2000

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Abigail Crouse

Comment

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*Abigail Crouse**

Heather Mercer was an all-state kicker who helped lead her high-school football team to a state championship.[1] Several coaches who worked with Mercer regarded her skills as competitive to those of any kicker playing at the collegiate Division One level.[2] After graduation, she attended Duke University where she was a walk-on player on the school's football team.[3] Because she was female, however, she was not treated like most of the walk-ons.[4] The coaches gave her a private try-out, and she was only allowed to practice with the other walk-on kickers (all of whom were male) even though the other walk-on kickers were allowed to practice with the full team.[5] She was not issued a uniform, nor was she allowed to dress for games.[6] Despite this discrimination, she was still able to demonstrate her remarkable skills. In the team's spring intrasquad match, Mercer kicked the twenty-eight-yard winning field goal for her team, and the coach told her she had made the Duke University team.[7] Nonetheless, the discrimination continued the following year. Even though she was a member of the team, the

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1. *See* Timothy W. Smith, *A Kicker Sues, Saying She Was Treated Unfairly*, N.Y. TIMES, Sept. 17, 1997, at C1. *See generally* Mercer v. Duke Univ., 190 F.3d 643 (4th Cir. 1999).

2. *See* Smith, *supra* note 1, at C1.

3. *See id.*

4. *See id.*

5. *See id.*

6. *See id.* While the other walk-on kickers sat on the field with the team, the coach told Mercer she could sit in the stands with her boyfriend during home games. *See id.*

7. *See id.*

coach told her she would be a distraction to the other players if she were allowed to dress in uniform and stand on the sideline.[8] The coach later told her she had no place on the team.[9]

In many areas of American law, the last century has witnessed the deterioration of legally enforceable gender roles.[10] Since 1971, the Supreme Court has consistently affirmed that gender based "classifications may not be used, as they once were, . . . to create or perpetuate the legal, social, and economic inferiority of women."[11] Congress has also taken steps to provide equal opportunity to women, passing legislation such as Title IX of the Educational Amendments.[12]

Despite the gains made by legislative and judicial efforts, Heather Mercer's situation demonstrates that legal reform is still needed to combat some types of gender discrimination. Congress promulgated Title IX with the hope that it would provide women with equal opportunity.[13] The sexual prejudice engrained in our society, however, may have blinded the founders of Title IX to the fact that their efforts to alleviate gender-based discrimination also perpetuated it.[14] This Comment will argue that the contact sport exception to Title IX, which permits gender-based discrimination in contact sports, denies equal ath-

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8. *See id.* Ironically, the Duke football coach asked Mercer to conduct interviews with news media about being the only female kicker on a Division I football team, even though he refused to let her dress for games. *See id.*

9. *See id.*

10. Until 1920, women did not have the right to vote, *see* U.S. CONST. amend. XIX (passed 1920), were discouraged from pursuing an education, and could legally be treated as a man's inferior. *See* Goesaert v. Cleary, 335 U.S. 464, 467 (1948) (rejecting challenges to a Michigan law denying women the right to have bartender licenses unless they were the wife or the daughter of a male tavern owner). Women were thought of as weak and in need of men's help and care. *See generally* JOHN STUART MILL, THE SUBJECTION OF WOMEN (1869). However, in 1971, the U.S. Supreme Court held that a state violates the Equal Protection Clause of the Fourteenth Amendment when one of its laws or official state policies "denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." United States v. Virginia, 518 U.S. 515, 532 (1996).

11. *Virginia*, 518 U.S. at 534.

12. 20 U.S.C. § 1681 (1994); *see also infra* text accompanying note 19.

13. *See generally* 118 CONG. REC. 5803 (1972).

14. *See* 118 CONG. REC. 5811 (1972) (report by Dr. Bernice Sandler titled "The Status of Women: Employment and Admissions") ("Sex discrimination is the last socially acceptable prejudice. Sex prejudice is so engrained in our society that many who practice it are simply unaware that they are hurting women.").

letic opportunity to men and women and solidifies traditional gender roles.

Part I of this Comment examines the origins of Title IX and the contact sports exception as well as the current state of the law. Part II describes the district court's dismissal of Mercer's claim and the Fourth Circuit's reversal of that decision in *Mercer v. Duke University*.[15] Part III articulates the superiority of the Fourth Circuit's interpretation of the contact sport exception. This Part also examines weaknesses in the Fourth Circuit's interpretation, noting that even the best interpretation of the contact sport exception creates problems of application. Part IV proposes the elimination of the contact sport exception and the creation of new regulatory language that will ensure equal athletic opportunity.

I. CURRENT REMEDIES FOR GENDER DISCRIMINATION IN ATHLETICS

Many students are denied the opportunity to play their sport of choice because their school only offers one team, limited to members of the opposite sex. Such students may have two federal remedies: an action under Title IX or an action under 42 U.S.C. § 1983. Title IX is the most widely available of these remedies and is specifically designed to deal with discrimination in educational programs.

A. TITLE IX PROVIDES A REMEDY FOR GENDER-BASED DISCRIMINATION IN ATHLETICS

Congress passed Title IX of the Educational Amendments of 1972 in response to abundant evidence of widespread academic discrimination against women.[16] The legislation was modeled after Title VI of the Civil Rights Act of 1964, which banned race discrimination in federally funded programs.[17] Through Title IX, Congress intended "to put into law 'the essential guarantees of equal opportunity in education.'"[18] The

15. 190 F.3d 643 (4th Cir. 1999).

16. In the summer of 1970, the House Special Subcommittee on Education held hearings on sex discrimination that went on to serve as the basis for Title IX legislation. *See generally* 118 CONG. REC. 5804 (1972).

17. *See* Haffer v. Temple Univ., 524 F. Supp. 531, 533 (E.D. Pa. 1981) (stating that Title IX was "intended to provide appropriate safeguards 'parallel to those found in Title VI'" (quoting 118 CONG. REC. 5803 (1972) (remarks of Senator Bayh))).

18. *See id.* (quoting 118 CONG REC. 5808 (remarks of Senator Bayh)).

Act provides that "no person . . . on the basis of sex, shall 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."[19] Two years later, Congress amended Title IX in the Educational Amendments of 1974 to make the statute applicable to athletic programs.[20] It authorized the Department of Health, Education and Welfare[21] to promulgate regulations for implementing Title IX that included "with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports."[22] In early summer of 1975, the agency issued a final version of its regulations.[23]

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19. 20 U.S.C. § 1681 (1994).

20. *See* Provision Relating to Sex Discrimination, Pub. L. No. 93-380, 88 Stat. 612 (1974). The issue of Title IX's applicability to athletics was barely mentioned in the debates surrounding passage of the original Title IX legislation. Among the few references to athletics, the sponsor of the legislation did note that Title IX would not mandate the desegregation of football. *See* 117 CONG. REC. 30,407 (1971) (statement of Senator Bayh). Senator Bayh stated:

> [N]or do I feel [Title IX] mandates the desegregation of football fields. What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. We are not requiring that intercollegiate football be desegregated . . . .

Id.

21. The Department of Health, Education, and Welfare was charged with writing the regulations, however, that Department was later split into smaller entities. The Department of Education now administers Title IX. To help provide continuity, this Comment will refer to the administrative agency as the Department of Health, Education and Welfare rather than referring to both agencies.

22. Provisions Relating to Sex Discrimination, Pub. L. No. 93-380, 88 Stat. 612 (1974). This language presented a compromise to a much more far-reaching amendment proposed by Senator Tower. Senator Tower first proposed that all intercollegiate athletics be exempt from the requirements of Title IX, but later modified his proposal to exempt only "intercollegiate athletic[s] to the extent that such activity does or may provide gross receipts or donations to the institution necessary to support that activity." 120 CONG REC. 15,322-23 (1974) (statement of Sen. Tower). Senator Tower and many others feared that Title IX could totally upset intercollegiate athletics, depriving universities of important revenue and depriving men and women of certain opportunities, all in the name of gender equity. *See id.* This amendment was criticized for focusing too closely on the financial burdens Title IX would impose to guarantee gender equity. *See generally Prohibition of Sex Discrimination, 1975: Hearings on S. 2106 Before the Subcomm. on Educ. of the Senate Comm. on Labor and Pub. Welfare*, 94th Cong. (1975). Some critics noted that "such an amendment to Title IX would help perpetuate the very inequities that the law was enacted to eliminate . . . . The Tower Bill would perpetuate years of past discrimination in sports by allowing it to occur whenever

The Department of Health, Education and Welfare's regulations follow the congressional mandate of equal athletic opportunity, stating: "No person shall, on the basis of sex, be excluded from participation in, be denied benefits of, be treated differently from another person, or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient."[24] The regulations further state that recipients can offer separate teams for members of each sex,[25] but must provide equal athletic opportunity for members of both sexes.[26] The regulations also provided a three-year transition period for compliance with the regulations.[27] The Department of Health, Education and Welfare re-

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money is involved." *Id.* at 61 (testimony of the United States National Student Association). For a further discussion of the Tower amendment, see Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL'Y 51, 54 (1996).

23. *See* Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Financial Assistance, 40 Fed. Reg. 24,128 (1975). Congress had 45 days to disapprove the final regulations by concurrent resolution. *See* Brake & Catlin, *supra* note 22, at 56. Opponents to equal opportunity in athletics proposed several amendments to the regulations, but none of these bills passed. The regulations went into effect on July 21, 1975. *See id.*

24. 34 C.F.R. § 106.41(a) (1999) [hereinafter "anti-discrimination clause"].

25. *See id.* § 106.41(b) ("[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.") [hereinafter "separate teams exception"].

