

AGAINST WOMEN'S SPORTS

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ABSTRACT

This Article challenges the longstanding assumption that sports should be segregated by sex. Imposing sex segregation on sports is problematic for many reasons. Sex segregation reflects and reinforces a binary view of both sex and gender unsupported by science. It communicates that women are physically unable to compete against men, even though research indicates considerable variation among individual athletes and different sports, and further reveals that attributes other than sex are often more important determinants of athletic ability. It reinforces unfounded gender stereotypes that harm both women and men. And sex segregation uncritically prioritizes athletic activities involving strengths typically associated with male bodies, without requiring us to ask why we view these strengths as the most important in the first place.

Sex segregation should not be the default in sports. Rather, if the entity that regulates a sport believes the sport should be segregated by sex, that entity should meet a burden equivalent to intermediate scrutiny by articulating why sex segregation is substantially related to an important interest. If the regulatory entity is governmental, then relevant constitutional provisions and federal laws, including the Equal Protection Clause and Title IX, already reflect this obligation. And even when the regulatory entity is private, a test analogous to intermediate scrutiny should be required to justify sex segregation as a matter of policy.

The Article does not claim that we should do away with all sex segregation in sports. Indeed, at times sex segregation is likely the best choice, or should be included as an option. But we should think carefully and critically about when and why we engage in such segregation. A thoughtful reexamination of the sex segregation norm we have too long taken for granted will improve sports for everyone.

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INTRODUCTION

Most people agree that it's good for women to play sports.¹ We encourage girls and women to participate in sports, beginning before elementary school and continuing into old age. We believe it worthwhile for women to use their bodies in athletic endeavors to improve health, gain strength and coordination, experience camaraderie, and acquire the discipline necessary to improve at a physical activity. We value the opportunity to praise women for what their bodies can do rather than merely how their bodies look. And we celebrate the inspiring accomplishments of the most gifted women athletes.

But why is it that when women play sports they almost always do so separately from men? The default of sex segregation is a powerful and nearly ubiquitous one. From four-year-olds playing soccer to elite swimmers at the Olympics to senior citizens in a bowling tournament, the assumption is that women and men don't play with or against one another. What is the reason for this near-universal norm of sex segregation? Is it that women are physically, intellectually, or emotionally unable to compete against men? Would integrated competition be dangerous for women? Would it be unseemly? Would it be disruptive?

In this Article, I challenge the idea that women's² sports are an unqualified good. To be clear, there is no doubt in my mind that it is good for women to play sports. But automatically designating particular sports, teams, competitions, and athletic pursuits *for women* is less self-evidently good. Accepting a default of sex segregation in athletic endeavors harms both women and men. Such an assumption enforces stereotypes and misconceptions about the physical abilities of the sexes. And ultimately, it limits athletic opportunities for people of all sexes and genders.

Although sports function as both recreation and entertainment, the issue

1. When I use the term sports, I am referring specifically to organized sports with a nominally competitive dimension. At various times throughout the article I will refer more generally to athletic endeavors, which include both activities that we typically consider sports (elite soccer; club gymnastics) and other physical activities that for various reasons are not considered sports (hiking; limbo).

2. Throughout the Article I acknowledge a partially unresolved conflation of sex and gender, of the word "female" and the word "woman," and thus of biological categories and socially constructed ones. For the most part, when I talk about "women's sports," I am actually referring to "sports played by female athletes." But the conflation of sex and gender in the way people talk about sports and use the English language more generally make it debilitatingly awkward to use that phrasing throughout the Article. Although I recognize that it is an imperfect solution, I have generally chosen to treat "women athletes" and "female athletes" as coextensive for purposes of the paper, and to treat "women's sports" as synonymous with "sports played by female people," with deviations from this phrasing noted where appropriate. I also acknowledge that in some instances I elide the distinction between cis- and trans-women—an issue that also flows from the conflation of sex and gender throughout sports and that I address directly in Part II.A.

of sex segregation in sports is neither frivolous nor trivial. Sports have been the site of some of our most potent civil rights battles, from the racial desegregation of baseball³ to the trademark battle over the controversial name of Washington D.C.'s professional football team.⁴ And athletes have initiated some of the most powerful and controversial protests against injustice; from the 200-meter medalists at the 1968 Mexico City Olympic games protesting racial inequality by raising their fists in a black power salute,⁵ to Muhammed Ali's principled refusal to enlist in the Vietnam War,⁶ to the recent decision of individual football players and other athletes to kneel for the national anthem as a protest of state violence against black people.⁷ Sports are not a rarified realm far removed from the civil rights issues of our time. Rather, they both reflect and reinforce the concerns of equality and justice that permeate society as a whole.

Women athletes have long been part of such civil rights activism. When Kathrine Switzer tried to become the first woman to register for and finish the Boston Marathon, some men were so opposed to her participation that they attempted to physically remove her from the course.⁸ Decades later, the Yale women's crew team stripped naked and confronted their athletic director to protest the lack of women's shower facilities at their training location—a deficiency that routinely forced them to wait on the coed bus, cold, wet, and tired, while the less successful men's team finished showering.⁹ And, more recently, women's soccer stars grew tired of making less money than their less successful male counterparts and filed suit under Title VII.¹⁰ Sports thus serve as a prominent battleground on which gender

3. Mark Armour, *Baseball Integration, 1947–1986*, SOC'Y FOR AM. BASEBALL RESEARCH, <http://sabr.org/bioproj/topic/integration-1947-1986> (last visited Feb. 19, 2017).

4. Adam Liptak, *Supreme Court Could Weigh In on Redskins Trademark Case*, N.Y. TIMES (May 2, 2016), <https://www.nytimes.com/2016/05/03/us/politics/supreme-court-redskins-trademark-case.html>.

5. Ben Cosgrove, *The Black Power Salute That Rocked the 1968 Olympics*, TIME (Sept. 27, 2014), <http://time.com/3880999/black-power-salute-tommie-smith-and-john-carlos-at-the-1968-olympics/>; Gary Younge, *The Man Who Raised a Black Power Salute at the 1968 Olympics*, THE GUARDIAN (Mar. 30, 2012, 5:59 PM), <https://www.theguardian.com/world/2012/mar/30/black-power-salute-1968-olympics>.

6. Krishnadev Calamur, *Muhammad Ali and Vietnam*, THE ATLANTIC (June 4, 2016), <https://www.theatlantic.com/news/archive/2016/06/muhammad-ali-vietnam/485717/>.

7. See, e.g., Lindsay Gibbs, *Tracking the Kaepernick Effect: The anthem protests are spreading*, THINKPROGRESS (Sept. 20, 2016), <https://thinkprogress.org/national-anthem-sports-protest-tracker-kaepernick-284ff1d1ab3e#.p2nqxyv24>.

8. David Davis, *Behind The Photo That Changed The Boston Marathon Forever*, DEADSPIN (Apr. 20, 2015, 9:04 AM), <http://deadspin.com/behind-the-photo-that-changed-the-boston-marathon-forev-1698054488>. Other women also ran and completed the Boston Marathon before Switzer, but she was the first to do so as a registered competitor, under the gender-neutral name, K.V. Switzer.

9. Steve Wulf, *Title Waves*, ESPN THE MAGAZINE (June 14, 2012), <http://www.espn.com/espnw/title-ix/article/7985418/espn-magazine-1976-protest-helped-define-title-ix-movement>.

10. Andrew Das, *Top Female Players Accuse U.S. Soccer of Wage Discrimination*, N.Y. TIMES (Mar. 31, 2016), <https://www.nytimes.com/2016/04/01/sports/soccer/uswnt-us-women-carli-lloyd-alex->

roles and women's rights are contested and redefined.

The issue of sex segregation in sports is particularly important today, when women's rights are at a crossroads. In many respects, women have achieved something approaching equality: girls surpass boys on some parts of the SAT,¹¹ more women than men now attend college and some professional schools,¹² women are increasingly well-represented in some sectors of the workforce,¹³ and women have begun to serve in combat positions in the military.¹⁴ Yet at the same time, self-titled men's rights activists and members of the so-called "manosphere" loudly trumpet women's inferiority.¹⁵ Half of Americans believe that women should be legally required to change their surnames upon marriage because "women should prioritize their marriage and their family ahead of themselves."¹⁶ Only 22 out of one hundred senators are women, as are 83 out of 435 representatives.¹⁷ And our more than two century-long streak of male presidents remains unbroken.

The idea that women are weaker and less physically capable underlies some of the more virulent arguments that women simply are not equal to men.¹⁸ And the presumed need for sex segregation in sports only reinforces

morgan-hope-solo-complain.html? r=0.

11. *SAT Percentile Ranks for 2015 College-Bound Seniors*, THE COLLEGE BOARD (2015), <https://secure-media.collegeboard.org/digitalServices/pdf/sat/sat-percentile-ranks-gender-ethnicity-2015.pdf>; Diane F. Halpern et al., *The Science of Sex Differences in Science and Mathematics*, 8(1) PSYCHOL. SCI. PUB. INT. 1 (2007).

12. David R. Francis, *Why Do Women Outnumber Men in College?*, NAT'L BUREAU OF ECON. RES., <http://www.nber.org/digest/jan07/w12139.html> (last visited Feb. 19, 2017); Daniel Borzelleca, *The Male-Female Ratio in College*, FORBES (Feb. 16, 2012, 3:26 PM), <http://www.forbes.com/sites/ccap/2012/02/16/the-male-female-ratio-in-college/# 72f575e01525>; *Statistics*, AM. BAR ASS'N, http://www.americanbar.org/groups/legal_education/resources/statistics.html (last visited Feb. 19, 2017).

13. Anne Kreamer, *A Female-Dominated Workplace Won't Fix Everything*, HARV. BUS. REV. (Oct. 17, 2011), <https://hbr.org/2011/10/we-may-have-come-from-mars-and>; Ben Popper, *Why Women Are Dominating In The Workplace*, BUSINESS INSIDER (Jul 22, 2010, 2:46 PM), <http://www.businessinsider.com/why-women-are-better-suited-to-the-modern-workplace-2010-7>; Kathleen Elkins, *20 Jobs That are Dominated by Women*, BUSINESS INSIDER (Feb. 17, 2015, 4:15 PM), <http://www.businessinsider.com/pink-collar-jobs-dominated-by-women-2015-2>.

14. Matthew Rosenberg & Dave Philipps, *All Combat Roles Now Open to Women*, *Defense Secretary Says*, N.Y. TIMES (Dec. 3, 2015), <https://www.nytimes.com/2015/12/04/us/politics/combat-military-women-ash-carter.html>.

15. See, e.g., James S. Fell, *The Toxic Appeal of the Men's Rights Movement*, TIME (May 29, 2014), <http://time.com/134152/the-toxic-appeal-of-the-mens-rights-movement/>.

16. Emily Fitzgibbons Shafer, *Hillary Rodham Versus Hillary Clinton: Consequences of Surname Choice in Marriage*, 34 GEND. ISSUES 316 (2017); Kimberly Lawson, *Half of Americans Think Women Should Be Required by Law to Take Husband's Name*, VICE: BROADLY (Jan. 27, 2017, 2:12 PM), https://broadly.vice.com/en_us/article/half-of-americans-think-women-should-be-required-by-law-to-take-husbands-name.

17. *Current Numbers*, RUTGERS CTR. FOR AMERICAN WOMEN AND POL., <http://www.cawp.rutgers.edu/current-numbers> (last visited Feb. 19, 2017).

