of contact sports teams is gender—not desire to play, ability, speed, or skill.³⁵

HEW’s reason for including the Contact Sports Exemption is largely unknown to the public because the Department of Education, the agency assuming HEW’s enforcement of Title

Id. (citing Thomas A. Cox, *Intercollegiate Athletics and Title IX*, 46 GEO. WASH. L. REV. 34, 40 (1977)).

²⁹ 34 C.F.R. § 106.41(a) (2009).

³⁰ Brake, *supra* note 26, at 47.

³¹ 34 C.F.R. § 106.41(b).

³² Brake, *supra*, note 26, at 47 n.154.

³³ 34 C.F.R. § 106.41(b).

³⁴ *Id.* Many opponents of the Contact Sports Exemption call into question the motives behind including basketball as a contact sport. See Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 396-97 (2000). Some even point to its inclusion as a contact sport as a revitalization of Senator Tower’s proposed Title IX amendment, excluding revenue producing sports from falling within the parameters of Title IX. *Id.* at 397.

³⁵ Sangree, *supra* note 34, at 391; 34 C.F.R. § 106.41(b).

IX, destroyed HEW's administrative dockets and files containing comments and communications regarding the Title IX Regulations and Policy Interpretation in 1985 and 1989.³⁶ The Congressional Hearings on the regulation also fail to explain the Contact Sports Exemption's inclusion in the Regulations.³⁷ When addressing Congress to introduce HEW's 1975 Regulations, HEW's Secretary Weinberger stated:

With regard to athletics . . . let's look first at what the regulation does not require because there seems to be a substantial misunderstanding about that. . . . [I]t does not require women to play football with men; . . . it will not result in the dissolution of athletic programs for men; . . . and it does not mean the National Collegiate Athletic Association (NCAA) will be dissolved and will have to fire all of its highly vocal staff.³⁸

Secretary Weinberger's statement suggests that the Contact Sports Exemption is an accommodation to parties who wanted athletics to be exempt from Title IX entirely or who wanted revenue producing sports to be excluded.³⁹

The regulations also contain an "Equal Opportunity" subsection which provides, "A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes."⁴⁰ The regulations delineate a non-comprehensive set of ten guidelines to determine whether there are equal opportunities available which include:

- (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

³⁶ Sangree, *supra* note 34, at 416.

³⁷ *Id.*

³⁸ *Id.* (quoting *Sex Discrimination Regulations, Hearings before the House Subcommittee on Post Secondary Education of the Committee on Education and Labor*, 94th Cong. 438-39 (1975) (statement of Caspar W. Weinberger, Sec. of Dept. of Health, Educ. and Welfare)).

³⁹ Sangree, *supra* note 34, at 416.

⁴⁰ 34 C.F.R. § 106.41(e) (2009).

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.⁴¹

In 1978, HEW attempted to clarify the obligations of federal aid recipients under Title IX by issuing a Policy Interpretation.⁴² The Policy Interpretation provided that equivalent female contact sports teams must be offered when there is sufficient interest, ability, and a reasonable expectation of competition exists.⁴³ The Policy Interpretation also set out three tests⁴⁴ to determine whether a school's sports program effectively satisfies Title IX.⁴⁵ Compliance with any one of the three tests is sufficient.⁴⁶

The first test is a "substantial proportionality" test.⁴⁷ The "substantial proportionality" test asks whether "participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments."⁴⁸ The second test is met if the institution can show "a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of [the underrepresented] sex."⁴⁹ The third test questions "whether it can be demonstrated that the interests and abilities of the members of [the

⁴¹ 34 C.F.R. § 106.41(c)(1)-(10).

⁴² *Cohen v. Brown Univ.*, 101 F.3d 155,166 (1st Cir. 1996).

⁴³ 44 Fed. Reg. 71,417-18 (C)(4)(a)(1)-(2) (Dec. 11, 1979).

⁴⁴ Although the regulations and the Policy Interpretation often reference "intercollegiate athletics," courts have interpreted them to apply to interscholastic athletics. *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 290 (2d Cir. 2004).

⁴⁵ Sangree, *supra* note 34, at 392.

⁴⁶ *Id.*

⁴⁷ 44 Fed. Reg. 71,418 (5)(a)(1); *see also Cohen*, 101 F.3d at 166 n.7.

⁴⁸ 44 Fed. Reg. 71,418 (5)(a)(1). HEW issued no official "benchmark" to determine an acceptable disparity between enrollment and sports participation, leaving courts to determine whether or not this test is satisfied. Sangree, *supra* note 34, at 392; *Cohen*, 101 F.3d at 176 (determining a disparity of 13.01% is too great); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993) (determining a disparity of 10.5% was too great).

⁴⁹ 44 Fed. Reg. 71,418 (5)(a)(2).

underrepresented] sex have been fully and effectively accommodated by the present program.”⁵⁰

Under the statute’s provisions, all violations of Title IX are investigated by the Department of Education (DOE), through which male or female student-athletes can file complaints.⁵¹ If the DOE finds that there has been a violation of Title IX, then the Department can informally resolve the situation.⁵² However, if the problem cannot be solved through informal intervention, then the DOE has the power to convene an administrative hearing and take away the institution’s federal funding.⁵³

Title IX Development in the Courts

Title IX does not contain a provision allowing a private cause of action for sex discrimination in athletics.⁵⁴ Instead, it contains guidelines for administrative enforcement of the statute’s schemes.⁵⁵ In 1979, the Supreme Court addressed whether a judicial remedy exists outside of the DOE’s administrative framework.⁵⁶ The Court ruled that there is a right to a private cause of action under Title IX.⁵⁷ To infer a private cause of action in Title IX violations, the Court cited Congress’s desire to “avoid the use of federal resources to support discriminatory practices” and “to provide individual citizens effective protection against those practices.”⁵⁸ However, it took the Court more than a decade to decide

⁵⁰ 44 Fed. Reg. 71,418 (5)(a)(3). The First Circuit has found that the third test poses an almost insurmountable burden of proof on the educational institution. Sangree, *supra* note 17, at 392; *Cohen*, 101 F.3d at 179 (finding that any lack of interest or ability can be attributed to a lack of opportunity or experience).

