Saint Louis University Law Journal

Volume 67
Number 1 *The Symposium Issue (Fall 2022)*

Article 4

2022

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Recommended Citation
Tracy Turner, *Dismantling the Cage of Binary Sports*, 67 St. Louis U. L.J. (2022).
Available at: https://scholarship.law.slu.edu/lj/vol67/iss1/4

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DISMANTLING THE CAGE OF BINARY SPORTS

TRACY TURNER*

ABSTRACT

This article responds to recent media coverage and legislative action regarding transgender athletes. For every step forward that organizations like the National Collegiate Athletic Association take to improve the wellbeing of transgender athletes, they are met with increasingly vehement objections. Often, these objections take the form of hurtful comments about the bodies, sexuality, and personality of individual athletes. Recently, several state legislatures have enacted "fairness" laws that categorically exclude transgender athletes from female programs. This article considers the relationship between two significant harms perpetuated by sex segregation in athletics: the relegation of female athletes to a second-tier status that caps their potential, and the trauma gender minority athletes experience while trying to fit into a heteronormative structure. Using Equal Protection doctrine, Title VII, and Title IX, the article argues against rigid sex and gender classifications in favor of individualized assessment of merit. The overall goal of the article is to advocate for a system of school athletics defined by inclusion rather than exclusion in which every athlete can find their ideal competitive fit and maximize their athletic excellence, a result that will strengthen the quality of American sport.

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INTRODUCTION

"'The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage.'"[1] The Department of Education (DOE) has unintentionally placed female athletes in such a cage by permitting sex segregated sports programs, which purport to provide a protected space for females to compete free of males but which ultimately trap them in a tier of athletics society assumes to be inferior. At the same time, this system also harms transgender athletes by imposing a binary that does not provide a space for their gender identity. This article explores the connections between these two harms and argues that they are equally unacceptable under Equal Protection doctrine. It proposes replacing the male-female structure with a system of integrated teams (all genders) and underrepresented gender teams (female and nonbinary) in which an individualized assessment of an athlete's best fit, rather than rigid sex categories, guides placement. It seeks to make sports more inclusive and equitable without reducing athletic opportunity for female athletes.

OVERVIEW

As UPenn elite swimmer Lia Thomas's record-breaking 2022 season unfolded, she became the face of controversy over the inclusion of transgender athletes in female sports. As explained by one reporter,

> Thomas's story has . . . become a right-wing obsession, a regular topic of discussion on Fox News. Conservative opinion sites have called her a man and deadnamed her, purposely using the name she went by before transitioning. Her moves have been minutely tracked by the U.K.'s *Daily Mail*, including once with cruel detail about her habits in the women's locker room provided by an anonymous teammate.[2]

Meanwhile, Thomas has explained that her ambition is to show other transgender girls that "they don't have to choose between who they are and the sport they love."[3]

When transgender[4] athletes seek to compete in a manner that matches their gender identity, they often face hateful personal attacks on their bodies,

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1. Brenden v. Indep. Sch. Dist. 742, 477 F.2d 1292, 1297 (8th Cir. 1973) (quoting an unnamed source).

2. Robert Sanchez, *'I Am Lia': The Trans Swimmer Dividing America Tells Her Story*, SPORTS ILLUSTRATED (Mar. 3, 2022), https://www.si.com/.amp/college/2022/03/03/lia-thomas-penn-swimmer-transgender-woman-daily-cover [https://perma.cc/P72Q-K3UU].

3. *Id.*

4. The author uses the term "gender minorities" to refer collectively to intersex athletes, transgender, and nonbinary individuals whose gender identity does not fit into the cisgender female and cisgender male dichotomy. Transgender refers to a gender identity that differs from the sex the individual was assigned at birth. *GLAAD Media Reference Guide 11th Edition, Glossary of Terms: LGBTQ*, https://www.glaad.org/reference/terms [https://perma.cc/2US7-ANUE] (last visited Oct. 14, 2022). Intersex refers to a person with one or more innate sex characteristics, including genitals,

sexuality, and personality.[5] The backlash has become more pronounced in recent years as organizations like the NCAA (college sports) and World Athletics (international competitions) have attempted to make progress on inclusivity.[6] School athletics now appear to be at a fork in the road, with the DOE reexamining Title IX regulations with an eye toward greater inclusivity,[7] while at least seventeen states have recently enacted laws to exclude transgender women from female athletic programs under the guise of "fairness" (hereinafter, collectively, "fairness laws").[8]

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internal reproductive organs, and chromosomes, that fall outside of traditional conceptions of male or female bodies. *Id.* Nonbinary refers to individuals whose gender identity is neither male nor female. *Id.* Cisgender refers to a gender identity that conforms to social norms for the sex assigned to the individual at birth. *GLAAD Media Reference Guide 11 Edition, Glossary of Terms: Transgender*, https://www.glaad.org/reference/trans-terms [https://perma.cc/C6A4-43R7] (last visited Oct. 14, 2022).

5. Intersex athletes have faced similar hostility, as demonstrated by the story of Caster Semenya. *See infra* § III(B).

6. David W. Chen, *Transgender Athletes Face Bans From Girls' Sports in 10 U.S. States*, N.Y. TIMES (May 24, 2022), https://www.nytimes.com/article/transgender-athlete-ban.html [https://perma.cc/2TNP-WY92] (updating the list from ten to eighteen states). The first of these laws was proposed in Idaho in February 2020, Fairness in Women's Sports Act, IDAHO CODE, § 33-6203 (2020), within months of the October 2019 decision by World Athletics to liberalize its rules regarding intersex and transgender athletes competing on women's teams in the Olympics, WORLD ATHLETICS, ELIGIBILITY REGULATIONS FOR TRANSGENDER ATHLETES 1, 5 (2019), https://www.worldathletics.org/download/download?filename=ace036eca21f4a4a9646fb3c40fe80be.pdf&urlslug=C3.5%20%20Eligibility%20Regulations%20Transgender%20Athletes [https://perma.cc/BZP2-P6SE]. The NCAA made similar changes to its policies in 2021. *Board of Governors Updates Transgender Participation Policy*, NCAA MEDIA CTR. (Jan. 19, 2022), https://www.ncaa.org/news/2022/1/19/media-center-board-of-governors-updates-transgender participation-policy.aspx [https://perma.cc/QZK8-B6CG] [hereinafter NCAA 2021 Policy].

7. The DOE has already proposed revisions to nonathletic regulations to clarify that sex discrimination includes gender identity discrimination and has announced an intent to similarly review athletic regulations. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390-01 (July 13, 2022) (to be codified at 34 C.F.R. pt. 106); *see also* Press Release, Dep't of Educ., The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment (June 23, 2022), https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment [https://perma.cc/D5QT-NNB9].

8. H.B. 391, 2021 Reg. Sess. (Ala. 2021); ARIZ. REV. STAT. ANN. §15-120.2 (2022); Fairness in Women's Sports Act, ARK. CODE ANN. § 6-1-107 (2021); Fairness in Women's Sports Act, FLA. STAT. § 1006.205 (2022); Fairness in Women's Sports Act, IDAHO CODE, § 33-6201-6206 (2020); IOWA CODE § 261I.3 (2022); KY. REV. STAT. ANN. §§ 156.070 (2022); S.B. 44, 2022 Reg. Legis. Sess. (La. 2022); S.B. 2536, Reg. Session (Miss. 2021); H.B. 112, 67th Reg. Session (Mont. 2021); Save Women's Sports Act, OKLA. STAT. tit. 70, § 27-106 (2022); Save Women's Sports Act, S.C. CODE ANN. § 59-1-500 (2022); S.B. 46, 97th Legis. Sess. (S.D. 2022); TENN. CODE ANN. § 49-6-310 (2022); TEX. EDUC. CODE § 33.0834 (2021); UTAH CODE ANN. § 53G-6-902 (2022); W.VA. CODE § 18-2-25d (2022); *see also* Chen *supra* note 6 (explaining the timing of these laws in conjunction with liberalization of qualification rules).

The debate is highly charged. On one side, supporters of exclusion fear that biological differences will create unfair advantages for transgender women.[9] The other side focuses on the psychological harm caused by forcing transgender women, whose womanhood is an essential aspect of their identity, to compete as males on male teams.[10] The room for compromise appears to be dwindling. The NCAA and World Athletics have attempted to use hormone levels to measure biological advantage.[11] However, "fairness" advocates are left dissatisfied by this compromise because they believe remaining biological differences in build and body functions still cause unfairness.[12] This belief, in turn, fuels renewed hostility toward transgender athletes.

Participants in this debate often fail to address a fundamental question: why does "fairness" in athletics require protection of female athletes from competition by supposedly superior transgender athletes? The argument that a given athlete is too strong for a particular competition seems antithetical to the nature of sport in American culture.[13]

The exclusion of male-to-female transgender athletes[14] from female competition is based on a binary, segregated view of sports in which women compete against women and men compete against men. Without such a view, the idea that female athletes should be protected against competition by transgender athletes has no mooring. When one starts poking at this concept of binary, sex-segregated sports, a truth emerges. The system supports marginalization of female and gender minority athletes alike. It has roots in a view of masculinity that depends upon differentiation from the presumed weaker female body,[15] a view that is equally incompatible with a female athlete competing against a male as it is with a transgender woman's femininity.

9. *See, e.g.*, Chen, *supra* note 6 (discussing both sides of the debate).

10. *Id.*

11. WORLD ATHLETICS, *supra* note 6, at 17; NCAA 2021 Policy, *supra* note 6.

12. *See, e.g.*, IDAHO CODE, § 33-6201 ¶ 11 (claiming hormone therapy does not erase biological advantage).

13. Our belief in a merit system is suggested by, for example, the common phrase, "May the best man [athlete] win." *May the Best Man Win*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/may-the-best-man-person-win [https://perma.cc/C42E-GLBC] (last visited Oct. 16, 2022).

14. Male-to-female transgender refers to individuals who were identified as male at birth but who identify as female. Some may undergo hormone therapy or surgery to bring their body more in line with their identity. *See* Linell Smith, *Glossary of Transgender Terms*, JOHNS HOPKINS MED. (Nov. 11, 2018), https://www.hopkinsmedicine.org/news/articles/glossary-of-terms-1 [https://perma.cc/L97S-RUEE]. This article does not distinguish between those who seek such treatment and those who do not. However, the article will sometimes refer to hormone therapy and its effects on a transitioning male-to-female individual's body.

15. DEBORAH L. BRAKE, GETTING IN THE GAME: TITLE IX AND THE WOMEN'S SPORTS REVOLUTION 29–30 (2010) (explaining the argument that when women seek to join male teams they "undermine the ability of sports to teach a traditional masculinity that defines manhood by its distance from, and superiority over, femininity").

The tight relationship between male hegemony and American sport culture has been the subject of much scholarly work. Scholars have linked sport culture to violence against women[16] and have portrayed the rise of sport as in part a reaction to feminism.[17] Although women were eventually allowed to participate in athletics, they were kept separated from men for reasons that ranged from paternalistic protection to preservation of ideals of femininity to fear that female teammates would dilute excellence.[18] These were the same rationales that supported exclusion of women from education and the workplace.[19] Strangely, these misogynistic rationales have morphed into a motto of female empowerment. The standard rationale for segregation is now that athletics provide important health and self-confidence benefits to women, and segregation is essential to the success of female athletes.[20] In an even stranger twist, female empowerment has come to mean, in some minds, disempowerment of transgender women based on the belief that female athletes should be able to compete without transgender competition.[21] Given its historical roots in misogynism, segregated sports as a method of empowering women should be

16. *See, e.g.*, MICHAEL A. MESSNER, OUT OF PLAY: CRITICAL ESSAYS ON GENDER AND SPORT 108, 112–13, 117 (2007) (summarizing and connecting multiple examples of scholarship on this topic).

17. *Id.* at 34, 93. On the link between sport and male hegemony more generally, *see id.* at 92–95; Eric Anderson, *"I Used to Think Women Were Weak": Orthodox Masculinity, Gender Segregation, and Sport*, 23 SOCIOLOGICAL FORUM 257, 258 (2008); Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J. L. REFORM 13, 93–99, 102–107 (2000-2001); Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WISC. WOMEN'S L.J. 225, 252 (1995); Karen L. Tokarz, *Separate But Unequal Educational Sports Programs: The Need for a New Theory of Equality*, 1 BERKELEY WOMEN'S L. J. 201, 240 (1985).

18. On the first two concerns, *see* EILEEN MCDONAGH & LAURA PAPPANO, PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS 34, 167–72, 174–80, 183–89 (2008). On the concern about diluting excellence, *see* B. Glenn George, *Fifty/Fifty: Ending Sex Segregation in School Sports*, 63 OHIO ST. L.J. 1107, 1113 n.30 (2002) (quoting NCAA official's assertion that including women would "doom" college athletics).

19. NANCY LEVIT & ROBERT R.M. VERCHICK, FEMINIST LEGAL THEORY: A PRIMER 91–94 (2d ed. 2016); JULIET A. WILLIAMS, THE SEPARATION SOLUTION?: SINGLE-SEX EDUCATION AND THE NEW POLITICS OF GENDER EQUALITY 36–44 (2016). More generally, biological difference has been a common rationale for subjugation of women in other contexts. *See, e.g.*, Judith Lorber, *Using Gender to Undo Gender: A Feminist Degendering Movement*, FEMINIST THEORY 79, 83 (2000) (on the historic use of biological difference to justify gender inequities).

20. *See, e.g.*, Fairness in Women's Sports Act, IDAHO CODE, § 33-6202(12) (2020) (arguing that separate teams are needed to enable female athletes to succeed and thereby gain the benefits of athletics). On the benefits of athletics to women, *see* ADRIENNE N. MILNER & JOMILLS HENRY BRADDOCK II, SEX SEGREGATION IN SPORT: WHY SEPARATE IS NOT EQUAL 28–29 (2016).

21. Will Hobson, *The Fight for the Future of Transgender Athletes*, WASH. POST (Apr. 15, 2021), https://www.washingtonpost.com/sports/2021/04/15/transgender-athletes-womens-sports-title-ix/ [https://perma.cc/K8HB-LXBT].

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closely scrutinized, as should the treatment of transgender athletes as unworthy of the same empowerment.

Prior to the enactment of Title IX in 1972, American athletics was nearly exclusively a male field as was, to a substantial extent, education as a whole.[22] Title IX has made important progress in reducing sex segregation in education.[23] Athletics, however, have been an exception to desegregation. Instead of leaving athletics subject to Title IX's general nondiscrimination provisions, DOE regulations (the "Separate Teams Exception") have endorsed segregation in athletics through a separate-but-equal approach that requires rough proportionality in athletic opportunity but only in the context of separate male and female programs.[24] The Separate Teams Exception responded to a fear that inferior female athletes would "doom" competitive college sports.[25] Whether this concern had merit did not appear to be a subject of debate. Female athletes were too few in number at the time to permit a meaningful analysis of their likely contributions.[26] Steeped as it is in a culturally engrained view of men as superior athletes, the "equal" part of separate-but-equal has been elusive. The molding of Title IX around an assumption of female inferiority in athletics inevitably relegates female programs to second-class status.[27] Female athletes receive less media coverage, less support, and less future opportunities after college.[28] For example, in 2020, men's Division I programs received twice the resources that women's programs received.[29] As Part II will explain, even the most celebrated women's team, the U.S. Women's Soccer Team, struggled to obtain equal pay and resources.[30]

As the 50th year of Title IX comes to a close, it is time to face the glass ceiling that its endorsement of segregated sports imposes. This requires confronting the assumption that female athletes are inferior to male athletes. If it were true that female athletes will always be inferior across all sports and

22. LEVIT & VERCHICK, *supra* note 19, at 119 (stating that before Title IX, only 2% of college athletes were women); WILLIAMS, *supra* note 19, at 36.

23. LEVIT & VERCHICK, *supra* note 19, at 115.

24. 34 C.F.R. § 106.41 (2010). For an explanation of the relevant DOE regulations, *see infra* Part I.

25. George, *supra* note 18, at 1145 n.30. The quote was uttered by an NCAA official at the time that the organization was opposing the inclusion of athletics in Title IX. *Id.*; *see also* MILNER & BRADDOCK II, *supra* note 20, at 17.

26. LEVIT & VERCHICK, *supra* note 19, at 119.

27. *See infra* § II(A) (on inequities between male and female sports programs and the second-class status that segregation creates).

28. *Id.*

29. Associated Press, *A New NCAA Report Shows the Stark Gap in Funding for Women's Sports*, NPR (June 24, 2022), https://www.npr.org/2022/06/24/1107242271/the-ncaa-says-that-funding-for-women-in-college-sports-is-falling-behind [https://perma.cc/NFV7-QSMW]. For more sources on inequities, *see infra* note 72.

30. *See infra* § II(A).

regardless of individual skill, then the current system might make sense. Challenging this assumption is difficult because the DOE's endorsement of segregated athletics[31] has led to an extremely limited opportunity for coed competition. Aside from quidditch,[32] school sports remain divided by sex.[33] Supporters of segregation will often point to performance gaps in sports like sprinting, which they declare to be inevitable due to biological differences.[34] However, it is impossible to know whether such gaps are truly inevitable when female athletes cannot train with or compete against male athletes. Athletes tend to rise to the level of their competitors, so separation of male and female athletes would not push female athletes to narrow the performance gap beyond what is necessary to win female competitions. Moreover, the world of sports is not limited to speed-oriented competition. We have sports like wrestling that use different weight classes to pair up similar physiques, sports like soccer that involve a complex array of skills, and sports like golf in which strategy can overtake strength as the main predictor of success. The breadth of the assumption of female inferiority across so many sports is suspicious.

Despite the barriers to crossover competition that segregation imposes, female athletes have provided evidence to dispute the assumption of female inferiority. Narrow windows for mixing of the sexes are sometimes opened when an individual school decides to permit a female athlete on a male team. Involuntary court-ordered opportunities also occur in an even smaller number of instances. Although courts have avoided deciding whether separate male and female programs are unconstitutional, they have found that an individual female athlete may have an Equal Protection right to be considered for inclusion on an otherwise all-male team, particularly when the school does not offer a female team in the sport at issue.[35] As a result of this limited mixing of the sexes, we do have evidence that female biology is a faulty proxy for athletic capability. Female athletes have shown their ability to compete with and against male athletes, even in sports like football and wrestling that are historically exclusive male domains.[36]

31. Athletics as used here refers to extracurricular sports programs. Physical education classes are required by Title IX to be co-ed and are not, therefore, a subject of this article. *See* 34. C.F.R. § 106.34 (2021).

32. The gender-neutral design of quidditch promotes mutual respect between athletes and erodes the stereotype of female inferiority that segregated sports perpetuates. *See* Adam Cohen et al., *Investigating a Coed Sport's Ability to Encourage Inclusion and Equality*, 28 J. SPORT MGMT. 220, 226 (2014).