18. See, e.g., Emmanuel Goldstein, *The Men's Rights Movement Is No Place for Men*, RETURN

that notion. Yet the default of sex segregation in sports remains underexamined. A number of researchers have considered certain facets of sex segregation in sports. Some have focused on the physiology of men and women and whether it justifies sex segregation as a policy.¹⁹ Others have focused on whether Title IX prohibits sex segregation with respect to specific sports.²⁰ One has argued that school sports should be entirely free of gender classification.²¹ And a few situate sex segregation in sports within a problematic pattern of sex segregation in society more generally.²² Existing analysis is generally limited to particular sports or particular categories of athletes.

This Article provides an overarching structural critique of the sex-segregation norm in all sports at all levels. It interrogates why we believe certain sports to be more important than others. It also questions why we consider some activities sports and others not. This structural critique provides a foundation for a searching legal analysis that applies to all government-sponsored and government-supervised sports at every level of competition. To further that analysis, the Article imports recent scientific research and other empirical evidence about women's athletic capabilities. For privately sponsored and privately supervised sports, a substantially similar analysis should apply as a matter of good policy.

OF KINGS (June 6, 2013), <http://www.returnofkings.com/7877/the-mens-rights-movement-is-no-place-for-men>.

19. Eileen McDonagh & Laura Pappano, *PLAYING WITH THE BOYS* (1st ed. 2009); Claire F. Sullivan, *Gender Verification and Gender Policies in Elite Sport: Eligibility and "Fair Play"*, 35 J. SPORT & SOC. ISSUES 400 (2011), <http://history.msu.edu/hst484-f15/files/2015/10/Sullivan-2011-JSSI.pdf>; Catherine Jean Archibald, *De-Clothing Sex-Based Classifications—Same-Sex Marriage Is Just the Beginning: Achieving Formal Sex Equality in the Modern Era*, 36 N. KY. L. REV. 1 (2009).

20. B. Glenn George, *Fifty/Fifty: Ending Sex Segregation in School Sports*, 63 OHIO ST. L.J. 1107, 1107–08 (2002) (proposing that all college sports covered by Title IX be half men and half women, and further linking sex segregation to problematic commercialization); Dana Robinson, *A League of Their Own: Do Women Want Sex-Segregated Sports?*, 9 J. CONTEMP. LEGAL ISSUES 321, 321 (1998); *Thirty Years of Avoiding Sexual Discrimination in Schools*, WYO. LAW., April 2002, at 21; see generally Laura A. Zaccone, *Policing the Policing of Intersex Bodies Softening the Lines in Title IX Athletic Programs*, 76 BROOK. L. REV. 385 (2010); Jennifer E. Powell, *Title IX: Straining Toward an Elusive Goal*, 1 WILLAMETTE SPORTS L.J. 1 (2004); Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in A Civil Rights Statute*, 32 CONN. L. REV. 381 (2000)

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

22. Note, *Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression*, 110 HARV. L. REV. 1627, 1627 (1997); David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 COLUM. J. GENDER & L. 51, 53 (2011); Eric Anderson, *"I Used to Think Women Were Weak": Orthodox Masculinity, Gender Segregation, and Sport*, 23(2) SOC. FORUM 1 (2008); Shari L. Dworkin & Cheryl Cooky, *Sports, Sex Segregation, and Sex Testing: Critical Reflections on This Unjust Marriage*, TAYLOR & FRANCIS ONLINE (June 13, 2012), <http://www.tandfonline.com/doi/abs/10.1080/15265161.2012.680545>; Judith Lorber, *Believing is Seeing: Biology as Ideology*, 7 GENDER & SOC'Y 568, 571–74 (1993); Catherine Jean Archibald, *De-Clothing Sex-Based Classifications—Same-Sex Marriage Is Just the Beginning: Achieving Formal Sex Equality in the Modern Era*, 36 N. KY. L. REV. 1 (2009).

Ultimately, I conclude that many instances of sex segregation in government-sponsored sports do not survive true intermediate scrutiny—the kind that courts apply to sex- and gender-based classifications in other contexts. Based on available evidence, some instances of sex-segregation in sports survive that standard, and others do not. I argue that each situation must be considered on its own merits, with attention to the nature and purpose of the sport,²³ the purpose or goals of a particular sporting environment,²⁴ the social advantages and disadvantages of sex segregation, and the best available biological and sociological evidence.²⁵

This Article proceeds as follows. In Part I, I trace the history of women in sports and women's sports, including the laws and regulations that have governed women's participation in sports over time. In particular, I examine the norm of sex segregation in sports. In Part II, I question the sex-segregation norm, arguing that it wrongly treats sex and gender as binary, assumes without evidence that men and women cannot compete with or against one another, reinforces gender stereotypes harmful to both men and women, and blinds us to the biases built into what we consider "sports" in the first place. In Part III, I explain why defaulting to sex segregation in sports is often illegal and virtually always bad policy. I then propose an agenda for sex integration that will improve sports both for women and for everyone else.

I. WOMEN AND SPORTS

This Part briefly summarizes the history of women's participation in sports. It then surveys the current social and legal landscape for women who participate in athletic endeavors.

A. History

Prior to 1870, physical activities for women were recreational rather than

23. In this Article, I do not engage in a detailed analysis of the "purpose" of particular sports or sporting environments. Certainly that purpose should play a role in both legal and policy analysis, and I discuss the implications of this insight in Part III. But for the balance of the article, my fundamental assumption is that different sports, and sports competitions at different levels, have a range of purposes—indeed, one sports environment may have many purposes. And, in some instances, sex segregation does nothing to further any relevant purpose and in many instances actively hinders it.

24. *Id.*

25. My argument is not that every permutation of government-sponsored sports should be judicially scrutinized, any more than every workplace, school, or government program should be judicially scrutinized for sex or gender inequality. As I will explain, we can extrapolate general principles that can be applied across various athletic contexts with a high degree of accuracy, with judicial review as a mechanism for deciding the right approach in close cases or as a backstop against abuse by individuals.

competitive. Excessive physical activity was thought to be dangerous for women, particularly in association with menstruation.²⁶ In 1874, for instance, Edward Clarke, a professor at Harvard Medical School, stated that “both muscular and brain labor must be reduced at the onset of menstruation.”²⁷ In the early 1900s, female physical education teachers were opposed to interscholastic basketball competition because they believed it put too much strain and stress on the girls while also potentially creating a public spectacle of women competing.²⁸ Opponents of women’s participation in athletic endeavors offered a myriad of other physiological and psychological reasons that women could not participate.²⁹

Nonetheless, in the late 1800s and early 1900s, women began to form informal athletic clubs for sports such as tennis, croquet, and archery. Women’s collegiate athletics also increased in the early 1900s, although they tended to deemphasize competition and did not gain widespread prominence. With the women’s suffrage movement, culminating in the recognition of a constitutional right to vote in 1920, came renewed interest in athletic activities for women, but the struggles of the depression took precedence and gains for women were relatively minimal until the 1940s.

Beginning after World War II, however, women’s participation in sports increased dramatically. From 1948 to 1972, the percentage of U.S. women athletes in the Summer Olympic games increased from 12.67 percent of U.S. athletes to 21 percent.³⁰ At the 1960 Summer Olympics in Rome, Wilma Rudolph won three gold medals in sprinting events, and was part of the team that set the at-the-time world record in the 4x100 meter relay.³¹ This made Rudolph the first American woman to win three gold medals in track and field events at a single Olympics game.³² In 1945, golfer Babe Didrikson Zaharias had become the first woman to make a tournament cut in a men’s Pro Golf Association tournament.³³ Five years later, the Ladies

26. EDWARD H. CLARKE, *SEX IN EDUCATION, OR, A FAIR CHANCE FOR GIRLS* 102 (1874).

27. *Id.* For more modern research regarding the effect of menstruation on girls, see, e.g., Gretchen Reynolds, *Athletic Performance and the Monthly Cycle*, N.Y. TIMES (July 20, 2011, 12:01 AM), https://well.blogs.nytimes.com/2011/07/20/athletic-performance-and-the-monthly-cycle/?_r=0.

28. Patricia A. Cain, *Women, Race, and Sports: Life Before Title IX*, 4 J. GENDER RACE & JUST. 337, 342 (2001).

29. See generally SUSAN A. CAHN, *COMING ON STRONG: GENDER AND SEXUALITY IN TWENTIETH-CENTURY WOMEN’S SPORTS* (1998).

30. Compare *United States at the 1948 London Summer Games*, SPORTS-REFERENCE, <http://www.sports-reference.com/olympics/countries/USA/summer/1948/> (last visited Feb. 19, 2017); with *United States at the 1972 Munich Summer Games*, SPORTS-REFERENCE, <http://www.sports-reference.com/olympics/countries/USA/summer/1972/> (last visited Feb. 19, 2017).

31. *Wilma Rudolph*, SPORTS-REFERENCE, <https://www.sports-reference.com/olympics/athletes/ru/wilma-rudolph-1.html>.

32. *1960: Rudolph takes Third Olympic gold*, BBC, http://news.bbc.co.uk/onthisday/hi/date_s/stories/september/11/newsid_3554000/3554568.stm (last visited Feb. 19, 2017).

33. *Bio: Babe Zaharias*, LADIES PROF. GOLF ASSOC., <http://www.lpga.com/players/babe-zaharias/82800/bio> (last visited Feb. 19, 2017).

Professional Golf Association was founded,³⁴ and that same year Kathryn Johnston became the first girl to play Little League Baseball.³⁵ In 1973, women's tennis player Billie Jean King defeated Bobby Riggs in an exhibition match widely known as the "Battle of the Sexes," mere months after the founding of the Women's Tennis Association.³⁶

As more women began to participate in athletic activities, Congress passed Title IX. On August 6, 1971, Senator Birch Bayh introduced an early version of Title IX as an amendment to the Higher Education Act of 1971³⁷; he reintroduced the legislation the following year as an amendment to the Higher Education Act of 1965.³⁸ In presenting his proposed legislation, Senator Bayh commented: "[O]ne of the great failings of the American educational system is the continuation of corrosive and unjustified discrimination against women. It is clear to me that sex discrimination reaches into all facets of education."³⁹ He added: "the facts absolutely contradict these myths about the 'weaker sex' and it is time to change our operating assumptions."⁴⁰

Congress enacted Title IX with two principal purposes: "to avoid the use of federal resources to support sexually discriminatory practices, and to provide individual citizens effective protection against those practices."⁴¹ Title IX was modeled after the Civil Rights Act of 1964.⁴² Although the statute is frequently associated with sports programs, Title IX does not explicitly mention athletics, nor did Senator Bayh mention athletics when introducing the amendment.⁴³ Rather, he first addressed athletics in response to a question from Senator Peter H. Dominick about whether the 1971 amendment would require the integration of athletic facilities. Senator Bayh responded, "[I do not] feel it mandates the desegregation of football fields. What we are trying to do is provide equal access for women and men students . . . where there is not a unique facet such as football involved."⁴⁴

34. *About LPGA*, LADIES PROF. GOLF ASSOC., <http://www.lpga.com/about-lpga> (last visited Feb. 19, 2017).

35. Neil Amdur, *BASEBALL: One More Pitch for First Girl in Little League*, N.Y. TIMES (Aug. 20, 2001), <http://www.nytimes.com/2001/08/20/sports/baseball-one-more-pitch-for-first-girl-in-little-league.html>.