⁵¹ 34 C.F.R. § 106.71(b) (2009) (adopting enforcement procedures found in 34 C.F.R. § 100.6-100.11 and 34 C.F.R. § 101).

⁵² *Id.* § 100.8(a).

⁵³ *Id.* § 100.8.

⁵⁴ Anne-Marie Harris & Kenneth B. Grooms, *A New Lesson Plan for Educational Institutions: Expanded Rules Governing Liability Under Title IX of the Educational Amendments of 1972 for Student and Faculty Sexual Harassment*, 8 AM. U. J. GENDER SOC. POL’Y & L. 575, 584 (2000).

⁵⁵ *Id.*

⁵⁶ *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979).

⁵⁷ *Id.* at 717.

⁵⁸ *Id.* at 704.

whether the private cause of action extended exclusively to injunctive relief or also included damages.⁵⁹

In *Franklin v. Gwinnett County Public Schools*, the Court decided that the right to monetary damages could be inferred by courts in Title IX private causes of action.⁶⁰ The Supreme Court has since stipulated that the private cause of action exists when an educational institution, such as a school district, has a discriminatory policy or the school district has “actual notice” and is “deliberately indifferent” toward discriminatory conduct of its employees.⁶¹ Although there is some disagreement among the circuits, the majority of courts hold that because Title IX applies to institutions receiving federal aid, a private cause of action cannot be brought against an individual.⁶²

At least one lower court attempted to award punitive damages in a Title IX private cause of action.⁶³ However, the Fourth Circuit, the highest court to rule on the matter, held punitive damages are not recoverable in Title IX private causes of action—reversing the lower court.⁶⁴

II. THE HISTORY AND DEVELOPMENT OF THE EQUAL PROTECTION CLAUSE

Title IX is not the only federal provision addressing sex discrimination. Many forms of gender discriminatory conduct are barred by the Equal Protection Clause of the Fourteenth Amendment.

⁵⁹ Harris & Grooms, *supra* note 54, at 585.

⁶⁰ 503 U.S. 60, 73 (1992).

⁶¹ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998); *see also* *Elborough v. Evansville Cmty. Sch. Dist.*, 636 F. Supp. 2d 812, 818 (W.D. Wis. 2009).

⁶² *See* *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1018, 1034 (7th Cir. 1997) (holding individuals cannot be defendants in Title IX private causes of action). *Contra* *Mennone v. Gordon*, 889 F. Supp. 53, 56 (D. Conn 1995) (holding that an individual can be sued if he or she exercised a sufficient level of control over the discriminatory program or activity); *Mann v. Univ. of Cincinnati*, 864 F. Supp. 44, 47 (S.D. Ohio 1994) (holding that a claim can be brought against an educational program and its officials).

⁶³ *Heckman*, *supra* note 12, at 565 (discussing *Mercer v. Duke Univ.*, 32 F. Supp. 2d (M.D.N.C. 1998)).

⁶⁴ *Id.* at 565-66.

Background

The Thirteenth Amendment, passed in 1865 after the end of the Civil War, abolished the institution of slavery within the United States.⁶⁵ However, there was immediate resistance to the abolition of slavery in the South.⁶⁶ Southern politicians undermined the impact of the Thirteenth Amendment by passing “Black Codes,” laws which deprived newly-freed slaves of legal, civil, and political rights and encouraged the use of terror tactics against African Americans.⁶⁷ In order to enforce the guarantees of the Thirteenth Amendment and curtail the enforcement of “Black Codes,” Congress passed the Civil Rights Act of 1866.⁶⁸ Soon after, the constitutionality of the Act was challenged.⁶⁹ In order to insulate the act from repeal, Congress drafted the Fourteenth Amendment; and the states ratified it.⁷⁰

In pertinent part, the Equal Protection Clause of the Fourteenth Amendment provides: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁷¹ The Fourteenth Amendment was the brainchild of Reconstruction Republicans who aspired for Federal citizenship to be a guarantee of uniformity of fundamental rights throughout the states.⁷²

Judicial Expansion of the Equal Protection Clause and Gender Discrimination

While Congress originally enacted the Fourteenth Amendment to address postbellum racial inequalities, it has

⁶⁵ U. S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

⁶⁶ Samuel Estreicher, Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 451-52 (1974).

⁶⁷ *Id.* at 452.

⁶⁸ *Id.*; see also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

⁶⁹ Estreicher, *supra* note 66, at 452.

⁷⁰ *Id.*

⁷¹ U.S. CONST. amend. XIV, § 1.

⁷² Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham’s Theory of Citizenship*, 36 AKRON L. REV. 717, 719 (2003).

since been extended by the Courts to address gender discrimination.⁷³

However, the Supreme Court did not interpret gender to be within the protection of the Equal Protection Clause immediately after the Fourteenth Amendment was enacted. When the Court first addressed the subject of gender inequality under the Equal Protection Clause in *Bradwell v. Illinois*, it declined to extend Fourteenth Amendment protections to a woman who was seeking to become a lawyer in Illinois.⁷⁴ The Court employed a rational basis standard to determine that bar membership is not one of the Constitutional guarantees of citizenship.⁷⁵ It was not until *Reed v. Reed* in 1971 that the Court recognized a successful Equal Protection claim for gender discrimination.⁷⁶ The Court overturned an Idaho law that required males be preferred as administrators of estates over equally qualified females.⁷⁷ The Court found that the capricious preference for males under the statute reflected “the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause.”⁷⁸ The Court established a “substantial relationship” test for gender discrimination cases finding that government acts must be “reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”⁷⁹

While the Supreme Court has extended the Equal Protection Clause to gender discrimination claims, the standard of review for gender claims is still not as high as the standard of review for racial discrimination claims.⁸⁰ The

⁷³ See generally *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

⁷⁴ 83 U.S. 130 (1872). Justice Bradley found that “[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.” *Id.* at 141 (Bradley, J., concurring).

⁷⁵ *Id.* at 132.

⁷⁶ *Reed v. Reed*, 404 U.S. 71 (1971).

⁷⁷ *Id.* at 73.

⁷⁸ *Id.* at 76.