26. *See id.* § 106.41(c) ("A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes."). The regulation goes on to list several factors that should be considered in deciding whether a recipient has met the requirement of equal athletic opportunity. *See id.* However, this provision of the regulation allows recipients to spend more money on teams for one sex than it does on teams for another sex. "Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams will not constitute noncompliance with this section." *Id.* However, "the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex." *Id.* This exception seems to reflect Senator Tower's concern that Title IX not destroy intercollegiate football. *See supra* note 22.

27. *See* 34 C.F.R. § 106.41(d) ("A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation."). The Department of Health, Education and Welfare recognized the huge disparities that existed between men's and women's athletic programs and accordingly gave schools and universities a limited period of time to reform their programs. *See id.* The agency also recognized that

ceived many comments after issuing the proposed regulations[28] and, as a result, issued a Policy Interpretation to make the regulations easier to understand.[29] The Policy Interpretation provides a detailed set of factors and standards for determining whether recipients have complied with Title IX, including equity in scholarships, resources and facilities.[30]

Based on this foundation, Title IX seemed poised to readily effectuate Congress's goal of equal athletic opportunity in the early 1980s.[31] Indeed, it had already achieved significant gains

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elementary schools were not in need of such a lengthy adjustment period. "A recipient which operates or sponsors . . . athletics at the elementary school level shall comply fully with this section . . . in no event later than one year from the effective date of this regulation." *Id.*

28. Former Department of Health Education and Welfare Secretary Caspar Weinberger stated, "I had not realized until the comment period [on the Title IX regulations] that athletics is the single most important thing in the United States." Haffer v. Temple Univ., 524 F. Supp. 531, 536 n.9 (E.D. Pa. 1981). "Representative Patricia Schroeder testified that she was 'shocked by the hysteria that has surrounded these regulations, especially those relating to sports and athletic programs.'" *Id.* at 536 (quoting *Hearings on Title IX Before the Subcomm. on Postsecondary Educ. of the House Comm. on Educ. and Labor*, 94th Cong. 97 (1975) (statement of Rep. Schroeder)). She further stated that "[t]he spector of that sacrosanct institution, big time football, dying at the height of its glory, of football heroes in tattered uniforms playing to half-empty stadiums, are alarmist tactics that serve only to cloud the issue." *Id.*

29. *See* 44 Fed. Reg. 58,070-76 (1978) (noting that the agency intended the Policy Interpretation to "provide a framework within which those complaints can be resolved and to provide institutions of higher education with additional guidance on the requirements of" compliance with Title IX).

30. *See id.* These factors and standards also included comparisons of participant interest and abilities, and equity in equipment, travel, tutoring, coaching, and recruiting. *See id.* The Policy Interpretation also provides information and documentation on past and present discrimination against women. *See id.* It has played an important role in the courts as plaintiffs try to force schools to comply with Title IX because it is the clearest statement of the agency's interpretation of the regulatory criteria of the statute. Consequently, courts grant it substantial deference. *See, e.g.*, Kelley v. Board of Trustees, 832 F. Supp. 237, 242 (C.D. Ill. 1993) ("[T]he Court must give deference to regulations and interpretations promulgated under the authority of Congress.").

31. This goal was based both on the notion that women and men should be treated equally and in recognition of the health, psychological, and sociological benefits of women's participation in athletics. Women who participate in athletics are more likely to finish school, more likely to go to college, less likely to have an unwanted pregnancy and less likely to use drugs. *See, e.g.*, 145 CONG. REC. H6396 (daily ed. July 26, 1999) (statement of Rep. Morella). Furthermore, proponents argue that women who participate in sports lower their risk of breast cancer, are less likely to suffer from depression, and have a healthier body image. *See id.*

for women—by 1976, just four years after the passage of Title IX, over two million girls were participating in sports.[32] This was an increase of 600%.[33] In 1984, however, the Supreme Court halted the progress Title IX had made toward eliminating gender discrimination in athletics. The Court declared that Title IX was "program specific" and therefore applied only to individual *programs* that received federal funds.[34] Although most educational institutions receive and depend on federal funding at the institutional level, few receive funding specifically for their sports programs;[35] thus, this holding effectively removed gender-based discrimination in athletics from Title IX's purview. The Court's decision led to a sudden weakening of government efforts to ensure gender equality in athletics.[36]

In response to the Court's action, Congress immediately sought to re-extend Title IX's application to athletics by changing Title IX's definition of "program or activity."[37] Congress passed the Civil Rights Restoration Act of 1987 over a presidential veto and specified that the term "program or ac-

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32. *See* Jessica E. Jay, *Women's Participation in Sports: Four Feminist Perspectives*, 7 TEX. J. WOMEN & L. 1, 4 (1997) (citing Joan O'Brien, *The Unlevel Playing Field*, SALT LAKE TRIB., Sept. 4, 1994, at A9).

33. *See id.*

34. *See* Grove City College v. Bell, 465 U.S. 555, 572-74 (1984).

35. *See* Jay, *supra* note 32, at 5; *see also* Brake & Catlin, *supra* note 22, at 57-59.

36. *See* Brake & Catlin, *supra* note 22, at 58-59. The decision had substantial effects on the Department of Education's enforcement of Title IX action. *See id.* The agency's Office of Civil Rights (OCR) immediately dropped or narrowed 40 pending Title IX cases and suspended cases where the agency had found discrimination and was monitoring enforcement. *See id.* The agency began to ignore the numerous complaints about discrimination in athletics that flowed into the office on a daily basis. *See id.* Because the Supreme Court's interpretation of the law is final, this decision halted any further progress in the courts. *See id.*

37. *See* 20 U.S.C. § 1687 (1994); Brake & Catlin, *supra* note 22, at 59. In 1988, most members of Congress felt strongly that Title IX should apply to athletics. *See, e.g.*, 134 CONG. REC. 247 (1988) (statement of Sen. Packwood) ("Prior to the [*Grove City*] case, everyone . . . thought that the Title IX regulations meant institution wide coverage. And this, very frankly, is how we finally were able to get universities and . . . high schools, to give equal treatment to women in athletics. This was the opening wedge."). Congressional debates revealed a strong majority of congressional members thought that discrimination against female athletes was a significant problem and deserved a civil rights remedy. *See, e.g.*, 130 CONG. REC. 25,602 (1984) (statement of Sen. Hatch) ("I personally do not know of any Senator in the Senate—there may be a few, but very few—who does not want title IX implemented so as to continue to encourage women throughout America to develop into Olympic athletes . . . .").

tivity" encompasses "all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education . . . any part of which is extended Federal financial assistance."[38]

After passage of the Civil Rights Restoration Act, Title IX regained momentum. In 1992, the Supreme Court held that plaintiffs in a Title IX case have the right to monetary damages in addition to the right to force compliance with the statute.[39] This decision gave athletes greater incentive to sue, thereby motivating schools to bring their athletic programs into compliance with the statute.[40] Several recent appellate court decisions have further protected women's athletics by holding that schools discriminating on the basis of gender in the allocation of resources or in participation opportunities are liable under Title IX.[41] In addition, congressional support for the legislation

38. 20 U.S.C. § 1687. Congressional findings clearly stated their intent for the new statute to overrule the Supreme Court's decision. "[C]ertain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of [T]itle IX of the Education Amendments of 1972 . . . legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered." Pub. L. No. 100-259, § 2, 102 Stat. 28 (1988). The Supreme Court has not taken any cases challenging the applicability of Title IX to athletics since the 1987 Act, even denying certiori in the recent controversial case of *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997) (holding that Brown University violated Title IX by demoting women's varsity gymnastics and volleyball to donor-funded status).

39. *See* Franklin v. Gwinett County Pub. Sch., 503 U.S. 60, 76 (1992). Until *Franklin*, plaintiffs bringing Title IX suits could only seek a court order forcing the school to comply with a law. *See* Brake & Catlin, *supra* note 22, at 60-61.

40. *See* Brake & Catlin, *supra* note 22, at 60-61. Because the plaintiffs were students, they would often graduate before any changes would be made, minimizing their incentive to sue under the law before the decision to allow money damages. *See id.*

41. *See generally* Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996); Favia v. Indiana Univ., 7 F.3d 332 (3d Cir. 1993); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993). In these cases, the appellate courts held that it is a violation of Title IX for post-secondary institutions to eliminate certain women's intercollegiate teams or deprive them of varsity status if women are underrepresented in the institution's athletic programs. *See Cohen*, 101 F.3d at 180; *Favia*, 7 F.3d at 342-44; *Roberts*, 998 F.2d at 831-32. The courts rejected the defense that financial problems compelled the university to cut funding to the women's team and insisted on substantial proportionality, where each gender is entitled to equal representation in the schools athletic programs. *See Cohen*, 101 F.3d at 176; *Favia*, 7 F.3d at 342-44; *Roberts*, 998 F.2d at 830.

remains overwhelmingly strong.[42] In 1994, Congress took strides to further increase Title IX's effectiveness by passing the Equity in Athletics Disclosure Act.[43] The Act requires that schools publish data on athletic opportunities available to men and women so that female athletes can determine which institution best suits their needs.[44]

As a result of Title IX and recent judicial decisions interpreting the statute, women's athletics have prospered. Only one in twenty-seven girls participated in high school sports in 1971, but by 1994 that number had risen to one in three.[45] Two years after Title IX was passed, an estimated 50,000 men and 50 women received athletic scholarships to go to college.[46] Today women receive about one third of the available athletic scholarships.[47] Moreover, Title IX, combined with Olympic competition, has helped to prompt an increased emphasis on women's athletics worldwide.[48]