36. *Billie Jean King*, INTERNATIONAL TENNIS HALL OF FAME, <https://www.tennisfame.com/hall-of-famers/inductees/billie-jean-king/> (last visited Feb. 19, 2017).

37. 117 Cong. Rec. 30403 (1971).

38. 118 Cong. Rec. 5803 (1972).

39. *Id.*

40. 118 Cong. Rec. 5804 (1972).

41. Ann K. Wooster, Annotation, *Sex discrimination in public education under Title IX—Supreme Court cases*, 158 A.L.R. Fed. 563 (1999).

42. *Cannon v. University of Chicago*, 441 U.S. 677, 684–685 (1979).

43. 118 CONG. REC. 5803–12 (1972).

44. 117 CONG. REC. 30407 (1971). The regulations covering athletics under Title IX were

The language of Title IX itself is simple. “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.”⁴⁵ The implementing regulations, however, made clear of the sweeping scope of the statute: it required equal opportunity to play sports at all levels at all educational institutions that receive public funding.⁴⁶ Equal opportunity is assessed using ten different factors, largely falling into the broader categories of expenditures, facilities, coaching and tutoring, scheduling, and publicity.⁴⁷ The regulations are not without limitations. They allow segregated teams so long as selection for the team is based on competitive ability or the sport in question is a contact sport.⁴⁸ When a particular sport has a team for one sex, members of the opposite sex must be allowed to try out.⁴⁹ Additionally, unequal aggregate expenditures for each sex does not necessarily constitute unequal opportunity, despite the factors enumerated above.⁵⁰

With the passage of Title IX and its implementing regulations, the incremental progress of the previous decades increased exponentially. Since 1972, female participation in high school sports has increased over 900 percent.⁵¹ The number of women collegiate athletes has increased from fewer than 30,000 in the 1971–1972 school year to over 193,000 in the 2010–2011 school year,⁵² while the number of American women athletes in the Summer Olympics has increased from 84 in 1972 to 294 in 2016.⁵³ From the 1988–1989 school year to the 2015–2016 school year, schools added a net of 3434 women’s NCAA Division I, II, or III teams, which accounted for 80.9 percent of all teams added during that period.⁵⁴ Professional

published four years later. 34 C.F.R. § 106.41 (1975).

45. 20 USCS § 1681 (1972).

46. 34 C.F.R. § 106.41(c) (1975).

47. *Id.*

48. 34 C.F.R. § 106.41(b) (1975) (stating that “contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact”).

49. *Id.*

50. 34 C.F.R. § 106.41(c) (1975).

51. *Title IX Myths and Facts*, WOMEN’S SPORTS FOUNDATION, (Mar. 18, 2013) <https://www.womenssportsfoundation.org/advocate/title-ix-issues/what-is-title-ix/title-ix-myths-facts> (last visited Feb. 19, 2017).

52. Maya Dusenbery & Jaeah Lee, *Charts: The State of Women’s Athletics, 40 Years After Title IX*, MOTHER JONES (Jun. 22, 2012), <http://www.motherjones.com/politics/2012/06/charts-womens-athletics-title-nine-ncaa>.

53. *United States at the 1972 Munich Summer Games*, SPORTS-REFERENCE <http://www.sports-reference.com/olympics/countries/USA/summer/1972/> (last visited Feb. 19, 2017); United States Olympic Committee, *U.S. Olympic Committee Announces 558 Member 2016 U.S. Olympic Team*, <http://www.teamusa.org/road-to-rio-2016/team-usa/athletes> (last visited Feb. 19, 2017).

54. *Student–Athlete 2015–16 NCAA Sports Sponsorship and Participation Rates Report 283*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (Oct. 2016), <http://www.ncaapublications>.

women's sports leagues have emerged, such as the WNBA in 1996,⁵⁵ the National Pro Fastpitch softball league in 2004 (originally launched as Women's Pro Fastpitch in 1997),⁵⁶ the Women's Flat Track Derby Association in 2004,⁵⁷ and the National Women's Soccer League in 2013.⁵⁸ As more girls and women have begun to participate in sports at all levels, educational institutions and other athletic associations have made choices, albeit not necessarily well-considered or even conscious ones, about the way that sex should affect the shape of athletic programs and competitions.

B. Today

Today female participation in organized sports at the high school is an all-time high.⁵⁹ The same is true at the college level.⁶⁰ The total number of collegiate female athletes participating in basketball, ice hockey, lacrosse, soccer, track, and volleyball were at all-time highs in the 2015–2016 school year.⁶¹ At the professional level, the WNBA currently has 12 teams after launching with eight.⁶²

What these many different athletic pursuits have in common, however, is that they are generally undertaken in sex-segregated settings. Most sports are sex segregated at all levels of competition, though there are exceptions.⁶³ These include some sports where the objective is pure speed, such as

com/productdownloads/PR1516.pdf.

55. *Frequently Asked Questions: WNBA*, WNBA, <http://www.wnba.com/faq/> (last visited Feb. 19, 2017).

56. *NPF History*, NATIONAL PRO FASTPITCH, <http://www.profastpitch.com/about/history/> (last visited Feb. 19, 2017).

57. *WFTDA History*, WOMEN'S FLAT TRACK DERBY ASSOC., <https://wftda.org/history> (last visited Feb. 19, 2017).

58. *Breakers History*, BOSTON WOMEN'S SOCCER, LLC, http://www.bostonbreakerssoccer.com/ABOUT/HISTORY/index_E.html (last visited Feb. 19, 2017). The league was preceded by the Women's United Soccer Association from 2001–2003, Jere Longman, *SOCCER: Women's Soccer League Folds on World Cup's Eve*, N.Y. TIMES, Sept. 16, 2003, <http://www.nytimes.com/2003/09/16/sports/soccer-women-s-soccer-league-folds-on-world-cup-s-eve.html>, and the Women's Professional Soccer league from 2009–2012. *About WPS*, WOMEN'S PROFESSIONAL SOCCER, <http://web.archive.org/web/20120417190537/http://www.womensprosoccer.com/about/about-wps> (last visited Feb. 19, 2017).

59. The National Federation of State High School Associations, *2015–2016 High School Athletics Participation Survey*, http://www.nfhs.org/ParticipationStatistics/PDF/2015-16_Sports_Participation_Survey.pdf (explaining that the number of girl participants has increased from 294,015 in the 1971–1972 school year to 3,324,306 in 2015–2016) (last visited Feb. 19, 2017).

60. *Supra* note 52 (explaining that the average number of female collegiate athletes per institution has increased from 81.6 in the 1981–1982 school year to 155.8 in 2015–2016).

61. *Id.*

62. *Supra* note 53.

63. Moreover, many sports are not sex segregated in their non-competitive forms, such as hiking, rock climbing, kayaking, mountain biking, and parkour.

NASCAR⁶⁴ and Nacra 17 sailing.⁶⁵ Various forms of equestrian competition including dressage, jumping, and eventing are also integrated.⁶⁶ And some sports are structured so as to include both men and women, such as mixed curling,⁶⁷ mixed doubles tennis,⁶⁸ pairs figure skating,⁶⁹ luge,⁷⁰ and competitive cheerleading,⁷¹ although in many of these sports the rules preserve presumptively distinct roles for men and women. In figure skating, for example, the official rules for international competition dictate that men must wear sleeves and women must wear skirts, and that the “man” must lift, hold, and throw the “lady.”⁷²

Yet despite the rise of women’s sports, those sports remain less popular than men’s. In basketball, NBA games during the 2015–2016 regular season averaged an attendance total of 17,864 people.⁷³ By contrast, WNBA games during the 2016 regular season averaged only 7655 people.⁷⁴ Likewise, the average NBA salary during the 2013–2014 season was 4.9 million dollars.⁷⁵ In 2014, the average WNBA salary was 75,000 dollars, and star player Diana Taurasi was paid more by a foreign league to sit out of the WNBA season than she would have received for playing that season.⁷⁶ And even when women’s sports teams out-perform men’s, women often receive less

64. *Active Driver Listing*, COMPREHENSIVE RACING STATISTICS, <http://racing-reference.info/driver.htm> (last visited Feb. 19, 2017).

65. *SAILING, History of Sailing at the Olympic Games*, THE OLYMPIC STUDIES CENTRE, (Oct. 19, 2017), https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Factsheets-Reference-Documents/Games/OG/History-of-sports/Reference-document-Sailing-History-at-the-OG.pdf#_ga=1.162649214.33350132.1486506979.

66. *EQUESTRIAN SPORT History of Equestrian Sport at the Olympic Games*, OLYMPIC STUDIES CENTRE, (Oct. 19, 2017), https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Factsheets-Reference-Documents/Games/OG/History-of-sports/Reference-document-Equestrian-Sport-History-at-the-OG.pdf#_ga=1.190078441.33350132.1486506979.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. National Cheerleaders Ass’n, *NCA Competition Rule Book For School Teams*, http://nca.s3.varsity.com.s3.amazonaws.com/Files/Competitions/Rules-Divisions/nca_school_rulebook.pdf (last visited Feb. 19, 2017).

72. International Skating Union, *Special Regulations & Technical Rules, Single & Pair Skating and Ice Dance*, http://static.isu.org/media/79156/2012_specialregulations_technicalrules_singleandpair_icedance.pdf (last visited Feb. 19, 2017).

73. Richard Sandomir, *After Two Decades, W.N.B.A. Still Struggling for Relevance*, N.Y. TIME (May 28, 2016), <https://www.nytimes.com/2016/05/28/sports/basketball/after-two-decades-wnba-still-struggling-for-relevance.html>.

74. *WNBA’s Record-Breaking Season Scores Highest Attendance in Five Years*, WNBA (Sept. 21, 2016), <http://www.wnba.com/news/record-breaking-attendance-five-years-digital-social-retail/>.

75. Kurt Badenhausen, *Average MLB Player Salary Nearly Double NFL’s, But Still Trails NBA’s*, FORBES (Jan. 23, 2015, 11:01 AM), <http://www.forbes.com/sites/kurtbadenhausen/2015/01/23/average-mlb-salary-nearly-double-nfls-but-trails-nba-players/#2f76eb8f269e>.

76. *Sefko: Why WNBA Has Never Been Stronger as League Enters Dallas Market*, SPORTSDAY (July 2015), <http://sportsday.dallasnews.com/dallasmavericks/mavericksheadlines/2015/07/26/sefko-why-wnba-has-never-been-stronger-as-league-enters-dallas-market>.

in pay and benefits. In 2016, for example, members of the U.S. women's soccer team filed a complaint with the Equal Employment Opportunity Commission for receiving less in game compensation, sponsorship opportunities, and travel per diems than their male counterparts, even though the women's team was unquestionably more successful in competitions such as the World Cup.⁷⁷

These disparities reflect longstanding attitudes among those considered authorities on the sport of basketball. Jeff Pearlman, writing for *Sports Illustrated*, said: “[t]he WNBA’s emergence is a mathematical, sociological impossibility,” adding, “the majority of sports fans simply don’t crave women’s professional basketball.”⁷⁸ The 2015 FIFA Women’s World Cup only awarded its participants 2.6 percent of what the male competitors received for the 2014 World Cup.⁷⁹ Total in-home television viewership of the Women’s World Cup was approximately 764 million,⁸⁰ or approximately 23 percent of the men’s World Cup viewership.⁸¹

These disparities are perhaps unsurprising given common—albeit poorly supported—attitudes toward women’s sports. For instance, *Sports Illustrated* writer Andy Benoit has claimed that “women’s sports in general [are] not worth watching.”⁸² In defense of Benoit, *Barstool Sports’* John Feitelberg opined: “women’s sports aren’t as interesting as men’s, that’s not opinion[,] it’s fact.”⁸³

But are women’s sports really “less interesting” than men’s sports? “Interesting” is, after all, a social construct. The next Part will consider the validity of sex segregation in sports, examining various arguments for this longstanding practice.