33. *Id.* at 221.

34. *See, e.g.*, IDAHO CODE, § 33-6201(8).

35. *See infra* note 171. The extremely minimal mixing of the sexes that this current ability of a female athlete to litigate her way on to a male team permits should not be confused with integration and is grossly inadequate to ensure equal opportunity.

36. *See Att'y Gen. v. Mass. Interscholastic Athletic Ass'n, Inc.*, 393 N.E.2d 284, 293 (Mass. 1979); *see generally infra* note 178.

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We could expect that removing the barriers imposed by sex segregation would further destabilize the assumption of male athlete superiority. This article, however, does not set out to prove that female athletes would achieve equal representation on integrated teams. Rather, it focuses on what equal opportunity should mean. This article joins scholars who have challenged rigid sex segregation in athletics by calling for greater inclusivity for gender minorities in athletics[37] and by criticizing the separate-but-equal approach to athletics endorsed by Title IX.[38] Some have supported a system that ends all-male athletics while retaining opportunity teams for females (hereinafter "one-sided integration model").[39] The one-sided integration model does not seem to address inclusion of gender minorities. Others have argued for the complete invalidation of segregated sports, a change that benefits gender minorities but risks greatly diminishing athletic opportunity for female athletes in selective programs,[40] or have supported continuation of the current more minimalist opening up of male teams to some female athletes through individual lawsuits.[41]

This article bridges the gap in current scholarship between the one-sided integration model and the needs of gender minorities in three main steps. It first explains that biological differences, even assuming their relevance to athletic performance, do not support all-male programs. This step is significant because integrated programs, not labeled as "boys'" or "men's," can enable capable female athletes to rise to the highest level of play at which they can successfully compete while also providing gender minorities with a place to play without denying their gender identity. The article next justifies the retention of a protected space for some athletes as a means to correct for past discrimination under an anti-subordination theory, which courts have accepted as a rationale for affirmative action in the context of sex classifications. This step is significant in its shift away from biological difference as a rationale for protecting females from competition. In a third step, the article argues that gender minorities should not be categorically excluded from protected opportunity teams (referred to

37. Jordan Buckwald, *Outrunning Bias: Unmasking the Justifications for Excluding Non-Binary Athletes in Elite Sport*, 44 HARV. J.L. & GENDER 1, 55 (2021); Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 3 (2011); Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 966–74 (2019).

38. George, *supra* note 18, at 1145; MCDONAGH & PAPPANO, *supra* note 18, at 29; MILNER & BRADDOCK II, *supra* note 20, at 115; Tokarz, *supra* note 17, at 231, 240.

39. MCDONAGH & PAPPANO, *supra* note 18, at 224; MILNER & BRADDOCK II, *supra* note 20, at 118–128; Tokarz, *supra* note 17, at 244.

40. George, *supra* note 18, at 1145; Jennifer E. Powell, *Title IX: Straining Toward an Elusive Goal*, 1 WILLAMETTE SPORTS L. J. 1, 25 (2004); *see also* Nancy Leong, *Against Women's Sports*, 95 WASH. U. L. REV. 1249, 1285–87 (2018) (advocating for integration to the extent consistent with the nature of the sport).

41. Dana Robinson, *A League of Their Own: Do Women Want Sex-Segregated Sports?*, 9 J. CONTEMP. LEGAL ISSUES 321, 350 (1998).

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herein as underrepresented gender teams). Anti-subordination theory supports protection of the victimized group from the dominant group but does not support protection of one victimized group from another victimized group. Because gender minorities have suffered from the male hegemonic underpinnings of segregated sports alongside their cisgender female peers, an affirmative action rationale does not support protecting cisgender female athletes from competition by gender minorities. In the system urged by this article, some cisgender female athletes and some gender minority athletes would prove themselves fit for integrated (no longer all-male) teams while some would find a better fit on underrepresented gender teams. Equal Protection requires an individualized assessment of this fit.

The article also contributes to existing scholarship by exploring how legal doctrine can fill in the space currently occupied by the Separate Teams Exception. Specifically, the article proposes that integration of athletics can be regulated in a manner that adequately ensures opportunities for female and gender minority athletes through the same Title VII principles that have managed sex desegregation of the workplace. While the relationship between Title VII and Title IX has been explored before as a means for preventing discrimination within the existing segregated structure, this article is unique in considering how Title VII principles can alleviate concerns about increased marginalization of female athletes in an integrated structure.[42] For example, the article explores how Title VII principles can be applied to ensure that female athletes are considered for inclusion on integrated teams in a fair manner, that they are treated as equal members of such teams, and that programs do not create artificial barriers to dissuade female athletes from pursuing these opportunities. Similarly, gender minorities can use the same principles to fight against discriminatory exclusion from underrepresented gender teams.

42. Scholarly mention of Title VII's relevance to Title IX has thus far been limited to the employment context, *see* Brake, *supra* note 17, at 129 (noting that Title VII has been applied to Title IX claims brought by coaches as employees of their schools); Kristi L. Schoepfer, *Title VII: An Alternative Remedy for Gender Inequity in Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 107, 108 (2000) (explaining the benefits of Title VII analysis in the Title IX context but limiting her argument to scholarship athletes as employees of their schools), and as a possible way of evaluating claims of unequal resources between segregated programs. Brian A. Snow & William E. Thro, *Still on the Sidelines: Developing the Nondiscrimination Paradigm Under Title IX*, 3 DUKE J. GENDER L. & POL'Y 1, 33–43 (Spring 1996) (arguing for application of Title VII to Title IX claims involving disparities within the segregated Title IX system but not developing an argument for use of Title VII analysis to female athletes excluded from male teams); Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Sex-based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731, 751–56 (2003) (rebutting argument that Title VII principles should apply to Title IX's requirement that women's programs be comparable to men's programs). This article will focus on how Title VII doctrine can ensure equal opportunity for females in integrated programs.

The article also addresses recent changes in the law including on one end, the Supreme Court's holding in *Bostock* that sex discrimination includes transgender discrimination, and on the other end, the new exclusionary state "fairness" laws. Although the validity of the "fairness" laws could be considered a separate legal question, the issue is closely tied to analysis of the DOE's regulations because these laws rely on the same faulty arguments that are typically offered in favor of the DOE's separate-but-equal approach.

The article consists of six parts. Part I explains the Separate Teams Exception and how it came to be. Part II explains the harms caused by sex segregation in sport. Part III explores the relevance of *Brown v. Board of Education*'s analysis of the fallacy of separate-but-equal in the face of structural inequality. Part IV extracts key relevant concepts from Equal Protection doctrine on suspect classifications. Part V uses those principles to argue that the Separate Teams Exception is unconstitutional to the extent it permits separate "boys'" and "men's" teams that exclude capable female athletes. This part argues that separation must be limited to excluding cisgender males from underrepresented gender teams as necessitated by past discrimination. It also addresses the constitutional right of gender minorities to inclusion in underrepresented gender teams and presents the argument against the state "fairness" laws. After focusing mostly on selective programs, this part argues that rationales for segregation in nonselective programs are even weaker. Part VI explains that in the absence of the Separate Teams Exception, Title IX's general nondiscrimination clause can be applied to athletics without adversely affecting female participation or the competitive level of sport by using Title VII principles to regulate desegregation. The article concludes by explaining how the arguments herein can work together to begin the process of desegregation as a practical matter even if the DOE decides to leave the regulations unchanged. The overall goal of the article is to advocate for a system of school athletics defined by inclusion rather than exclusion in which every athlete can find their ideal competitive fit and maximize their athletic excellence, a result that will strengthen rather than weaken the quality of American sport.

I. TRACING SEGREGATION: THE SEPARATE TEAMS EXCEPTION

The Statute. Title IX provides, "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 . . . ."[43] While exceptions are listed, sports programs are not among the exceptions.[44] In fact, proposed amendments to exempt athletic programs were rejected.[45] Nonetheless, after lobbying by revenue-producing

43. 20 U.S.C. § 1681.

44. *Id.*

45. MILNER & BRADDOCK II, *supra* note 20, at 17.

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collegiate sports programs,[46] the Javits Amendment was enacted to delegate authority to the DOE to devise "reasonable provisions" for "intercollegiate athletic activities."[47]

The Regulation. The result of the Javits mandate was 34 CFR §106.41 ("the Regulation").[48] The Regulation begins by reinforcing the general prohibition of discrimination from Title IX: "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" any entity receiving federal financial assistance.[49] However, in subsection (b), entitled "Separate Teams," it creates an exception for "teams . . . based upon competitive skill" and teams involving "a contact sport."[50] With respect to teams based upon competitive skill, the Regulation does require that single-sex teams must allow members of the excluded sex to try-out for the team but only if "athletic opportunities for members of that sex have previously been limited," and contact sports are excluded from this requirement.[51]

At this point, the reader would think that single-sex teams would not comply with Title IX unless they met the competitive skill or contact sport exceptions. However, subsection (c) of the regulation states that "unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section."[52] This implies more generally that separate teams can comply with Title IX.

The Policy Interpretation. The Regulation is then further watered down by a 1979 policy interpretation from the DOE ("the Policy Interpretation"),[53] which

46. George, *supra* note 18, at 1113–14.

47. Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974).

48. MILNER & BRADDOCK II, *supra* note 20, at 17; 34 C.F.R. § 106.41(a)-(b) (2020).

49. *Id.* § 106.41(a).

50. Specifically, the exception provides "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." *Id.* at § 106.41(c).

51. *Id.*:

> [W]here 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.

52. *Id.* at § 106.41(c).

53. U.S. DEPT. OF HEALTH, EDUC. & WELFARE, OFFICE FOR CIVIL RIGHTS, TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, A POLICY INTERPRETATION: TITLE IX AND INTERCOLLEGIATE (1979), https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html [https://perma.cc/T3ZU-9D5C].

expands upon "equal opportunity" in a way that focuses on proportionality and comparability between, specifically, male and female programs.[54] It also states that the Regulation does not require integration of teams.[55] Like the regulation itself, the Policy Interpretation also extends beyond collegiate athletics by stating that "its general principles will often apply to club, intramural, and interscholastic athletic programs."[56]

The result of this messy progression in the DOE's interpretation of Title IX is that the statutory charge to accommodate intercollegiate athletics resulted in a broad regulatory pronouncement that separate-but-equal is sufficient to satisfy Title IX's general nondiscrimination provision.[57] This article refers collectively to the separate-but-equal aspects of the Regulation, including subsections (b) and (c), and the Policy Interpretation, as the Separate Teams Exception. It is worth noting that separate-but-equal does not appear anywhere in Title IX.[58] Instead, it evolved from an administrative process within the DOE. Building on previous scholarly work,[59] this article constructs a thorough challenge to the Separate Teams Exception under the Equal Protection Clause.[60] It then explains how Title VII doctrine can lead application of Title IX's general nondiscrimination provision to begin to create equal opportunity in sport.

54. For example, one criterion is "Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities." *Id.* at C.5.b.1. In addition to proportionality, programs can show compliance through continuing expansion of athletic opportunities for females or by showing they have fully and effectively accommodated female interest in athletics. *Id.* at 5.b.

55. *Id.* at C.4.

56. *Id.* at III.

57. On Title IX indoctrinating a "separate-but-equal" approach to sports, *see* MCDONAGH & PAPPANO, *supra* note 18, at 29; Tokarz, *supra* note 17, at 230. The term "separate-but-equal" is also used to refer to sports in Lucinda M. Finley, *Sex-Blind, Separate But Equal, or Anti-Subordination? The Uneasy Legacy of Plessy v. Ferguson for Sex and Gender Discrimination*, 12 GA. ST. U. L. REV. 1089, 1103 (1996).

58. *See* 20 U.S.C. § 1681.

59. George, *supra* note 18, at 1123–27 (discussing equal protection challenges in the courts); MCDONAGH & PAPPANO, *supra* note 18, at 121–23 (raising the question of whether equal protection doctrine should preclude exclusion of women from male sports); Tokarz, *supra* note 17, at 243 (arguing that excluding women from male sports based on overbroad generalizations is unconstitutional). Additional scholars have questioned the constitutionality of sex-segregated sports without making a firm argument. *See* Jessica Constance Caggiano, *Girls Don't Just Wanna Have Fun: Moving Past Title IX's Contact Sports Exception*, 72 U. PITT. L. REV. 119, 134–35 (2010); MCDONAGH & PAPPANO, *supra* note 18, at 27; Snow & Thro, *supra* note 42, at 29–30. Yet another scholar suggests that while the Equal Protection Clause has placed limits on sex segregation, more is needed. Powell, *supra* note 40, at 10–16.

60. U.S. Const. amend. XIV, § 1.

II. UNDERSTANDING THE PROBLEM WITH SEGREGATED SPORTS

The DOE failed to learn an important lesson of history: separate-but-equal is a myth when it leaves the victims of structural inequity on one side of the divide while leaving the beneficiaries of that inequity on the other side to continue on their merry way.[61] Two examples will be offered here to illustrate the two most problematic aspects of segregated sports: (1) the impossibility of women achieving equal opportunity in sex-segregated sports because of the structural inequities it perpetuates, and (2) the harm to gender minority athletes resulting from its enshrinement of heteronormative biases. The two examples are drawn from professional international sports and are, therefore, at first blush arguably irrelevant to this article's focus on Title IX. However, the ill effects of segregation at the professional, international level are a magnified image of the same effects at the Title IX level. More specifically, the U.S. Women's soccer example illustrates how segregation clouds analysis of equality, and the Caster Semenya example illustrates how segregation enforces the subjugation of gender minorities by imposing a false binary. Both stories will be tied to inequities experienced by athletes in the Title IX context.

A. Segregation Prevents Equality: Lessons from the U.S. Women's National Team in Soccer

In February 2022, the U.S. Women's National Team (WNT) and the United States Soccer Federation reached a landmark settlement that undoubtedly represents a huge step forward for equity in professional sports.[62] However, the story behind this victory reveals the systemic undervaluation of women's athletics created by segregated sports. An outsider would have thought that the 2016 equal pay lawsuit filed by the WNT against the MNT would be a slam dunk given the success of the WNT in winning two World Cup championships[63] compared to the Men's National Team (MNT), which had not even qualified for the FIFA World Cup during the relevant time period.[64] Yet, it took six years to

61. *See, e.g.*, WILLIAMS, *supra* note 19, at 112. *Cf.* Hila Keren, *Can Separate Be Equal?: Intimate Economic Exchange and the Cost of Being Special*, 119 HARV. L. REV. F. 19, 23–24 (2006) (on the inherent problems with a home-market dichotomy given its connection to male hegemony).

62. Rachel Treisman, *The U.S. National Women's Soccer Team Wins $24 Million in Equal Pay Settlement*, NPR (Feb. 22, 2022), https://www.npr.org/2022/02/22/1082272202/women-soccer-contracts-equal-pay-settlement-uswnt [https://perma.cc/S6JJ-KLG8].

63. Opening Brief of Plaintiffs-Appellants at 10–11, Morgan v. U.S. Soccer Fed'n, Inc., 25 F.4th 1102 (9th Cir. 2022) (No. 21-55356) [hereinafter "Opening Brief"].

64. *Id.* at 5.

reach a settlement.[65] The complexities that made the lawsuit challenging to win reflect the second-tier status of women's sports.

In addition to unequal pay, the WNT claimed other discriminatory practices in a wide range of areas such as medical care, training, travel arrangements, accommodations, publicity, and merchandising.[66] While some of these Title VII claims were allowed to proceed, the WNT's Equal Pay Act claim was dismissed by the District Court.[67] The Federation's brief in support of the motion to dismiss contended that the WNT did not require equal skill, effort, and responsibility as the MNT.[68] It also argued that the men's FIFA World Cup was more widely publicized and that men's soccer requires more speed and strength and therefore was a "different world" than women's soccer.[69] It also pointed to the greater revenue potential of the MNT.[70] These are the classic arguments that arise from segregated sports because female athletes cannot prove they are equal to men when they are not permitted to compete against them. Therefore, as seen with the WNT, female athletes can outperform all of their peers and yet still be presumed inferior to male athletes without an opportunity to prove otherwise. This presumed inferiority is offered, as it was in the Federation's brief, as a rationale for lower pay and lesser resources.

The ultimately successful argument by the Federation, however, was different and reveals another layer of complexity when evaluating equity in a segregated system. The court's dismissal focused on the WNT's decision to trade greater pay-per-play bonuses for other benefits such as insurance and guaranteed salary, leading the court to conclude, essentially, that their lower pay was their own fault.[71] From the Federation's perspective, it was hard to see any unfairness. But why would the players make such a seemingly unfavorable tradeoff? The answer could possibly be found in the broader context faced by the women's team. If the MNT had a bad year and lower earnings from the Federation as a result of less games, players could fall back on supplemental income and insurance benefits through their professional club teams, but the history of the equivalent women's club league was plagued by lack of interest and resources and had experienced multiple stops and starts.[72] The unreliability

65. Ivan Moreno, *Women's Soccer Seeks OK For Pay Deal 6 Years In Making*, LAW 360 (Jun. 23, 2022), https://www.law360.com/employment-authority/articles/1546291/women-s-soccer-team-attys-seek-6-6m-of-24m-bias-deal [https://perma.cc/C4TL-SFTR].

66. *Id.* at 9.

67. Morgan v. U.S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635, 656 (C.D. Cal. 2020).

68. Defendant's Memorandum of Points and Authorities in Support of Its Motion for Summary Judgment at 7–14, Morgan v. U. S. Soccer Fed'n, Inc., 445 F. Supp. 3d 635 (C.D. Cal. 2020) (No. 2:19-cv-01717-RGK-AGR) [hereinafter "SJM"].

69. *Id.* at 12–13.

70. *Id.* at 12.

71. *U.S. Soccer Fed'n. Inc.*, 445 F. Supp. 3d at 654–55.

72. *Id.* at 644 (noting 2013 as the inception year for the most recent version of the women's professional club league); Kelly Whiteside, *Women's Pro Soccer League to Debut in U.S. Next*

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of professional women's club soccer would have made guaranteed WNT salary attractive, even if less risk meant less reward. Their "choice" of guaranteed salary and benefits, therefore, may have been more of a necessity created by the second-tier status of women's soccer.