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42. Many members of Congress as well as outside commentators have commended the legislation. Senator Reid stated, "Title IX has been an outstanding program. It has allowed women to build their athleticism just as men did for many decades." 145 CONG. REC. S8206 (daily ed. July 12, 1999). Some members of the public and Congress have reacted negatively to the law's growth, but their reactionary tendencies are far outweighed by supporters of the legislation. For instance, Rep. Hastert has twice proposed eliminating funding for Title IX enforcement and both proposals failed. *See* Jackie Koszczuk, *Gender Equity in Sports: Will Hastert Go to the Mat?*, 57 CONG. Q WKLY. 745, 746 (1999). Moreover, in 1998, Rep. Hastert, concerned with the effect Title IX has on men's low revenue sports like wrestling, proposed an amendment that would require that colleges publicly give advance notice of their intention to drop a sport. *See id.* Several critics attacked the bill as an encroachment on Title IX and it was defeated by a strong majority, 292-129. *See id.* Rep. McKeon, who is also concerned with the effect Title IX has had on men's sports, noted that support for women's athletics is strong. *See id.* "The attitude [is] if men's sports are dropped, that's tough." *Id.*

43. Pub. L. No. 103-382, § 360B, 108 Stat. 3969, 3969-71 (1994).

44. *See id.* Schools must provide a listing of varsity teams, number of participants, whether the coach is full or part-time and the coach's gender, the number and gender of assistant coaches, salaries for coaches, total operating expenses and total financial aid available. *See id.*

45. *See* Jay, *supra* note 32, at 6.

46. *See* 145 CONG. REC. S8206 (daily ed. July 12, 1999) (statement of Sen. Reid).

47. *See id.* Senator Reid commented that it is good that women receive one third of all athletic scholarships, but "[i]t should be half." However, "a third is certainly a step in the right direction." *Id.*

48. *See* Jere Longman, *How the Women Won*, N.Y. TIMES MAG., June 23, 1996, at 23, 24 ("The global triumph of women in sports has a distinctly made-in-American flavor. Its roots reach back to the Administration of that old-fashioned statist-liberal Richard Nixon. He signed the 1972 legislation that

Not only are women playing sports, but the public is watching. In the opening game of the women's World Cup Soccer Competition at Giants Stadium in New Jersey, more fans watched the American women defeat Denmark than have ever watched a Giants or Jets National Football League game at that stadium.[49] Furthermore, women have become a key audience in sports programming. In covering the 1996 Summer Olympics, NBC found that "what makes or breaks coverage is the ability to hold women."[50]

B. A GOAL YET TO BE OBTAINED: THE WEAKNESSES OF TITLE IX AND § 1983 IN ESTABLISHING GENDER EQUITY

Notwithstanding the significant progress Title IX has effected, there is still no comprehensive remedy for gender discrimination in athletics. Title IX creates a statutory cause of action for gender discrimination by institutions receiving federal funding,[51] and § 1983 provides a more general remedy for discrimination by state actors.[52] However, the contact sport exception to Title IX prevents many plaintiffs from obtaining Title IX relief.[53] Furthermore, confusion about the preclusive effect of Title IX denies many plaintiffs the more general remedy available under § 1983.[54]

1. The History and Effect of the Contact Sport Exception to Title IX

Despite significant gains in recent years, gender-based discrimination in athletics still exists[55] and, in some cases, it is

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mandated athletic equality at American universities, ultimately touching off a worldwide recruiting war for female athletic talent.").

49. *See* S. Res. 141, 106th Cong. (1999).

50. Longman, *supra* note 48, at 23 (quoting Peter C. Diamond, NBC's senior vice president for Olympic Programming).

51. *See supra* note 19 and accompanying text.

52. *See* 42 U.S.C. § 1983 (1994).

53. *See infra* Part I.B.1.

54. *See infra* Part I.B.2. Moreover, § 1983 is limited to actions against state schools, because a state actor must be involved to trigger its remedy.

55. *See* Tarik El-Bashir, *Title IX Study: Equity Is Still a Decade Away*, N.Y. TIMES, Apr. 29, 1997, at B13 (noting that according to a report by the NCAA, women's collegiate athletics are about 10 years away from achieving total equality with men's sports). "'Any progress is good progress, but it is disheartening to see that 25 years since Title IX, how slow the progress in this area is.'" *Id.* (quoting Patricia Viverito, the chair of the NCAA committee on women's athletics). In a study of 305 schools with major athletic programs, the institutions spent $407 million on men's sports and $137 million on

even sanctioned by Title IX.[56] The Department of Health, Education and Welfare regulations allow an exception to Title IX's broad mandate of gender equality in athletics,[57] if the school

> 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, . . . members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport.[58]

The regulation goes on to define contact sports as, "boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact."[59] The Policy Interpretation clarifies that, "[i]n the

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women's athletics in the 1995-96 school year. *See id.*

Rep. Reid's salutation to the U.S. women's soccer team provides an example of the pervasiveness of the gender inequalities that still exist in sports. He referred to Mia Hamm, one of the stars of the team, as a female Michael Jordon. *See* 145 Cong. Rec. S8205-06 (daily ed. July 12, 1999) (statement of Rep. Reid). Despite the fact that Rep. Reid's compliments indicate how far women's athletics have come, this Comment demonstrates that female athletes are still compared to and considered second-best to male athletes.

A major feature of the current debate surrounding Title IX is the effect the law has on football. Because of football's popularity and perceived superiority over other sports, many recipients have refused to fully enforce Title IX when such enforcement would result in cutbacks to the football program. The average college football team consists of 117 students. *See* Malcolm Moran, *Title IX Is Now an Irresistible Force*, N.Y. TIMES, June 21, 1992, § 8, at 1. Since so many men have an opportunity to play on a football team, administrators claim it is not fair to count the participants for the purposes of Title IX because no other sport needs this many players. *See id.* However, professional football teams have significantly fewer players (about 50). *See id.* Donna Lopiano, executive Director of the Women's Sport Foundation, considers this refusal an indication that many administrators believe that the high revenues produced by football justify breaking the law. *See id.* ("We're giving scholarships to tackling dummies. . . . Are we saying it's more important to give a full scholarship to a tackling dummy than it is the first-string women's soccer player for the team you don't have? God forbid you should take the tackling dummy's opportunity away. It's crazy.").

56. *See* 34 C.F.R. § 106.41(b) (1999) (allowing recipients of federal aid to operate separate teams for each gender). Although this Comment focuses on discrimination when separate teams for both genders do not exist, there is abundant evidence that separate teams do not provide equal athletic opportunity. *See* Virginia P. Corudace & Steven A. Desmarais, Note, *Where the Boys Are: Can Separate Be Equal in School Sports?*, 58 S. CAL. L. REV. 1425, 1460-64 (1985); Tracy J. Johnson, Comment, *Throwing Like A Girl: Constitutional Implications of Title IX Regarding Gender Discrimination in High School Athletic Programs*, 18 N. ILL. U. L. REV. 575, 591-97 (1998); Dana Robinson, Comment, *A League of Their Own: Do Women Want Sex-Segregated Sports?*, 9 J. CONTEMP. LEGAL ISSUES 321, 339-40 (1998).

57. *See* 34 C.F.R. § 106.41(b).

58. *Id.* [hereinafter the "contact sport exception"].

59. *Id.*

selection of sports, the regulation does not require institutions to integrate their teams nor to provide exactly the same choice of sports to men and women."[60] This Policy Interpretation and agency regulations have been granted substantial deference by the courts.[61]

Most courts have broadly interpreted the contact sport exception to mean that a school cannot be liable for a Title IX violation for any type of gender discrimination in a contact sport.[62] In *Williams v. School District of Bethlehem*, the Third Circuit considered the issue of whether a high school boy could be excluded from his school's field hockey team on the basis of gender when the school offered no field hockey team for males.[63] John Williams played intramural coeducational field hockey as an eighth grader, but his high school only offered a girls' field hockey team.[64] John tried out for the team, earned a tentative position as goalie, and was issued a uniform.[65] However, when school officials learned that John and another boy[66] had earned positions on the team, they told the boys that they could not play because of their gender.[67] John's parents sued, alleging inter alia a violation of Title IX.[68]

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60. 44 Fed. Reg. 71,417-18 (1979).

61. *See, e.g.*, Williams v. School Dist. of Bethlehem, 998 F.2d 168, 171 (3d Cir. 1993) ("We accord [the Department of Health, Education and Welfare's] interpretation of the regulation 'appreciable deference.'"); Barnett v. Texas Wrestling Ass'n, 16 F. Supp. 2d 690, 694-95 (N.D. Tex. 1998) ("The Fifth Circuit and other circuit courts of appeals have granted the regulations appreciable deference."). *See generally* Chevron, U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984) (noting that an agency's interpretation of a congressional mandate will be accepted if Congress has not clearly spoken on the issue and the agency interpretation is reasonable).

62. *See Williams*, 998 F.2d at 172-74 (discussed *infra*); *Barnett*, 16 F. Supp. 2d at 694-95 (discussed *infra*); *cf.* Adams v. Baker, 919 F. Supp. 1496, 1503 (1996) (holding that Title IX did not require schools to allow a female wrestler to participate on the wrestling team because wrestling is a contact sport).

63. *Williams*, 998 F.2d at 168. For a more in-depth discussion of this case, see Renee Forseth & Walter Toliver, Casenote, *The Unequal Playing Field—Exclusion of Male Athletes From Single-Sex Teams:* Williams v. School District of Bethlehem, Pa., 2 VILL. SPORTS & ENT. L.F. 99 (1995).