77. Laura Santhanam, *Data: How Does the U.S. Women’s Soccer Team Pay Compare to the Men?*, PBS NEWSHOUR (May 31, 2016), <http://www.pbs.org/newshour/rundown/data-how-does-the-u-s-womens-soccer-team-pay-compare-to-the-men/>.

78. Jeff Pearlman, *Why the WNBA Isn’t—and Will Never be—a Popular League*, SPORTS ILLUSTRATED (Jun. 16, 2010), <http://www.si.com/nba/2010/06/16/wnba>.

79. Caitlin Murray, *Women’s World Cup: Bigger, Better—but Still Treated as the Poor Relation*, THE GUARDIAN (Jul. 4, 2015, 9:59 AM), <https://www.theguardian.com/football/2015/jul/04/womens-world-cup-fifa-tournament-mens>.

80. *Record-Breaking FIFA Women’s World Cup Tops 750 million TV Viewers*, FIFA (Dec. 17, 2015), <http://www.fifa.com/womensworldcup/news/y=2015/m=12/news=record-breaking-fifa-womens-world-cup-tops-750-million-tv-viewers-2745963.html>.

81. *2014 FIFA World Cup Reached 3.2 billion Viewers, One Billion Watched Final*, FIFA (Dec. 16, 2015), <http://www.fifa.com/worldcup/news/y=2015/m=12/news=2014-fifa-world-cuptm-reached-3-2-billion-viewers-one-billion-watched--2745519.html>.

82. Timothy Burke, *Dopey Sports Illustrated Writer: Women’s Sports Aren’t Worth Watching*, DEADSPIN (Jun. 22, 2015, 10:42 PM), <http://deadspin.com/dopey-sports-illustrated-writer-womens-sports-arent-wo-1713258896>.

83. John Feitelberg, *Sports Illustrated Writer Says Women’s Sports Aren’t Worth Watching And, As You Can Expect, His Opinion Has Been Very Well Received*, BARSTOOL SPORTS (Jun. 23, 12:11 PM), <http://www.barstoolsports.com/boston/sports-illustrated-writer-says-womens-sports-arent-worth-watching-and-as-you-can-expect-his-opinion-has-been-very-well-received/>.

II. WOMEN'S SPORTS?

Why it is that when women play sports, they almost always play *women's* sports? This Part discusses four reasons that this default is unwarranted. First, sex-segregation in sports relies on a falsely binary conception of both sex and gender: this complex topic has garnered a great deal of critical examination on its own, so for present purposes I primarily flag the debate as deserving of greater study. Second, in many instances the assumption that men and women cannot compete against one another is either false or unproven. Third, and relatedly, in many instances the supposed necessity of women's sports is founded upon unjustified gender stereotypes, which constrain both women and men. And finally, the idea of women's sports uncritically incorporates a view of sports that prioritizes physical abilities at which men excel.

A. False Binaries

Most entities that sponsor or supervise sports display a reflexive and uncritical view of both sex and gender as binary. Researchers have long recognized that sex and gender are different: sex refers to biological categories; gender to socially constructed roles.⁸⁴ As I have previously observed, the terms are both misused and conflated in discussions of sports.⁸⁵ Still, sex and gender share an important similarity when it comes to sports: in both instances the categories are treated as both mutually exclusive and all-encompassing. That is, an athlete is either male or female, and either a man or a woman, but never both, and certainly not neither one.

Yet science clearly indicates that sex is not, in fact, a binary proposition. Typically, female sex is determined by two "X" chromosomes while male sex is determined by an "X" and a "Y" chromosome.⁸⁶ It is possible, however, to have three sex-determinative chromosomes. An "XXY" combination can result in "external male genitalia and poor physical development," or there may be some cells with the "XXY" combination and some with only "X" chromosomes.⁸⁷

Thus, biologists have long known that people are not neatly divisible into the categories of male and female on the basis of chromosomes. Those not

84. See generally JUDITH BUTLER, *GENDER TROUBLE* (2d ed. 1999); JUDITH BUTLER, *UNDOING GENDER* (2004).

85. See *infra* note 1. In this section, I strive to disaggregate sex and gender, although the task is made difficult by the inaccurate terminology used throughout the realm of athletics.

86. *Gender and Genetics*, WORLD HEALTH ORG., <http://www.who.int/genomics/gender/en/index1.html> (last visited February 23, 2017).

87. *Genetics Home Reference, Klinefelter Syndrome*, NAT'L INST. FOR HEALTH, Klinefelter Syndrome, <https://ghr.nlm.nih.gov/condition/klinefelter-syndrome> (last visited February 23, 2017) (identifying the XXY chromosome as "Klinefelter Syndrome").

neatly categorized are not a majority, but they are not isolated examples. For example, researchers have found that out of every 1,000 babies, 1.7 are born with chromosomes that do not “match” their sexual organs. Biologist Anne Fausto-Sterling observes:

European and American culture is deeply devoted to the idea that there are only two sexes. But if the state and legal system has an interest in maintaining only two sexes, our collective biological bodies do not. While male and female stand on extreme ends of a biological continuum there are many other bodies . . . that evidently mix together anatomical components conventionally attributed to both males and females.⁸⁸

In short, scientists consider the binary view of sex a substantial oversimplification.

Yet despite this compelling scientific evidence, sports regulatory entities stubbornly adhere to a binary view of sex. This view is readily evident in the long and ongoing practice of so-called gender testing—an inaccurately-named practice because the purpose is actually to discern an individual's biological sex. Under a gender-testing regime, female athletes competing in international and Olympic sports have been forced to undergo an intrusive and evolving battery of tests to prove themselves female as a prerequisite for participation in female-only events.⁸⁹

So-called gender testing operates under the assumption that male and female are the only two forms of the human body, and that those forms may be “enforced and made visible to observers.”⁹⁰ Moreover, gender testing places a disproportionate emphasis on sex as an advantage, when in fact there are all sorts of genetic variations, unlinked to sex, that can give one athlete an advantage over another, and that are neither tested nor policed.⁹¹

For present purposes I do not explore the policing of sex and gender in any detail, as this complex topic deserves its own sustained focus and should be informed by a thorough grounding in biology and endocrinology. Here, my point is simply that neither sex nor gender is binary, and that this well-accepted scientific principle further problematizes the designation of particular sports competitions as “women's” competitions.

Although gender verification testing has been performed for decades in

88. EILEEN MCDONAGH & LAURA PAPPANO, *PLAYING WITH THE BOYS* (2008).

89. Laura A. Wackwitz, *Verifying the Myth: Olympic Sex Testing and The Category “Woman”*, 26 *WOMEN'S STUDIES INT'L FORUM* 553, 553–60 (2003).

90. *Id.* at 554.

91. See, e.g., *Something Only I Can See*, *THIS AMERICAN LIFE* (Jan. 15, 2016), <https://www.thisamericanlife.org/radio-archives/episode/577/something-only-i-can-see>.

competitive sports and both intersex and transgender women have been subject to specific requirements to compete in women's sports, current scientific research shows that neither sex nor gender is binary. One important lesson to learn from intersex and transgender athletes is simply that neither sex nor gender falls into the clear categories that we once believed they did. This conclusion undermines the use of either sex or gender as the only way, the best way, or even a viable way of separating athletes into groups.

B. Unjustified Segregation

One oft-repeated justification for gender verification testing, as well as for sex segregation more generally, is that these practices are necessary to enforce a level playing field. Yet this view is inherently premised on the idea that males are “faster, stronger, and better” at athletics than females.⁹² As a result, the same system that supposedly guarantees a space for women to compete simultaneously communicates women's “competitive inferiority.”⁹³

This section will discuss the unproven assumption that women cannot compete against men in athletic activities. To be clear, my claim is not that women can or should compete against men in every athletic endeavor. I acknowledge at the outset that in some instances research indicates that women, on average, are less proficient at particular athletic activities than are men.⁹⁴ This set of activities, however, is not my focus here: rather, I wish to challenge the prevailing assumption that male athletes are better than female athletes at *all* athletic endeavors. Available evidence supports the claim that in some instances some female athletes perform as well or better than male athletes at particular endeavors, while in other instances the pervasive norm of segregation means that we haven't yet accumulated enough information to reach a conclusion.

1. Integrated competition

On August 6, 1926, nineteen-year-old Gertrude Ederle became the first woman to swim the English Channel, a 21-mile stretch separating Great

92. Cheryl Cooky, et al., “What Makes a Woman a Woman?” Versus “Our First Lady of Sport”: A Comparative Analysis of the United States and the South African Media Coverage of Caster Semenya, 37 J. SPORT & SOC. ISSUES 31, 34 (2013).

93. Wackwitz, *supra* note 89.

94. For a brief survey, see, for example, David Epstein, Opinion, *How Much Do Sex Differences Matter in Sports?*, WASH. POST (Feb. 7, 2014), https://www.washingtonpost.com/opinions/how-much-do-sex-differences-matter-in-sports/2014/02/07/563b86a4-8ed9-11e3-b227-12a45d109e03_story.html?utm_term=.7174e8e0c680.

Britain from the northwestern part of France.⁹⁵ Ederle completed her swim in 14 hours and 31 minutes.⁹⁶ She encountered storms and heavy swells—what one authority described as “horrendous conditions.”⁹⁷ Indeed, she was forced to swim 35 miles to complete the 21 mile crossing. Yet her time was the fastest time yet recorded, surpassing the best time among the five men who had preceded her by more than two hours.⁹⁸ Her record remained unbroken until 1950.⁹⁹

By the time she set the English Channel record, Ederle held 18 world swimming records, won three medals in Paris at the 1924 Olympics, and had defeated fifty-one other swimmers in her first long-distance race between Manhattan Beach and Brighton Beach.¹⁰⁰ She set seven world records when she made it to the Brighton Beach shoreline.¹⁰¹ Ederle was also the first woman to swim the New York Bay and her time of 7 hours, 11 minutes broke the previous men's record by swimming from the New York Battery to Sandy Hook, New Jersey, a distance of 22 miles.¹⁰² Her time remained unbroken for 81 years.¹⁰³ Ederle held 29 national and world amateur records from 1921 to 1925.¹⁰⁴

Research suggests that women have a physiological edge in distance swimming, particularly under extreme temperature conditions. A swimmer's body is supported by water, so “rather than being a problem, a higher percentage of body fat may enhance performance.”¹⁰⁵ For example, a higher percentage of body fat may improve a swimmer's buoyance,

95. *Gertrude Ederle Becomes First Woman to Swim English Channel*, HISTORY, <http://www.history.com/this-day-in-history/gertrude-ederle-becomes-first-woman-to-swim-english-channel> (last visited Feb. 19, 2017).

96. Richard Severo, *Gertrude Ederle, the First Woman to Swim Across the English Channel, Dies at 98*, N.Y. TIMES (Dec. 1, 2003), <http://www.nytimes.com/2003/12/01/sports/gertrude-ederle-the-first-woman-to-swim-across-the-english-channel-dies-at-98.html>.