The WNT lawsuit is a compelling story because these players struggled to obtain equality despite their absolute dominance over their competitors. The prospects for many female athletes are much less hopeful. The inability to prove their worth compared to male athletes and the corresponding second-tier status of female athletics begins at the Title IX level. Female student athletes continue to face pervasive, persistent inequities fifty years after the enactment of Title IX.[73]

Year, USA TODAY (Nov. 21, 2012), https://www.usatoday.com/story/sports/soccer/2012/11/21/new-womens-soccer-league-to-debut-next-year/1720343/ [https://perma.cc/D9HB-RK3H] (noting the prior failures of the professional league); *Women's Professional Soccer*, FUN WHILE IT LASTED, https://funwhileitlasted.net/womens-professional-soccer-2009-2011/ [https://perma.cc/Y3XW-5SZE] (last visited Oct. 16, 2022) (explaining that women's professional soccer saw seasons in 2001-2003 and 2009-2011 and attributing both dissolutions of the league to lack of interest and resources); *see also* Andrew Das, *Pay Disparity in U.S. Soccer? It's Complicated*, N.Y. TIMES (Apr. 21, 2016), https://www.nytimes.com/2016/04/22/sports/soccer/usmnt-uswnt-soccer-equal-pay.html [https://perma.cc/B5G7-3XVX] (explaining that players on the men's team had pay security through their professional club teams while the women did not). The lack of a stable professional league was never tied to the WNT's negotiating decisions by the parties or the court. As an external factor, it would not have been relevant to the Equal Pay claim. However, it seems likely that the WNT would not have needed health insurance, for example, or guaranteed salary if it could have relied on obtaining both through external play as did the men. As the court did emphasize, it was for these benefits that the WNT eventually traded in their initial request for equal pay-per-play bonuses. *Morgan v. U.S. Soccer Fed'n. Inc.*, 445 F. Supp. 3d at 654–55. Although the professional league was active in 2016-2017 when the WNT was negotiating for a new agreement, its most recent reincarnation was only a few years old at that point. Players may not have wanted to rely on the new league "trying to create an economic model that is sustainable." Whiteside, *supra* note 72.

73. Erin E. Buzuvis, *Attorney General v. MIAA at Forty Years: A Critical Examination of Gender Segregation in High School Athletics in Massachusetts*, 25 TEX. J. ON C.L. & C.R. 1, 9 (2019); Brake, *supra* note 17, at 73–82; HEATH FOGG DAVIS, BEYOND TRANS: DOES GENDER MATTER? 114–15 (2017); MILNER & BRADDOCK II, *supra* note 20, at 41; Schoepfer, *supra* note 42, at 111–16; Snow & Thro, *supra* note 42, at 26–28; Karen L. Tokarz, *supra* note 17, at 230–233; *see also generally*, KAPLAN, HECKER & FINK LLP, NCAA EXTERNAL GENDER EQUITY REVIEW, PHASE I: BASKETBALL CHAMPIONSHIPS (Aug. 2, 2021), https://kaplanhecker.app.box.com/s/6fpd51gxk9ki78f8vbhqcqh0b0o95oxq [https://perma.cc/Y5W2-9X43], and PHASE II (Oct. 25, 2021), https://kaplanhecker.app.box.com/s/y17pvxpap8lotzqajjan9vyye6zx8tmz [https://perma.cc/2DE2-EN7D] (extensive report on structural inequities in collegiate athletics). Eileen McDonagh and Laura Pappano summarized the problem well: "[I]t has been drilled into our heads that female athletes are not as good as male athletes, that female sports are less interesting, that female sporting events are less worthy of promotion or public interest." MCDONAGH & PAPPANO, *supra* note 18, at 3.

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Despite Title IX's commitment to examining particular markers of equity between male and female sports,[74] its allowance of sex segregation has perpetuated male dominance by trapping female athletes in a separate tier that is treated as inferior.[75] Were integrated competition available, qualified female athletes could escape the second-tier status imposed by segregation. The viability of this alternative is discussed in Parts IV and V.

B. *Segregation Breeds Exclusion: Lessons from Caster Semenya's Career and Lawsuit*

In 2009, after a two-second victory over her closest competitors,[76] Olympic athlete Caster Semenya found herself at the heart of controversy over the participation of intersex athletes in women's sports.[77] Raised as female from birth, her sex classification was continually challenged because many considered her body more masculine than feminine.[78] At the young age of 18, she had already been subjected to a two-hour pre-race examination of her genitalia including visual inspection and photographing and had become used to heading to the bathroom with competitors to prove her sex.[79] Additional sex-verification tests followed her 2009 victory,[80] and the International Association of Athletics Federation (IAAF) ultimately found that to qualify to compete in her event, she had to take testosterone suppressants.[81] She complied, resulting in weight gain, fevers, abdominal pain and "constant nausea," emotional

74. 34 C.F.R. § 106.41(c) (listing factors such as facilities, coaching, practice time, and publicity as having relevance to equal opportunity in school athletics).

75. *See id.*; Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 376 n. 63 (2004) (arguing that overemphasis on sex differences has perpetuated male hegemony); MILNER & BRADDOCK II, *supra* note 20, at 106 (explaining that segregation provides the rationale for unequal pay and perpetuates inequities by limiting the incentives for women to participate in high-level athletic competition), 110 (explaining that segregation has led the media to construct false narratives of female inferiority), and 113–15 (noting the important role that racial desegregation played in improving racial attitudes and using results from a survey of school athletes to show that sex integration improves attitudes toward female athletes).

76. JOANNA HARPER, SPORTING GENDER: THE HISTORY, SCIENCE, AND STORIES OF TRANSGENDER AND INTERSEX ATHLETES 107 (2020).

77. Semenya has not confirmed that she is intersex. Melissa Block, *The Sensitive Question of Intersex Athletes,* NPR (Aug. 16, 2016), https://www.npr.org/sections/thetorch/2016/08/16/490236620/south-african-star-raises-sensitive-questions-about-intersex-athletes [https://perma.cc/ZD8G-AQMH].

78. HARPER, *supra* note 76, at 106–07.

79. DAVIS, *supra* note 73, at 111–12; Arbitral Award at ¶ 74, *Semenya v. Int'l Ass'n of Athletics Fed'ns*, Ct. of Arb. for Sport (2019), https://www.sportsintegrityinitiative.com/wp-content/uploads/2019/07/Award-5794-final-with-redactions-for-publication-compressed.pdf [https://perma.cc/TV2Q-X4U9].

80. Arbitral Award, *supra* note 79, at ¶ 75.

81. *Id.* at ¶ 77.

distress, and ultimately less success in her field.[82] Although she remained highly competitive, she did not return to her prior level of success until 2015 when hormone qualification rules were relaxed due to a challenge brought by another athlete, Dutee Chand.[83] Now free of medication, in 2016, she became the first woman to win all three of the 400 m, 800 m, and 1500 m titles at the South African National Championship, and she took home a gold medal in the 800 m at the 2016 Rio de Janeiro Olympics.[84] By 2019, the IAFF (now renamed World Athletics) put hormone qualification rules back in place for races of 400 meters to one mile.[85] Given her difficult experience with medication in the past, Semenya decided not to comply this time and instead launched a challenge to the new rules.[86] During the long course of the legal challenge, which was eventually unsuccessful, she had to switch from the events she had trained for throughout her career into longer races that were not subject to the most recent version of the hormone qualification rules.[87] She unsuccessfully attempted to qualify for the 5,000 meter race at the 2020 Tokyo Olympics.[88] The decade of public scrutiny over her body caused Semenya "immense pain and suffering" that "drained" her love of the sport.[89] As she explained to the IAAF, she felt her ordeal was not just about her ability to participate in the sport to which she had devoted her life but also about her "right to be human."[90] Since Semenya's exclusion from the 2020 Olympics, a representative of the International Olympic Committee has expressed uncertainty regarding hormone qualification

82. *Id.* at ¶ 78–79.

83. *Id.* at ¶ 80.

84. *Id.*

85. IAAF HEALTH & SCIENCES DEPT., ELIGIBILITY REGULATIONS FOR THE FEMALE CLASSIFICATION (ATHLETES WITH DIFFERENCES OF SEX DEVELOPMENT) EXPLANATORY NOTES/Q&A at 3–4 (May 1, 2019), https://www.worldathletics.org/download/download?filename =b6f96abb-91fb-40c1-8fbb-82375efa75f7.pdf&urlslug=Explanatory%20Notes%3A%20IAAF% 20Eligibility%20Regulations%20for%20the%20Female%20Classification [https://perma.cc/9W 52-2ZYR].

86. Melissa Block, *Olympic Runner Caster Semenya Wants To Compete, Not Defend Her Womanhood*, NPR (July 28, 2021), https://www.npr.org/sections/tokyo-olympics-live-updates /2021/07/28/1021503989/women-runners-testosterone-olympics [https://perma.cc/P8AA-42NP].

87. Associated Press, *Caster Semenya Pins Olympic Hopes on 5,000 Meters, Plans to Stick to Longer Distances*, ESPN (Apr. 15, 2021), https://www.espn.com/olympics/trackandfield/story/_ /id/31261460/caster-semenya-pins-olympic-hopes-5000-meters-plans-stick-longer-distances?plat form=amp [https://perma.cc/R38S-XDQP].

88. Reuters, *Caster Semenya's Tokyo Bid Ends as Qualifying Deadline Passes*, CNN (July 1, 2021), https://www.cnn.com/2021/07/01/sport/caster-semenya-tokyo-bid-ends-spt-intl /index.html [https://perma.cc/2C4H-B5XV].

89. Arbitral Award, *supra* note 79, at ¶¶ 73, 76.

90. *Id.* at ¶ 82.

requirements,[91] but new guidelines still permit such requirements on a sport-specific basis.[92]

Numerous intersex, transgender, and nonbinary student athletes have endured similar trauma in their sports careers.[93] Most recently, college swimmer Lia Thomas came under heavy criticism after she completed the NCAA's required one year of hormone replacement therapy and transitioned from UPenn's male team to its female team.[94] Thomas found the courage to take the required medication, despite the risk to her athletic career, only to be greeted by public attacks after her post-transition success in the pool.[95] Like the exclusion of women from male sports, the attacks on intersex and gender minority athletes is a symptom of their subordination, in this case by what one scholar has deemed a "gender caste system" in which a heteronormative standard relegates transgender and nonbinary individuals to an "untouchable" status.[96] This is evident from the cruel treatment they receive by fellow athletes and the public[97] and the double standard to which they are often held under which if they perform too well, they are cheating, and if they underperform, they must be purposefully holding back to shift away suspicion.[98] By embracing the categorization of sex as binary[99] and permitting the organization of sport around a flawed male/female

91. Sean Ingle, *IOC Admits Guidelines for Transgender Athletes are Not Fit for Purpose*, GUARDIAN (July 30, 2021), https://www.theguardian.com/sport/2021/jul/30/ioc-admits-guidelines-for-transgender-athletes-are-not-fit-for-purpose [https://perma.cc/DH6A-YDJ6].

92. INTERNATIONAL OLYMPIC COMMITTEE, IOC FRAMEWORK ON FAIRNESS, INCLUSION, AND NONDISCRIMINATION ON THE BASIS OF GENDER IDENTITY AND SEX VARIATIONS § 4.1, https://stillmed.olympics.com/media/Documents/News/2021/11/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf?ga=2.262911244.1471022538.1650848730-1108970423.1650848730 [https://perma.cc/T4XC-7D2M].

93. Buzuvis, *supra* note 37, at 16–20; Clarke, *supra* note 37, at 968; HARPER, *supra* note 76, at 59, 71, 79, 94–96, 101, 116–19, 121, 123, 125, 142, 144–51.

94. Sanchez, *supra* note 2.

95. *Id.*

96. Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 L. & SEXUALITY 123, 125–26 (2001); *see also* Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J. L. REFORM 718, 718 (2010) (using the term "unnatural outcasts" rather than "untouchable").

97. *See, e.g.*, Arbitral Award, *supra* note 79, at ¶ 89; Jeffrey O. Segrave, *Challenging the Gender Binary: The Fictive and Real World of Quidditch*, 19 SPORT IN SOC'Y 1299, 1300 (2016); Clarke, *supra* note 37, at 968; DAVIS, *supra* note 73, at 112; James Factora*, Fear of Harassment Is Forcing LGBTQ+ Youth Out of Sports, Study Finds,* THEM (Sept. 16, 2021), https://www.them.us/story/majority-lgbtq-youth-dont-play-sports-fear-harassment [https://perma.cc/CQ9C-RMWQ]; Raiya Taha-Thomure, *Gender-Based Violence: Testimonies from Trans* Athletes in North America*, LGBTQ HISTORY DIGIT. COLLABORATORY (Apr. 15, 2022), https://lgbtqdigitalcollaboratory.org/gender-based-violence-trans-athletes/ [https://perma.cc/M3HN-FY9D].

98. Arbitral Award, *supra* note 79, at ¶ 85; HARPER, *supra* note 76, at 59.

99. *See infra* Part I for discussion of how Title IX evolved to promote sex segregation in sport.

sex divide,[100] the DOE perpetuates discrimination and harassment of this population.[101] The recent state "fairness" laws further codify the male/female divide and emphasize the supposed needs of female athletes to protection from competition without any consideration of the needs of gender minorities.[102] As Thomas expressed, trans athletes just want to compete without being forced to choose between "who they are and the sport they love."[103] Rigid binary classifications make this impossible, leaving athletes with the psychological harm that denying their identity causes.[104]

C. The Interrelated Nature of Subordination of Females and Gender Minorities in Segregated Sports

The inequities suffered by females and gender minorities due to the segregation of sports are interconnected, and it would be a mistake to treat them as separate problems. The hatred launched at gender minorities and the presumption of inferiority of female athletes are two threads from the same source: the image of the physically superior, masculine male athlete and the accompanying ideal of the slender, not-too-muscular, preferably physically attractive female athlete.[105] Cisgender female and gender minority athletes are fighting the same battle against these stereotypes.

100. On the flaws of the male v. female sex classification in light of the biological continuum of sex characteristics, *see* Buckwald, *supra* note 37, at 4 n. 12; Julie A. Greenberg, *Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience*, 39 SAN DIEGO L. REV. 917, 920 n.10 (2002) (citing cases that have grappled with the lack of clarity around sex characteristics); HARPER, *supra* note 76, at 19 (calling the male v. female divide "fantasy"); Leong, *supra* note 40, at 1262–63; MCDONAGH & PAPPANO, *supra* note 18, at 46; McGinley, *supra* note 96, at 718; MILNER & BRADDOCK II, *supra* note 20, at 54. On the continuum of gender identity, *see* Buckwald, *supra* note 37, at 4 n.13; Clarke, *supra* note 37, at 905–10; Weiss, *supra* note 96, at 126.

101. *See* MILNER & BRADDOCK II, *supra* note 20, at 96 (arguing integration could reduce discrimination against LGBTQ+ athletes).

102. For a list of these laws, *see supra* note 8.

103. Sanchez, *supra* note 2.

104. Nicole Legate, Richard M. Ryan & Netta Weinstein, *Is Coming Out Always a "Good Thing?" Exploring the Relations of Autonomy Support, Outness, and Wellness for Lesbian, Gay, and Bisexual Individuals*, 3 SOC. PSYCH. & PERSONALITY SCI. 145, 146, 150 (2012) (concluding that revealing sexual identity promotes wellness in supportive contexts); Weiss, *supra* note 96, at 141 (on the debilitating effects of being forced to present as a member of a sex with which a person does not identify).

105. Eric Anderson, *Updating the Outcome: Gay Athletes, Straight Teams, and Coming Out in Educationally Based Sport Teams*, 25 GENDER & SOC'Y 250, 250–51 (2011); MCDONAGH & PAPPANO, *supra* note 18, at 169–71, 187–89; MESSNER, *supra* note 16, 40–42; Todd Crosset, *Masculinity, Sexuality, and the Development of Early Modern Sport,* SPORT, MEN, AND THE GENDER ORDER 51–53 (Michael A. Messner & Donald F. Sabo eds., 1990); *see also* Title IX's Legacy for College Athletics, Chron. of Higher Educ. 6 (2022), https://connect.chronicle.com/CHE-CI-WC-2022-TitleIX-KeyTakeaways-TIAA_Landing-Page.html [https://perma.cc/NQ33-NVC6] (quoting professor of sports media at Ithaca College as stating that anyone who thinks that

Yet, the segregated approach to athletics seems to have created an entitlement felt by some female athletes for protection against competition by intersex and transgender athletes who have different physiques than the average female.[106] This desire for a protected all-cisgender-female sphere, combined with animus toward nontraditional gender identities,[107] has led to the marginalization of gender minorities. A shameful history of sex verification has ranged from, in the early days, requiring athletes to parade naked in front of sports officials to have their genitalia inspected,[108] to more recently, requiring hormone replacement therapy that can have the difficult side effects experienced by Semenya.[109] Notably, the state "fairness" laws are aimed at undoing even the slight progress that has been made toward treating gender minorities more humanely.[110] Many of these state laws do not address how sex is to be determined, presumably leaving athletes with the sex indicated on their birth certificates.[111] One state's law reintroduces physical inspection as a means of

exclusionary policies are "just about [the] less-than 1 percent" of athletes who are transgender is "missing the point" because these policies are supported by "the very same arguments" that have "trapped women forever").

106. *Olympian Erika Brown: 'We Cannot Allow Transgender Females to Compete Against Biological Women,'* SWIMMING WORLD MAG. (Dec. 29, 2021), https://www.swimmingworldmagazine.com/news/olympian-erika-brown-we-cannot-allow-transgender-females-to-compete-against-biological-women/ [https://perma.cc/PX3Q-5JP2] (quoting female Olympian on Lia Thomas); Katie Barnes, *Amid Protests, Penn Swimmer Lia Thomas Becomes First Known Transgender Athlete to Win Division I National Championship*, ESPN (Mar. 17, 2022) (quoting concerns that transgender swimmer's participation was unfair). *But see,* Dave Zirin, *How Sports Have Been Used to Attack Trans People*, NATION (Feb. 28, 2022) (interviewing Olympian Chris Mosier in response to the fairness argument), https://www.thenation.com/article/society/interview-chris-mosier/ [https://perma.cc/S8JM-P3CW].

107. For specific stories, *see* Sanchez, *supra* note 2; DAVIS, *supra* note 73, at 111–13; *Trans Athletes Face Hate Speech On and Off the Field*, YLE NEWS (May 11, 2021), https://yle.fi/news/3-12176268 [https://perma.cc/8FGH-7AGE]. For a general discussion, *see* Buckwald, *supra* note 37, at 33–47 (arguing that the fairness argument is a cover for discriminatory motives).

108. Buckwald, *supra* note 37, at 14–25; Erin E. Buzuvis, *Hormone Check: Critique on Olympic Rules on Sex and Gender*, 31(1) WIS. J. LAW, GENDER, & SOC. 30–39 (2016).

109. The International Olympics Committee, the International Association of Athletics Federations (now World Athletics), and the NCAA have made moderate changes to their sex qualification rules to focus on hormone levels rather than genitalia. Frankie de la Cretaz, *The IOC Has a New Trans-Inclusion Framework, But Is the Damage Already Done?*, SPORTS ILLUSTRATED (Mar. 23, 2022), https://www.si.com/olympics/2022/03/23/transgender-athletes-testosterone-policies-ioc-framework [https://perma.cc/6RHN-FU4A]; WORLD ATHLETICS, *supra* note 6; NCAA Policy, *supra* note 6. Regarding the effects of hormone treatment, *see supra* § II(B) (the Caster Semenya story).