64. *See Williams*, 998 F.2d at 170.

65. *See id.*

66. *See id.* The second boy was not a party to the action. *See id.* at n.1.

67. *See id.* at 170.

68. John's parents also alleged violations of the Equal Protection and Due Process Clauses of the U.S. Constitution under 42 U.S.C. § 1983 and the Equal Rights Amendment of the Pennsylvania Constitution (E.R.A.), PA. CONST. art. I, § 28. *See Williams*, 998 F.2d at 170.

Although the district court found a violation of Title IX, the Third Circuit reversed,[69] stating that the contact sport exception is "the broadest exception recognized to the overarching goal of equal athletic opportunity."[70] The court noted that Title IX imposes a general obligation upon recipients of federal funds to make athletic opportunities available to men and women, but it reasoned that the law gives schools substantial flexibility to organize their athletic programs as they see fit.[71] The court did not consider the specific wording of the contact sport exception; rather, it merely defined field hockey as a contact sport and dismissed the claim.[72]

The U.S. District Court for the Northern District of Texas gave the same broad meaning to the contact sport exception in *Barnett v. Texas Wrestling Association.*[73] In *Barnett*, two female members of their high school wrestling team were denied the opportunity to participate in mixed-gender matches at the North Texas Open Wrestling tournament.[74] The girls brought an action against the school, the wrestling association, and the wrestling officials association claiming a violation of Title IX and a § 1983 violation.[75] The district court quickly dismissed the Title IX claim, claiming the contact sport exception "expressly permit[s] schools to sponsor sexually segregated teams, 'where selection for such teams is based upon competitive skill or the activity involved is a contact sport.'"[76] After stating this rule, the court went no further in its analysis than to confirm that wrestling is a contact sport[77] before concluding that the school was free to exclude the girls from the matches without fear of Title IX liability.[78] Like the *Williams* court, this court did not examine the "try-out" language of the regulation or con-

69. *See Williams*, 998 F.2d at 169-80.

70. *Id.* at 172. The court stated that there was ample evidence in the record to conclude that field hockey is a contact sport and that therefore the district court should not have granted plaintiff's motion for summary judgment. *See id.* at 171-72.

71. *See id.* at 171.

72. *See id.* at 174 ("If it is determined that field hockey is a contact sport, no other inquiry is necessary because that will be dispositive of the Title IX claim.").

73. 16 F. Supp. 2d 690 (N.D. Tex. 1998).

74. *See id.* at 692-93.

75. *See id.* at 690.

76. *Id.* at 694 (quoting 34 C.F.R. § 106.41(b)).

77. *See id.* (citing 34 C.F.R. § 106.41(b) and stating that wrestling is the quintessential contact sport).

78. *See id.*

sider the fact that the girls had already made the team. The court simply and quickly concluded that there could be no Title IX liability because the sport involved was a contact sport.

2. Section 1983 Is a Poor Alternative to Title IX

Plaintiffs who are denied Title IX relief for gender based discrimination may still have a civil rights remedy if the discriminating actor was acting under the color of state law.[79] However, Title IX's preclusive effects and § 1983's limited applicability to public schools make the civil rights statute an unreliable remedy for athletes who suffer gender discrimination.

Section 1983 provides a cause of action to enforce the Fourteenth Amendment, which provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[80] Thus, there must be an "exceedingly persuasive justification" for the court to uphold discrimination by a state actor on the basis of gender.[81] Furthermore, courts must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.[82] Some plaintiffs who have been excluded from participation in a sport based on their gender have successfully enforced their right to play and compete through § 1983 actions.[83] However, there is

79. *See id.* at 695 ("The lack of a Title IX violation, however, does not mean that the defendants' actions were in all respects lawful."). Section 1983 of Title 42 provides a statutory remedy for violations of federal statutory rights. *See* Maine v. Thiboutot, 448 U.S. 1, 1 (1980) (holding that plaintiffs have the ability to bring § 1983 claims predicated on federal statutory rights). Section 1983 also provides a remedy for violations of constitutional rights when any person acting under the color of state law deprives another of "any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983 (1994); *see also Barnett*, 16 F. Supp. 2d at 695 (stating that § 1983 "provides the statutory vehicle for addressing alleged violations of Fourteenth Amendment rights"). For an analysis of state action, see generally *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) and *Shelley v. Kraemer*, 334 U.S. 1 (1948).

80. U.S. CONST. amend. XIV, § 1. When a state actor discriminates on the basis of gender, the state action is subject to intermediate constitutional scrutiny. *See* Reed v. Reed, 404 U.S. 71, 75-76 (1971).

81. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

82. *See* United States v. Virginia, 518 U.S. 515, 533-34 (1996).

83. *See* Adams v. Baker, 919 F. Supp. 1496, 1503-04 (D. Kan. 1996) (holding that although the plaintiff, who was denied the opportunity to wrestle on her school's team, did not have a Title IX cause of action because wrestling is a contact sport, the plaintiff did state a § 1983 claim); Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1031-32 (W.D. Mo. 1983) (dismissing plaintiff's Title IX claim but issuing injunction under § 1983 to secure plaintiff's right to try out for the football team).

dispute among courts as to whether student athletes have a § 1983 remedy.[84] Several courts have held that § 1983 claims of gender discrimination in an educational setting are preempted by Title IX.[85] Thus, Title IX can preempt § 1983 and the contact sport exception can preempt Title IX, leaving some student athletes without a remedy for gender discrimination.

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84. This conflict arises out of the following doctrine. The Supreme Court has stated that where a federal statute provides a comprehensive enforcement scheme, Congress intended to foreclose a right of action for violations of that statute under § 1983. *See* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 20-21 (1981). *Sea Clammers* held that congressional intent to preclude constitutional claims can be gleaned from the comprehensive nature of the remedial devices provided in the particular act. *See id.* Six years later in *Wright v. City of Roanoke Redevelopment & Housing Authority*, the Court held that a § 1983 claim would not be precluded unless a defendant demonstrates "by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement." 479 U.S. 418, 423 (1987).

The Court has also stated that when a federal statute confers a right that is virtually identical to the constitutional right in the § 1983 claim, the § 1983 claim may be precluded by the statute if Congress intended for the statute to provide "the exclusive avenue through which a plaintiff may assert [constitutional] claims." Smith v. Robinson, 468 U.S. 992, 1009 (1984).

85. *See* Williams v. School Dist. of Bethlehem, 998 F.2d 168, 176 (3d Cir. 1993); Pfeiffer v. School Bd. for Marion Center Area, 917 F.2d 779, 789 (3d Cir. 1990); Nelson v. University of Maine System, 914 F. Supp. 643, 647-48 (D. Me. 1996) (holding that Title IX claims trump constitutional claims); Mann v. University of Cincinnati, 864 F. Supp. 44, 47-48 (S.D. Ohio 1994); Mabry v. State Bd. for Community Colleges, 597 F. Supp. 1235, 1239 (D. Colo. 1984), *aff'd*, 863 F.2d 311 (10th Cir. 1987). These courts have reasoned that the comprehensive nature of Title IX indicates that Congress intended to foreclose additional constitutional claims. *See, e.g.*, *Nelson*, 914 F. Supp. at 647-48 (holding that remedies available under Title IX clearly establish congressional intent to foreclose § 1983 claims). These holdings are peculiar given the Supreme Court's holding in *Mississippi Univ. for Women v. Hogan*. 458 U.S. 718 (1982). In that case, the Court refused to consider an argument that Mississippi University for Women was constitutionally permitted to discriminate on the basis of gender simply because Title IX exempts institutions that have traditionally been dedicated to single sex education. The Court held that Congress did not have power under Section 5 of the Fourteenth Amendment to "restrict, abrogate, or dilute these guarantees." *Id.* at 719 (quoting Katzenback v. Morgan, 384 U.S. 641, 651 n.10 (1966)). Rather, Section 5 enforcement powers are "limited to adopting measures to enforce the guarantees of the Amendment." *Id.* For a good discussion of this issue, see Michael A. Zwibelman, *Why Title IX Does Not Preclude Section 1983 Claims*, U. CHI. L. REV. 1465 (1998).

Williams v. School District of Bethlehem is an example of a case where the plaintiff was denied relief entirely because the contact sport exception precluded Title IX relief, and Title IX precluded recovery under § 1983. 998 F.2d at 176 (refusing to consider the plaintiff's § 1983 claim because it is "based on a matter fully addressed by the comprehensive scheme in Title IX.").

Section 1983 is a potential remedy for athletes who are denied the opportunity to play their sport of choice because of their gender, but it is far from a comprehensive solution to gender discrimination. Unfortunately, athletes who want to participate in a sport that is limited to members of the opposite sex are still denied equal protection of the law.[86] Heather Mercer's situation is a unique case in which a female athlete was given the right to relief after suffering discrimination in the context of a contact sport. *Mercer v. Duke University* is significant because it represents the first time a court has held that an athlete denied the right to play a contact sport because of her[87] gender has a Title IX action.[88]

II. *MERCER v. DUKE UNIVERSITY*: A STEP TOWARD EQUAL ATHLETIC OPPORTUNITY

Heather Mercer brought an action against Duke University, claiming that the football coach's actions toward her constituted a violation of Title IX and state tort law.[89] However, the United States District Court for the Middle District of North Carolina initially dismissed Mercer's complaint, holding that football is a contact sport so Duke was not required to allow females to play on its football team.[90] The court cited the Department of Health, Education and Welfare's Policy Interpretation to support its conclusion that Title IX does not require schools "to integrate their teams nor to provide exactly the same choice of sports to men and women."[91] Mercer argued that Duke, by allowing her to try out, scrimmage, and practice with the team had chosen to permit mixed-gender participation in contact sports, and having made that choice, the University was required by Title IX to prevent discrimination against

86. *See supra* notes 63-78 and accompanying text (discussing *Williams* and *Barnett).*

87. This Comment will often use the pronoun "her," but "her" should be read as gender neutral—a short form of "her/his." As the *Williams* case demonstrates, the contact sport exception leads to discrimination against both male and female athletes. *See Williams*, 998 F.2d at 168.