⁷⁹ *Id.* (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

⁸⁰ See generally *United States v. Virginia*, 518 U.S. 515, 532 (1996) (“Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men)”).

current standard for evaluating equal protection claims is an “Intermediate Scrutiny” test.⁸¹ In Equal Protection cases, the state is burdened with showing that the discriminatory provision is “substantially related” to an “important governmental objective[].”⁸² Furthermore, the state’s action must be “free of fixed notions concerning the roles and abilities of males and females.”⁸³

Private Causes of Action Under the Equal Protection Clause

The Constitution does not contain a right to a private, civil cause of action for violations of Constitutional rights. The postbellum Congress that enacted the Thirteenth, Fourteenth, and Fifteenth Amendments, also recognized that former slaves’ newly secured rights would be much safer if they had a way to address alleged violations of their Constitutional rights in the American court system.⁸⁴ Consequently, Congress passed the Ku Klux Klan Act, inventing “a civil cause of action for violations of citizens’ ‘rights, privileges, or immunities secured by the Constitution,’” to curtail the Klan from harassing former slaves and Southern Republicans.⁸⁵ The Ku Klux Klan Act was the precursor to the modern statute, 42 U.S.C. § 1983, that creates a private, civil cause of action for Constitutional violation.⁸⁶

The current formulation of § 1983 protects any citizen of the United States from “deprivation of any rights, privileges, or immunities secured by the Constitution and laws.”⁸⁷ A female student bringing an Equal Protection sex discrimination claim under § 1983 must tailor her case to show “she did not have

⁸¹ *Id.* at 533.

⁸² *Id.* (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)); Blake J. Furman, Note, *Gender Equality in High School Sports: Why There Is a Contact Sports Exemption to Title IX, Eliminating It, and a Proposal for the Future*, 17 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1169, 1178-79 (2007).

⁸³ *Hogan*, 458 U.S. at 724-25.

⁸⁴ Daniel J. Lynch, Comment, *Compensatory Damage Awards in Section 1983 Actions Based on Federal Statutory Violations*, 34 *WAYNE L. REV.* 1373, 1375 (1988).

⁸⁵ *Id.* (quoting Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13).

⁸⁶ *Id.*; 42 U.S.C. § 1983 (2006).

⁸⁷ 42 U.S.C. § 1983.

opportunities afforded to her on account of gender.”⁸⁸ The Equal Protection Clause only bars overt or intentional discrimination.⁸⁹ In order to succeed with an Equal Protection claim, a plaintiff must prove that his or her gender classification, under the rules in question causes them to receive unequal, unfavorable treatment compared to members of the opposite gender.⁹⁰ Again, the use of unequal treatment can be constitutionally justified by showing the action was substantially related to an important government interest.⁹¹

Unlike Title IX private claims, § 1983 causes of action are available to litigants where the defendant is propelled by evil intent or motivation or has reckless or callous disregard for constitutional protections.⁹² Punitive damages can be awarded at the judge’s discretion to deter further violations of constitutional rights or punish particularly egregious behavior.⁹³ Furthermore, another major difference between Title IX private causes of action and § 1983 claims is that Title IX private causes of action can only be brought against institutions receiving federal funding and § 1983 claims can be brought against offending individuals and municipalities.⁹⁴

§ 1983 Claim Preemption

If a lawsuit asserts a § 1983 claim and another federal statute has a private cause of action addressing similar subject matter, the courts must determine if the claim provided by federal law preempts the 1983 claim.⁹⁵ If the 1983 claim is “virtually identical” to a constitutional right protected by the

⁸⁸ Kimberly Capadona, Comment, *The Scope of Title IX Protection Gains Yardage as Courts Continue to Tackle the Contact Courts Exception*, 10 SETON HALL J. SPORT L. 415, 426 (2000).

⁸⁹ *Id.* (citing *Washington v. Davis*, 426 U.S. 229, 238-39 (1976)).

⁹⁰ *Id.* at 427.

⁹¹ *United States v. Virginia*, 518 U.S. 515, 533 (1996).

⁹² *See Santiago v. Garcia*, 821 F.2d 822, 829 (1st Cir. 1987).

⁹³ *See Creamer v. Porter*, 754 F.2d 1311, 1320 (5th Cir. 1985).

⁹⁴ *See generally* Diane Mishra, Note, *When the Interests of Individuals and Municipalities Diverge: Municipal Dual Representation and Conflicts of Interest in § 1983 Litigation*, 119 YALE L.J. 86, 92 (2009); Aaronberg, *supra* note 17, at 247-51.

⁹⁵ *Smith v. Robinson*, 468 U.S. 992, 1008-09 (1984).

federal statute and Congress intended the federal statute to be the sole avenue of redress, then the 1983 claim is preempted.⁹⁶

Until 2009, there was an equal split between the circuits regarding whether private causes of action preempt § 1983 claims.⁹⁷ Preventing further confusion surrounding Equal Protection claims and Title IX, the Supreme Court found that Title IX does not specifically address private causes of action and that the remedies provided under Title IX are not as strictly enforced, restrictive, or carefully tailored as other statutes where § 1983 claims are precluded.⁹⁸ Therefore, the Supreme Court held that § 1983 sex discrimination claims are not preempted by Title IX private causes of action.⁹⁹

III. CROSS-OVER CASES: CONTRADICTIONS BETWEEN TITLE IX REGULATIONS AND THE EQUAL PROTECTION CLAUSE

Cross-Over Cases

Title IX has had an astronomical impact on increasing the amount of women participating in athletic programs.¹⁰⁰ Fewer than 300,000 women participated in athletic programs in 1971, or approximately one in twenty-seven.¹⁰¹ By 1998-1999, the number of females participating in sports had increased to 2.6 million, or approximately one in three.¹⁰² However, Title IX regulations assume that males and females will have an equal interest in equivalent sports.¹⁰³ They perpetuate a presumption that men and women will be “equally eager to kick a soccer ball or wield an oar.”¹⁰⁴ However, what if their interests do not match up?

⁹⁶ *Id.* at 1009.

⁹⁷ See David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 232 (2005) (citing the Second, Third, and Seventh Circuits who found the claims were preempted and the Sixth, Eighth, and Tenth Circuits who found the claims were not preempted).

⁹⁸ *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 795 (2009).