110. *See supra* note 6 regarding the timing of the fairness laws compared to changes in NCAA and World Athletics policies.

111. H.B. 391, Reg. Sess. (Ala. 2021); ARIZ. REV. STAT. ANN. §15-120.02 (2022); Fairness in Women's Sports Act, ARK. CODE ANN. § 6-1-107 (2021); KY. REV. STAT. ANN. §§ 156.070, 164 (2022); S.B. 2536, Reg. Session (Miss. 2021); H.B. 112, 67th Reg. Session (Mont. 2021); UTAH CODE ANN. § 53G-6-901-903 (2022); W.Va. CODE § 18-2-25d (2022). Most of the remaining

sex verification.[112] Physical inspection, presumably of genitalia, has been thoroughly rejected at the elite levels of sport as an illegitimate means of sex classification in light of the complete lack of any scientific relationship between genitalia and athletic performance.[113]

Because segregation is harming both cisgender females and gender minorities, the case for desegregation must be mindful of the interconnections and must propose solutions that ensure equal opportunity for all athletes. This article argues that for women to have uncapped equal opportunity in sport, the overly broad and generalized assumption underlying segregation that females are inherently inferior to males must be discarded. By the same logic, so too must we discard the equally faulty assumption that transgender women and intersex athletes are inherently superior to females. It makes no sense to reject one assumption and leave the other in place. Moreover, any normative argument for equal opportunity for cisgender females must not abandon equal opportunity for gender minorities. The article will return to these important connections when it argues for retention of underrepresented gender teams open to both cisgender females and gender minorities.[114]

III. UNDERSTANDING THE CONSTITUTIONAL FLAWS OF SEPARATE-BUT-EQUAL IN THE CONTEXT OF MALE HEGEMONY IN SPORT

The most analogous situation to the Separate Teams Exception's endorsement of sex segregation in sport is the government's endorsement of separate-but-equal in public education prior to *Brown v. Board of Education*.[115] In finding separate-but-equal violated the Equal Protection Clause, the Court in

statutes require proof of sex at birth through an original birth certificate. Fairness in Women's Sports Act, FLA. STAT. ANN. § 1006.205 (2021); IOWA CODE §§ 261l.1-.2 (2022); S.B. 44, Reg. Legis. Sess. (La. 2022); Save Women's Sports Act, OKLA. STAT. tit. 70, § 27-106 (2022); Save Women's Sports Act, S.C. CODE ANN. § 59-1-500 (2022); S.B. 46, 97th Legis. Assemb., Reg. Sess. (S.D. 2022); TENN. CODE ANN. § 49-6-310 (2022), and S.B. 2153, 112th Gen. Assemb. (Tenn. 2022); TEX. EDUC. CODE § 33.0834 (2021).

112. Fairness in Women's Sports Act, IDAHO CODE, § 33-6201-6206 (2020).

113. DAVIS, *supra* note 73, at 121 (on the irrelevance of genitalia); Jason Scott, *IOC Announces New Policies for Transgender Athletes*, ATHLETIC BUSINESS (Jan. 28, 2016), https://www.athleticbusiness.com/operations/legal/article/15147371/ioc-announces-new-policies-for-transgender-athletes [https://perma.cc/WTL8-ZGW3] (reporting on the IOC's conclusion that sex anatomy is irrelevant to fair competition). The NCAA also adjusted its policies to disconnect eligibility from sex change surgery. *See* NCAA OFFICE OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 13 (Aug. 2011), https://www.transathlete.com/_files/ugd/2bc3fc_4a135824fabc462183c71357c93a99b4.pdf [https://perma.cc/TQ9S-YZNF] (dropping surgery as a criterion for transgender female athletes to compete in female competitions); Buzuvis, *supra* note 37, at 24 (explaining that in the pre-2011 NCAA policy, eligibility depended upon the sex indicated on the athlete's state-issued license, which, in some states, would require surgery before the individual could change their sex identification).

114. *See infra* § V(C)(2).

115. 347 U.S. 483 (1954).

Brown assumed that black and white schools were equal, or were "being equalized," in terms of tangible factors like teacher salaries, curricula, and facilities.[116] Nonetheless, the Court found that the exclusion of black children from white schools "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."[117] It concluded that in the context of public education, separate was inherently unequal and segregation deprived black children of equal protection under the law.[118] Although not a part of the Court's reasoning, the School Board's claim of equal resources seems doubtful given the pervasive inequalities at the time.[119]

Though the subjugation of women does not match the legacy of slavery in America, women have been dehumanized by, for example, being denied the right to vote and being treated as, essentially, the property of their husbands.[120] They have also been purposefully inhibited from financial independence and subjected to violence.[121] More specifically, segregation in sport has been linked by scholars to a desire to protect male hegemony.[122] Accordingly, the message that sex segregation in sport sends about the inferiority of the "weaker sex" connects to a history of repression in a manner that can perpetuate male dominance in the minds of members of both sexes.[123] In addition, inequity

116. *Id.* at 492–93.

117. *Id.* at 494.

118. *Id.* at 495.

119. *See* Stacy Hawkins, *Reverse Integration: Centering HBCUs in the Fight for Educational Equality*, 24 U. PA. J.L. & SOC. CHANGE 351, 386 (2021).

120. *See* Frontiero v. Richardson, 411 U.S. 677, 685 (1973) (comparing the status to women to that of slaves); Joseph Warren, *Husband's Right to Wife's Services*, 38 HARV. L. REV. 421 (1925) (covering laws that treated women as mere extensions of their husbands).

121. Brake, *supra* note 17, at 102 (on sexual violence in the culture of sport); LEVIT & VERCHICK, *supra* note 19, at 52 (on economic controls), 67 (on sexual harassment), 75 (on segregation within the market), 192–93 (on violence against women); MCDONAGH & PAPPANO, *supra* note 18, at 33 (on isolation of women from the public sphere); MILNER & BRADDOCK II, *supra* note 20, at 2; Tokarz, *supra* note 17, at 239 (on the link between femininity stereotypes and violence against women).

122. MESSNER, *supra* note 16, at 34–38. On the link between sport and male hegemony more generally, *see id.* at 92–95, 134; Anderson, *supra* note 17, at 257–58; Brake, *supra* note 17, at 26–30, 93–107; Thornburg, *supra* note 17, at 252; Tokarz, *supra* note 17, at 240.

123. *See* Michael Messner, *Gender Ideologies, Youth Sports, and the Production of Soft Essentialism*, 28 SOCIOLOGY SPORT J. 151, 157 (2011) (asserting that Title IX's segregation of sport has "valorized" sex differences). Integration of sports, by comparison, has potential to improve gender relations by fostering mutual respect and teamwork. *Id.* at 167; *see also* Alex Channon et al., *Introduction, in* SEX INTEGRATION IN SPORT & PHYSICAL CULTURE: PROMISES & PITFALLS 3 (2017); Janet S. Fink et al., *Challenging the Gender Binary? Male Basketball Practice Players' Views of Female Athletes and Women's Sports*, *in* SEX INTEGRATION IN SPORT AND PHYSICAL CULTURE: PROMISES AND PITFALLS at 212–13; Barbara Humberstone, *Warriors or Wimps? Creating Alternative Forms of Physical Education*, *in* SPORT, MEN, AND THE GENDER ORDER, *supra* note 105, at 203–10; Chloe Maclean, *Friendships Worth Fighting For: Bonds*

persists for female sports despite Title IX's efforts at achieving the equal part of separate-but-equal.[124] *Brown* thus stands for two important points applicable to sex segregation in sport. First, separate will never be equal when segregation perpetuates dominance because dominance leads to inequitable distribution of resources, and second, regardless of inequity in resources, separation is in and of itself a harm when it sends a message of inferiority to a group that has suffered a history of repression.

IV. IDENTIFYING KEY PRINCIPLES OF INTERMEDIATE SCRUTINY FROM EQUAL PROTECTION DOCTRINE ON SEX-BASED CLASSIFICATIONS

Despite its relevance to the issue, *Brown* has never been extended to sex segregation in athletics or even in education generally. Instead, Equal Protection challenges to sex-based classifications are resolved through intermediate scrutiny, which requires that distinguishing between the sexes is "substantially related" to an "important governmental objective[]."[125] This requires more than a "rational basis" and less than a "compelling state interest," and more than "reasonably related" and less than "narrowly tailored."[126] Courts have alternatively described intermediate scrutiny as requiring that a sex classification must serve an "exceedingly persuasive justification."[127]

Gender Minorities and Sex-Based Classifications. As an initial matter, although not definitive yet, it seems likely that courts will treat sex-based classifications the same regardless of whether the individual asserting a violation of the Equal Protection Clause was discriminated against as a cisgender male or female or as a transgender, intersex, or nonbinary individual. The key Supreme Court case is *Bostock v. Clayton*.[128] This case involved Title VII claims against employers for discriminating against gay and transgender employees.[129] Interpreting the language "because of sex" in Title VII, the Court found, "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."[130] The Court later stated its conclusion more

Between Women and Men Karate Practitioners as Sites for Deconstructing Gender Inequality, *in* SEX INTEGRATION IN SPORT AND PHYSICAL CULTURE: PROMISES AND PITFALLS at 267–68; MCDONAGH & PAPPANO, *supra* note 18, at 150; Segrave, *supra* note 97, at 198.

124. *See supra* note 73 (on inequitable resources).

125. Craig v. Boren, 429 U.S. 190, 197 (1976).

126. *See* Purvi Patel, *Equal Protection*, 8 GEO. J. GENDER & L. 145, 148–53 (2007) (describing the three tiers).

127. Univ. of Miss. for Women v. Hogan, 458 U.S. 718, 724 (1982); *accord* United States v. Virginia (*VMI*), 518 U.S. 515, 531 (1996).

128. *See* Bostock v. Clayton Cnty, 140 S. Ct. 1731 (2020).

129. *Id.* at 1731.

130. *Id.* at 1737.

broadly, "It is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[131] The Court rejected the employers' argument that they had not engaged in sex discrimination because their conduct showed no animus toward men or women.[132] The Court explained that "the statute focuses on discrimination against individuals, not groups."[133] The Court's decision did not appear to rest on any particularities of Title VII or its history other than the language "because of sex."[134] Although the Equal Protection Clause does not share this language, providing instead that no citizen can be denied "equal protection of the laws,"[135] it has been found to limit "classification based on gender."[136] The similarity between "because of" and "based on" is self-evident. Given the substantially similar goals of Title VII and the Equal Protection Clause, courts have applied the *Bostock* holding to conclude that intermediate scrutiny applies to nontraditional gender identities.[137] *Bostock* has also been applied to Title IX.[138]

Below, the article will first identify and then apply three main concepts regarding intermediate scrutiny that are needed to evaluate segregated sports. Under *Bostock*, these concepts are equally applicable to discrimination against gender minorities.

Principle #1: Stereotypes and Overbroad Characterizations. First, to qualify as an important state interest, the justification must not be based on stereotypes or conjecture.[139] In finding that a public university violated the Equal Protection Clause by excluding a male applicant from an all-female nursing program, the Court in *Mississippi v. Hogan* stated that sex classifications must be "free of fixed notions concerning the roles and abilities of males and females."[140] Specifically, "if the statutory object 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."[141] It then

131. *Id.* at 1741.

132. *Id.* at 1736.

133. *Id.* at 1745.

134. *Id.* at 1776, 1828.

135. U.S. CONST. amend. XIV, § 1.

136. United States v. Virginia (*VMI*), 518 U.S. 515, 532 (1996).

137. B. P. J. v. West Virginia State Bd. of Educ., 2021 WL 5711543, *4 (S.D. W.Va. 2021); Hecox v. Little, 479 F. Supp. 3d 930, 974 (D. Idaho 2020); M.E. v. T.J., 854 S.E.2d 74, 109–10 (N.C. Ct. App. 2020); *see also* Susannah Cohen, *Redefining What it Means to Discriminate Because of Sex: Bostock's Equal Protection Implications*, 122 COLUM. L. REV. 407, 441–42 (2022).

138. Doe v. Snyder, 28 F.4th 103, 114 (9th Cir. 2022); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020); Dimas v. Pecos Indep. Sch. Dist. Bd. of Educ., 2022 WL 816501 at *4 (D.N.M. 2022); N.H. v. Anoka-Hennepin Sch. Dist. No. 11, 950 N.W.2d 553, 563 n.3 (Minn. Ct. App. 2020).

139. Craig v. Boren, 429 U.S. 190, 198–99 (1976).

140. Univ. of Mississippi for Women v. Hogan, 458 U.S. 718, 724–25 (1982).

141. *Id.* at 725.

found that the exclusion of males from the nursing program was based on impermissible stereotypes regarding what work is best suited to females as compared to males.[142] Similarly, in *United States v. Virginia* (VMI), a prestigious state military academy excluded women because it believed that admission of women would require lowering physical fitness standards and altering its signature adversarial environment.[143] Although VMI presented expert testimony that, for example, women did not tend to perform well in an adversarial environment, the Court noted that evidence also showed that some women would want to attend VMI and could succeed and therefore rejected VMI's asserted interest because it was impermissibly based on stereotypes.[144] It explained, "generalizations about 'the way women are,' [and] estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."[145]

Moreover, overly broad characterizations fail to satisfy the "substantially related" component of intermediate scrutiny. The legislature must narrow the scope of a classification to situations in which the otherwise overbroad characterization "comport[s] with fact."[146] In *Craig v. Boren*, for example, the Court struck down a law that had a lower drinking age for women than men because it found that a minor percentage difference between men and women arrested for drunk driving was insufficient to justify the sex-based classification.[147]

Principle #2: Inequities. Second, a separate-but-equal approach is discriminatory if it excludes women from better programs. In *VMI*, Virginia tried to compensate for the unconstitutional exclusion of women from VMI with the creation of a leadership academy for women (VWIL).[148] The Court, however, pointed to numerous tangible and intangible inequities between VMI and VWIL including, for example, lower entering test scores, less degree choices, less rigor, lower financial support, and less prestige.[149] It accordingly found that Virginia's unconstitutional exclusion of women from VMI was not cured by the availability of a VWIL education.[150]

Principle #3: Supporting the Disadvantaged Class. Third, in contrast to prohibited subordination of women, remediation of past discrimination can be an important government interest to pass the intermediate scrutiny test. The nursing program in *Mississippi v. Hogan* contended that the exclusion of men

142. *Id.* at 729.
143. United States v. Virginia (*VMI*), 518 U.S. 515, 524 (1996).
144. *Id.* at 540–45.
145. *Id.* at 550.
146. Craig v. Boren, 429 U.S. 190, 199 (1976).
147. *Id.* at 201–02.
148. *VMI*, 518 U.S. at 517.
149. *Id.* at 553.
150. *Id.* at 555–56.

compensated for past discrimination against women and that the program was a lawful affirmative action program.[151] The Court acknowledged that "a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened" by past discrimination.[152] Stated differently, such a justification requires that members of the benefitted sex suffered a past disadvantage in connection with the classification.[153] In this case, however, the Court found that women had not previously been excluded from the nursing profession and therefore Mississippi's justification could not pass intermediate scrutiny.[154] Similarly, in VMI, Justice Ginsburg wrote that sex classifications may be used to "compensate" women for past disadvantages and to ensure equal opportunity but may not be used to "perpetuate the legal, social, and economic inferiority of women."[155] These cases support an anti-subordination analysis of sex classifications under intermediate scrutiny, an issue to which this article will turn in Section V.C.

As will be explained next, the justifications offered in support of the Separate Teams Exception violate each of these three principles and therefore fail intermediate scrutiny.

V. APPLYING INTERMEDIATE SCRUTINY TO THE SEPARATE TEAMS EXCEPTION

Having established relevant principles from Equal Protection doctrine, this article will now use these principles to prove that the Separate Teams Exception is unconstitutional. The earlier discussion of the Separate Teams Exception outlined three structural components of the DOE athletic regulations: (1) the contact sports rule allowing programs to bar all females[156] from participation in certain sports; (2) the competitive skill rule allowing programs to exclude members of a sex unless opportunities in the sport are limited, in which case they must be allowed to try out; and (3) the permission to segregate all athletic programs explicit in the Policy Interpretation and implied by the separate-but-equal criteria listed in the Regulation. Each component is addressed below. The article argues that the resolution of the debate regarding gender minority athletes depends upon an analysis of whether sex classifications are permissible even as to cisgender females and cisgender males. Therefore, the Equal Protection analysis below will focus first on this classification before turning to gender minority athletes.

151. Univ. of Miss. for Women v. Hogan, 458 U.S. 718, 727 (1982).

152. *Id.* at 728.

153. *Id.*

154. *Id.* at 730.

155. *VMI*, 518 U.S. at 533–34.

156. George, *supra* note 18, at 1114–115. Although worded in a manner that is not specific to females, the contact sports exception has been applied to exclude females only.

A. The Paternalistic Exclusion of Females From Contact Sports

An important starting point in this analysis is the Separate Teams Exception's express pronouncement that programs can categorically exclude girls from participation in contact sports.[157] While the Regulation requires that programs at least permit girls to try out for boys' teams if they do not have a girls' team, this is not required for contact sports, which include boxing, wrestling, rugby, ice hockey, football, and basketball.[158] There is only one purported justification for this aspect of the Regulation: the need to protect girls from injury.[159] This rationale is highly questionable because it violates the first principle discussed above: it seeks to "protect" girls "because they are presumed to suffer from an inherent handicap or to be innately inferior."[160] While it may be true that some, or even most, girls lack the physique for contact sports and could therefore be easily injured, it is also true that some girls can compete safely. All but one of the listed contact sports have seen at least some minimal mixing of the sexes.[161] As the Court in *VMI* held, girls cannot be categorically

157. 34 CFR § 106.41(b) (2000).

158. *Id.*

159. Lafler v. Athletic Bd. of Control, 536 F. Supp. 104, 106–07 (W.D. Mich. 1982) (upholding exclusion of girls from boxing because differences in muscle mass and bone density per pound would disrupt the use of weight classes to ensure safe competition and because breast shields used by plaintiff could be unsafe for competitors while noting that exclusion from other sports may be unconstitutional); *see also* George, *supra* note 18, at 1126, 1129. Outside the context of the contact sports rule, one case upheld a wider exclusion of girls from boy teams based on general physiological differences between average members of each sex. Ritacco v. Norwin Sch. Dist., 361 F. Supp. 930, 932 (W.D. Pa. 1973) (upholding exclusion of girls from boy teams under a rational basis analysis because it concluded that evidence of various physiological differences, interpreted as general advantages not tied to a particular sport, supported "encouraging" girls to play on their own teams rather than with boys); *see also* George, *supra* note 18, at 1129 (noting concern about the effect of unqualified female athletes in traditionally male sports). This rationale will be addressed in the next section of the article since it better connects to sex segregation in sport generally than it does to the contact sports rule particularly.