88. *See* Mercer v. Duke Univ., 190 F.3d 643, 647-48 (4th Cir. 1999).

89. *See* Mercer v. Duke Univ., 32 F. Supp. 2d 836, 837 (M.D.N.C. 1998), *rev'd* 190 F.3d 643 (4th Cir. 1999); *see also supra* notes 1-9 and accompanying text (describing the facts of *Mercer*). Mercer did not bring a § 1983 action, presumably because Duke is a private university so there is no state actor involved.

90. *See Mercer*, 32 F. Supp. 2d at 839.

91. *Id.*

her.[92] The district court, however, rejected this argument, and it cited *Williams* to support its conclusion that even if Duke had previously allowed mixed-gender football, the University was free under Title IX to change its mind and subsequently limit the sport to members of one sex.[93]

On appeal from the district court's decision, the Fourth Circuit refused to uphold this broad interpretation of the contact sport exception.[94] It held that an individual who suffers discrimination as a member of a contact sport team composed primarily of individuals of the opposite sex does indeed have a Title IX claim.[95] The court performed an in-depth analysis of the regulation's language[96] and concluded that the more natural reading of the contact sport exception provides:

> [I]n non-contact sports, but not in contact sports, covered institutions must allow members of an excluded sex to try out for single-sex teams. Once an institution has allowed a member of one sex to try out for a team operated by the institution for the other sex in a con-

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92. *See id.* at 840.

93. *See id.*

94. *See* Mercer v. Duke Univ, 190 F.3d 643, 644 (4th Cir. 1999).

95. *See id.* at 647-48.

96. The court began its analysis by stating that the anti-discrimination clause and the contact sport exception of 34 C.F.R. § 106.41 "stand in a symbiotic relationship to one another." *Mercer*, 1990 F.3d at 646. The court explained that the anti-discrimination clause bars all sex discrimination, including providing athletics separately on the basis of gender. *See id.* Since this clause standing alone would require schools to integrate all their sports teams, and radically change the dynamics of interscholastic athletics, the Department of Health, Education and Welfare provided an exception to this broad rule by allowing schools to provide separate teams for men and women if the sport is a contact sport. *See id.* (citing 34 C.F.R. § 106.41(b)). In the contact sport exception, the agency addresses the question of what restrictions apply to a school that operates a team for one gender but does not offer a corresponding team for the other gender. *See id.* "[T]he apodosis of the sentence requires that 'members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport.'" *Id.* at 647. The court went on to reason that "[t]he text of this clause, on its face, is incomplete: it affirmatively specifies that members of the excluded sex must be allowed to try out for single-sex teams where no team is provided for their sex, but is silent regarding what requirements, if any, apply to single sex teams in contact sports." *Id.* There are thus two possible interpretations of the contact sport exception according to the court. First, "it could be read to mean that 'members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport *in which case*... [the anti-discrimination clause] *does not apply at all*.'" *Id.* However, the contact sport exception could also be read to mean that "members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport, *in which case members of the excluded sex need not be allowed to try out*." *Id.* at 647-48.

> tact sport, [the contact sport exception] is simply no longer applicable, and the institution is subject to the [anti-discrimination clause].[97]

The court reasoned that the anti-discrimination clause prohibits all types of gender discrimination in intercollegiate athletics.[98] The language of the contact sport exception does not exempt schools from that broad prohibition.[99] Rather, the exception merely states that schools need not allow members of the excluded sex to try out for a team contact sport.[100]

The Fourth Circuit supported its decision by employing several methods of statutory interpretation. The court looked to Title IX itself to help decipher the meaning of the contact sports exception.[101] It reasoned that if the Department of Health, Education and Welfare wanted to exempt contact sports entirely from the requirements of the anti-discrimination clause, it certainly knew how to do so, as Congress had set forth several clear exceptions in Title IX itself.[102] By placing the exception to the anti-discrimination clause where it did, the court concluded that the agency must have intended for the exception to apply only to try-outs in contact sports.[103] The court then looked to the legislative history of Title IX to see if it supported such a reading.[104] The court found this interpretation consistent with Congress's intent to "prohibit discrimination in all circumstances where such discrimination is unreasonable" and to allow recipients to segregate their athletic teams.[105]

The court also rejected the Third Circuit's interpretation of the contact sport exception in *Williams*,[106] finding such a broad

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97. *Id.* at 647-48.

98. *See id.* at 646.

99. *See id.*

100. *See id.*

101. *See id.*

102. *See id.* at 647; *see also* 20 U.S.C. § 1681(a)(3) (1994) (granting an exemption to religious schools or universities if the application of the statute would conflict with religious teachings); *id.* § 1681(a)(4) (granting an exemption to military educational institutions); *id.* § 1681(a)(5) (granting an exemption to single-sex institutions); *id.* § 1681(a)(6) (granting an exemption to social fraternities and sororities and voluntary youth service organizations); *id.* § 1681(a)(9) (granting an exemption to beauty pageant scholarships).

103. *See Mercer*, 190 F.3d at 647.

104. *See id.*

105. *Id.* "If a university chooses not to permit members of the opposite sex to try out for a single-sex contact-sports team, this interpretation respects that choice." *Id.*

106. *See* Williams v. School Dist. of Bethlehem, 998 F.2d 168, 174 (3d Cir.

interpretation of the regulation inconsistent with the regulation's language.[107] Where "the university invites women into what appellees characterize as the 'traditionally all-male bastion of collegiate football'. . . [our interpretation] is the only one permissible under law."[108] The court therefore held that Mercer did state a claim upon which relief could be granted[109] and remanded the case to the district court. To date, the Fourth Circuit has been the only court to hold that an individual who is denied the opportunity to participate in a contact sport because of her or his gender has a legitimate Title IX claim.[110]

III. REMAINING PROBLEMS WITH THE CURRENT TEXT OF THE CONTACT SPORT EXCEPTION

The contact sport exception to Title IX, along with the limited scope of § 1983, provide inadequate remedies to athletes like Heather Mercer who have suffered discrimination based on their gender. The current language of the contact sport exception is based on archaic stereotypes and thwarts the remedial objectives of Title IX. Although the Fourth Circuit in *Mercer* took great strides to narrow the exception, the discriminatory impact of the regulations can be fully remedied only if the Department of Education or Congress rewrites the regulation and clarifies the Policy Interpretation.

1993); *see also supra* notes 63-72 and accompanying text.

107. *See Mercer*, 190 F.3d at 648. The *Mercer* court criticized the test laid out by the *William*'s court ("'if it is determined that [a particular sport] is a contact sport, no other inquiry is necessary because that will be dispositive of the title IX claim'") as a "lone unexplained statement." *Id.* (quoting *Williams*, 998 F.2d at 174).

108. *Id.*

109. *See id.* ("[B]ecause appellant has alleged that Duke allowed her to try out for its football team (and actually made her a member of the team), then discriminated against her and ultimately excluded her from participation in the sport on the basis of her sex, we conclude that she has stated a claim under the applicable regulation.").

110. *See id.* ("We take to heart appellees' cautionary observation that in [recognizing a cause of action] we thereby become the 'first Court in United States history to recognize such a cause of action.'").

A. THE REGULATION IS A REASONABLE AGENCY INTERPRETATION

1. Conflict Between the Text of Title IX and the Contact Sport Exception

The current language of the contact sport exception condones discrimination based on gender. Although the anti-discrimination clause provides a broad prohibition on gender-based discrimination in intercollegiate athletics,[111] the regulation's exceptions weaken its aims. In the separate teams exception, the regulation follows Congress's desire to allow schools to segregate their teams based on gender.[112] Some commentators argue that this "separate but equal treatment" will never yield equal opportunity and will instead keep women's athletics in a second-best position to men's athletics.[113] Although this may be true, the separate teams clause at least provides members of both genders with an opportunity to participate in athletic contests if there is enough interest to establish separate teams.[114] However, the contact sport exception narrows this protection. When there is not enough interest to form two separate teams, a recipient of federal funding may deny an individual the right to participate in her sport of choice—not because she lacks the necessary skill, but merely because of her gender.[115] On its face, the contact sport exception defies the stated goal of Title IX, that "[n]o person . . . shall on the basis of sex, be excluded from participation . . . [in] any education . . . activity receiving Federal financial assistance."[116]

2. The Contact Sport Exception Is a Reasonable Interpretation of Congress's Mandate and Is Unlikely To Be Overturned

Although most agency regulations that defy the purpose of their empowering legislation can be overturned as unreasonable agency action, it is unlikely that the courts alone could repeal the contact sport exception. It was not until two years af-

111. *See supra* text accompanying note 24 (quoting the anti-discrimination clause).

112. *See* 34 C.F.R. § 106.41(b) (1999); *see also supra* note 20 (noting that the enacting Congress did not want to desegregate football).

113. *See generally* Robinson, *supra* note 56 (arguing against sex segregation in sports).

114. *See* 34 C.F.R. § 106.41(b).