97. *Id.*

98. *Gertrude Ederle Becomes First Woman to Swim English Channel*, HISTORY, <http://www.history.com/this-day-in-history/gertrude-ederle-becomes-first-woman-to-swim-english-channel> (last visited Feb. 19, 2017).

99. Christopher Reed, *Obituary: Gertrude Ederle*, THE GUARDIAN (Dec. 2, 2003, 9:18 PM), <https://www.theguardian.com/news/2003/dec/03/guardianobituaries.sport>.

100. *Gertrude Ederle*, THE ECONOMIST (Dec. 18, 2003), <http://www.economist.com/node/2299956>.

101. *Gertrude Ederle*, INT'L SWIMMING HALL OF FAME, [http://www.ishof.org/gertrude-ederle-\(usa\).html](http://www.ishof.org/gertrude-ederle-(usa).html) (last visited Feb. 19, 2017).

102. *Gertrude Ederle Becomes First Woman to Swim English Channel*, HISTORY, <http://www.history.com/this-day-in-history/gertrude-ederle-becomes-first-woman-to-swim-english-channel> (last visited Feb. 19, 2017); Alex Q. Arbuckle, *Gertrude Ederle's Channel Swim*, MASHABLE, <http://mashable.com/2016/04/14/gertrude-ederle-english-channel/> (last visited Feb. 19, 2017).

103. Arbuckle, *supra* note 102.

104. Severo, *supra* note 96.

105. L.B. Ransdell & C.L. Wells, *Sex Differences in Athletic Performance*, 60 WOMEN IN SPORT AND PHYSICAL ACTIVITY J., 55 (1999).

thereby reducing drag in the water; likewise, higher body fat may better prevent loss of body heat in cold water.¹⁰⁶ Others suggest that female swimmers also may have anthropometric advantages: “despite arm length differences, females pulled deeper and narrower than males” with the result that they were “technically more efficient than males.”¹⁰⁷

These advantages are more pronounced in lengthy channel swimming contests, but evidence also suggests that women are competitive with men in somewhat shorter swimming events. In records for American distance swimming, women hold the current record in the 5, 15, 20, 25, 30, and 35 kilometer events.¹⁰⁸

Women also compete with men in other sports. Rock climber Lynn Hill is five foot two and weighs only 110 pounds.¹⁰⁹ In her prime, she was one of the best rock climbers in the world. She is the first, and now one of only two people, to succeed in free climbing The Nose—a difficult route on El Capitan in Yosemite Valley, California—in a single day.¹¹⁰ In 1979, she was the first woman to climb a route rated 5.12d; in 1991, she was the first woman to complete a route graded 5.13; and in 1992, she was the first woman to make an on-sight ascent of a route rated 5.13b.¹¹¹ She is also a five-time winner of the Rock Master Invitational competition and a three-time winner of the Bercy Masters.¹¹²

More recently, in 2017 a long distance runner named Courtney Dauwalter won the Moab 240 Mile Endurance Run—a grueling race in the Utah desert that took her 57 hours and 52 minutes to complete¹¹³—by more than ten hours over the nearest competitor, a man.¹¹⁴ In the process, she surpassed every other competitor, both male and female.¹¹⁵ Dauwalter

106. *Id.*

107. D.J. Dutto & J.M. Cappaert, *Biomechanical and Physiological Differences Between Males and Females During Freestyle Swimming*, 26 *MEDICINE & SCIENCE IN SPORTS & EXERCISE* 1086 (1994).

108. Oddly, even though women hold the records in many events, the results for men and women are still reported separately. American Long Distance Swimming Records, USA SWIMMING, usaswimming.org (on file with author).

109. Rick Vanderknyff, *Mile High in Her Field: Rock-Climber Lynn Hill, a Native of Fullerton, Is First Female Star of the Sport*, L.A. TIMES (Jan. 4, 1993), http://articles.latimes.com/1993-01-04/local/me-941_1_lynn-hill.

110. *Yosemite—Long Hard Free Climbs*, <http://web.stanford.edu/~clint/yos/longhf.htm> (last visited Feb. 19, 2017).

111. *Biography*, LYNN HILL CLIMBING, http://lynnhillclimbing.com/?page_id=5 (last visited Feb. 19, 2017).

112. *Id.*

113. Tim Huebsch, *Colorado Woman Wins Moab 240-miler in Utah Outright by 10 hours*, *RUNNING* (October 17th, 2017), <https://runningmagazine.ca/courtney-dauwalter-2017-moab-240-mile-endurance-run/>.

114. Ariella Gintzler, *How Courtney Dauwalter Won the Moab 240 Outright*, *Trail Runner* (October 18, 2017), <https://trailrunnermag.com/people/news/courtney-dauwalter-wins-moab-240.html>.

115. *Id.*

believes that women and men can compete against one another in ultramarathons.¹¹⁶ She says: "I'm pretty competitive. Winning is always my goal. I think women can compete against men on the same playing field in ultras."¹¹⁷

At least some scientists agree with her. In the past twenty years, some researchers have suggested that gender variation in running performance decreases as distance increases, especially in races longer than a marathon. This idea was based on differences in "fuel utilization, muscle damage following exercise, relative improvements in performance over past decades, and on the analysis of marathon *versus* ultra-marathon performances of men and women."¹¹⁸ In order to test a hypothesis that the difference in male and female running performances decrease as race distance increases, researchers analyzed the best running speeds of female ultramarathon runners as compared to those of the best male runners. Their research revealed that men ran faster than women at distances from 5 to 42.2 kilometers, but not at 90 kilometers. This was found to support the hypothesis that women ultramarathon runners have greater fatigue resistance as compared to equally trained men.¹¹⁹ Moreover, between 1983 and 2012, the sex difference in men and women Ironman Hawaii finishers decreased for both overall race time and running, although not for swimming and cycling.¹²⁰

Gertrude Ederle, Lynn Hill, and Courtney Dauwalter are just a few examples of women who equal or surpass men at their chosen athletic endeavors.¹²¹ Their example demonstrates that there are athletic domains

116. Indeed, Dauwalter is not an anomaly: another woman, Pam Reed, also finished inside the top ten at the 2017 Moab 240, taking seventh place. *MOAB 240 Live Tracking of Runners During the Event*, MOAB 240 ENDURANCE RUN, <http://www.moab200.com/2017-moab-live.html>.

117. Gintzler, *supra* note 114.

118. Matthias Alexander Zingg et al., *Will Women Outrun Men in Ultra-Marathon Road Races from 50 km to 1,000 km?*, SPRINGERPLUS (Feb. 18, 2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3945434/>.

119. Jenefer Bam et al., *Could Women Outrun Men in Ultramarathon Races?*, 29 MED. SCI. SPORTS EXERCISE J. 244–44 (1997).

120. Christoph A. Rüst, et al., *Sex Difference in Race Performance and Age of Peak Performance in the Ironman Triathlon World Championship from 1983 to 2012*, 1 EXTREME PHYSIOL. MED. 12 (Dec. 14, 2012).

121. For example, Alison Streeter has crossed the English Channel 43 times and is dubbed Queen of the English Channel; the King of the English Channel has crossed 34 times. *See Swim-List*, <http://www.channelswimming.com/swim-list.htm> (last visited Feb. 19, 2017). Women also hold the records for fastest backstroke and records in completing the English Channel. *CSA Records*, CHANNEL SWIMMING ASSOCIATION, <http://www.channelswimmingassociation.com/records> (last visited Feb. 19, 2017). With respect to rock climbing, Ashima Shiraiishi became the first woman and the youngest male or female to climb a V15, a 30-move bouldering problem in Japan. She is also the first female climber to send a 5.15 sport-climbing route. *See Jayme Moye, Why Teenage Girls Are Dominating Climbing*, MEN'S JOURNAL, <http://www.mensjournal.com/adventure/articles/why-teenage-girls-are-dominating-climbing-w203154> (last visited Feb. 19, 2017).

where, even as the sport is currently constructed, women could compete against men and sometimes win against them.

In other sports, gender seems entirely irrelevant. At the 1992 Olympics, female Shan Zhang of China was the gold medalist in the mixed-event skeet competition. She was the first woman to beat men in the history of the Olympics' shooting competition and, since that time, no mixed events have been held in an Olympic shooting competition, even though shooting seems particularly well-suited for sex-integrated competition. Objections to integration seem rooted in structural aspects of the sport rather than women's actual ability:

The fundamentals of executing a good shot work the same regardless of gender, size or age. The question of why females no longer compete with males or why we have differing number of shots in the same events comes up often when I explain our sport to new people. It does seem sexist, but the fact that we have separate events from males in the Olympics actually is a good thing since more females can compete this way. There can only be so many people on the shooting line at one time.¹²²

One might reasonably query, however, why the limitation on the number of people on the shooting line necessarily translates to sex-segregation in shooting. Whatever else might be said of shooting, authorities suggest that gender is irrelevant to performance.

Similarly, authorities describe dogsled racing as "truly co-ed."¹²³ Men and women compete against one another in the Iditarod, a 1000-mile trek across Alaska, and in 1985, Libby Riddles was the first woman to win the Iditarod.¹²⁴ Susan Butcher, a leader for women in the sport, won the Iditarod four times and was the first to reach the summit of Mount McKinley, North America's highest mountain, with a dog team. Her Iditarod success brought attention to the race of an unprecedented level.¹²⁵ Although a woman has not won the race since 1990, in 2015, women made up nearly one third of the entries.¹²⁶ Typically, top-ten finishers in the Iditarod are often an even split between men and women.¹²⁷

122. *USA Shooting Viewpoint: Men vs. Women in Competitive Shooting*, USA SHOOTING (Feb. 28, 2012), <http://www.usashooting.org/news/2012/2/28/195-usa-shooting-viewpoint--men-vs-women-in-competitive-shooting>.

123. Katie Orlinsky, *Meet the Women of the Iditarod*, OUTSIDE, <https://www.outsideonline.com/2060331/meet-women-itarod> (last visited Feb. 19, 2017).

124. Katie Orlinsky, *Enduring the Iditarod as Equals*, N.Y. TIMES (Mar. 13, 2015), <https://www.nytimes.com/2015/03/14/sports/women-of-the-itarod.html>.

125. Viv Bernstein, *Susan Butcher, Pioneer in Sled-Dog Racing, Is Dead at 51*, N.Y. TIMES (Aug. 7, 2006), <http://www.nytimes.com/2006/08/07/sports/07butcher.html>.

126. Orlinsky, *supra* note 124.

127. Katie Orlinsky, *Meet the Women of the Iditarod*, OUTSIDE, <https://www.outsideonline.co>

Researchers have noted that, historically, stakeholders have viewed as least appropriate for men and women to compete with and against one another.¹²⁸ Ironically, some contact sports in fact appear to be quite well-suited for sex-integrated competition, if not better-suited than their non-contact analogs.

Fencing provides a prime example. Fencing is unlike sports such as short-distance running and weightlifting, which primarily—perhaps even exclusively—test speed and strength. In sports that are absolute or near-absolute tests of speed and strength, testosterone provides a significant advantage, and men generally perform better at the elite levels of the sport. Speed and strength are not irrelevant to fencing, but to a much greater extent the sport rewards agility, accuracy, coordination, and strategy. Elite fencers often practice against members of the opposite sex,¹²⁹ and many agree that sex predicts almost nothing about fencing ability. Fencing is sex segregated, but the culture surrounding fencing both reflects and reinforces the idea that women and men are equally important within the sport. In college fencing, for example, participants in each of the three divisions—foil, epee, and sabre—compete in a round-robin format so that each fencer competes against every other fencer within the division.¹³⁰ Importantly, there is a single medal for the entire team, so that each fencer's performance—whether male or female—contributes equally to the team's overall score. This scoring structure reinforces the equal standing of men and women within the sport and incentivizes schools to invest both financial and other resources equally between men and women.