⁹⁹ *Id.* at 798.

¹⁰⁰ JESSICA GAVORA, *TILTING THE PLAYING FIELD*, 34 (2002).

¹⁰¹ *Brake*, *supra* note 26, at 15.

¹⁰² *Id.*

¹⁰³ GAVORA, *supra* note 100, at 6.

¹⁰⁴ *Id.*

Some school districts have tried to avoid the issue presented in cross-over cases by arguing that “[i]t makes no difference that there might be a few girls who wish to play football.”¹⁰⁵ Conversely, and perhaps more importantly, courts have disagreed, stating that it does make a difference if even one boy wants to try out for field hockey or one girl wants to try out for football.¹⁰⁶ The crux of the issue presented in cross-over cases originates in the Title IX regulations that permit sex-segregated teams when the sport involved is a “contact sport.”¹⁰⁷ It is important to note that under Title IX, schools get to decide “whether co-educational participation in a contact sport will be permitted.”¹⁰⁸ Moreover, while a school can decide to exclude males or females from contact sports, the regulations do not dictate it. The intersection between the Contact Sports Exemption and the Equal Protection Clause has been one of the most highly litigated aspects of Title IX.¹⁰⁹

Force and Equal Protection Claims

Nichole Force was an athletic eighth grader enrolled in Pierce City Junior High School, a public school in Missouri.¹¹⁰ Force, who had previously played football on her elementary school team, wanted to try out for the school’s seventh grade football team.¹¹¹ Nichole’s mother approached school officials and petitioned the school board for the opportunity for Nichole to go out for the team.¹¹² The school board denied the Forces’ request, citing the potential risk for girls’ safety playing football, the possibility that other girls might try out for the team, the potential for boys wanting to go out for the girls’ volleyball team, and administrative difficulties of allowing a

¹⁰⁵ Lantz *ex rel.* Lantz v. Ambach, 620 F. Supp. 663, 665 (S.D.N.Y. 1985) (quoting Attorney General’s Brief).

¹⁰⁶ *Id.*

¹⁰⁷ Heckman, *supra* note 12, at 563.

¹⁰⁸ Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1025 (W.D. Mo. 1983) (citing Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass’n, 647 F.2d 651, 655-56 (6th Cir. 1981)).

¹⁰⁹ Heckman, *supra* note 12, at 563.

¹¹⁰ Force, 570 F. Supp. at 1021, 1022-23.

¹¹¹ *Id.* at 1022.

¹¹² *Id.* at 1023.

girl to play on a boys' team.¹¹³ After the school board's second meeting, Nichole's mother filed suit for injunctive relief to allow Nichole to try out for the team on the basis of an Equal Protection claim.¹¹⁴

Football is the quintessential "contact sport" typically played by males.¹¹⁵ It involves very strenuous direct contact between players that can be very dangerous, regardless of gender.¹¹⁶ Given the heightened physicality of football as compared with many other sports, it provides a "litmus test" for constitutionality claims as they relate to the Contact Sports Exemption.¹¹⁷ Thus, if sex-segregating a highly dangerous contact sport such as football is found to be unconstitutional, then the same prohibitions in less physical sports such as soccer, baseball, or basketball apply.¹¹⁸ Between 1974 and 1999, courts have reviewed five prominent cases involving the exclusion of girls from football teams based solely on their gender, and in all five cases, the courts have upheld the girls' Equal Protection claims.¹¹⁹

Force held that the school's justification for uniformly excluding all female students from the football team was unconstitutional.¹²⁰ Furthermore, while *Force* was not granted a constitutional "right to try" to play football, the court found that she had the right to try to succeed according to her abilities.¹²¹ The ruling clarified that if the goal of the school offering athletic programs is to maximize educational and athletic opportunities for all students, then it was absurd to deny girls the chance to try out for the eighth grade boys' football team.¹²² The judge in *Force* further articulated that in identifying an important governmental objective to satisfy the intermediate scrutiny test, "Care must be taken in ascertaining

¹¹³ *Id.*

¹¹⁴ *Id.* at 1022.

¹¹⁵ MCDONAGH & PAPPANO, *supra* note 21, at 125.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 128.

¹²⁰ *Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020, 1031-32 (W.D. Mo. 1983).

¹²¹ *Id.* at 1031.

¹²² *Id.* at 1025-28.

whether . . . the objective itself reflects archaic and stereotypic notions. Thus if the . . . objective is to exclude or ‘protect’ members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.”¹²³

Even with the victories under the Equal Protection Clause, there is very little consistency amongst jurisdictions about the rights granted under cross-over claims.¹²⁴ Even within the same jurisdiction, there are inconsistent standards of review for cross-over claims.¹²⁵ Some courts have ruled that it is unconstitutional to deny girls access to try out for boys’ sports teams, and other courts have held that girls must be allowed to play on boys teams whenever they want, regardless of ability.¹²⁶

Safety of Female Students as an Important Governmental Objective

Throughout the jurisprudence of cross-over claims, the most commonly used justification for excluding women from contact sports is to protect them from injury.¹²⁷ In other words, in order to protect female students from getting injured, they must be excluded from playing.¹²⁸ Of note, women’s allegedly inferior biology and subsequent need for protection were also used as justification for excluding women from non-contact sports prior to the passage of Title IX.¹²⁹ In *Force*, the court found that ensuring the safety of the sport for all of the student participants qualified as an important governmental objective.¹³⁰ The judge in *Force* recognized, given physiological considerations, the “typical” 13 year-old-girl might be more prone to injury from football than the “typical” 13 year-old-

¹²³ *Id.* at 1024. (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

¹²⁴ Tracy J. Johnson, Comment, *Throwing Like a Girl: Constitutional Implications of Title IX Regarding Gender Discrimination in High School Athletic Programs*, 18 N. ILL. U. L. REV. 575, 577 (1998).

¹²⁵ *Id.*

¹²⁶ *Id.* at 577-78.

¹²⁷ Sangree, *supra* note 34, at 421.

¹²⁸ *Id.*

¹²⁹ *Id.* at 425.