115. *See id.*

116. 20 U.S.C. § 1681 (1994).

ter the passage of Title IX that Congress declared its intent for the statute to apply to athletic programs.[117] In directing the Department of Health, Education and Welfare to promulgate regulations on the application of Title IX to intercollegiate sports, Congress specified that the rules should be "reasonable provisions considering the nature of particular sports."[118] Because this mandate presented a compromise from a more far-reaching proposal that would have exempted all revenue-producing intercollegiate sports from Title IX,[119] it is unlikely that a court would strike down the contact sport exception as arbitrary and capricious. Rather, the courts will continue to defer to the agency's interpretation, finding it reasonable.[120] Furthermore, the contact sport exception has been in force for twenty-five years. Although this fact alone does not make it good law, Congress's early acquiescence to the language[121] seems to indicate that the agency did not overreach the authority extended to it by Congress. Given the legislative history and Congress's expressed intent and subsequent acquiescence,[122] courts are likely to find that the contact sport exception is a "reasonable provision considering the nature of particular sports."[123]

B. THE TEXT AND PURPOSE OF THE CONTACT SPORT EXCEPTION CONTRADICT ITS LEGISLATIVE HISTORY, MAKING THE REGULATION DIFFICULT TO INTERPRET

Even though courts are likely to continue upholding the contact sport exception as a valid exercise of agency power, the interpretation of the regulation is subject to debate because its language is ambiguous. The regulation does not state what requirements, if any, apply to single-sex teams in contact

117. *See supra* note 20 and accompanying text.

118. Provisions Relating to Sex Discrimination, Pub. L. No. 93-380, 88 Stat. 612 (1974).

119. *See supra* note 22.

120. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); *see also* text accompanying note 61. Courts have accorded "appreciable deference" to the regulations promulgated under Title IX. *See* Mercer v. Duke Univ., 32 F. Supp. 2d 836, 839 (M.D.N.C. 1998).

121. *See supra* note 23 (noting that Congress had 45 days to disapprove the regulations but took no action).

122. *See supra* notes 20, 23 (describing congressional intent in passing Title IX and congressional acceptance of the regulation).

123. Gender and Athletics Act, Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974); *see also supra* note 22 and accompanying text.

sports.[124] It merely states that members of the excluded sex must be allowed to try out for a single sex team in a non-contact sport.[125] As the Fourth Circuit recognized in *Mercer*, this language is ambiguous and subject to two interpretations.[126] It could be interpreted to mean that the anti-discrimination clause does not apply to contact sports at all, and recipients can always discriminate on the basis of gender when a contact sport is involved. In the alternative, it could be interpreted to imply that members of an excluded sex need not be allowed to *try out* for a contact sport.[127] All other instances of gender discrimination in contact sports would still be prohibited.

Mercer reasons that the latter interpretation is the correct one, and a structural analysis of the statute supports this conclusion. The contact sport exception states that "members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport."[128] *Unless* is used as a conjunction, tying the independent clause "members of the excluded sex must be allowed to try out" to the condition in which the mandate does not apply, that is when "the sport involved is a contact sport."[129] Because "unless the sport involved is a contact sport" is a dependent clause, it has no meaning except in relation to the independent clause on which it relies, "that members of the excluded sex must be allowed to try out."[130] Under a close grammatical reading, the contact sport provision provides only one exception, that members of one sex need not be permitted to try out for teams composed of members of the opposite sex if the sport involved is a contact sport. Because the rules of statutory interpretation require that exceptions to statutes be interpreted narrowly,[131] this construction of the regulation is the most appropriate.

As the Fourth Circuit remarked, this reading is reinforced by the structure of Title IX itself. Congress clearly stated the

124. *See* Mercer v. Duke Univ., 190 F.3d 643, 646 (4th Cir. 1999).

125. *See id.*; *see also supra* note 96 (describing the Fourth Circuit's analysis).

126. 190 F.3d at 647.

127. *See id.*

128. 34 C.F.R. § 106.41(b) (1999); *see also supra* notes 101-05 and accompanying text (describing the analysis of the Fourth Circuit).

129. 34 C.F.R. § 106.41(b).

130. *Id.*

131. *See, e.g.*, John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 97 (1993).

circumstances in which a recipient will be excused from the non-discrimination requirements of Title IX.[132] If the Department of Health, Education and Welfare wanted to exempt contact sports completely from the requirements of Title IX, it could have used the clear exceptions in the statute as a model for exemptions in the regulations. Rather, the agency chose language that does not entirely exempt contact sports from the purview of the statute.

Critics may argue that a study of the legislative history undercuts the efficacy of the Fourth Circuit's structuralist argument.[133] But, according to the commonly accepted canons of statutory interpretation, courts should consider legislative history where the statute is ambiguous.[134] Therefore, even though the Fourth Circuit's reading of the contact sport exception seems to be the most reasonable textualist interpretation, the analysis must continue. The inquiry into legislative history is both necessary and significant because the exception is silent as to the rights of members of an excluded sex who wish to try out for a contact sport.

Although it was generally agreed in the 1970s that women should be given opportunities to participate in athletics, the use of Title IX as the mechanism to achieve that goal was hotly debated.[135] Indeed, in the discussions surrounding the original passage of the statute, members of Congress barely mentioned athletic opportunity for women.[136] To the extent that it was discussed, members of Congress emphasized their intent that the legislation would not interfere with intercollegiate football.[137] Two years later, when Congress manifested its intent for the statute to apply to athletics,[138] its mandate to the Department of Health, Education and Welfare merely required "reasonable provisions considering the nature of particular

132. *See supra* note 102 and accompanying text (noting the exemptions to Title IX).

133. *See supra* note 96 (describing the structuralist arguments of the Fourth Circuit in *Mercer*).

134. *See* Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 610-12 n.4 (1991).

135. *See supra* note 22 and accompanying text (noting controversy over the application of Title IX to athletics and describing the Tower Amendment).

136. *See supra* note 20 (noting the lack of references to athletics in the reports and debates on the passage of Title IX).

137. *See supra* note 20 (quoting Senator Bayh, "[N]or do I feel [Title IX] mandates the desegregation of football fields.").

138. *See supra* note 20 and accompanying text.

sports"[139]—not true equal athletic opportunity. Although Congress apparently recognized the need to stop gender-based discrimination in athletics, it did not whole-heartedly pursue such a goal.[140]

The lack of congressional enthusiasm for true equal opportunity is reflected both in the contact sport exception and in section 106.41(c) of the regulations, in which the agency states that a funding disparity between men's and women's sports is not determinative of a violation of the equal opportunity mandate.[141] The agency followed the congressional mandate by implementing "reasonable provisions"[142] that increased women's athletic opportunities. However, the regulations allow the continuation of certain discriminatory practices, such as segregated contact sports and funding disparities, that many people would have found reasonable in the mid-1970s.

The Fourth Circuit did not delve deeply into legislative history. Rather, the court summarily stated that its interpretation was consistent with the "congressional intent not to require the sexual integration of intercollegiate contact sports" but to "prohibit discrimination in all circumstances where such discrimination is unreasonable."[143] Although the Fourth Circuit's conclusion that the legislative history supported its interpretation of the statute[144] is true to an extent, the court's analysis is somewhat incomplete. The court reasoned that its interpretation does not defy congressional intent because it continues to give recipients the opportunity to prohibit members of the excluded sex from trying out for a single-sex team.[145] However, this interpretation ignores the hostility many members of Congress expressed toward passing any legislation that could harm or change intercollegiate football.[146] Indeed, Duke's defensive reference to the "traditionally all-male bastion of col-

139. Gender and Athletics Act, Educational Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974); *see also supra* note 22 and accompanying text.

140. *See supra* notes 20-22 and accompanying text.

141. *See supra* note 26 and accompanying text (quoting the regulation's provision on funding of sports).

142. *See supra* note 139 and accompanying text.

143. Mercer v. Duke Univ., 190 F.3d 643, 647 (4th Cir. 1999).

144. *See supra* text accompanying note 105.

145. *See supra* note 105 and accompanying text.

146. *See supra* notes 20-22 (noting the conflict over equal athletic opportunity).

legiate football"[147] is probably somewhat more consistent with the intent of the enacting Congress.

This legislative history injures some of the Fourth Circuit's otherwise solid analysis. One of the court's strongest statements—that the *Williams* court's holding that the involvement of a contact sport is dispositive of the Title IX claim[148] is a "lone unexplained statement" that is "inconsistent with the language of the regulation,"[149]—is not completely justified. Although the Fourth Circuit is correct that the text does not advocate such a broad interpretation, the legislative history suggests that this could have been Congress's intent.[150] Given the enacting Congress's concern for the preservation of football, the broad interpretation of the contact sport exception in *Williams*,[151] *Barnette*,[152] and the district court's decision in *Mercer*[153] does have a foundation, albeit a weak one.

However, a complete analysis of the regulation cannot stop there. The contradiction between the text of the contact sport exception and the legislative history of Title IX warrant the consideration of the purpose[154] of Title IX and of current public values.[155] The Supreme Court has stated that remedial statutes, in particular, should be interpreted broadly to effectuate their purpose.[156] The key mandate of Title IX provides for an

147. *Mercer*, 190 F.3d at 643; *see also* text accompanying note 108.

148. *See supra* note 107.

149. *Mercer*, 190 F.3d at 648.

150. Because Congress rejected the Tower Amendment and accepted the "reasonable provisions considering the nature of particular sports" language, it can be assumed that it was not Congress's intent to exempt all revenue producing sports. However, the "reasonable provision" language was a compromise to supporters of the Tower Amendment, neither exempting football nor requiring many of the sacrifices inherent in providing true equal opportunity in athletics.