160. Univ. of Miss. For Women v. Hogan, 458 U.S. 718, 725 (1982); Force by Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1024 (W.D. Mo. 1983).

161. At least a dozen women have played college football despite the ability of programs to categorically exclude women under Title IX's contact sports rule. Lars Anderson, *Is This the NFL's First Female Player?*, BLEACHER REPORT (June 13, 2017), https://bleacherreport.com/articles/2715385-nfl-first-female-player-becca-longo-kicker [https://perma.cc/HY8K-PK6H]. For examples in the other contact sports, *see* Lindsay Berra, *Hockey Star Kendall Coyne: 'People Don't Respect the Women's Game as Much as the Men's Game'*, ESPN (July 30, 2018), https://www.espn.com/espnw/voices/story/_/id/24232705/hockey-star-kendall-coyneplayingmen-league-future-nwhl; Ike Bryant, *'A Lot was Missing': Marisol Nugent Hopes to Bring Attention to Women's Wrestling*, DAILY TAR HEEL (Jan. 20, 2022), https://www.dailytarheel.com/article/2022/01/unc-wrestling-marisol-nugent-first-female-wrestler-on-unc-d1-roster [https://perma.cc/7CGV-KFE8]; Robinson, *supra* note 41, at 353 (on a female playing pro basketball on men's team); Emily Zemlir, *12 Times Female Athletes Competed Against Men—And Won*, ELLE (Aug. 14, 2017), https://www.elle.com/culture/g30119/female-athletes-who-won-against-men/

excluded based on a generalization if some might be interested in and capable of meeting a program's requirements.[162] Anti-discrimination law does not permit seemingly rational distinctions that are likely the result of assumptions about the differential worth of the group at issue.[163] In addition to excluding athletes who could excel in contact sports, the contact sports rule harms all women by perpetuating the stereotype of female weakness.[164]

Moreover, the rationale does not stand up to basic logic. While most girls lack the physique to be, for example, a lineman, so too do most boys.[165] Safety,

[https://perma.cc/EVS4-3ZQF] (including an example of a woman knocking out a man in boxing). Rugby appears to be the one exception where no woman has yet been allowed to play on a male team.

162. United States v. Virginia (*VMI*), 518 U.S. 515, 542 (1996); *see also* Att'y Gen. v. Mass. Interscholastic Athletic Ass'n (*MIAA*), 393 N.E.2d 284, 293 (Mass. 1979) (rejecting sex as a proxy for athletic prowess because of the proven capability of women to compete against men); Brenden v. Indep. Sch. Dist. 742, 477 F.2d 1292, 1302 (8th Cir. 1973) (stating that assumptions about women as a class cannot be used to deprive individuals of consideration of their qualifications); Clinton v. Nagy, 411 F. Supp. 1396, 1400 (N.D. Ohio 1974) (focusing on the individual at issue instead of the class in general); Darrin v. Gould, 540 P.2d 882, 892 (Wash. 1975) (finding that qualifications of *most* girls is an irrelevant factor in determining whether individual qualified girls should be permitted to play football); *Force*, 570 F. Supp. at 1029 (finding that evidence that girls in general would be at a disadvantage in football due to size, speed, and lean body mass ratio did not bear on individual girl's Equal Protection claim); Hoover v. Meiklejohn, 430 F. Supp. 164, 170 (D. Colo. 1977) (finding that generalizations about physical differences would not even satisfy a rational basis test in light of the great variations among members of each sex); Lantz by Lantz v. Ambach, 620 F. Supp. 663, 665 (S.D.N.Y. 1985) (rejecting program's reliance on general differences between girls and boys of the relevant ages); Leffel v. Wis. Interscholastic Athletic Ass'n, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978) (finding exclusion unlawful despite evidence of generalized differences).

163. Paul Brest, *Forward: In Defense of The Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6 (1976).

164. *Id.* at 8 (making this point in the context of race discrimination). The DOE's proposed changes to nonathletic components of its regulations include a clarification that sex discrimination includes discrimination based on sex stereotype. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41533 (July 12, 2022). If the proposals are enacted, they will create an internal inconsistency with the contact sports rule under the arguments presented here and also with the endorsement of all-male teams, as argued in subsequent sections.

165. Top-level college linemen average between 285 and 300 pounds. Matt Allibone, *Bulking Up: How High School Football Players Can Gain Weight in a Healthy Way*, YORK DAILY RECORD (Aug. 14, 2019), https://www.ydr.com/story/sports/high-school/football/2019/08/14/piaa-sports-how-football-players-gain-weight-healthy-ways/1773036001/ [https://perma.cc/9U7C-TEVN]. The average weight of a 20-year-old man, by comparison, is under 200 pounds, and the ideal weight is even less for the majority of height ranges. Stephen Gill, *Is There an Average Weight for Men?*, MEDICAL NEWS TODAY (Feb. 14, 2018), https://www.medicalnewstoday.com/articles/320917 [https://perma.cc/6GJV-LPD5] (last updated May 1, 2021). On the variability in both male and female athlete capability, *see* Adams *ex rel.* Adams v. Baker, 919 F. Supp. 1496, 1504 (D. Kan. 1996) (rejecting the safety concern because both boys and girls face risks in wrestling and the school had no evidence that girls were categorically at a higher risk than boys); *Hoover*, 430 F.

as an aspect of ability, can be determined through tryouts. And if lifting the ban on girls results in an explosion of tryouts that taxes athletic programs, a result that seems highly unlikely,[166] legitimate height and weight requirements tied to particular roles on a team can be created to narrow the field.[167] In any event, any administrative burden involved in running tryouts would fail to establish a sufficiently strong government interest under intermediate scrutiny.[168]

Another way in which the contact sports ban fails the test of logic is that if boys can choose to take on the risks of a sport, the only way to justify removing such a choice from girls is reliance on paternalistic sentiment deeply rooted in the subordination of women in our society.[169]

Accordingly, while seemingly hesitant to address the constitutionality of the provision head on, courts have found on a case-specific basis that exclusion of female athletes from contact sports teams violated the Equal Protection Clause or state equivalents and have required the team at issue to consider the athlete's

Supp. at 169 (rejecting the safety concern as a reason to exclude girls from soccer team because the team did not have any requirements to ensure the safety of males despite variety of male physiques).

166. *Force*, 570 F. Supp. at 1026. It is highly unlikely that after their total exclusion from contact sports since Title IX's inception in 1972, girls would suddenly flood the recruitment pool in these programs.

167. *See* Caggiano, *supra* note 59, at 141; Leong, *supra* note 40, at 1284; Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 400–11 (Winter 2000); Tokarz, *supra* note 17, at 244. As will be subsequently argued, any such seemingly gender-neutral criteria should be required to satisfy the test for a bona fide occupational qualification. *See infra* § VI(E).

168. *See* Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (rejecting administrative convenience as support for a military health benefits rule that assumed wives of servicemen were dependent on their husbands but required husbands of servicewomen to prove dependency); *Force*, 570 F. Supp. at 1030 (rejecting the burden of weeding out unqualified girls as a legitimate reason to exclude all girls from football).

169. Caggiano, *supra* note 59, at 130; George, *supra* note 18, at 1130–31; Leong, *supra* note 40, at 1271–72; Amy H. Nemko, *Single-Sex Public Education After VMI: The Case for Women's Schools*, 21 HARV. WOMEN'S L.J. 19, 47 (Spring 1998); Tokarz, *supra* note 17, at 242–43; *see also Adams*, 919 F. Supp. at 1504 (noting the paternalistic nature of the safety argument); Clinton v. Nagy, 411 F. Supp. 1396, 1399–1400 (N.D. Ohio 1974) (explaining that females, like males, may decide that the benefits of football outweigh the risks); Darrin v. Gould, 540 P.2d 882, 892 (Wash. 1975) (noting that boys face the same safety risks as girls in football); *Force*, 570 F. Supp. at 1029 (noting absence of evaluation of boys to determine whether they have the attributes to play football safely and calling the safety argument "paternalistic"); *Hoover*, 430 F. Supp. at 169 (referring to the safety concern as "patronizing"). The court's analysis of boxing rules in Lafler v. Athletic Bd. of Control, 536 F. Supp. 104, 106–07 (W.D. Mich. 1982), discussed in note 159, at least seemed rooted in particularities of boxing that could make mixed competition dangerous for both girls and the boys against whom they competed. However, while the court's analysis might seem fair and rational at first glance, it relied on the general differences in muscle tissue and bone density per pound between males and females, *id.*, while the Court in VMI required consideration of the individual's qualifications to play the sport at issue. United States v. Virginia (*VMI*), 518 U.S. 515, 550 (1996). Like in other contexts, the ability of an individual woman to box against men in her weight class can be determined based on her own physical characteristics and ability.

qualifications individually.[170] It is difficult to interpret these holdings as anything other than rejection of the contact sports rule as unconstitutional.

B. The Illogic of Excluding Females from Other Selective Teams

Male teams cannot be supported by a concern for female athletics. In addition to the unconstitutional exclusion of females from male contact sport teams, the Separate Teams Exception's permission to retain all-male teams in other competitive sports is also inconsistent with the Equal Protection Clause. When state actors attempt to justify exclusion of a female from a male sport outside of the contact sports rule, they tend to argue that requiring sex integration would shut inferior female athletes out of sport.[171] However, this purported government interest in ensuring opportunity in sport for females is not substantially related to the exclusion of females from teams. At most, this interest could only support the exclusion of males from female teams, a separate question to which this article will turn in Section C below.[172]

When properly focusing an Equal Protection Clause analysis on the justification for excluding females from male teams, two purported interests emerge: (1) females cannot compete at the same level as males, so it is better for their competitions to be separate;[173] and (2) females competing with males is unseemly.[174] Both claims violate principle #1 above because they are overly

170. *Adams*, 919 F. Supp. at 1504; *Clinton*, 411 F. Supp. at 1400; *Force*, 570 F. Supp. at 1029; *Hoover*, 430 F. Supp. at 169–70; Lantz by Lantz v. Ambach, 620 F. Supp. 663, 666 (S.D.N.Y. 1985); Leffel v. Wis. Interscholastic Athletic Ass'n, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978); *see also* Att'y Gen. v. Mass. Interscholastic Athletic Ass'n (*MIAA*), 393 N.E.2d 284, 289 (Mass. 1979) (predicting that courts would find exclusion of female athletes fails to satisfy intermediate scrutiny); Brenden v. Indep. Sch. Dist., 742, 477 F.2d 1292, 1300 (8th Cir. 1973) (invalidating exclusion of girls from noncontact sports); Powell, *supra* note 40, at 16 (citing additional cases).

171. Bucha v. Ill. High Sch. Ass'n, 351 F. Supp. 69, 75 (N.D. Ill. 1972) (finding that generalized physiological differences would lead males to dominate females in integrated sports); *Hoover*, 430 F. Supp. at 170 (suggesting that separate-but-equal is preferable because males would dominate mixed teams); Ritacco v. Norwin Sch. Dist., 361 F. Supp. 930, 932 (W.D. Pa. 1973) (reasoning that separate-but-equal protects girls from having to compete against boys who will on average be superior athletes). Similar arguments were made but rejected in: *Brenden*, 477 F.2d at 1302; *Darrin*, 540 P.2d at 892; and *Force*, 570 F. Supp. at 1025–26.

172. *See infra* § V(C).

173. *See supra* note 171 (on crowding out females).

174. *Adams*, 919 F. Supp. at 1501 (summarizing testimony of some parents who thought boys wrestling a girl involved "improper touching"); Micol Pizzolati & David Sterchele, *Mixed-Sex in Sport for Development: A Pragmatic and Symbolic Device. The Case of Touch Rugby for Forced Migrants in Rome*, *in* SEX INTEGRATION, *supra* note 123, at 1276–77 (describing embarrassment felt by both sexes when first competing against one another in touch rugby); MCDONAGH & PAPPANO, *supra* note 18, at 14, 185–88 (describing social resistance to women in sports); Fortin v. Darlington Little League, Inc., 514 F.2d 344, 351 (1st Cir. 1975) (rejecting player preferences and impropriety as rationales for sex segregation in sports).

broad characterizations that deny women the individualized consideration they deserve.

Females have shown they can compete with males. Given the long history of preventing females from competing with males and given the inferior resources devoted to the training of female athletes,[175] it is impossible to argue that females are incapable of competing with males without relying on evidence that is marred by the history of discrimination against females in sport.[176] In fact, the most reliable evidence available comes from the limited opportunities that have been granted to females to compete with males. And this evidence shows quite the opposite of the hypothesis. Women have already proven themselves capable of competing with men in a variety of sports when given a chance. These stories range from old legends like Jackie Mitchell striking out Babe Ruth, Billy Jean King beating Bobby Riggs in a tennis match, and Jackie Tonawanda knocking out Larry Rodania, to modern examples of women competing on NCAA Division I football teams and joining professional baseball teams.[177] If women are already competing with men despite the limited opportunities to do so in segregated sports, it would be fair to hypothesize that more women would prove themselves able to compete in integrated sports. In any event, as explained above in connection with the contact sports exception, even if only some women are able to compete with men, that is reason enough to find that the purposeful retention of all-male teams is unconstitutional under *VMI*.

Whether an athlete is qualified is an individual consideration. Defenders of sex segregation often choose sports like sprinting, in which studies have

175. *See supra* at note 73 (on inferior resources).

176. On the history of discrimination against women in sports, *see* LEVIT & VERCHICK, *supra* note 19, at 120; MCDONAGH & PAPPANO, *supra* note 18, at 7–19; David Whitson, *Sport in the Social Construction of Masculinity*, in SPORT, MEN, *supra* note 105, at 27. On the connection between past discrimination and female athlete skills, *see* DAVIS, *supra* note 73, at 132–33.

177. Zemlir, *supra* note 161. The Zemlir piece features a football kicker. However, a female player was recently recruited to Division III where she plays as "free safety," a defensive quarterback position. Shenandoah University Hornets, 2022 Football Roster, https://suhornets.com/sports/football/roster/haley-van-voorhis/7669 [https://perma.cc/E7DQ-VWKY]. At least a dozen women have played college football. Anderson, *supra* note 161. More girls are rising up through high school football. *See, e.g.*, Emily Olson*, 'Brooklyn is a Football Player . . . She Also Just Happens to be a Girl': Female High School Football Players are Breaking Barriers*, USA TODAY SPORTS (Sept. 27, 2021), https://www.usatoday.com/story/sports/highschool/2021/09/27/three-female-high-school-football-players-make-history-impact/5893306001/?gnt-cfr=1 [https://perma.cc/5ELP-QSRT]. For stories of women beating men in elite international competition including long distance swimming, *see* Leong, *supra* note 40, at 1266. For more stories of women playing men in professional sports including basketball and baseball, *see* Robinson, *supra* note 41, at 352–53. Another scholar has made the interesting point that current female athletes have surpassed records set by past male athletes, a comparison that make sense given the lesser time that women have been engaged in sports compared to men. Tokarz, *supra* note 17, at 220–21.

shown performance gaps at an elite level.[178] Performance gap evidence addresses neither all sports nor all levels of any particular sport.[179] Moreover, the performance gap has already narrowed since Title IX was enacted despite the "protection" from male competition and unequal resources experienced by female athletes.[180] Rather than assuming that the narrowing of the performance gap has reached its natural limit,[181] the more logical assumption would be that it would further narrow if women were allowed to compete with men on equal

178. Interim Arbitral Award ¶ 336, 337, Dutee Chand v. Athletics Fed'n of India & The Int'l Ass'n of Athletics Fed'ns (CAS 2014/A/3759) (Ct. of Arb. for Sport, July 24, 2015), https://www.doping.nl/media/kb/3317/CAS%202014_A_3759%20Dutee%20Chand%20vs.%20AFI%20%26%20IAAF%20%28S%29.pdf [https://perma.cc/9KNU-FZ67] (noting evidence submitted showed a 10-12% performance gap in the context of sprinting); HARPER, *supra* note 76, at 2 (reporting an 11% differential in average male and female sprinting speed).

179. *See* Leong, *supra* note 40, at 1269–70 (discussing evidence that women can compete, and win, against men in a variety of sports); MCDONAGH & PAPPANO, *supra* note 18, at 21–22, 58–63 (discussing sports in which females might even have an advantage). It is conjectural to assume, for example, that males would have a natural advantage over females in a sport like curling which depends more on skill than on muscle mass, stride, speed, or height. *See* Brenden v. Indep. Sch. Dist., 742, 477 F.2d 1292, 1300 (8th Cir. 1973) (noting lack of evidence comparing boys and girls in noncontact sports in which success is tied to "coordination, concentration, agility, and timing"); Att'y Gen. v. Mass. Interscholastic Athletic Ass'n (*MIAA*), 393 N.E.2d 284, 295 (Mass. 1979) (mentioning gymnastics, swimming, and riflery as examples of sports in which male advantage is skeptical). In terms of the level of sport at which the performance gap has been studied, statistics about elite athletes do not tell us much about whether there are meaningful performance gaps at the elementary, recreational, club, or lower division varsity or collegiate levels. For example, the legislative statement in the Arizona Save Women's Sports Act cited an article that contained performance gap information at the Olympic athlete level but that offered only general information about strength and fitness at other levels. ARIZ. REV. STAT. § 15-120.02 (2022), citing Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 51 SPORTS MED. 199 (2021), https://doi.org/10.1007/s40279-020-01389-3 [https://perma.cc/9HWF-4AQ3]. Adolescent differences are particularly questionable in light of conflicting research. *Compare* E. Ramos et al., *Muscle Strength and Hormonal Levels in Adolescents: Gender Related Differences*, 19(8) INT'L J. SPORTS MED. 526, 526 (Nov. 1998) (finding no significant difference in strength between boys and girls until age 17), *with* Konstantinos Tambalis et al., *Physical Fitness Normative Values for 6-18-year-old Greek Boys and Girls, Using the Empirical Distribution and the Lambda, Mu, and Sigma Statistical Method*, 16(6) EUR. J. SPORT SCI. 736, 739, 744 (2016), https://pubmed.ncbi.nlm.nih.gov/26402318 (cited by the Arizona legislature as support for physical differences in adolescents).

180. *See* Caggiano, *supra* note 59, at 120; MCDONAGH & PAPPANO, *supra* note 18, at 72; MILNER & BRADDOCK II, *supra* note 20, at 44–45; Tokarz, *supra* note 17, at 220–21.