¹³⁰ *Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020, 1028 (W.D. Mo. 1983).

boy.¹³¹ However, the judge rejected the notion that all 13 year-old-girls, especially Nichole Force, fit within the label of what is “typical.”¹³² The court also pointed out that the school district did not apply the “safety factor” to males.¹³³ While the Supreme Court has yet to address the issue of protecting the safety of women in sports specifically, the highest federal court to hear a case using safety of the participants involved, the First Circuit, held that protecting girls from injury was not a sufficient reason to exclude them from Little League baseball.¹³⁴

Men’s Equal Protection Claims

While women have had great success as plaintiffs for Equal Protection claims, men who bring the same claims in order to try out for a women’s sports team are often rejected.¹³⁵ School districts and other educational institutions have been able to defend exclusionary practices of men based on gender by citing the creation of “sports opportunities for women” as the important governmental objective.¹³⁶ Assertions of biological differences and generalizations about the strength of a typical male versus a typical female are more readily accepted in male Equal Protection cases.¹³⁷ Schools have also been able to successfully argue that given biological differences, men would soon dominate women’s sports teams if they were allowed to try out on a competitive basis.¹³⁸ These defenses to discriminatory policies have been championed by school districts to exclude boys from playing on girls’ field hockey and volleyball teams.¹³⁹

¹³¹ *Id.* at 1028.

¹³² *Id.* at 1028-29.

¹³³ *Id.* at 1029.

¹³⁴ *Fortin v. Darlington Little League, Inc.*, 514 F.2d 344, 350-51 (1st Cir. 1975).

¹³⁵ *Furman*, *supra* note 82, at 1179.

¹³⁶ *Id.*

¹³⁷ B. Glenn George, *Fifty/Fifty: Ending Sex Segregation in School Sports*, 63 OHIO ST. L.J. 1107, 1127 (2002).

¹³⁸ *Id.*

¹³⁹ *See Kleczek ex rel. Kleczek v. R.I. Interscholastic League, Inc.*, 768 F. Supp. 951, 956 (D.R.I. 1991) (upholding a boy’s exclusion from a field hockey team); *Petrie v. Ill. High Sch. Ass’n*, 394 N.E.2d 855, 862 (Ill. App. Ct. 1979) (upholding a boy’s exclusion from a volleyball team).

Title IX and Cross-Over Cases

Taking into account the immense amount of court victories women have garnered in cross-over cases based on Equal Protection claims, assertions based on Title IX are almost never included.¹⁴⁰ However, given the judicially created right to a Title IX private cause of action, some petitioners have opted to include Title IX questions and claims in their law suits.¹⁴¹

Courts have been very clear that the sex-segregation of contact sports provided for in Title IX regulations is discretionary, not mandated. The school district in *Force* attempted to defend their exclusionary regulations based on the practice's conformity with Title IX.¹⁴² The court emphasized that the Contact Sports Exemption is permissive and is not a mandate dictating exclusionary actions and practices.¹⁴³

The Fourth Circuit held that the Title IX Contact Sports Exemption permits the exclusion of women in cross-over cases even when they have demonstrated the athletic ability to compete.¹⁴⁴ Sue Mercer became the first female member of the Duke football team.¹⁴⁵ Despite making the team, participating in practice drills, and being listed on the team roster, Mercer was prevented from attending the team's summer training camp, was not allowed to dress in a uniform for games, and was prohibited from sitting on the team's sidelines during games.¹⁴⁶ The next season, Duke's coach cut Mercer from the team.¹⁴⁷ Mercer alleged that she was cut for the sole reason of her gender because less talented male walk-on kickers were allowed to remain on the team.¹⁴⁸ The Fourth Circuit concluded that the Contact Sports Exemption would have allowed Duke to exclude Mercer from the team, even though she had

¹⁴⁰ See Johnson, *supra* note 124, at 577 (noting that the majority of court rulings are under the Equal Protection Clause).

¹⁴¹ See Lantz *ex rel.* Lantz v. Ambach, 620 F. Supp. 663, 664 (S.D.N.Y. 1985).

¹⁴² Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1024 (W.D. Mo. 1983).

¹⁴³ *Id.* at 1024-25.

¹⁴⁴ See Mercer v. Duke Univ., 190 F.3d 643 (4th Cir. 1999).

¹⁴⁵ *Id.* at 645.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

demonstrated the ability to play.¹⁴⁹ However, once she was allowed to compete on the team, she could no longer be excluded or discriminated against on the basis of gender.¹⁵⁰

Equal Opportunity

A section of Title IX that might be fruitful in cross-over claims litigation is the “Equal Opportunity” subsection which provides, “A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.”¹⁵¹ Despite the fact that the C.F.R. Regulations have been in effect for over 30 years, of the ten Equal Opportunity guidelines,¹⁵² litigation has centered almost exclusively around the first provision which focuses on “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.”¹⁵³ One could argue, taken the guidelines as a whole, that a particular athletic program does not provide an “Equal Opportunity” to members of both genders by denying them access to cross-over sports, even though the regulations say separate teams for separate genders does not necessarily mean the school is noncompliant. However, the regulations imply that schools should offer, at least, equivalent sports teams.

¹⁴⁹ *Id.* at 647-48. The Court stated:

We therefore construe the second sentence of subsection (b) as providing that in non-contact sports, but not in contact sports, covered institutions must allow members of an excluded sex to try out for single-sex teams. Once an institution has allowed a member of one sex to try out for a team operated by the institution for the other sex in a contact sports, subsection (b) is simply no longer applicable, and the institution is subject to the general anti-discrimination provision of subsection (a).

Id.

¹⁵⁰ *Id.*

¹⁵¹ 34 C.F.R. § 106.41(c) (2009).

¹⁵² *See supra* note 41 and accompanying text.

¹⁵³ 34 C.F.R. § 106.41(c)(1); Heckman, *supra* note 12, at 566-67.