151. Williams v. School Dist. of Bethlehem, 998 F.2d 168, 172 (3d Cir. 1993); *see also* notes 63-72 and accompanying text.

152. Barnette v. Texas Wrestling Ass'n, 16 F. Supp. 2d 690, 694-95 (N.D. Tex. 1998); *see also supra* text accompanying notes 73-78.

153. Mercer v. Duke Univ., 32 F. Supp. 2d 836, 838-39 (M.D.N.C. 1998); *see also* notes 89-93 and accompanying text (describing the district court opinion).

154. *See, e.g.*, Reves v. Ernst & Young, 494 U.S. 56, 60-61 (1990).

155. For a good description of the process of statutory interpretation, see generally William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) (stating that ambiguous statutes should be interpreted in the manner that best carries out their purpose).

156. *See, e.g.*, Atchison, Topeka & Santa Fe R.R. Co. v. Buell, 480 U.S. 557, 562 (1987).

end to gender-based discrimination in educational programs and activities.[157] Moreover, it is clear from the passage of the Civil Rights Restoration Act of 1987—and the strong majority that supported it—that Congress expected Title IX to provide equal athletic opportunity for both genders.[158] Indeed, although Title IX is designed to apply generally to all gender discrimination in educational institutions, "women's athletics have become the touchstone for Title IX's effectiveness."[159]

Current congressional debate further indicates that Congress expects Title IX to further the goal of decreasing gender barriers to athletic participation. In 1994, Congress passed the Equity in Athletics Disclosure Act to assure that female students could pick schools that provide equal athletic opportunity.[160] Furthermore, the failure of House Speaker Hastert's proposal to amend Title IX to protect men's sports and to cut funding for enforcement of the law demonstrates that the current Congress does not share the hesitations and biases of the enacting Congress.[161] Hastert, like Senator Tower in 1974,[162] wanted to protect men's sports from the effect of Title IX, but his proposal was defeated by an overwhelming majority of 292-129.[163] The majority's clear unwillingness to endanger Title IX's efficacy demonstrates strong support for continuing the fight against gender discrimination in athletics.[164] Congress's salutations to the 1999 U.S. Women's World Cup Championship Team—not to mention its recognition that Title IX helped to bring about such a victory—further confirm current legisla-

157. *See* 20 U.S.C. § 1681 (1994); *see also* 118 CONG. REC. 5803 (daily ed. Feb. 28, 1972) (statement of Sen. Bayh) (stating that "the heart of [Title IX] is a provision banning sex discrimination in educational programs receiving Federal funds"). In introducing the measure, Senator Bayh stated that, "a strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women." 118 CONG. REC. at 5804.

158. *See supra* notes 37-38 and accompanying text.

159. Mark Hankerson, *Courts Have Extended Sex Bias Law's Reach*, 57 CONG. Q. WKLY. 747, 747 (1999).

160. *See supra* notes 43-44 and accompanying text.

161. *See* Koszczuk, *supra* note 42, at 745-47.

162. *See supra* note 22 (noting Senator Tower's attempt to pass an amendment to exempt all men's revenue-producing sports from the requirements of Title IX).

163. *See* Koszczuk, *supra* note 42, at 746.

164. *See id.* (noting "[t]he attitude was, if men's sports are dropped, that's tough." (comments of Rep. McKeon)).

tive support for equal opportunity in athletics.[165] Equal athletic opportunity for women athletes is a clear goal of the current Congress, and given the ambiguity of the contact sport exception, the regulation should be interpreted to best reflect this public policy goal.

The interpretation of the contact sport exception in *Williams* and *Barnette*, which allows a recipient of federal funds to discriminate based on gender simply because the sport involved is a contact sport, contravenes the goal of Title IX and the strong congressional and public support for women's athletics. Title IX prohibits gender-based discrimination and Congress strongly supports that prohibition. Therefore, the Fourth Circuit's interpretation in *Mercer*, which protects victims of gender discrimination by granting the plaintiff a Title IX cause of action, best effectuates the purpose of Title IX.

C. WEAKNESSES IN THE BEST INTERPRETATION OF THE CONTACT SPORT EXCEPTION

Because the Fourth Circuit's interpretation provides the most logical textualist reading of the regulation[166] and better accomplishes the purpose of Title IX, it is the superior interpretation of the contact sport exception. Unfortunately, the application of this reading provides perverse incentives to the recipients of Title IX funding. Under the Fourth Circuit's analysis, a recipient of federal funding can escape liability under Title IX by simply not allowing members of the excluded sex to try out for contact sports.[167] Many schools and colleges have gone beyond the requirements of the Department of Health, Education and Welfare's regulations and have allowed members of an excluded sex to try out for a team in a contact sport composed of members of the opposite sex.[168] Indeed, several courts hearing

165. *See* 145 CONG. REC. S8205-06 (daily ed. July 12, 1999) (statement of Sen. Reid); Sen. Res. 141, 106th Cong., 145 CONG. REC. 8648-49 (1999) (*To Congratulate the United States Women's Soccer Team on Winning the 1999 Women's World Cup Championship*).

166. *See* discussion *supra* Part III.B.

167. *See* Mercer v. Duke Univ., 190 F.3d 643, 647-48 (4th Cir. 1999).

168. *See, e.g.*, Barnette v. Texas Wrestling Ass'n, 16 F. Supp. 2d. 690, 692 (N.D. Tex. 1998) (recounting that the female plaintiffs were members of their respective high school wrestling teams); Adams v. Baker, 919 F. Supp. 1496, 1500 (D. Kan. 1996) (noting that evidence was presented demonstrating that 800 girls participate in competitive wrestling in the United States); Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1023-25 (W.D. Mo. 1983) (holding that under the Equal Protection Clause, a school must allow a female

§ 1983 actions have held that the Fourteenth Amendment requires public schools to go beyond the requirements of the contact sport exception.[169] However, the Fourth Circuit's reading of the exception indirectly encourages private schools and colleges, which are not bound by the Fourteenth Amendment, to prevent members of an excluded sex from trying out for a team in a contact sport.

If private schools or colleges open try-outs to members of an excluded sex, they are subject to the full requirements of the anti-discrimination clause.[170] That clause requires, among other things, that no athlete shall be treated differently from other athletes because of gender.[171] Therefore, a recipient that opened single-sex teams to members of the opposite sex but wanted to retain some gender-based distinctions could subject itself to Title IX liability and damages. The surest way for a recipient to avoid Title IX litigation is to prevent members of the opposite sex from trying out for a contact sport.

A hypothetical situation similar to the facts in *Barnette*[172] demonstrates the disincentive created by such an interpretation. Today, over 800 girls participate in competitive wrestling in the United States.[173] Many are able to do so because the school has made the opportunity available to them.[174] Consider these facts: if a private school recognized the interest of female students in wrestling, did not have enough females to form a separate team, and did not want female students wrestling male students, it has one option—deny females the right to try out. It could not adopt an incremental solution, such as permitting females to try out for the team, practice with the team, but compete solely against other female wrestlers, without exposing itself to liability.[175] Although this incremental solution

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to try out for a contact sport unless the school provides an important government objective for the classification).

169. *See Adams*, 919 F. Supp. at 1505 (finding no substantial government interest warranting a school's decision to prevent a female plaintiff from trying out for the wrestling team); *Force*, 570 F. Supp. at 1031 (finding no important government interest to warrant denying a female plaintiff the opportunity to try out for the school football team).

170. *See Mercer*, 190 F.3d at 647.

171. *See* 34 C.F.R. § 106.41(a) (1999) ("No person shall, on the basis of sex, . . . be treated differently from another person . . . [in] athletics offered by a recipient . . . .").

172. *See Barnette*, 16 F. Supp. 2d at 692-93.

173. *See Adams*, 919 F. Supp. at 1500 (recounting the findings of fact).

174. *See id*; *see also Barnette*, 16 F. Supp. 2d at 692.

175. The author does not endorse such a policy, but merely suggests it may

is not the policy goal advocated by this Comment,[176] it does give more female students the ability to participate. Furthermore, it eventually may produce enough interest to form a separate team for female students, thereby increasing athletic opportunities.[177] It is contrary to public support of women's athletics for the federal government to provide such disincentives to athletic participation and program development.[178] It is also inconsistent for the contact sport exception to permit gender-based discrimination that is unconstitutional under the Fourteenth Amendment.[179] Consequently, the only solution to the ambiguous language and the discriminatory results of the contact sport exception is to change its wording.

IV. A PROPOSAL TO AMEND THE CONTACT SPORT EXCEPTION TO ENSURE EQUAL ATHLETIC OPPORTUNITY

The disincentives created by the contact sport exception can be eradicated if Congress or the Department of Education

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be preferable to completely denying the right to participate on an athletic team.

176. This Comment does not endorse such a policy because it continues to discriminate on the basis of gender. Indeed, if a public school instituted such a policy, it might violate the Equal Protection Clause. One court has already found that such discrimination, undertaken by a state school, violates the equal protection clause. *See Adams*, 919 F. Supp. at 1504. The *Adams* court stated that a school policy denying female wrestlers the opportunity to wrestle members of the opposite sex is not substantially related to the goals of avoiding sexual harassment litigation ("A school district best avoids sexual harassment litigation by acting to prevent sexual harassment rather than excluding females from participating in activities."), increasing student safety (female students are no more likely to become injured than male students), or avoiding disruption of the school setting. *See id.*; *see also* discussion *supra* Part I.B.2. However, the suggested situation involves a private school that would not be subject to the requirements of the Fourteenth Amendment. Furthermore, several courts have held that § 1983 claims are precluded by Title IX. *See supra* note 85 and accompanying text. In these jurisdictions, if the Title IX claim against a public school is dismissed, the plaintiff does not have a § 1983 claim. *See supra* note 85 and accompanying text.