Likewise, women have demonstrated that—within a weight class—they can compete successfully against men. It has slowly become less unusual for girls to wrestle at the high school level. According to the NFHS High School Athletics Participation Survey, during the 2010–2011 school year, there was a 0.3 percent increase in the number of male wrestlers and a 19.8 percent increase in the number of female wrestlers.¹³¹ Moreover, girls have shown that they can compete successfully against boys. Several girls have won several state championships in all-boys divisions: Michaela Hutchison

m/2060331/meet-women-itarod (last visited Feb. 19, 2017).

128. See, e.g., Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 383 (2000); Jessica Constance Caggiano, Note, *Girls Don't Just Wanna Have Fun*, 72 U. PITT. L. REV. 119, 125 (2010).

129. My research assistant—once ranked fourth in the United States and eighteenth in the world—recalls that one of his primary sparring partners was a woman.

130. Jason Rogers & Will Spear, *The Ultimate Guide to NCAA Fencing*, BETTER FENCER (Apr. 20, 2017), <https://betterfencer.com/articles/ncaa-fencing#the-format>.

131. Joseph Santoliquito, *Girls High School Wrestling Grows Rapidly at National Level*, MAXPREPS (March 27, 2012), <http://www.maxpreps.com/news/EYvdhNqZb069CZgu3ryckA/girls-high-school-wrestling-grows-rapidly-at-national-level.htm>.

in Alaska in 2006, Hope Steffensen in Alaska in 2010, Rachel Hale in Vermont in 2011, and Danielle Coughlin in Massachusetts in 2013. Anecdotally, participants have observed several advantages women may have: much greater flexibility, making them difficult to pin; a lower center of gravity at the same weight class, meaning that they are more difficult to destabilize; and the ability to sprawl more easily.¹³² Also anecdotally, both female and male wrestlers report a reasonable level of comfort with male-female matches, despite occasional exceptions and residual sexism expressed through disproportionate horror at the idea of “losing to a girl.”¹³³ Oddly, however, the growing interest in women’s wrestling has been accompanied, in many instances, with support for the idea of women’s wrestling as a separate sport.¹³⁴ Six states currently have female wrestling championships.¹³⁵ It’s worth examining why—when women have shown they can compete with men in a sport—the increase in women’s participation is immediately followed by efforts at sex-segregation. As one article notes rather uncritically: “A day may come when there can never be another Michaela Hutchison story in high school wrestling, as all-girls competitions are developed in every state.”¹³⁶

Beyond fencing and wrestling, sports officials have often excluded women from integrated competition based on the belief that they need a “special level of protection in and from athletic arenas.”¹³⁷ Some have expressed concern that women are more prone to injury,¹³⁸ while others argue that men have a size and strength advantage that are difficult for a woman to challenge in sports like football and basketball.¹³⁹ Some research indeed shows a higher incidence of injury among female athletes; the most

132. A sprawl is a maneuver designed to defeat a takedown by moving the legs backward so as to land on an opponent’s back. Christopher VanLang, *How Do High School Wrestlers Feel About Having to Wrestle a Girl?*, QUORA (Dec. 8, 2016), <https://www.quora.com/How-do-high-school-wrestlers-feel-about-having-to-wrestle-a-girl> (Several current and former high school wrestlers have made similar comments to me.).

133. *Id.*

134. See, e.g., Grace Chen, *Female Wrestling May Become New High School Sport*, PUB. SCHOOL REVIEW (May 30, 2016), <https://www.publicschoolreview.com/blog/female-wrestling-may-become-new-high-school-sport>.

135. *Id.*

136. Gary Abbott, *Women’s Wrestling Week: Alaska’s Michaela Hutchison Was First Girl to Win State Title Against Boys*, U.S. OLYMPIC COMM. (Mar. 13, 2016, 1:19 PM), <http://www.teamusa.org/USA-Wrestling/Features/2016/March/13/Michaela-Hutchison-becomes-first-to-win-boys-state-meet>.

137. Laura A. Wackwitz, *Verifying the Myth: Olympic Sex Testing and The Category “Woman”*, WOMEN’S STUDIES INT’L FORUM, 553, 5 (2003).

138. Robert H. Shmerling, *The Gender Gap in Sports Injuries*, HARVARD HEALTH BLOG (Dec. 3, 2015, 9:00 AM), <http://www.health.harvard.edu/blog/the-gender-gap-in-sports-injuries-201512038708>.

139. Jane McManus, *Can Women Play with the Men?*, ESPN (May 9, 2011), <http://www.espn.com/espnw/news/article/6495612/women-pro-sports-women-play-men>.

common explanations are that women have less muscle mass, more body fat, greater flexibility, less powerful muscles, and a wider pelvis (which alters alignment of the knees and ankles).¹⁴⁰ Female athletes also experience concussions at a higher rate than male athletes, with female high school soccer players experiencing concussions at twice the rate of their male counterparts.¹⁴¹

Even if women are somewhat more injury-prone, however, that tendency is not necessarily sufficient to support the idea that women should not play contact sports in which the risks are substantial for both men and women. Take football. Researchers increasingly agree that playing high school football comes with the risk of permanent brain damage, particularly for those who sustain multiple concussions. There are well-documented instances of brain injury, spinal impairment, and other serious injuries throughout high school, college, and professional football. At its extreme, football has resulted in injuries causing permanent paralysis and even death.¹⁴² If this risk of serious injury does not mean that men should not play football, it is difficult to argue that a concern for women's safety would justify completely excluding them from contact sports.

Whatever others may think, women athletes do not seem particularly concerned about their own safety, even within the realm of contact sports. Despite daunting odds, many have attempted to find a way onto men's sports teams. Susan Sangree describes her experience trying out for her high school's hockey team in 1975.¹⁴³ She was certainly good enough to play, as evidenced by the fact that the coach allowed her to practice with the boys until she removed her helmet and he saw her ponytail and realized that she was a girl.¹⁴⁴ But due to her gender she was not only disqualified, but also subjected to harassment by her classmates as punishment for the very act of

140. Shmerling, *supra* note 138.

141. Marjorie A. Snyder, *Girls Suffer Sports Concussions at a Higher Rate Than Boys. Why Is That Overlooked?*, WASH. POST (Feb. 10, 2015), https://www.washingtonpost.com/posteveryt hing/wp/2015/02/10/our-effort-to-reduce-concussions-in-youth-sports-overlooks-the-biggest-victims-girls/?utm_term=.2b4506f1b9fc.

142. Kelly McEvers, Lauren Silverman & Becky Sullivan, *Deaths Persist In Youth And Student Football Despite Safety Efforts*, NAT. PUB. RADIO (Nov. 25, 2015, 4:10 PM), <http://www.npr.org/sections/health-shots/2015/11/25/457374128/deaths-persist-in-youth-and-student-football-despite-safety-efforts> (noting the deaths of at least 19 student football players between January 2015 and date of article); Tom Farrey, *Pop Warner Football Player Paralyzed at 13 Dies at 18*, ESPN (May 11, 2016), http://www.espn.com/espn/otl/story/_id/15507908/donnovan-hill-pop-warner-player-was-paralyzed-13-dies-18 (last visited Feb. 19, 2017) (explaining circumstances surrounding the death of Donovan Hill, a football player paralyzed at age 13 who died at age 18 from surgical complications).

143. Susan Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 385–87 (2000).

144. *Id.* at 385–86.

trying out.¹⁴⁵ In the years since Sangree was excluded from her team, high school hockey has evolved: there are now girls' teams in a number of states, so girls have the opportunity to play hockey, albeit not against boys.

Likewise, a number of women have played both high school and college football. The first woman to play on a boys' high school varsity team was Theresa Dion, who in 1972 played as a placekicker for her high school team in Florida. Since then, women have played at a variety of positions in both high school and collegiate competition. In 2000, Samantha Grisafe played quarterback in a varsity Division I game, and Erin DiMeglio, a senior in 2012, is believed to be the first girl to play quarterback in a high school football game in Florida.¹⁴⁶ In 2013, Reilly Fox of Fort Worth, Texas was the first girl to play varsity football at her high school and the district's first female player in fifteen years.¹⁴⁷ In 2016, according to the National Federation of State High School Associations, there were 1,964 girls playing high school football, more than double the number of seven years ago.¹⁴⁸ And women have also played college football, often although by no means exclusively—as kickers.¹⁴⁹ Perhaps not as many women have the physical ability to play football as men,¹⁵⁰ but given the number of women who have already successfully participated at football at the high school and college level, there does not seem to be any absolute rule that no women can play football, or that men and women cannot play against one another.

2. Segregated competition

At the 2015 CrossFit Games,¹⁵¹ athletes completed an event called

145. *Id.* at 386.

146. Adam Himmelsbach, *To The Boys, Her Role Is Simple: Teammate*, N.Y. TIMES, Sept. 2, 2012, <http://www.nytimes.com/2012/09/03/sports/girl-is-pioneer-at-quarterback-for-florida-high-school.html>.

147. *Female High School Football Player in Texas a Game-Changer*, CBS NEWS (Sept. 21, 2015, 3:04 PM), <http://www.cbsnews.com/news/female-high-school-football-player-in-texas-a-game-changer/>.

148. Cork Gaines, *The Number of Girls Playing High School Football is on the Rise Even Though Overall Participation is Down*, BUS. INSIDER (Oct. 3, 2016), <http://www.businessinsider.com/more-girls-are-playing-high-school-football-2016-10>.

149. Jonathan Lintner, *Indiana Girl Signs to Play College Football at Campbellsville*, USA TODAY (Jun. 5, 2014, 5:48 PM), <http://www.usatoday.com/story/sports/ncaaf/2014/06/05/jeffersonville-indiana-girl-shelby-osborne-college-football/10033155/> (describing Shelby Osborne, Campbellsville's first female defensive back); Christopher Lawlor, *Woman Aims to Coach College Football Team*, USA TODAY (Oct. 13, 2005, 10:29 PM), http://usatoday30.usatoday.com/sports/preps/football/2005-10-13-notes_x.htm (describing Joyce Mungari, former linebacker and special teams player at Contra Costa).

150. One might also ask 4'8" linebacker Felicia Perez whether build is as important as people say it is. Brad Myers, *4-Foot-8 Girl Packs a High School Football Punch*, USA TODAY (Sept. 14, 2016, 4:01 AM), <http://www.usatoday.com/story/news/humankind/2016/09/14/4-foot-8-girl-packs-high-school-football-punch/90312298/>.

151. CrossFit is a relatively new sport. It dubs itself "the sport of fitness." *What is CrossFit?*,

Murph.¹⁵² The event consisted of a one-mile run, 100 pullups, 200 pushups, 300 squats, and another one-mile run.¹⁵³ The men completed the event wearing a 20-pound weight vest; the women, a vest weighing 14 pounds.