181. The state "fairness" laws embrace this faulty assumption. Some note that the performance gap has stopped narrowing. Fairness in Women's Sports Act, ARK. CODE ANN. § 6-1-107 (West 2021); Fairness in Women's Sports Act, IDAHO CODE § 33-6201-6206 (2020); 2022 La. Sess. Law Serv. Act 283 (S.B. 44) (West). Their reliance on the stagnation of the narrowing is a self-fulfilling prophecy: the only way the performance gap can continue to narrow is to remove rather than reinforce the inequities caused by segregation.

footing.[182] In any event, as noted in the previous section, reliance on general physical distinctions between males and females does not justify limiting female athletes who could do well in integrated competition.[183]

The possibility of female flight cannot justify male teams. A related argument is that if male teams open to females, the best female athletes will abandon female teams, causing female teams to slip even further into inferiority.[184] This argument has a few significant flaws. First, it seems to continue to hope that separate-but-equal can become equal despite historical and current evidence to the contrary.[185] *Degrees* of inferiority seem unimportant when segregation prevents female athletes from ever proving their skill is comparable to male athletes. Second, it sacrifices the interests of top female athletes for the sake of the group.[186] If a female athlete successfully competes

182. Scholars have argued that if women could train with and compete against men, and with the same resources, starting early in their athletic career, currently observed performance gaps would likely further narrow if not disappear entirely. *See* Buzuvis, *supra* note 37, at 37–38 (segregation is itself perpetuating performance gap); MCDONAGH & PAPPANO, *supra* note 18, at 10 (noting that if girls were encouraged to develop kicking and other football skills, we would learn that they can compete with boys); MILNER & BRADDOCK II, *supra* note 20, at 6 (theorizing that an egalitarian view of female ability and equal resources would enable greater athletic success), and 42 (commenting that denying women the chance to compete against men has prevented female athletes from reaching their full potential); Snow & Thro, *supra* note 42, at 39–40, n.179 (suggesting that physical differences may be due to the "inculcation of athletic skills" within the current segregated structure). When we assume that women cannot compete with men and deprive them of opportunity and support to try, we impose a cap on performance that may be more fiction than truth. *See* Bill Taylor, *What Breaking the 4-Minute Mile Taught Us About the Limits of Conventional Thinking*, HARV. BUS. REV. (Mar. 9, 2018), https://hbr.org/2018/03/what-breaking-the-4-minute-mile-taught-us-about-the-limits-of-conventional-thinking [https://perma.cc/VPP4-K2BM] (on the role that mindset played in prolonging the four-minute mile barrier that has since been broken by many elite athletes).

183. *Supra* Part IV (on invalidity of generalizations as a basis for sex classification).

184. *See* Pam R. Sailors, *Off the Beaten Path: Should Women Compete Against Men*, in SEX INTEGRATION, *supra* note 123, at 20 (mentioning this argument); Yellow Springs Exempted Village Sch. Dist. Bd. of Ed. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 658 (6th Cir. 1981) (relying on this argument). For cases rejecting this argument, *see* Force by Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1025 (W.D. Mo. 1983), and Darrin v. Gould, 540 P.2d 882, 892 (Wash. 1975). This article recognizes the possibility that desegregation could move top female athletes out of female teams. *See* MILNER & BRADDOCK II, *supra* note 20, at 5 (noting that racial desegregation moved black athletes out of HBCU athletic programs). It argues, however, that such a result is a desirable outcome, as it would mean better opportunity for these athletes.

185. *Supra* note 73 (on inequities caused by separate-but-equal).

186. George, *supra* note 18, at 1120–21 (addressing the harm that merely focusing on opportunity does to female athletes who wish to compete on equal footing with males). Imagine arguing, for example, that we should not have required all-white colleges to open admission to minorities because doing so would deprive HBCUs of their brightest applicants. Supporting the important opportunities HBCUs provide to minority students would not legitimize depriving individuals of the opportunity to make a different choice for themselves. Moreover, while HBCUs are indeed struggling for equal resources, they have continued to attract and educate some of the

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on an integrated team, then that is exactly where she belongs. Holding back the athlete for the sake of other less competitive athletes is foreign to the common understanding of sport and, as earlier explained, contrary to established nondiscrimination principles. Third, the argument fails to recognize what female flight from female teams would signify. Top female athletes would not flee female teams unless integrated teams were superior. Thus, the desire to leave is inescapably tied to separate-but-unequal. Top female athletes would also not be able to flee female teams in significant numbers unless real opportunity opened to them in integrated teams. In other words, female flight would mean that Title IX had achieved its equal opportunity goal and, if the numbers were large enough to make a significant impact, this would suggest that female teams might no longer be needed.[187] As one court has pointed out, segregated programs cannot simultaneously argue that females are unqualified to compete with males while arguing on the other hand that opening up teams to females would result in female flight from female teams. If females are not qualified for an integrated team, they will not make the team and hence will not flee.[188]

Males should not be protected from competing against females. The second justification is even more problematic. It is true that males can be uncomfortable competing with females.[189] They may hold back their full effort to avoid appearing ungentlemanly.[190] They may fail to include their female

finest minds in American history. Hawkins, *supra* note 119, at 357–59, 365. Why should we not assume that female teams would continue to attract and train excellent female athletes even if some decide to compete on an integrated team?

187. *See Force*, 570 F. Supp. at 1026 (rejecting female flight argument where only a single girl in the school had shown an ability to compete on boys football team).

188. *Id.*

189. *See* Adams v. Baker, 919 F. Supp. 1496, 1500, 1501 (D. Kan. 1996) (noting testimony that some boys forfeited rather than compete in wrestling match against plaintiff and some boys threatened to quit); Fortin v. Darlington Little League, Inc., 514 F.2d 344, 351 (1st Cir. 1975) (rejecting refusal of male coaches to coach girls in baseball as a rational government interest); Pizzolati & Sterchele, *supra* note 174, at 166–67; Bruce Kidd, *The Men's Cultural Center: Sports and the Dynamics of Women's Oppression/Men's Repression*, *in* SPORT, MEN, *supra* note 105, at 39; Tokarz, *supra* note 17, at 223.

190. *See* Fortin, 514 F.2d at 349 (rejecting such an argument). For examples of comments by athletes, *see* Danielle DiCarlo, *Playing Like a Girl? The Negotiation of Gender and Sexual Identity Among Female Ice Hockey Athletes on Male Teams*, in SEX INTEGRATION, *supra* note 123, at 257; Fink et al., *supra* note 123, at 213; Robert J. Lake, *"Guys Don't Whale Away at the Women": Etiquette and Gender Relations in Contemporary Mixed Doubles Tennis*, *in* SEX INTEGRATION at 114–16.

teammates in plays.[191] They may feel embarrassment from losing to a female.[192] These arguments reveal the exact reason why excluding females from male teams is problematic to sex equality. They reflect the assumption of male superiority that exclusively male sports have freely cultivated. They also seek to perpetuate the false narrative that women need the protection of a man because they are the weaker sex.[193] The only way to challenge the stereotypes that this behavior is based on is to compete with men. To the extent male reluctance to play against females is based on a concern for safety, Section A above explains that safety ultimately depends on the individual's fit for the team at issue, which should be decided through individualized assessment rather than categorical separation of the sexes.

Since none of the rationales for excluding females from male teams holds water, Equal Protection would seem to require integrated teams. Courts have tip-toed around this conclusion by focusing on the individual claimant and the specific situation,[194] but if a men's team must permit a qualified female athlete to join, it is not a men's team and calling it such operates to unfairly deter qualified female athletes from asserting their rights. The only remaining question is whether integration needs to be complete or whether all-female teams can be justified even in the absence of all-male teams. This question is addressed next.

C. An Anti-Subordination Approach to Desegregating Selective Programs

1. Excluding Males When Necessary to Ensure Opportunity for Selective Program Participation

The most widely accepted rationale for the separate-but-equal approach to sports is that integrated sports would crowd out females because teams would prefer male athletes.[195] As explained above, this rationale relies on an overbroad

191. *See, e.g.*, Karin Grahn & Viveka Berggren Torell, *Negotiations of Gender Discourse: Experiences of Co-Education in a Swedish Sports Initiative for Children*, *in* SEX INTEGRATION, *supra* note 123, at 83 (quoting young boy's description of sex-specific passing in integrated soccer).

192. *See* MCDONAGH & PAPPANO, *supra* note 18, at 185; Ellen J. Staurowsky, SPORT, MEN, AND THE GENDER ORDER CRITICAL FEMINIST PERSPECTIVES 165 (Michael A. Messner & Donald F. Sabo eds. 1990); Tokarz, *supra* note 17, at 223.

193. MCDONAGH & PAPPANO, *supra* note 18, at 187; MESSNER, *supra* note 16, at 37.

194. *See generally supra* note 170.

195. George, *supra* note 18, at 1145; Robinson, *supra* note 41, at 352. For cases accepting the argument, *see* O'Connor v. Board of Ed. of Sch. Dist. 23, 449 U.S. 1301, 1307 (1980) (J. Stevens sitting as Circuit Justice) (suggesting that this rationale could support a decision to bar plaintiff from boys' team but ultimately deferring to Court of Appeals); O'Connor v. Board of Ed. of Sch. Dist. No. 23, 645 F.2d 578, 580, 582 (7th Cir. 1981) (holding in favor of the school district on this basis); *Ritacco*, 361 F. Supp. at 932 (relying on the argument). For cases rejecting the argument, *see Brenden*, 477 F.2d at 1302-03; Force by Force v. Pierce City R-VI Sch. Dist., 570 F. Supp.

and speculative assumption that female athletes would continue to underperform male athletes across all sports at all levels even if provided equal resources and co-training with male athletes.[196] However, one essential difference can safely moor it to Equal Protection doctrine. When the rationale is applied to exclude males from female sport rather than to exclude females from male sport, it can be justified under Principle #3, i.e., an anti-subordination interpretation of the Equal Protection Clause.

If sports were suddenly ordered to be integrated, we could imagine that one path would be to simply dissolve female teams. Our country saw a similar phenomenon in the early days of racial desegregation in schools. Integration did not go two ways. Instead, black children were sent to white schools, black schools were closed, and black teachers lost their jobs.[197] Although white schools had superior resources, this did not translate to a better learning experience for black children due to horrific treatment by white students and white teachers.[198] It seems plausible that desegregation of sports might follow a similar path, raising a potential to harm female athletes.

The concern about what happens to females in sport is thus legitimate. However, this concern is only a reason to ensure opportunity for females to engage in sport and does not help legitimize male teams. Retention of male teams does not follow as a necessity of retaining female teams. Differentiating between the two policies is supported by an anti-subordination interpretation of the Equal Protection Clause. Although anti-subordination theory has not been as successful in the context of "strict scrutiny" of racial classifications,[199] it has fared much better under the lesser "intermediate scrutiny" applied to sex classifications[200] Legitimizing the goal of redressing past discrimination against female athletes, most courts have rejected Equal Protection Clause claims brought by male athletes excluded from female teams.[201] By extension, a school

1020, 1025 (W.D. Mo. 1983); Att'y Gen. v. Mass. Interscholastic Athletic Ass'n (*MIAA*), 393 N.E.2d 284, 294 (Mass. 1979); Darrin v. Gould, 540 P.2d 882, 892 (Wash. 1975).

196. *See, e.g.*, *Darrin*, 540 P.2d at 892 (finding this argument to be based on mere conjecture).

197. Hawkins, *supra* note 119, at 360–361, 386.

198. *Id.* at 357, 361, 366.

199. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 290, 307–10 (1978); *MIAA*, 393 N.E.2d at 357 (finding that excluding boys from girls teams categorically violated the state's Equal Rights Amendment under a strict scrutiny test). *But see Brest*, *supra* note 163, at 16–17 (arguing that antidiscrimination law should not prohibit protection of the subordinated class).

200. Califano v. Webster, 430 U.S. 313, 317 (1977) (holding that law allowing women to discount more years of lower earnings than men to generate higher average earnings for purposes of age benefits calculations was substantially related to a strong government interest in reducing economic disparity between men and women due to past discrimination and was not based on stereotypes about women); *see also Bakke*, 438 U.S. at 302–03 (distinguishing gender from race).

201. Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982) (holding that excluding male from female volleyball team was substantially related to strong government interest in redressing past discrimination against females in athletics because the exclusion did not relate to

should be able to retain female teams even if it must replace its male teams with integrated teams.[202] Accordingly, the fear of displacing female athletes cannot support the Separate Teams Exception because female teams can be retained even if male teams are found to violate Equal Protection. If integration someday becomes so successful that male opportunity in sport is significantly reduced, the retention of all-female teams might no longer pass intermediate scrutiny because this success would suggest that structural inequities have been resolved. It is also theoretically possible that society might someday evolve to erase the stereotype of "the weaker sex" that makes segregation so problematic. However, if we consider racial desegregation as the closest model, we can expect such an evolution to take at least 68 years (and counting).

2. Ensuring Opportunity for Gender Minorities and the Unconstitutionality of State "Fairness" Laws

We now come to the critical issue with which this article began. As noted earlier in the article, forcing gender minorities to assume a gender that does not reflect their sense of self for any purpose, including athletics, carries a significant risk of psychological harm.[203] While the integrated teams for which this article argues would be an important step toward avoiding this harm by removing "men's" and "boys'" labels, it does not completely resolve concerns about inclusivity. Gender minority athletes may wish to compete in female athletics for a variety of reasons including a lack of an integrated team in a particular sport (e.g., cheerleading), greater comfort with females than males, or a better fit for their particular athletic development needs. Therefore, the question

"invidious discrimination"); Mularadelis v. Haldane Central Sch. Bd., 74 A.D.2d 248, 256 (N.Y. 1980) (holding that excluding males from female tennis team was permissible method to redress disparate treatment of females in athletics even though plaintiff presented no evidence that the particular school had engaged in such discrimination); *cf.* Williams v. Sch. Dist. of Bethlehem, Pa., 998 F.2d 168, 175 (3d Cir. 1993) (holding that Title IX did not require allowing male to try out for female hockey team even though no male team was available because males had not experienced a history of exclusion from sport and focus of Title IX was on ensuring equal opportunity for females). *But see* D.M. by Bao Xiong v. Minn. State High School League, 917 F.3d 994, 1002–03 (8th Cir. 2019) (holding that where boys rather than girls were underrepresented in school's athletic programs, excluding males from dance team violated the Equal Protection Clause).

202. *See* Force by Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1026 (W.D. Mo. 1983) (expressing that Equal Protection might permit female teams to exclude males even if it requires male teams to admit qualified females); Hoover v. Meiklejohn, 430 F. Supp. 164, 170 (D. Colo. 1977) (stating that promoting female participation in sport is a legitimate government interest and maintaining a separate team is a legitimate method); MCDONAGH & PAPPANO, *supra* note 18, at 7–8 (on the difference between voluntary and coercive segregation); MESSNER, *supra* note 123, at 167 (supporting this approach); *accord* Robinson, *supra* note 41, at 323–24; Snow & Thro, *supra* note 42, at 48–49; Tokarz, *supra* note 17, at 244–45.

203. *See supra* note 104.

remains: should a one-sided integration model include them in the same opportunities offered to female athletes?

As a starting point, it is important to distinguish between supporting female-only teams under an anti-subordination theory as opposed to basing them on biological differences. This article has argued against biological differences as a reason to segregate male and female athletes, and these arguments apply no less strongly to distinctions between females and gender minorities. *Bostock*[204] would seem to require application of intermediate scrutiny to the exclusion of gender minorities from a team if based, as exclusion usually is, on a theory that an individual is not sufficiently female. Notably, the DOE has already proposed amendments to its regulations clarifying that Title IX's prohibition of sex discrimination includes discrimination on the basis of gender identity and has expressed the view that such an interpretation is necessary to be consistent with *Bostock*.[205] When it later turns to the athletic regulations,[206] the DOE will need to assess what *Bostock* means for transgender athletes.

The arguments against segregated sports provided in this article also defeat the state "fairness" laws.[207] If, as this article has argued, excluding females from a male team is impermissibly based on generalized differences between the sexes,[208] so too is excluding an intersex or transgender athlete from a female team. If a female cannot be presumed inferior to males based on generalized differences between the sexes, then a transgender athlete cannot be presumed superior to cisgender females.[209] An athlete should be entitled to an individualized assessment of whether their skill is at an appropriate level to join a particular team, free from examinations of their genitalia, hormone levels, and other imperfect proxies for ability. In granting a preliminary injunction against enforcement of the Idaho statute, for example, the federal court rejected the state's claim that transgender athletes enjoy an "absolute advantage" over cisgender females.[210] It cited evidence that biological advantage enjoyed by transgender girls over cisgender girls varies according to the effect of puberty

204. *See supra* Part IV (discussion of Bostock).

205. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41531, 41537 (proposed July 13, 2022) (to be codified at 34 C.F.R. pt. 106).

206. *Id.* at § 41537.

207. An advocate could hope that courts would also see the animus behind anti-trans legislation and find these laws unconstitutional on that basis. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996) (holding that Colorado constitutional amendment to prohibit protection of gender minorities failed rational basis scrutiny because it was motivated by animus).

208. *See supra* § V(A) & (B).

209. For an extensive discussion of the logical errors involved in basing segregation on biology, *see* Buckwald, *supra* note 37, at 32–44; *see also* Messner, *supra* note 123, at 159 (emphasizing that only transgender women and not transgender men are sex tested, revealing that their exclusion is based on presumed inferiority of female athletes).

210. Hecox v. Little, 479 F. Supp. 3d 930, 980–81 (D. Idaho 2020).

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blockers and noted that the studies the state relied on did not support a clear and universal advantage.[211] Similarly, scholars have pointed out the lack of reliability both in sex identification methods, such as chromosomes, and in asserted determiners of physical advantage, such as hormone levels.[212] In addition, regardless of how advantage is attempted to be measured—muscle mass, body fat, hormone levels, lung capacity—variations exist within sex classifications as well as between them. As one scholar has commented, why should testosterone levels preclude a transgender athlete from competing on a female team when variation in testosterone levels are tolerated within the male category?[213] Male athletes have had testosterone levels that would place them within the female category and yet do not complain about unfairness in competing against men with higher levels.[214]

Any attempt to retain purely cisgender female teams, such as the state "fairness" laws, is clearly overbroad in this respect because such attempts exclude gender minorities without consideration of an individual athlete's performance level or even the particular sport. Ironically, many of these laws have quoted Justice Ginsburg's statement in *VMI* that there are "inherent differences between men and women," and that these differences "remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."[215] As argued throughout this article, segregation does in fact denigrate both females and gender minorities and constrains their opportunity in sport significantly. Moreover, "celebrat[ing]" biological differences by deeming them an inevitable and across-the-board physical inferiority of cisgender females compared to gender minority athletes violates the central holding of the Court in *VMI* that generalizations about sex differences cannot be used to deny individuals equal opportunity.[216] Given the history of reliance on biological differences to subordinate women,[217] the generalizations underlying the "fairness" laws should be particularly suspect. Like the attempt to exclude men from the female nursing program in *Hogan*,[218] the exclusion of gender minorities from female teams harms rather than helps women by perpetuating sex stereotypes. It is revealing, for example, that the

211. *Id.*

212. For a particularly thorough discussion of this topic, *see* Buckwald, *supra* note 37, at 25–33; *see also* Buzuvis, Hormone Check, *supra* note 108, at 41; Leong, *supra* note 40, at 1262.