One can imagine that the arguments against mixed-gender wrestling are likely to be more persuasive to a school board or principal than they were to the *Adams* court. Therefore, given the option of requiring mixed-gender wrestling or preventing female participation on the team, many recipients, sadly, are more likely to choose the latter option.

177. As more female students are given opportunities to compete, they may encourage other females to try the sport.

178. *See generally supra* Part III.C.

179. *See supra* Part I.B.2 (recalling Fourteenth Amendment case law on gender discrimination).

revises the regulation. The Department of Education could delete the contact sport exception and let the regulation read as follows: "where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, . . . members of the excluded sex must be allowed to try out for the team offered."[180] To help institutions and the courts better understand this language, the Department of Education should also revise the Policy Interpretation. The language relied upon by the district court in *Mercer*—that Title IX does not require schools "to integrate their teams nor to provide the same choice of sports to men and women"[181]—should be deleted. In its place, new text should convey that every student at a school, regardless of gender, should have the opportunity to try out for any sport offered by the school. Selection for the team may then be made according to an athlete's skills but not according to gender. The interpretation should also include, among its factors and standards,[182] that try-outs must be open to members of both genders when only one team is offered in a sport.

Several public policy goals would be accomplished by these revisions. First, such a regulation would mandate nondiscrimination. It would not only rid the regulation of the current disincentive to letting members of an excluded sex try out for a single-sex team, but it would also require that members of both genders be allowed to try out for a sport even though only one team is offered. Second, it would acknowledge a more enlightened view of gender-based differences as they pertain to athletics. The stereotypical belief that men are better athletes than women does not always hold true when comparing two individuals,[183] and may not be true as a generalization. Under the current version of the regulations, a talented athlete may be denied an athletic opportunity simply because of her gender. Under a revised version of the regulation, however, the ath-

180. *Cf.* 34 C.F.R. § 106.41(b) (1999) (deleting the language "unless the sport involved is a contact sport").

181. *See supra* note 91 and accompanying text.

182. *See supra* note 30 (noting that the Policy Interpretation sets out several factors and standards).

183. *See* United States v. Virginia, 518 U.S. 515, 550 (1996) (stating that "generalizations about 'the way women are,' 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"); *see also supra* note 1 and accompanying text (noting that Heather Mercer's kicking skills were better than those of many men).

lete's ability to compete would depend on individual skill rather than pre-conceived notions of what that skill can be.

One potential criticism of this regulation is that its mandate of equal opportunity would apply equally to males and females. Therefore, males would be allowed to play on teams composed of females if the institution did not offer a corresponding team for males. Although this is a fair, neutral policy, many fear that male participation on female teams may have the effect of diluting the athletic opportunities of females.[184] Fears that the participation of male athletes on female teams will significantly decrease female opportunities, however, are for the most part unfounded. First, many schools already offer separate teams in popular sports.[185] Under the new regulation, men would not be allowed to try out for a women's team if there was a men's team available. Second, Title IX case law still requires that the number of females participating in athletics be substantially proportionate to the number of females enrolled in an institution.[186] Institutions must continue to retain this substantial proportionality. If a glut of males try out for and make the female field hockey or volleyball team, the institution will be forced to create separate teams, thereby increasing net athletic opportunities.

The new language in the regulation has further benefits—it acknowledges that contact between men and women in the course of athletic competition is no different than contact between two members of the same sex. It is unclear why the Department of Health, Education and Welfare decided to distinguish between contact sports and non-contact sports. Two possible explanations include concerns about safety and concerns about sexual contact.[187] Contact sports, like all sports, involve a risk of injury. However, the view that women should receive greater protection from injury is ill-founded—women

184. *See* Robinson, *supra* note 56, at 323 (noting that women support "sex segregated sports for several different reasons. Women may fear . . . that if girls teams are replete with boys then fewer opportunities for girls exist; and that if total integration occurred, girls teams would disappear.").

185. Many schools offer men's and women's tennis, swimming, basketball, track, cross-country, and golf, to name a few.

186. *See supra* note 41 (discussing recent cases where courts have held that there should be proportional representation of men and women athletes in school athletic programs).

187. *See, e.g.*, Adams v. Baker, 919 F. Supp. 1496, 1504 (D. Kan. 1996) (discussing the defendant's offered defenses for segregated wrestling team, including safety concerns and fear of sexual harassment litigation).

are no more likely to become injured in a contact sport than men.[188] Although it is true that, in absolute terms, men are generally stronger and bigger than women,[189] these average physiological differences do not justify the incorporation of group stereotypes into the law.

In other legal areas, courts and the government have rejected the use of gender stereotypes as a justification for discrimination. The Equal Employment Opportunity Commission, for example, has rejected the use of group gender stereotypes as an employment qualification.[190] If a job requires heavy lifting, an employer can require that applicants be able to lift fifty pounds but cannot confine the search solely to men because it is perceives that women cannot do heavy lifting.[191] Likewise, the Court employs intermediate scrutiny to the use of gender stereotypes in Fourteenth Amendment cases.[192] State policies that deny equal opportunity to women "simply because they are women" are unconstitutional.[193] Further, the rationale that women are more susceptible to injury because of their size is used inconsistently. Schools and universities do not prevent smaller males from trying out for contact sports in order to protect them. Rather, the try-out is based on competitive skill, and the athlete who is selected assumes the risk that his size may make him more susceptible to injuries. Under the proposed language of the regulation, selection is still based on competitive skill so that only members of the opposite gender who are able to compete can play. Similarly, when an athlete of a minority sex on a team agrees to play, she assumes the risk of the athletic injuries to which her size may make her more susceptible.

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188. *See id.*

189. *See, e.g.*, William P. Ebben & Randall L. Jensen, *Strength Training for Women: Debunking Myths That Block Opportunity*, 26 PHYSICIAN & SPORTS MED., May 1998, at 86, 88 (noting that "the average American male is about 13 cm taller than the average female and about 18 kg heavier" and that "women possess about two thirds the strength of men.").

190. *See* 29 C.F.R. § 1604.2(a)(1)(i)-(ii) (1999) (stating that the use of gender stereotypes as justifications for gender discrimination are not protected by exceptions to Title VII and that the statute requires that "individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.").

191. *See id.*

192. *See supra* notes 10, 80-82 and accompanying text (examining Fourteenth Amendment case law).

193. United States v. Virginia, 518 U.S. 515, 532 (1996); *see also supra* note 10.

The fear of sexual contact is also unjustified. Athletic contact is not sexual contact nor should it be perceived as such. An athlete who perceives normal contact in the course of athletic competition to be sexual contact should not play. Likewise, a student who fails to act maturely in such a situation should be denied the opportunity to participate.[194] Although this system would require more awareness and regulation by coaches, it allows schools to avoid peer sexual harassment litigation without denying half the school's population the opportunity to participate in a sport.[195]

Finally, the new regulation would resolve the conflict between the contact sport exception and § 1983 actions. Situations in which the plaintiff is denied all federal relief because the contact sport exception prevents Title IX relief and Title IX precludes a § 1983 action[196] would disappear because the regulation would mandate equal treatment. The new regulation would require the same type of non-discrimination that the Fourteenth Amendment requires in all state laws.[197] Furthermore, all student athletes at recipient institutions, whether attending public or private schools, would be entitled to relief.[198] Therefore, plaintiffs like Heather Mercer who are victims of gender discrimination at private institutions would be guaranteed a federal cause of action.

CONCLUSION

There are several problems with the current text of the Title IX regulations on athletics. As the *Mercer* court expressed, the contact sport exception presents unclear direction regarding how courts should deal with the case of an athlete who has

194. *See, e.g.*, Adams v. Baker, 919 F. Supp. 1496, 1504 (D. Kan. 1996) (reasoning that "[a] school district best avoids sexual harassment litigation by acting to prevent sexual harassment rather than excluding females from participating in activities").

195. *See id.* at 1504-05.

196. *See* Williams v. School Dist. of Bethlehem, 998 F.2d 168, 176 (3d Cir. 1993); *see also supra* notes 84-85 and accompanying text (discussing possible preclusion of § 1983 claims by Title IX).

197. *See supra* notes 80-82 and accompanying text (examining requirements of Fourteenth Amendment).

198. Because Title IX was enacted under the congressional spending power, all institutions that receive funding must comply. *See supra* text accompanying notes 18-19. Section 1983, on the other hand, depends on congressional authority under the Fourteenth Amendment to prevent the states from denying equal protection of the law. *See supra* notes 80 and accompanying text.

been denied the opportunity to play a sport because of her gender. The language of the exception is ambiguous and confusing. Furthermore, an analysis of *Mercer* demonstrates that the purposivist and textualist interpretations contradict the interpretation based on legislative history. Finally, even the most favorable interpretation of the contact sport exception encourages recipients of federal funds to deny athletes the right to try out for a team solely on the basis of gender. Such results are inconsistent with congressional and public support for equal athletic opportunity and fail to fulfill the mandate of Title IX.

In order to combat gender-based discrimination in athletics and to achieve congressional and public goals of equal athletic opportunity, the language of the regulation must be changed. Deleting the contact sport exception would provide athletes with opportunities to play and compete based on their ability, not their gender. Furthermore, a new Policy Interpretation, clarifying the regulation's intent to make athletic participation dependent on skill rather than gender would ensure that the courts and recipients understand the new language. Such changes would give athletes like Heather Mercer the opportunity to compete and would reflect the realization that men and women should be able to pursue their individual goals free from gender-based restraints.