Courts Determinations on the Constitutionality of the Contact Sports Exemption

While courts have been keen to grant Equal Protection claims to female athletes, they have been slow to rule that the Contact Sports Exemption is unconstitutional.¹⁵⁴ One of the few cases to question the constitutionality of the Contact Sports Exemption is *Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association*.¹⁵⁵ In stark contrast to most school districts dealing with cross-over cases, Yellow Springs School District encouraged their teams to be coed, deciding that mixed sex teams provide educational advantages over sex-segregated teams.¹⁵⁶ In violation of the Ohio High School Athletic Association's (OHSAA) disallowance of coed teams for contact sports, two girls at Yellow Springs middle school joined the boys' basketball team.¹⁵⁷ However, the girls who made the team were not allowed to participate.¹⁵⁸ If Yellow Springs attempted to recruit girls for the boys' basketball team, they would be prohibited from participating in interscholastic competitions by OHSAA.¹⁵⁹ Fearing compliance with OHSAA's rules would conflict with federal law and put its federal funding in jeopardy, the school district filed a lawsuit.¹⁶⁰

The District Court judge ruled that OHSAA's regulation and the Contact Sports Exemption were unconstitutional and a violation of substantive due process.¹⁶¹ He asserted that exclusion of female students from football robbed them of their personal choice in matters of "education and acquisition of knowledge."¹⁶² The judge acquiesced that sex-segregated teams

¹⁵⁴ George, *supra* note 137, at 1127.

¹⁵⁵ 647 F.2d 651 (6th Cir. 1981).

¹⁵⁶ *Id.* at 652.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 443 F. Supp. 753, 758 (S.D. Ohio 1978) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923)).

are constitutional if they allow for due process concerns.¹⁶³ However, he emphasized the constitutionality of sex-segregated teams cannot be used as an excuse to exclude qualified girls from contact sports teams.¹⁶⁴ Insofar as the Equal Protection Clause, the District Court found that the Title IX regulation's exclusion of girls from football based on gender alone was both unfair and contradictory to the personal rights guaranteed by the Fourteenth Amendment.¹⁶⁵

The Sixth Circuit reversed the District Court alleging that the judge assumed without examination that the OHSAA rule and the Title IX regulation were identical.¹⁶⁶ The court of appeals asserted that the rules of OHSAA do not comply with Title IX.¹⁶⁷ The OHSAA regulation prohibits girls from participating on a boys' team in any contact sport at all levels.¹⁶⁸ Title IX is permissive and flexible on whether or not girls can play on boys' contact sports teams, rather than mandatory.¹⁶⁹ The majority of the court implied that the Title IX regulations are less offensive to the Constitution because they are permissive.¹⁷⁰

Critics of the *Yellow Springs* decision point out that by allowing schools to permissively decide whether or not to sex-segregate allows sports to exist outside of the equality contemplated by the Title IX statute.¹⁷¹ Moreover, institutions that provided cause for the passage of Title IX by discriminating against students on the basis of gender are further allowed to decide how to promulgate policies to further exclude and sex-segregate students on the basis of sex.¹⁷²

Another example comes from a New York case. Because there was no girls' football team at her school, Jacqueline Lantz sued to be allowed to try out for the junior varsity boys'

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 759.

¹⁶⁶ *Yellow Springs*, 647 F.2d at 656.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *See id.*

¹⁷¹ Sangree, *supra* note 34, at 396.

¹⁷² Jamal Greene, *Hands Off Policy: Equal Protection and the Contact Sports Exemption of Title IX*, 11 MICH. J. GENDER & L. 133, 165 (2005).

team.¹⁷³ In addition to her Equal Protection claims, she brought a Title IX claim against the state Department of Education, crying foul over a regulation that provided: “There shall be no mixed competition in the following sports: basketball, boxing, football, ice hockey, rugby and wrestling.”¹⁷⁴ The district court held that not allowing girls to try out for boys’ teams is not a violation of Title IX.¹⁷⁵ However, some legal scholars have criticized the court for not making the next logical step by holding that Title IX regulations per se allow gender to be the basis for excluding girls from sports such as football.¹⁷⁶ Consistent with other female cross-over cases, the court found that the Equal Protection Clause allowed Lantz to try out on the basis of her ability.¹⁷⁷

III. THE GREAT INEFFICIENCY

Regardless of one’s personal views on gender equality in sports, the Contact Sports Exemption does not work properly. If the Equal Protection Clause prohibits denying opportunities to women or men based solely on their gender, then a congressional regulation that perpetuates that discrimination should be struck down by courts or changed.¹⁷⁸ Even though courts have not held that the Regulation is patently unconstitutional, women have an established constitutional right to try out for contact sports teams on the basis of ability—a right that is often neglected by the current formulation of the Title IX regulations.¹⁷⁹

Moreover, forcing federal courts to provide injunctive relief to students denied the right to try out for sports teams based on policies in precise conformity with federal regulations is the height of inefficiency and absurdity.¹⁸⁰ Congress gave HEW an unenviable task when it explicitly delegated the responsibility

¹⁷³ Lantz *ex rel.* Lantz v. Ambach, 620 F. Supp. 663, 664 (S.D.N.Y. 1985).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 665.

¹⁷⁶ Sangree, *supra* note 34, at 395.

¹⁷⁷ Lantz, 620 F. Supp. 2d at 666.

¹⁷⁸ Greene, *supra* note 172, at 163-64.

¹⁷⁹ See *supra* note 145 and accompanying text.

¹⁸⁰ See *generally supra* notes 126-30 and accompanying text.

of balancing Title IX mandated gender equality and the unique challenges athletics programs create.¹⁸¹ It stands to reason that HEW should have also taken into consideration well-established constitutional concepts, such as substantive due process under the Equal Protection Clause. Even if HEW, and subsequently the Department of Education, did not anticipate the constitutional conflict between a regulation allowing sex-segregation in contact sports and Equal Protection Clause claims, they have not amended or even attempted to amend the Regulations since 1975.¹⁸²

Generally speaking, federal courts should not be determining the roster for middle school football tryouts. Case in point, when Force was attempting to join the boys' football team, she wanted to join the seventh grade boys' team.¹⁸³ However, based on delays inherent in federal courts and service of process requirements, the entire seventh grade football season had already passed, and the court was litigating whether or not she should be allowed to try out for the eighth grade team.¹⁸⁴ Taking into consideration the seasonal and immediate nature of sports and athletic tryouts, the long dockets and service of process requirements of federal court is not the most effective way to eradicate gender discrimination in school athletic programs. Furthermore, the judgment of Congress and factual realities dictate that the Department of Education is better equipped to handle cross-over cases than the courts.¹⁸⁵ Title IX is a blanket prohibition on discrimination, and the statute's enforcement mechanisms are adjudicatory in nature.¹⁸⁶ If the Department of Education amended the regulations to be in conformity with the Equal Protection Clause, it would have the ability to informally investigate and address Title IX violations as well as hold administrative hearings.¹⁸⁷ The DOE could also withhold an educational institution's federal funding, providing further

¹⁸¹ Greene, *supra* note 172, at 164.