213. Buzuvis, *supra* note 108, at 46.

214. *Id.*

215. United States v. Virginia (*VMI*), 518 U.S. 533 (1996); *see, e.g.*, Fairness in Women's Sports Act, ARK. CODE ANN. § 6-1-107 (2021); Fairness in Women's Sports Act, IDAHO Code, § 33-6201-6206 (2020); S.B. 44, Reg. Legis. Sess. (La. 2022). For the use of this quote in a law review article arguing against inclusion of transgender and intersex women, *see* Doriane Lambelet Coleman, *Sex in Sport*, 80 L. & CONTEMP. PROBS. 63, 69–70 (2017).

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

217. *See* Lorber, *supra* note 19, at 83.

218. *See supra* Part IV (for discussion of Hogan).

"fairness" laws would count female-to-male transgender athletes as female even if they were increasing their hormone levels and undergoing physical change to become more masculine.[219] They are apparently unconcerned about physical advantage in this other context. This inconsistency suggests that the laws are driven less by fairness concerns and more by a desire to prevent recognition of gender transitions, i.e., to define men as male and women as female. Such an adherence to rigid heteronormativity has undeniable connections to perpetuating male hegemony by maintaining the separateness of femininity from masculinity.[220]

Since it cannot be supported by generalizations about biological difference, the next question is whether exclusion of gender minorities can be supported on an anti-subordination theory. In the prior section, this article argued that anti-subordination theory could support exclusion of males from female teams. The same argument does not work to justify exclusion of gender minorities because they are victims of, rather than the beneficiaries of, structural inequities. Gender minorities share with women a similar history of exclusion from the benefits of male hegemony.[221] They have at least an equivalent need for equal opportunity as do cisgender females.[222] They have endured social isolation, harassment, and violence that can interfere with their emotional and physical wellbeing and ultimately block their access to equal opportunity in society as a whole.[223] Common sense suggests that these inequities inhibit gender minorities from achieving their full potential in athletics, just as they inhibit them in all other aspects of society. While it may be true that some male-to-female transgender athletes benefitted from training as male athletes prior to their transition, this would depend on the timing of their transition compared to the beginning of their athletic training and would also be counterbalanced by the societal discrimination they would likely experience as soon as they were suspected of gender nonconformity.

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219. *See* statutes cited in note 8 (all of which determine sex by either birth certificate, genitalia, or natural, unaltered hormone levels).

220. *See supra* note 15 and § II(C).

221. Jaime M. Grant et al., *Injustice at Every Turn: A Report on the National Transgender Discrimination Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY & NAT'L GAY & LESBIAN TASK FORCE (Sept. 11, 2012), https://transequality.org/sites/default/files/docs/resources/NTDS_Exec_Summary.pdf [https://perma.cc/3TAC-AYPJ] (executive summary of survey of over 6,000 transgender and genderqueer individuals revealing pervasive discrimination across categories including employment, education, and housing); *see also* MILNER & BRADDOCK II, *supra* note 20, at 112 (noting the negative effects of heteronormative attitudes on athletes).

222. *See* Hecox v. Little, 479 F. Supp. 3d 930, 976–77 (D. Idaho 2020) (distinguishing cases allowing exclusion of men from women's teams because unlike men, transgender athletes have been disfavored rather than favored).

223. Grant, *supra* note 221, at 3; Naomi Schoenbaum, *The New Law of Gender Nonconformity*, 105 MINN. L. REV. 831, 844–56 (2020) (detailing discrimination and harassment cases).

Moreover, the vehemence with which transgender and intersex athletes are rejected as female competitors is directly tied to the view of women as weak that male hegemony has perpetuated.[224] To the extent some transgender women are taller, stouter, or more masculine than the average cisgender female, their identification as women challenges the "weaker sex" narrative. The assumption of female inferiority and the fear of nonconforming gender identities are thus two sides of the same coin. Anti-subordination theory simply does not protect cisgender females from competition by their fellow victims of discrimination. Categorical exclusion of gender minorities cannot therefore survive intermediate scrutiny. Instead of cisgender female teams, an anti-subordination analysis supports broader underrepresented gender teams.[225]

Before wrapping up this section, it is important to clarify how the inclusion of gender minorities on underrepresented gender teams fits into the overall structure for which this article has advocated. In the one-sided integration model, all athletes would have the option of competing in non-gendered, integrated teams. The labels of "men's" and "boys'" would be removed. As explained in the next section, Title VII doctrine would be used to ensure equal opportunity on these teams and increase, if not equalize, female representation. As a result, gender minorities can find a home on these teams without denying their gender identity. Although some gender minority athletes may have important reasons for preferring an underrepresented gender team, many of the top gender minority athletes, like the top female athletes, would probably prefer to compete on integrated teams, which are likely to offer the highest level of play and the most lucrative and prestigious opportunities.[226] Disputes between cisgender female athletes and intersex and transgender athletes should greatly diminish as a result.

224. Buckwald, *supra* note 37, at 52–53 (connecting discrimination against transgender athletes to gender stereotypes that support male dominance).

225. *See* MILNER & BRADDOCK II, *supra* note 20, at 125 (supporting the inclusion of gender minorities on all-female teams). At a minimum, underrepresented gender teams should include transgender and intersex athletes who identify as women. Transgender men, however, should also be included. Although they identify as men, many transgender men are raised as female and have trained in female athletics before their transition. Accordingly, they have been subjected to the same discrimination and inequality in resources as female athletes. The final category to consider would be nonbinary athletes, i.e., athletes who do not identify with either gender. It seems that integrated, nongendered teams would be the best fit for most nonbinary athletes. However, nonbinary individuals do suffer the same experiences with societal discrimination, as do other gender minorities. Anti-subordination theory therefore supports their inclusion in opportunity teams as needed to correct for societal discrimination. For example, if a nonbinary athlete has had insufficient opportunity to develop athletically in segregated male athletics due to discriminatory treatment, inclusion on an underrepresented gender team would be warranted. Rather than a categorical exclusion, individualized assessment of the fit between the athlete and the team in this situation would be the fairest approach.

226. This assumption is not based on biological superiority of male athletes but rather on the practical reality that integrated teams would pull from a wider field of top athletes.

What, then, would underrepresented gender teams look like? They would consist of cisgender females and gender minority athletes who either could not qualify for integrated teams or chose underrepresented gender teams for other reasons that might include camaraderie, social comfort in that environment, a desire to support the category, coaching preferences, or personal development goals. We might expect these teams to have a special cohesiveness in both skill level and social connection. Nonetheless, some might have a lingering concern that cisgender females would be at a disadvantage on these teams. To a large extent, this concern has already been addressed through the preceding analysis in terms of the need for individualized assessment rather than categorical exclusion, the question marks involved in assuming the inferiority of female athletes, the difficulty in defining biological advantage, and the conceptual question of whether protection of one set of athletes against another is consistent with the merit-based nature of sport. However, let's think about the practical question: will ending protection of cisgender female athletes from gender minority competition likely roll back their opportunity in athletics? It seems unlikely. It was already the case that intersex and transgender athletes were too small in number to marginalize female athletes.[227] Estimates of the proportion of the U.S. population that is transgender vary, but large-scale studies show only .4-.5%.[228] Although the percentage of transgender high school students may be slightly higher, their participation in athletics is low, leaving the percentage of transgender high school athletes at the same .4-.5% mark.[229] Mathematically, it would be rare for a team to have even a single transgender athlete. The percentage of athletes that could be considered intersex is even lower.[230] Moreover, the performance of transgender women and intersex athletes has not

227. HARPER, *supra* note 76, at 77, 96 (noting that relaxation of sex qualification rules did not result in a flood of transgender athletes); *see also Hecox*, 479 F. Supp. 3d at 977 (finding affirmative action cases did not support excluding transgender athletes from female teams for the additional reason that the evidence that they would displace female athletes was weak given that Idaho could only name two transgender athletes that competed on female teams and both had lost to female competitors).

228. Esther L. Meerwijk & Jae M. Sevelius, *Transgender Population Size in the United States: a Meta-Regression of Population-Based Probability Samples*, 107(2) AM. J. PUB. HEALTH e.4 (Feb. 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5227946/ [https://perma.cc/D8K9-4NPY] (reporting .4%); Jody L. Herman et al., *How Many Adults and Youth Identify as Transgender in the United States?*, UCLA SCHOOL OF L. WILLIAMS INST. 1 (June 2022), https://williamsinstitute law .ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf [https://perma.cc/8294-7PHG] (reporting .5%).

229. Katie Barnes, *Young Transgender Athletes Caught in Middle of States' Debates*, ESPN (Sept. 1, 2021) (calculating .44% based on information from recent studies by the CDC and a human rights organization).

230. Leonard Sax, *How Common is Intersex? A Response to Anne Fausto-Sterling*, 39(3) J. SEX RSCH. 174 (2002) (explaining that while one study found 1.7% of the population experiences an intersex trait, those who would be diagnosed as intersex would be only .018% of the population).

been uniformly superior even in sports in which physiology is believed to have relevance.[231] To pick one example, the inclusion of transgender female Laurel Hubbard on New Zealand's weightlifting team in the 2020 Olympics was controversial, but her performance left her short of reaching the finals.[232] Similarly, Caster Semenya's sprinting record is not, as relayed in Part II above, a story of domination. Given their small numbers and variation in performance levels, the likelihood that gender minorities would displace, in significant numbers, cisgender females on underrepresented gender teams seems remote, especially with the availability of integrated teams to attract top athletes. Isolated situations in which a particular transgender or intersex athlete is so far ahead of cisgender female competitors that no female competitor stands a reasonable chance of defeating her should be handled through an individualized assessment rather than categorical exclusion. Such decisions may reasonably depend on a variety of factors including the reasons the athlete prefers nonintegrated competition, the athlete's pattern of performance compared to other athletes, her experience with past discrimination in athletics or generally, and whether integrated competition would provide an adequate opportunity for her personal development as an athlete. Categorical exclusion of transgender athletes from underrepresented teams, however, is not supportable under an anti-subordination theory.

All-girls colleges have increasingly recognized the need to include gender minorities.[233] For the reasons explained in this section, female athletics programs should do the same.

D. The Case for Total Integration of Nonselective Programs

The purported government interests offered in support of segregation are even weaker in the context of non-selective levels of sport, such as JV, recreational, and intramural teams. In the absence of cuts, the concern that females will be shut out of sport by integration is not implicated. Similarly, while the arguments in favor of retaining some underrepresented gender teams as necessary until equal opportunity is obtained are strong at the selective level, they seem less so at the nonselective level because in the absence of a selective process, underrepresented genders would continue to have the same, if not better, access to sports in an integrated system. An inability to compete argument

231. In her book, Harper recounts numerous stories of intersex and transgender athletes. Many of these stories reveal that these athletes did not dominate the field of female athletics. HARPER, *supra* note 76, at 24, 95, 112–13, 135, 212, 216, 219; *see also* Buckwald, *supra* note 37, at 30–31.

232. *Laurel Hubbard: First Transgender Athlete to Compete at Olympics*, BBC (June 21, 2021), https://www.bbc.com/news/world-asia-57549653 [https://perma.cc/884B-S8X3]; *Laurel Hubbard Out of Women's +87kg Final After Three Failed Lifts*, OLYMPIC NEWS (Oct. 5, 2021), https://olympics.com/en/news/weightlifting-laurel-hubbard-transgender-three-failed-lifts-tokyo [https://perma.cc/83F5-8G4W].

233. MILNER & BRADDOCK II, *supra* note 20, at 111.

might be adjusted to an argument that females will be discouraged from participating in athletics at nonselective levels if they are constantly out-played by males. It is likely, however, that integrated sports would reveal a continuum of abilities across genders rather than a sharp divide.[234] Moreover, difference in skill is inherent in nonselective programs and can be addressed through (non-gendered) stratification of teams. For example, where a school currently has a male and female JV team, it might create two integrated teams instead and place participants on the team that best matches their skill level. Integrating nonselective programs can also have a positive ground-up effect to the extent they are preparing athletes for selective programs. They can teach mutual respect, fair play, and teamwork in a mixed gender setting and thereby lay the groundwork for integration at the selective level.

VI. REPLACING THE SEPARATE TEAMS EXCEPTION WITH TITLE VII DOCTRINE TO REGULATE DESEGREGATION

While Equal Protection doctrine supports the one-sided integration model for which this article has argued, it is not a sufficient tool to ensure that integration proceeds in an equitable manner that improves real opportunity for women and gender minorities. As argued above, Equal Protection doctrine invalidates categorical exclusions from athletic programs based on gender except as supported under an anti-subordination theory. However, it does not help identify when an athletic program has engaged in more subtle acts of discrimination. For this, we can turn to the same tools that have helped ensure equity in the desegregation of the workplace. Most notably, as one of the principle antidiscrimination federal statutes, Title VII provides a well-developed structure for identifying discriminatory actions. As this section will explain, its relevance to Title IX is supported by legislative history and has been recognized, at least in a limited range of cases, by the courts.

A. Title VII's Application to Title IX

Without the Separate Teams Exception, Title IX would be left with its general prohibition of discrimination on the basis of sex: "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."[235] This general prohibition can, and should, be enforced using Title VII doctrine.

Title IX piggybacks on the Civil Rights Act of 1964, and legislative history reveals an intent for its nondiscrimination provisions to follow the same

234. Buckwald, *supra* note 37, at 13 n. 63; Leong, *supra* note 40, at 1264–70; Fink, *supra* note 123, at 218; MCDONAGH & PAPPANO, *supra* note 18, at 17–19; Robinson, *supra* note 41, at 346–48; Tokarz, *supra* note 17, at 219–21.

235. 20 U.S.C. § 1681.

precedent.[236] The applicability of Title VII doctrine to Title IX is most clear in the context of employment discrimination claims.[237] However, courts have looked to Title VII doctrine for other types of Title IX claims as well.[238] During the process of desegregation for which this article has argued, Title VII doctrine can therefore be applied to ensure that all athletes have an equal opportunity to participate in integrated programs and that gender minorities will not be unfairly excluded from underrepresented gender teams. The specifics will be developed below. One caveat is that while Title VII doctrine can help define discrimination, it cannot limit liability for violation of the express provisions of Title IX or its regulations.[239]

A few important Title VII principles are next explained and connected the one-sided integration model argued for above. For clarity, this discussion will

236. Cannon v. Univ. of Chicago, 441 U.S. 677, 696 n.19 (1979) (quoting the sponsoring Senator as stating that "'enforcement of [Title IX] will draw heavily on [] precedents' under the Civil Rights Act of 1964").

237. Title IX regulations contain some employment-related provisions. *See* 34 C.F.R. §§ 106.51–106.61 (2020). The general introductory section for these rules provides:

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

§ 106.51(a)(1). The analogy to Title VII is extremely obvious in cases involving these provisions. *See* Mabry v. State Bd. of Cmty. Coll. & Occupational Educ., 813 F.2d 311, 314, 316–17 (10th Cir. 1987) (applying Title VII analysis to 34 C.F.R. § 106.57 (2020), which forbids any employment action "concerning the potential marital, parental or family status of an employee or applicant for employment which treats persons differently on the basis of sex").

238. Roberts v. Col. State Bd. of Agric., 998 F.2d 824, 832 (10th Cir. 1993) (applying Title VII's disparate impact analysis to find that Title IX claim does not require discriminatory intent); Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 897 (1st Cir. 1988) (applying Title VII sexual harassment law to Title IX); Mercer v. Duke Univ., 181 F. Supp. 2d 525, 536–37 (M.D.N.C. 2001) (applying Title VII's burden-shifting analysis for disparate treatment cases to athlete's claim that university football team discriminated against her in violation of Title IX); Sharif by Salahuddin v. N.Y. State Educ. Dept., 709 F. Supp. 345, 362 (S.D.N.Y. 1989) (applying Title VII "business necessity" rule to Title IX challenge to SAT scholarship requirements).

239. *See, e.g.*, Cohen v. Brown Univ., 991 F.2d 888, 901–02 (1st Cir. 1993) (holding that violation of Title IX is shown when a gender is underrepresented in a school's programs and has not been fully accommodated, without the need for additional proof of discriminatory intent under Title VII). Although some of the court's statements in Cohen seemed more broadly against considering Title VII doctrine, the court was clearly focused on the attempt to use Title VII as a defense to Title IX regulatory violations and was not thinking about its relevance to determine discrimination that does not fall into one of the express regulatory requirements. Similarly, in Haffer v. Temple Univ. of the Commonwealth of Higher Educ., 678 F. Supp. 517, 539–40 (E.D. P.A. 1987), the court held that if a regulatory violation is proven, no additional proof of discriminatory intent is needed under Title VI. *See also* Yuracko, *supra* note 42, at 742–62 (rebutting argument that Title IX's proportionality requirement should be limited to applicant pools like in Title VII cases).

adjust language from the employment context addressed in the cited cases to the context of athletic programs and Title IX.

B. Disparate Treatment Analysis

Title VII requires a plaintiff to prove that the decisionmaker based its decision in part upon the plaintiff's gender.[240] This does not, however, require ill will toward the plaintiff's gender.[241] It can also be proven through circumstantial evidence such as the chain of events,[242] past history of discrimination,[243] and a departure from normal procedure.[244]

Alternatively, a plaintiff can rely on the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this analysis, the plaintiff has an initial burden to prove a prima facie case of discrimination by showing that (1) she was a member of a protected class; (2) she sought, and was eligible for, the athletic program at issue; (3) she was rejected; and (4) the program selected athletes of a different gender with the same qualifications or continued to consider other athletes.[245] The burden then shifts to the program to articulate a legitimate, nondiscriminatory reason for rejecting the plaintiff.[246] Thereafter, the plaintiff may still recover if she can present evidence that the reason was pretextual.[247]

Disparate treatment analysis would help ensure that females who compete for spots on integrated teams have a fair shot. It would require the program rejecting an athlete to substantiate any claim that all spots went to more qualified males. An unsubstantiated "she wasn't good enough" claim would not survive the *McDonnell Douglas* test. Moreover, because ill will is not required to support a claim, a program's contention that its general goodwill was proven through its support of a separate underrepresented gender team would not be relevant. And a plaintiff could point to past exclusion of qualified athletes of the same gender or any departure from normal procedure, like giving the plaintiff only one try out while observing prospective male athletes repeatedly. Similarly, disparate treatment analysis could be applied if a gender minority's fit on an underrepresented gender team was not fairly assessed. The court could consider,

240. Texas Dept. of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981). Most of the cases cited in this section refer to sex rather than gender. The author is substituting "gender" for "sex" based on the analysis of *Bostock* in Part IV, *supra*.

241. Goodman v. Lukens Steel Co., 482 U.S. 656, 669 (1987), superseded by statute on other grounds as recognized in Jones v. RR. Donnelley & Sons Co., 541 U.S. 369, 371 (2004); *see also* Robinson v. City of Lake Station, 630 F. Supp. 1052, 1061 (N.D. Ind. 1986).