The winner of the men's event was Björgvin Karl Gudmundsson, with a time of 38:36.¹⁵⁴ In the women's division, Samantha Briggs completed the event in 39:10.¹⁵⁵ Her time would have been good enough for second place in the men's division. One might argue that Briggs's time was achieved with a lighter vest. While this is true, the women's race was also run later in the day, when the temperature was several degrees higher—indeed, multiple women were treated for heat-related injuries after the event.¹⁵⁶ One might also query whether six pounds would make much difference for an athlete of Briggs's caliber. And Briggs's success in Murph was echoed by the achievements of other female athletes in other events at the 2015 CrossFit Games.¹⁵⁷

At the 2016 CrossFit Games the following year, the first event was a seven-kilometer trail run. The forty male and forty female competitors raced

CROSSFIT, INC., <https://www.crossfit.com/what-is-crossfit> (last visited Feb. 19, 2017). More specifically, a CrossFit workout consists of “constantly varied functional movements performed at relatively high intensity.” *Id.* The CrossFit website explains: “CrossFit workouts are based on functional movements, and these movements reflect the best aspects of gymnastics, weightlifting, running, rowing and more.” *Id.* There is no “typical” CrossFit workout, but many workouts consist of a variety of movements performed for time or a variety of movements performed for a specified length of time in which the goal is to accumulate as many total repetitions as possible. *Id.*

The CrossFit Games are an annual event that takes place after a worldwide qualifying event followed by a regional event to further narrow the number of competitors. *About the Games*, CROSSFIT, INC., <https://games.crossfit.com/about-the-games> [<https://perma.cc/X7JU-BE8V>] (last visited Feb. 19, 2017). Forty men and forty women compete at the Games, at which they perform a number of workouts designed to test different aspects of fitness. *Id.*

152. Like many CrossFit workouts, Murph is named in honor of a soldier killed in combat, in this case Michael P. Murphy. *Workout of the Day*, CROSSFIT, INC., <https://www.crossfit.com/workout/2005/08/18/#/comments> (last visited Feb. 19, 2017).

153. *Id.*

154. 2015 Men's Murph *Leaderboard*, CROSSFIT, INC., <https://games.crossfit.com/legacy-leaderboard?competition=1&year=2015> (last visited Feb. 19, 2017).

155. 2015 Women's Murph *Leaderboard*, CROSSFIT, INC., <https://games.crossfit.com/legacy-leaderboard?competition=1&year=2015> (select “Games” tab; under “Division” select “Individual Women”; under “Sort” select “Murph”) (last visited Feb. 19, 2017).

156. Adam Schulte, *An Open Letter to CrossFit HQ: Respect Your Athletes*, T-NATION (June 3, 2016), <https://www.t-nation.com/powerful-words/open-letter-to-crossfit-hq>. Elite athlete Kara Webb was removed from the arena on a stretcher, two-time CrossFit Games champion Annie Thorisdottir described symptoms of heat stroke and later withdrew from the competition, and another competitor, Maddy Myers, also withdrew citing concerns of rhabdomyolysis. *Id.*

157. For example, in the 2015 CrossFit Games, athletes completed an event called Pier Paddle, consisting of a half mile swim, a two-mile paddle board, and another half-mile swim. Men and women did not compete directly against one another during the event, but of the top ten fastest times, five were registered by women, who also logged the third and fourth fastest times overall. 2015 Pier Paddle *Leaderboard*, CROSSFIT, INC., <https://games.crossfit.com/legacy-leaderboard?competition=1&year=2015> (select “Games” tab; under “Sort” select “Pier Paddle”; under “Division” select “Individual Men” or “Individual Women”) (last visited Feb. 19, 2017).

on the same course at the same time, but games director, Dave Castro, casually directed the women to line up a few feet behind the men. Although he did not offer an explanation, he commented: “you’re not competing against each other, so it doesn’t matter.”¹⁵⁸ Despite having to start physically behind the men and fight her way past them on a narrow and dusty trail, Briggs still finished with the third-fastest time overall, meaning that she ran faster than thirty-eight out of forty men despite her starting handicap.¹⁵⁹ Moreover, while the men tended to run faster than the women, the second place woman, Kristin Holte, would have finished ninth among the men, and the third place woman, Kristi Eramo, would have finished fourteenth—hardly a bottom of the pack finish in either case, particularly when we bear in mind that, like Briggs, both women were subject to the starting line penalty.¹⁶⁰

Our inability to compare the performances of Briggs, Holte, and Eramo directly with the performances of the male CrossFit Games competitors reveals the way that “women’s sports” become a self-perpetuating phenomenon. If we start with the assumption that women cannot perform at the same level as men—that they need shorter races or fewer sets or lighter weight vests, or that they will be slower anyway so they should start behind the men—then by necessity women need separate divisions, competitions, and events. And once we have established these sex-segregated events, there is no opportunity for women to prove that they *could* compete with men. We don’t know how quickly Briggs would have completed Murph with a heavier vest in cooler conditions because she wasn’t given the opportunity to demonstrate her ability. We don’t know how Briggs, Holte, and Eramo would have placed in the trail run had they been allowed to toe the starting line with the men.

CrossFit is far from the only sport in which men and women compete separately even though they are performing essentially the same sport. The list of sports with identical sex-segregated events is a long one, including skiing, snowboarding, swimming, many track and field events, golf, volleyball (both regular and beach), speed skating, and surfing. While men and women may or may not be similarly skilled at these various events, the important point is that in many instances we won’t really know whether they are unless we give men and women the opportunity to compete directly with one another.

158. *Behind the Scenes: 2016 Games, Part 1*, CROSSFIT, INC., (Feb. 21, 2017), <https://journal.crossfit.com/article/behind-the-scenes-16-games-part-1>.

159. *2017 Ranch Trail Run Leaderboard*, CROSSFIT, INC., (under “Sort” select “Ranch Trail Run”; under “Division” select “Individual Men” or “Individual Women”) <https://games.crossfit.com/legacy-leaderboard?year=2017&competition=3> (last visited Feb. 19, 2017).

160. *Id.*

In particular, sex segregation filters out the intangible effect of head-to-head competition. During Murph at the 2015 CrossFit Games, Gudmundsson, the winner of the men's division—who was also the only athlete to complete the event with a faster time than Briggs—completed the event only 34 seconds more quickly. Briggs was so far ahead of her nearest competitor that she was alone for her second one-mile run and alone on the field when she crossed the finish line. What if she had been chasing Gudmundsson? What if Gudmundsson had been chasing her? Would she have been motivated to move a little faster? Again, sex segregation in sports means that we cannot know. Assumptions of women's athletic inferiority thus remain both unproven and unchallenged.

C. Gender Stereotyping

Sex segregation in sports facilitates gender stereotyping. Indeed, the very existence of different divisions suggests that men's and women's sports are fundamentally different. Moreover, separate divisions facilitate each division taking on a separate character. And finally, if men and women compete in different divisions, then the divisions can have different rules, which often communicate stereotypes about gender.

Many rules communicate that women are physically and psychologically weaker than men. In tennis, for example, men play for best out of five sets, while women play for best out of three. The rule communicates that women are not able to play to five sets, and has been used to argue that women should be paid less for victories at most major tournaments than men.¹⁶¹ Aside from the rather dubious assumption that world-class female tennis players cannot play to five-sets played (does anyone really think that Serena Williams lacks the strength, endurance, or mental fortitude to play a five-set match?) the rule also suffers from a lack of consistency. Many women's three-set matches involve longer playing time and more points than many five-set matches by men. And male tennis players are not viewed as athletically inferior if they dominate an opponent and complete a match in three sets instead of five. If women must be protected from the hardship of playing to five sets, then why are those same women playing three set matches that last longer? The rule disparity subtly communicates that women are weaker, inferior athletes, and is made possible by the sex segregation of tennis.¹⁶²

161. Kerry Close, *5 Reasons Why Tennis Should Keep Paying Men and Women Equally*, TIME (Mar. 22, 2016), <http://time.com/money/4265912/equal-pay-tennis-djokovic-williams/>.

162. Other sports display similar disparities. For example, women's hockey has different rules for checking, hitting, and other movements. Likewise, baseball (usually deemed a men's sport) has

Other rules communicate that women's athleticism should emphasize stereotypically feminine qualities. Artistic gymnastics, for instance, evaluates both men and women on acrobatic ability, but also evaluates women on elegance and grace, while emphasizing strength and power for men. Both men and women perform a floor routine on a 39- by 39-foot mat. But after that there are major differences. Women's floor routines last up to 90 seconds, are performed to music of the gymnast's choice, contain acrobatic elements as well as several required dance elements, and are scored on factors including "artistry." Men's floor routines are only 70 seconds long, are not performed to music, are composed of "mostly acrobatic elements, combined with other gymnastic elements of strength and balance, flexibility, and handstands," and include no dance elements or artistry component to the scoring.

Indeed, even the difference in gymnastics attire requirements is telling. Women must compete in leotards, whose appearance itself is heavily regulated, as is the styling of their hair, the type of jewelry they may wear, and their overall appearance. Men wear long pants and tank tops. These requirements communicate that there is a correct way for men and women to look while engaging in an athletic endeavor that is functionally the same. Were men and women to compete directly against one another in gymnastics, these distinctions would be much more difficult to justify and enforce.

Gender stereotypes communicated through sports segregation are harmful to women. When the segregation occurs alongside rules that imply that women lack strength, stamina, coordination, or some other athletic ability, it reinforces notions of women's physical inferiority.¹⁶³ Moreover, in a society already hyperfocused on women's appearance, rules mandating or encouraging short skirts, tight leotards, highly styled hair, and heavy makeup reinforce the idea that even women whose bodies are highly trained to perform extraordinary feats must also present themselves for the visual consumption of the audience. Such rules undermine one important justification for women's sports in the first instance: to communicate that women should be valued for the things that they can do, not only for the way that they look.¹⁶⁴

different rules and standards from softball (usually deemed a women's sport).

163. See also Part II.B, *supra*.

164. This issue is particularly critical given the existence of publications such as the *Sports Illustrated Swimsuit Edition*, which present women—but not men—in sexually provocative poses. The women featured in the *Swimsuit Edition* are often mainstream models, whose bodies are not particularly athletic. Tom Jacobs, *Sports Magazine Covers Sexualize Female Athletes*, PACIFIC STANDARD (August 25, 2017), <https://psmag.com/social-justice/sports-magazine-covers-sexualize-female-athletes>. Occasionally the *Swimsuit Edition* also features athletes—for example, the 2017 issue featured Olympic gymnasts Simone Biles and Aly Raisman—yet the featured athletes are often posed provocatively in

Just as importantly, gender stereotypes communicated through sex segregation in sports are harmful to men. Even Olympic athletes report bullying and shaming for participation in sports that are perceived as feminine. Johnny Weir, an openly gay Olympic figure skater, explains: "Even if you're a figure skater and you're not gay, you're called gay all the time or you're made fun of for being a figure skater."¹⁶⁵ John Orozco, an Olympic gymnast, recalls peers who taunted him for participating in a supposedly feminine sport: "They just didn't understand everything that went into gymnastics. All the work, all the hours, all the blood, sweat and tears."¹⁶⁶ And if Olympic athletes are stung by taunts from peers, such criticism can be devastating for younger and less prominent athletes. Twelve-year-old Ronin Shimizu loved being on his school's cheerleading team, but was bullied mercilessly for it, tragically culminating in his suicide at age fourteen.¹⁶⁷ Likewise, fifteen-year-old Jamie Hubley was grievously harassed for his participation in figure skating, including an incident in which bullies attempted to shove batteries down his throat on a school bus; like Shimizu, Hubley eventually took his own life.¹⁶⁸

Bullying and harassment of young men who exhibit qualities viewed as feminine, including participation in stereotypically female sports, is a pervasive and troubling phenomenon. Research thoroughly documents its severe consequences, including social isolation, depression and other mental illnesses, academic underperformance, and physical self-harming.¹⁶⁹ In particular, researchers have found that "as early as grade one, stereotypes concerning the gender-appropriateness of athletics influence perceptions of and participation in athletic activities."¹⁷⁰ One takeaway, then, is that sex

revealing outfits, rather than engaged in the athletic endeavors that made them famous in the first place. With this inequality as a backdrop, the harm of sex-segregation that further undermines women's athletic achievements is thrown into sharp relief.