¹⁸² Brake, *supra* note 26, at 46-47.

¹⁸³ Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1023 (W.D. Mo. 1983).

¹⁸⁴ *Id.*

¹⁸⁵ *See generally* 20 U.S.C. §§ 1681-1688 (2006).

¹⁸⁶ 20 U.S.C. § 1682 (2006); 34 C.F.R. § 106.71 (2009).

¹⁸⁷ 20 U.S.C. § 1682.

incentives for school districts to act in conformity with constitutional principles.¹⁸⁸ Since an amendment to the regulations would not deprive students of their Title IX private causes of action or § 1983 constitutional claims, cross-over claim cases would not be completely removed from federal court.¹⁸⁹

While the present regulations purport to support gender equality, they work more to keep the status quo with regard to contact sports.¹⁹⁰ Title IX's Contact Sports Exemption allows for academic institutions to field coed contact sports teams, but does not require it.¹⁹¹ Upon the promulgation of the regulation, sporting bodies came up with restrictions excluding females from playing contact sports.¹⁹² Because the Contact Sports Exemption explicitly applied to only sports that are typically male dominated (boxing, wrestling, rugby, ice hockey, football, basketball), the Contact Sports Exemption became a hindrance to the educational equality contemplated by Title IX.¹⁹³

IV. PROPOSED SOLUTIONS

When it comes to Title IX, identifying the shortcomings of the Contact Sports Exemption is easy; coming up with reasonable alternatives is more difficult.

The 50/50 Proposal

Championed by Professor B. Glenn George, the 50/50 proposal calls for the complete elimination of sex-segregated sports.¹⁹⁴ In place of separate-but-equal gender segregated teams, Professor George envisions teams being comprised of half males and half females, with playing time split equally

¹⁸⁸ 34 C.F.R. § 100.8(c).

¹⁸⁹ *See generally* Cannon v. Univ. of Chi., 441 U.S. 677 (1979).

¹⁹⁰ Greene, *supra* note 172, at 170.

¹⁹¹ 34 C.F.R. § 106.41(b).

¹⁹² Sangree, *supra* note 34, at 436-37.

¹⁹³ *Id.* at 437.

¹⁹⁴ George, *supra* note 137, at 1145.

between the sexes to ensure equality.¹⁹⁵ The 50/50 proposal is ambitious, to say the least.

While this regime would more than fix the Contact Sports Exemption dilemma, it does not seem to be grounded in a realistic view of American sports culture. Even Professor George's most adamant supporters pre-empt discussions of the 50/50 proposal with the caveat: "[I]t is necessary to understand that the proposal assumes that . . . sports justify [their] placement in an academic institution by having goals other than to simply field the best team."¹⁹⁶ In addition to the proposal not taking into consideration current American sports culture, adherence to it would require an unrealistic administrative effort. To remain in compliance with Professor George's vision of equality, teams would have to field the exact same numbers of males and females, with an administration making certain that every interscholastic team in the country played its males and female players for equal amounts of time.¹⁹⁷

Other problems with the 50/50 proposal include destruction of the sports meritocracy.¹⁹⁸ More skilled players might not make the sports team in order to ensure an equal gender balance. Whereas Equal Protection litigation enables girls to try out for male dominated contact sports teams based on ability, the 50/50 proposal would lead to team membership based on quotas.¹⁹⁹

Completely Separate; Perhaps a Little Less Equal

Professor Deborah Brake also has a radical proposal for addressing the Contact Sports Exemption.²⁰⁰ Professor Brake advocates a rule that would stipulate a school must attempt to cultivate the appropriate interest and resources in a contact

¹⁹⁵ *Id.* The 50/50 proposal not only calls for equal playing time but also equal number of male and female participants on the playing field. *Id.*

¹⁹⁶ Furman, *supra* note 82, at 1188.

¹⁹⁷ *Id.* at 1189.

¹⁹⁸ *Id.* at 1193-94.

¹⁹⁹ *Id.* at 1193.

²⁰⁰ Greene, *supra* note 172, at 169.

sport if just one woman expresses interest in it.²⁰¹ She sees this as an appropriate measure to combat the “interest and ability” barrier, a theory that subscribes to the assumption that women are discriminated against by schools offering programs based on skill level.²⁰² Professor Brake believes that this will subvert the threat to substantive equality caused by programs being offered on the basis of “interest and ability.”²⁰³

As a matter of reality, this proposal’s grant of equal opportunities to participate in separate sports fits more with the current American sports culture. This theory would also eliminate some of the equality problems caused by the Contact Sports Exemption.

However, it would be hard to reconcile this program with principles of formal equality.²⁰⁴ It would require that the amount of sports programs for women be constantly in flux according to passing interest. Further, proving that a school is engaged in good faith efforts to cultivate interest and resources in women’s contact sports teams would be next to impossible. Finally, this proposal would likely add little to any substantive equality between men and women and would perpetuate the stereotype that women need separate sports teams because *all* of them are incapable of competing athletically with men.²⁰⁵

A Formal Equality Approach

A formal equality approach denies that there are any differences between men and women.²⁰⁶ One formal equality theory is assimilation, which is based on the concept that, if given the opportunity, women could compete at the same level as men.²⁰⁷ Under assimilationist approaches, the Contact Sports Exemption and the separate teams allowance from Title IX would be abolished.²⁰⁸ In their place would be a gender-blind

²⁰¹ Brake, *supra* note 26, at 140.

²⁰² Greene, *supra* note 172, at 168-69.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 166-67; *see generally* Furman, *supra* note 82, at 1191 (discussing historical protectionism based on a perceived vulnerability of the female sex).

²⁰⁶ Furman, *supra* note 82, at 1185.