242. Chan v. Donahoe, 63 F. Supp. 3d 271, 300 (E.D.N.Y. 2014).

243. Harris v. Birmingham Bd. of Educ., 712 F.2d 1377, 1383 (11th Cir. 1983).

244. Morrison v. Booth, 763 F.2d 1366, 1374 (11th Cir. 1985).

245. McDonnell Douglas Corp. v. Green, 411 U.S. at 802; *see also Burdine*, 450 U.S. at 253.

246. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 254.

247. *McDonnell Douglas*, 411 U.S. at 804; *Burdine*, 450 U.S. at 256.

for example, whether cisgender female athletes with the same skill level were permitted on the team.

C. Pattern and Practice Claims

A plaintiff's claim can also be based on a "pattern or practice" of discrimination.[248] This requires a showing, through statistical evidence or specific acts of discrimination, that discrimination against the plaintiff's gender was the program's "standard operating procedure."[249] The program can then rebut this showing by presenting a nondiscriminatory reason for the discriminatory results or by questioning the statistics.[250] Discriminatory motive as to a particular plaintiff will be assumed unless the program can show its discriminatory practice was not the reason for rejecting the plaintiff.[251]

Pattern and practice doctrine permits a plaintiff to use discrimination against the group in lieu of discrimination against the particular plaintiff. This can be effective to hold programs accountable if they were to avoid integration by continuing to view their teams as all-male teams. Repeated exclusion of qualified underrepresented gender athletes, special rules applied only to such candidates, and lack of representation as compared to their portion of the qualified applicant pool (discussed in more detail in Section D below) could sustain a pattern and practice claim.

D. Disparate Impact Analysis

Another accepted route for a discrimination claim under Title VII is to challenge a facially neutral policy by showing it has a disproportionate effect on the plaintiff's gender.[252] This does not require proof of discriminatory intent.[253] Such cases typically look at whether the representation of the disadvantaged class in the program at issue corresponds to their representation in the qualified applicant pool.[254] The relevant applicant pool can be a difficult issue in a disparate impact case. In the context of school sports, it might be the school population, the athlete population, or some reasonably defined subset thereof depending on the level of skill involved in the team at issue and the policy that is being questioned.[255] For example, if the policy at issue is one that discourages

248. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977).

249. *Id.*

250. *Id.* at 358.

251. *Id.* at 362.

252. 42 U.S.C. § 2000e–2(k).

253. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

254. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 (1977) (finding that teacher's claim of racial discrimination depended upon comparison of percentage of black teachers with the pool of qualified public-school teachers in the relevant labor market).

255. *See* In re Emp. Discrimination Litig. Against State of Alabama, 198 F.3d 1305, 1313 (11th Cir. 1999) (explaining that for low-skill positions, the comparison might be to the proportion in the

athletic activity by females in general and the plaintiff's contention is that the athletic programs as a whole at the school lack equal opportunity for females, then the school population might be the relevant pool to which female participation in athletic programs is compared. If, by contrast, the team at issue is high-level college basketball, then the parties would need to determine criteria to apply to define the qualified applicant pool—experience, height, and performance stats, for example.

Disparate impact is a theory that could be used to challenge, for example, the designation of teams as "men's" or "boys'" teams or as "women's" or "girls'" teams. Such a designation would be likely to deter many females and gender minorities from trying out for their best-fit team on the assumption that they would not be welcome or are not qualified. Since few females, in particular, are likely to attempt to cross such a rigid sex barrier, the number of females on the team is likely to be disproportionate to the number of qualified female athletes at the school in the sport at issue, thereby supporting a disparate impact claim. Another example would be a failure to actively recruit female athletes if male athletes are regularly recruited. Unless the school can establish one of the defenses discussed in section E below, the school could be found to have violated Title IX under a disparate impact analysis.

E. Bona Fide Occupational Qualification, Business Necessity, and Lack of Interest

Title VII provides a number of key defenses to discrimination claims. None of these defenses would enable unjustified exclusion of female athletes from integrated teams.

When a plaintiff's claim, whether disparate treatment or disparate impact, is based on a policy or practice, the program can defend the claim with evidence that the policy or practice is a "business necessity."[256] The defense depends upon a "manifest relationship" between the policy or practice and the program's success.[257] If the program meets this burden, a plaintiff can negate "necessity" by pointing to equally effective alternatives.[258]

Programs resisting integration could attempt to implement supposedly necessary policies that would work to exclude all or most females from teams. For example, a team wishing to remain exclusively male might institute minimum height and weight requirements that would exclude females.

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relevant population whereas for high-skill positions, the comparison might be to the proportion among those who applied but with careful consideration to any discouragement of application that might have occurred due to discriminatory policies).

256. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991 (1988) (considering disparate impact claim); Segar v. Smith, 738 F.2d 1249, 1270 (D.C. Cir. 1984) (considering disparate treatment claim).

257. *Watson*, 487 U.S. at 997.

258. Antonio v. Wards Cove Packing Co., 10 F.3d 1485, 1503 (9th Cir. 1993).

However, an excluded female could question the relationship between these criteria and the sport at issue. Weight would be a strange requirement for swimming, for example, and height does not seem particularly relevant to soccer. Male player stats and expert testimony could help establish the irrelevance of physical requirements. Similar arguments could be made regarding the use of policies to exclude gender minority athletes from underrepresented gender teams. For example, any limits on height or weight for inclusion on an underrepresented gender team would have to be relevant to whether the team would be a good fit for the excluded athlete.

A similar defense to "business necessity" is a claim that sex is a "bonafide occupational qualification reasonably necessary to the normal operation" of the business.[259] In contrast to the "business necessity" defense, which contends that exclusion of females was a secondary consequence but not the goal of the policy or practice at issue, the BFOQ defense admits an intent to exclude a gender but provides a lawful reason for the exclusion. This defense is extremely narrow.[260] In particular, a safety concern that effects only the woman herself is insufficient.[261] Moreover, sex cannot be used as a proxy for strength.[262] One example of this narrow defense is the allowance of a prison policy to hire only females to guard female inmates to preserve the dignity and privacy of the inmates.[263] Unless we return to the days of naked competition during the early Greek Olympics, bonafide occupational qualification is unlikely to help programs avoid integration.

In addition, when a claim is based on statistical evidence, the defendant may be able to argue that underrepresentation resulted from lack of interest among the excluded class.[264] However, any such argument should be viewed skeptically to ensure that the lack of interest did not result from discriminatory practices. For example, referring to a team as a "men's" or "boys'" team would signal that females are not welcome to tryout and therefore should prevent a lack of interest defense.[265] Courts have been inconsistent about applying the necessary rigor to an asserted lack of interest, but there is at least support in case law for rejecting

259. 42 U.S.C. § 2000e–2(e)(1); *see* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 200–01 (1991).

260. *Int'l Union*, 499 U.S. at 200–201.

261. *Id.* at 202.

262. *Id.*

263. Teamsters Local Union No. 117 v. Wash. Dep't. of Corrections, 789 F.3d 979, 991 (9th Cir. 2015).

264. *Hazelwood*, 433 U.S. at 312–13 (remanding for determination of appropriate applicant pool for statistical analysis).

265. Int'l Bhd. of Teamsters v. U.S., 431 U.S. 324, 365 (1977) (explaining that a "whites only" sign on the hiring office door would limit interest to the few who ignored the sign at the risk of rebuff).

the defense in such cases.[266] Accordingly, disparate impact theory could be an effective tool to ensure programs meet their obligation of providing adequate opportunity for females and gender minorities in sport.

F. *Affirmative Action*

Disparate impact theory does not require but can incentivize programs to provide affirmative action opportunities to underrepresented genders, including the creation of underrepresented gender teams or the use of equalizing factors in selection processes for integrated teams. The Supreme Court discussed the use of affirmative action to avoid disparate impact liability in *Ricci v. DeStefano*.[267] It held that the defendant must produce "strong . . . evidence" that its remedial actions are "necessary" to avoid causing a disparate impact on the protected class.[268] To make this showing, the defendant must show evidence of an existing disparity and must establish that its remedial action does not remove a "business necessity" that could not be addressed through equally effective alternatives.[269] Alternatively, affirmative action can be supported if it was necessary to eliminate imbalance in traditionally segregated opportunities.[270] The action must not excessively burden the other sex and must not be intended to be permanent.[271]

Title VII doctrine would thus permit a program to retain an underrepresented gender team to provide opportunity until the rosters of integrated teams resemble the proportion of female and gender minority athletes at the school or in the student body.[272] It could also permit mentorship or special extra training opportunities for athletes on underrepresented gender teams who want to compete on the integrated team. It could even permit consideration of a female's sex or gender as a plus factor in selection for integrated teams.[273]

266. Vicki Schultz, *Telling Stores About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1765–66 (June 1990) (discussing inconsistency in court approaches to the lack of interest argument).

267. Ricci v. DeStefano, 557 U.S. 557, 582 (2009).

268. *Id.*

269. *Id.* at 587.

270. Johnson v. Transp. Agency, Santa Clara Cnty., 480 U.S. 616, 630 (1987).

271. *Id.* at 639–40.

272. Cohen v. Brown Univ., 101 F.3d 155, 170–71 (1st Cir. 1996) (concluding that Title IX and Title VII both permit affirmative action in athletic programs); *see also* United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 208 (1979) (holding that preference for minorities in training program did not unnecessarily burden the rights of whites because it did not displace or prevent advancement of whites); Garnet v. Gen. Motors Corp., 114 F. Supp. 2d 649, 658 (N.D. Ohio 2000) (holding that special pre-apprentice training programs for women and minorities did not violate Title VII).

273. *Johnson*, 480 U.S. at 641 (holding that public agency can use gender as a plus factor in hiring under Title VII until workforce achieves proportional representation). *But see* Students for

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G. Program-Wide v. Sport-Specific Analysis

The DOE regulations do also have some provisions that can be helpful to integration when divorced from the Separate Teams Exception. The Policy Interpretation considers equal opportunity within the overall athletic program and not on a sport-specific basis.[274] For example, a school is not required to create a woman's wrestling team if it has an adequate offering of other female teams.[275] In an integrated system, this principle could have more of a reverse application: a program should not be able to satisfy its duty to provide equal opportunity to underrepresented genders by arguing that each specific integrated team used relevant criteria to select the best athletes if the program as a whole provides inadequate opportunity for all genders to participate in sport. Title IX would thus support a continuing obligation to offer underrepresented gender teams until integrated teams fully accommodate student interest in athletics.

Fair Admissions, Inc. v. Univ. of N.C., 142 S. Ct. 896 (Jan. 24, 2022) (granting certiori to review federal court decision 567 F. Supp. 3d 580 upheld race as a plus in admissions policies); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 142 S. Ct. 895 (Jan. 24, 2022) (granting certiori to review federal court decisions that upheld race as a plus in admissions policies). As noted earlier, affirmative action has fared better under intermediate scrutiny than under strict scrutiny, so it is not clear what affect the Harvard and UNC cases would have on gender-based affirmative action if the Supreme Court found that affirmative action is not permissible in the context of race.

274. The Regulation asks "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." 34 C.F.R. § 106.41(c)(1) (2019). The Policy Interpretation provides that programs can meet this requirement in any one of three ways: (1) by showing that participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; (2) by proving program expansion to meet any gap; or (3) by establishing that the interests and abilities of the members of that sex have been fully and effectively accommodated. Intercollegiate Athletics: Sex Discrimination, Intercollegiate Athletics: Sex Discrimination, 44 Fed. Reg. 71418 (Dec. 11, 1979). None of these methods requires that demand for a particular sport be met. *See* Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168, 174 (3d Cir. 1993) (focusing on whether male opportunities in sport in general at the school were limited rather than on whether male opportunities in field hockey were limited because the statute did not intend to force male and female teams for every sport); Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843, 856 (9th Cir. 2014) (evaluating Title IX claim by looking at the female enrollment at the school compared to female participation in athletics as a whole); Kelley v. Bd. of Trs., 35 F.3d 265, 270 (7th Cir. 1994) (finding that Title IX permitted eliminating men's swim team because male athletes on the whole "would continue to be more than substantially proportionate to their presence in the University's student body"). One exception is that because the Policy Interpretation does not require programs to permit females to compete on male contact sport teams, it does require a parallel women's team if sufficient interest exists. Intercollegiate Athletics: Sex Discrimination, 44 Fed. Reg. 71418 (Dec. 11, 1979).

275. *See, e.g.*, Mansourian v. Bd. of Regents of Univ. of Cal. at Davis, 816 F. Supp. 2d 869, 927 (E.D. Cal. 2011).

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Under this approach, many of the criteria in the Policy Interpretation remain helpful. If the frequent mentions of "men's and women's programs"[276] are ignored, because they permit unconstitutional segregation, the document's emphasis on meeting the needs of female students at a level proportionate to their representation in the student population could simply shift from a program comparison model to an overall opportunity model.[277] For example, instead of looking only at whether a school has an adequate number of female teams available to meet student interest,[278] the DOE could look at the combination of opportunities offered to female and gender minority students through integrated and underrepresented gender teams.

Many of the DOE's existing criteria—travel reimbursement, coaching and tutoring, locker rooms, medical and training services, housing and dining, and publicity—would be applicable to integrated sports.[279] For example, an integrated team has not provided adequate opportunity if male athletes are highlighted in announcements while female and gender minority athletes with the same or greater achievements are not. Proportionality in scholarships and other financial assistance to athletes should similarly remain a relevant criterion for compliance with Title IX.[280] Remaining criteria—equipment and supplies and scheduling of game and practice time[281]—may retain relevance only to underrepresented gender teams to ensure they are not deprioritized compared to integrated teams. Where the Policy Interpretation allows for some difference between programs, an interpretation consistent with the Equal Protection Clause could replace "men's" or "male" with "integrated," and "women's" or "female" with "underrepresented gender." For example, section VII.B.2.c permits unequal event management resources when differences in crowd size between male and female competitions exist.[282] This permission could still apply when integrated team events exceed the crowd size for an underrepresented gender team. By contrast, provisions in the Policy Interpretation that impermissibly permit segregation by gender can and should be disregarded as unconstitutional.[283]

276. *See, e.g.*, Intercollegiate Athletics: Sex Discrimination, 44 Fed. Reg. 41417 (Dec. 11, 1979) (identifying equivalence of various resources for men's and women's programs as a factor for compliance determinations).

277. If a portion of a regulation is deemed unconstitutional, remaining provisions can still be applied unless they were dependent upon the invalidated portion. *See* Carter v. Carter Coal Co., 298 U.S. 238, 312 (1936). The Regulation and Policy Interpretation were never intended to *require* sex segregation of athletics and therefore can be applied without reference to segregated programs.

278. Intercollegiate Athletics: Sex Discrimination, 44 Fed. Reg. 71414 V (Dec. 11, 1979).

279. 34 C.F.R. 106.41(c); Intercollegiate Athletics: Sex Discrimination, 44 Fed. Reg. 71415 VII.B (Dec. 11, 1979).

280. 44 Fed. Reg. 71415 VII.A.

281. 44 Fed. Reg. 71416 VII.B.

282. *Id.*

283. *See* Carter v. Carter Coal Co., 298 U.S. 238, 313 (1936). For example, section VII.C.4 of the Policy Interpretation provides that Title IX does not require integration of teams. This should

This section has examined how Title IX, through incorporation of Title VII doctrine and adaptation of its existing regulations, can ensure opportunity for underrepresented genders in sport if its general nondiscrimination provision is divorced from the Separate Teams Exception. The Separate Teams Exception would have to add some benefit to this goal in order to satisfy the "substantially related" component of intermediate scrutiny under the Equal Protection Clause. No such benefit is evident. In fact, the separate-but-equal approach has hindered equality even as it has required opportunity. The result has been a cap on the success of female athletes, who can rise to the top of their field and yet still be deemed inferior to male athletes because they have been denied the opportunity to train and compete in integrated athletics. While Title IX has moved the needle of opportunity tremendously, the Separate Teams Exception has imposed a stopper that must be removed if the "equal" part of equal opportunity is to be obtained.

CONCLUSION

As time has passed and more women have competed with men, evidence disproving the prediction of Javits Amendment supporters that permitting females to compete with males would be the "doom of intercollegiate sports"[284] has been mounting.[285] It is discouraging that these provisions remain on the books. Perhaps the DOE's planned review of the athletic regulations will result in substantial changes to the Separate Teams Exception. However, the goal of this article is to provide a path forward even if no changes occur. Specifically, it has provided arguments that can be used to challenge segregation in the courts and, applying Title VII doctrine to Title IX, to break down barriers to equal opportunity such as labeling teams as "boy's" or "men's" teams and recruiting only males. With respect to gender minorities, it has proposed two solutions, both of which are supported by Equal Protection doctrine: (1) replacing all-male teams with all-gender teams so that athletes do not need to deny their self-identity to participate, and (2) adjusting all-female teams to underrepresented gender teams with individualized assessment of an athlete's skill (rather than

be disregarded. Intercollegiate Athletics: Sex Discrimination, 44 Fed. Reg. 71417–18 (Dec. 11, 1979).

284. MILNER & BRADDOCK II, *supra* note 20, at 17.

285. *See generally* Brenden v. Indep. Sch. Dist. 742, 477 F.2d 1292, 1300 (1973) (explaining that subjective testimony that women are "wholly incapable of competing with men in interscholastic athletics" is susceptible to stereotypes and is not based on actual data); Nancy Leong, *Against Women's Sports*, 95 WASH. U. L. REV. 1249, 1285–1290 (2018) (discussing sports in which sex segregation is inappropriate, including in sports where men and women perform "essentially the same skills," where no rule changes would be necessary for women and men to compete together, and where gender is not necessarily the best basis of division); MCDONAGH & PAPPANO, *supra* note 18, at 10 (observing that if women were encouraged to develop certain athletic skills, then sex segregation in some sports would be obsolete).

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relying on imperfect biological markers) to determine whether such a team is an appropriate placement.

The arguments in this article continue to support athletic excellence by enabling programs to select the most qualified athletes while also ensuring adequate athletic opportunities for women and gender minorities. Although the balanced approach suggested in this article might invite only limited integration in certain sports like sprinting and weightlifting, where the necessary skills are narrow and dependent on a particular body type, we would be likely to see significant integration in a wide variety of sports. Many sports require or at least accommodate a variety of physiques. We might not ever see a female lineman on a Division I football team, but we might see more female kickers and even running backs. We might not ever see a female center play on a highly selective college basketball team, but we might see some female point guards. Integration would be even more significant at the high school varsity level and in nonselective programs. We have seen what integration in the workplace has meant for the position of women in society, and we have all benefitted from the value added by including women in the working world. Why would we not want to see that same progress in sport? We might see improvement in gender relations, a loosening of the association between sport and violence, and innovations in rules, strategy, and training techniques. Segregation is not just a cage for female athletes; it is a cage in which all athletics are housed. Let's start bending the bars.