²⁰⁷ *Id.*

²⁰⁸ *See id.*

meritocracy where teams would be fielded from the school's best athletes.²⁰⁹

While formal equality might adhere to the spirit of Title IX legislation, it would significantly reduce the number of females awarded opportunities to play sports over-all.²¹⁰ Justice Stevens articulated an attack on formal equality in sports teams by writing, "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."²¹¹

The Olympic Model

An Olympic model is the antithesis to an assimilationist model. The Olympic model is based on an understanding that men and women have fundamental "differences."²¹² Under the Olympic model, there would be men's and women's teams in every sport and each team would be provided equivalent financial resources.²¹³

While this approach would be acceptable under Title IX and the Equal Protection Clause, it does not account for general differences in preference between genders. This model assumes that there will be enough females interested at every school to play football or ice hockey and that simply might not be the case.

Amendment or Abolishment of the Regulation

Perhaps the most obvious means of addressing the shortcomings of the Contact Sports Exemption is an amendment to the Contact Sports Exemption Clause.

Some legal advocates call for a complete abolishment of the Contact Sports Clause, which would allow for anyone to try out for a sports team based on skill if there was not an equivalent sports team offered for that person's gender.²¹⁴

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *O'Connor v. Bd. of Educ. of Sch. Dist. 23*, 449 U.S. 1301, 1307 (1980).

²¹² *Furman*, *supra* note 82, at 1186.

²¹³ *Id.*

²¹⁴ *Id.* at 1187.

Advocates of this proposal point to the anti-discrimination purpose of the Title IX statute, and the inherent discrimination in segregated-sex sports teams.²¹⁵

An alternative option is to amend the language of the regulation to only allow women to try out based on ability for male dominated contact sports.²¹⁶ This language would reconcile the regulation with many successful Equal Protection claims made by women, while still excluding men from playing sports like volleyball and field hockey. Understanding this solution is not perfect, in this author's opinion, it is the most appropriate.

Realistically, this solution addresses asymmetry of athletic skills, recognizing that males, whether through cultural conditioning or inherent ability, generally have an athletic advantage over females.²¹⁷ Exclusion of males from female-dominated contact sports is necessary to prevent the eradication of women's teams.²¹⁸ This position, adopted indirectly by many federal courts, concedes that if sex-segregation does not exist in sports, boys cannot be prevented from playing every sport, thus eliminating the vast majority of girls' participation.²¹⁹

Moreover, unlike many other proposed solutions it is consistent with the athletic programs that exist in many schools across the United States. Allowing female students to try out for the football team would not require nearly as much of a monetary or administrative adjustment in athletic programs as the 50/50 proposal or Professor Brake's proposal.²²⁰ It would be relatively easy to implement within the existing framework of district rules and regulations.

Furthermore, this amendment is the very least that is necessary to bring the Title IX regulations in conformity with the successful Equal Protection claims in cross-over cases.²²¹ Unfortunately, like the Equal Protection jurisprudence itself,

²¹⁵ *Id.*

²¹⁶ Greene, *supra* note 172, at 169.

²¹⁷ *Id.*

²¹⁸ *Id.* at 151.

²¹⁹ *Id.*

²²⁰ *See supra* notes 193-204 and accompanying text.

²²¹ *See supra* notes 73-92 and accompanying text.

boys who wish to play girl dominated contact sports are prevented from doing so. But, exclusionary practices of boys may be a necessary evil to ensure female participation in athletics.²²²

Those against amendment or abolishment of the Contact Sports Exemption claim that the changes are not sufficient to bring about gender equality.²²³ They claim, at best, that Title IX regulations are an attempt to bring about formal gender equality without substantive equality.²²⁴ In their view, mere abolishment, amendment, or adjustment of the Contact Sports Exception is insufficient.²²⁵ Meanwhile, others are still in opposition to gender equality as defined by Title IX. The same critics of Title IX who supported the Tower Amendment, wanting revenue producing sports exempted from Title IX regulations, and those who put pressure on HEW when drafting Title IX to include the Contact Sports Exemption in the first place, would be opposed to any further adjustments to the regulations.²²⁶

CONCLUSION

When it comes to cross-over cases, the Contact Sports Exemption is constitutionally problematic, at best. Congress passed Title IX in order to eliminate sex discrimination in schools. However, when promulgating the relevant regulations, HEW incorporated gender stereotypes into regulations that were supposed to eliminate gender discrimination in sports. The Contact Sports Exemption supports stereotypes that suggest girls are only interested in playing contact sports traditionally dominated by girls and that boys are only interested in playing sports traditionally dominated by boys. Federal courts have offered some relief, vis-à-vis the

²²² Greene, *supra* note 172, at 151.

²²³ Furman, *supra* note 82, at 1187.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ See generally Aaronberg, *supra* note 17, at 751 (discussing the history of the Tower Amendment); Sangree, *supra* note 34, at 416 (quoting *Sex Discrimination Regulations, Hearings before the House Subcommittee on Post Secondary Education of the Committee on Education and Labor*, 94th Cong. 438-39 (1975) (statement of Caspar W. Weinberger, Sec. of Dept. of Health, Educ. and Welfare).

Fourteenth Amendment, to students victimized by the shortcomings of the Contact Sports Exemption. However, litigating little league football tryout rosters is not the most efficient use of the court's time. Nevertheless, given the amount of time that it takes to litigate a cross-over claim, the sports season in which the student wants to play is often finished before the student can obtain a court order to try out based on ability. Even though the Contact Sports Exemption is permissive, it still allows schools to participate in unconstitutional exclusionary practices based on gender. At the very least, the exemption needs to be amended by the Department of Education to address relevant Equal Protection violations. Furthermore, the DOE needs to provide its adjudicatory framework to informally intervene in Title IX violations to dispense swift administrative relief for students who are interested in playing gender atypical sports and are prevented from doing so based on school or district rules. The DOE also needs to employ its power to deprive federal funding from schools that violate the regulations in order to resolve cross-over cases, as an added incentive for schools and districts to respect their students' constitutional rights. The DOE should take into consideration the regulations' impact not only on girls who want to play sports like football and ice hockey but also boys who want to play sports like field hockey and volleyball.

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