165. *Tales of Childhood Bullying Reveal the Ugly Side of Figure Skating*, YAHOO! SPORTS (Feb 14, 2014, 7:21 AM), <http://sports.yahoo.com/news/tales-of-childhood-bullying-reveal-the-ugly-side-of-figure-skating-132139393.html>.

166. Jason Carroll & Vivienne Foley, *Bronx Native John Orozco an Unlikely Gymnastics Star*, CNN (July 26, 2012, 2:00 PM), <http://www.cnn.com/2012/07/26/us/john-orozco-olympic-gold/>.

167. Graham Gremore, *Bullied to Death: 12-Year-Old Male Cheerleader Commits Suicide Because of Classmates*, QUEERTY (Dec. 5, 2014, 5:12 PM), <https://www.queerty.com/bullied-to-death-12-year-old-male-cheerleader-commits-suicide-because-of-classmates-20141205>.

168. Hattie Brett, *There's A Whole Load of Homophobic Bullying Going On In The Male Figure Skating World*, THE DEBRIEF (Feb. 2, 2014), <http://www.thedebrief.co.uk/news/celebrity/there-s-a-whole-load-of-homophobic-bullying-going-on-in-the-male-figure-skating-world-2014026830>.

169. V. Paul Poteat, Ethan H. Mereish, Craig D. Giovanni & Brian W. Koenig, *The Effects of General and Homophobic Victimization on Adolescents' Psychosocial and Educational Concerns: The Importance of Intersecting Identities and Parent Support*, 58 J. COUNSELING PSYCH. 597 (2011); Brian W. Koenig, *Homophobic Teasing, Psychological Outcomes, and Sexual Orientation Among High School Students: What Influence Do Parents and Schools Have?*, 37(2) SCHOOL PSYCH. REV. 202 (2008).

170. Lisa A. Harrison & Amanda B. Lynch, *Social Role Theory and the Perceived Gender Role*

segregation in sports—and the reification of gender stereotypes that comes with it—is a catalyst for bullying and other negative behavior towards boys as well as girls.

D. Sports Essentialism

Sex segregation in sports also prevents us from looking more deeply at what activities we consider sports and why. Men invented most sports, and they did so at a time when the idea of women engaging in physical activity would have been viewed as a joke.¹⁷¹ It is unsurprising, therefore, that the sports men invented often showcase physical endeavors for which men's bodies tend to be better suited. As a result, the activities we consider sports emphasize physical abilities such as strength, speed, and power. Sports that showcase flexibility, agility, and balance—areas in which women tend to excel—are less common, and those that exist receive less attention.

One example is rhythmic gymnastics, an Olympic event in which currently only women compete.¹⁷² Gymnasts perform, accompanied by music, on a floor mat with a ball, hoop, ribbon, or clubs.¹⁷³ The first international rhythmic gymnastics event took place in 1964, and Olympic medals have been awarded for the sport since 1984.¹⁷⁴

Rhythmic gymnastics is enormously difficult, requiring exceptional flexibility and coordination as well as artistry and grace. Top rhythmic gymnasts train for eight to ten hours per day. For even the most cursory observer of rhythmic gymnastics, it would be difficult to argue that the endeavor requires any less athletic ability than throwing a football or hitting a baseball.¹⁷⁵

Yet rhythmic gymnastics receives almost no attention in comparison to sports such as football and baseball that are dominated by men. Top rhythmic gymnasts don't receive seven-figure endorsement deals or attract legions of fans. Part of the reason is that sports such as rhythmic gymnastics rely on abilities at which men, in the aggregate, are often not as proficient

Orientation of Athletes, 52 *SEX ROLES* 227, 228 (2005).

171. Indeed, some women athletes struggle not to be treated as a joke even today. Barbara Ellen, *When Will Sport Stop Treating Women as a Joke*, *THE GUARDIAN* (Apr. 1, 2017, 12:05 PM) <https://www.theguardian.com/commentisfree/2017/apr/01/lizzie-armitstead-sexism-cycling-barbara-ellen>.

172. Lindsey Green, *Everything You Never Needed to Know About Rhythmic Gymnastics*, *DEADSPIN* (Aug. 11, 2012, 1:00 PM), <http://deadspin.com/5933762/everything-you-never-needed-to-know-about-rhythmic-gymnastics>.

173. *Rhythmic Gymnastics Equipment & History*, *OLYMPIC GAMES*, <https://www.olympic.org/rhythmic-gymnastics-equipment-and-history> (last visited Feb. 19, 2017).

174. *Id.*

175. See, e.g., *Margarita Mamun Clinches Rhythmic Gymnastics Gold Medal*, *NBC OLYMPICS* (Aug. 20, 2016), <http://www.nbcolympics.com/video/margarita-mamun-clinches-rhythmic-gymnastics-gold-medal> (showing a video recording of a gold-medal-winning ribbon routine).

as women; it is unsurprising, then, that the sports men have created do not emphasize those abilities.¹⁷⁶

We might push the question further and ask why there are so few sports focusing primarily or exclusively on physical domains where women tend to perform better than men. Consider limbo. Shamika Charles, who holds the world record for limbo—she has limboed under a bar 8.5 inches from the ground—trains six hours per day and demonstrates flexibility that the vast majority of people cannot imagine.¹⁷⁷ Yet few people would describe limbo as a sport, or Charles as an athlete, even though the physical activity of limbo is demanding and her ability is extraordinary. Why is it that high jump is unquestioned as a sport, yet limbo is not only not a sport, but the mere suggestion that perhaps it should be considered a sport inevitably prompts derision?¹⁷⁸

We also see in real time that the creation of sports is not sex-neutral through the design of physical contests such as American Ninja Warrior (ANW). ANW is a competition in which athletes attempt to complete an obstacle course within a designated time limit.¹⁷⁹ The obstacles are challenging: they might involve swinging from a trapeze to a net, running across a spinning log, or scaling a thirty-foot chute.¹⁸⁰ Historically, men have been more successful at ANW: there has never been a female champion, and far more men than women qualify for the finals of the competition each year. Kacy Catanzaro—a five foot tall former collegiate gymnast—garnered attention in 2014 when she became the first woman to qualify for the finals.¹⁸¹ Her fans had high hopes for her the following year, but she failed to qualify for the finals due to an obstacle that involved leaping and bracing herself between two walls that were five feet apart—a nearly impossible feat given her small stature.¹⁸²

176. Cf. Rick Paulas, *Why Women Will Never Beat Men in "Sports"*, VICE (June 18, 2013), https://www.vice.com/en_au/article/why-women-will-never-beat-men-in-sports ("Sports currently fall into two categories: male sports, and females playing sports designed for men.").

177. Daisy May Sitch, *This Woman Just Limboed Underneath a Car (and Broke Another World Record)*, METRO (June 15, 2015, 12:45 PM), <http://metro.co.uk/2015/06/15/this-woman-just-limboed-underneath-a-car-and-broke-another-world-record-5246437/>.

178. I have witnessed this firsthand. I have also, however, witnessed people change their minds about the sport-ness of limbo when they realize they cannot articulate a compelling explanation for why it is not a sport.

179. *American Ninja Warrior*, ESQUIRE NETWORK, <http://tv.esquire.com/shows/american-ninja-warrior> (last visited Feb. 22, 2017).

180. *Id.*

181. Samer Kalaf, *Watch This Former Gymnast Tear Up The Course On American Ninja Warrior*, DEADSPIN (July 16, 2014, 11:05 AM), <http://deadspin.com/watch-this-former-gymnast-tear-up-the-course-on-america-1605896712>.

182. James Hibberd, *Was Tiny Kacy Catanzaro Doomed to Fail 'American Ninja Warrior'?*, ENT. WKLY. (Sept. 3, 2014, 10:03 PM), <http://ew.com/article/2014/09/03/kacy-catanzaro-doomed-american-ninja-warrior/>.

Some critics argued that Catanzaro's failure to qualify cements ANW as yet another sport at which men are better than women. But perhaps a better question might be why ANW obstacles are designed for men's bodies rather than women's. There is not, for example, an obstacle that involves crawling quickly through a very small chute—although this is a task that we might well expect an actual ninja to have to complete—and if the obstacle on which Catanzaro failed involved leaping between two very *narrow* walls, we might expect that her physique would give her an advantage over men because she is smaller. The fact that men tend to do better than women at ANW, then, is not really a simple reflection of pure athleticism as some might have us believe. Rather, the outcome is predetermined by the design of the sport itself.

Some might argue that we consider activities “sports”—or that some sports are more important sports—because they better showcase “athleticism” and are therefore more appealing to audiences. Yet several arguments belie this claim. First, sports are not universal in their cultural appeal. Much of the world finds soccer fascinating in a way that leaves Americans puzzled. Likewise, our views about particular sports are not stable over time. Football has undergone countless rule changes since its inception in 1869, and athletic competitions such as snowboarding or CrossFit demonstrate how new sports can become wildly popular in a short period of time. And finally, the notion that some sports are “better” than others at showcasing athleticism is itself questionable. Is football a better test of athletic ability than gymnastics? Anyone who is familiar with the endless hours of dedicated practice and the immense level of strength and skill required by each sport would disagree. Neither sport is clearly more athletic than the other—the two sports are simply very different. They require different skills and abilities. Any perception that one sport is “more important” or “more athletic” than the other reflects a deeply held yet undeniably socially constructed view of what sports actually are.

Surely there is an interesting conversation to be had about whether there are certain characteristics of the most popular men's sports that might make other sports, intentionally designed to reflect women's strengths, equally popular. That is, perhaps there is something inherently appealing to humans about the sports most popular today, such as football, basketball, and baseball. Is it the team dynamic? The complex set of rules allowing for a range of outcomes? The direct competition, rather than comparison of serial efforts? But nothing about this conversation requires any sort of reliance on the status quo. That is, to the extent that certain sports are deemed more important or better measures of athleticism, much of that determination results from our current preconceptions about sports, rather than the reverse.

III. AGAINST WOMEN'S SPORTS

This Part argues that the sports women play need not always be *women's* sports. In some instances, there is no reason why women and men should not play sports together. In other instances, we should not *assume* that men and women cannot play sports together because we lack sufficient information to do so: some sports may require more research and experience to determine whether sex-integrated competition is appropriate, while other sports may well require less than complete integration, but along lines other than gender. There may be some situations where sex-segregation is the most appropriate way of creating opportunities for both men and women to participate in sports. And perhaps there are also situations in which voluntary sex-segregation is appropriate.¹⁸³ But the naked assumption that sex-segregation is the proper course of action lacks sufficient justification.

I argue that the default should be one of integration, with the burden on the organization overseeing a particular sport or competition to demonstrate that the activity in question should instead be segregated along lines of sex or gender. Sports in which testosterone provides an advantage, primarily sports that measure speed and strength in a relatively pure form, are likely reasonable candidates for sex segregation at the highest levels. Sports that measure other characteristics—coordination, accuracy, agility, flexibility, and strategy—are less compelling cases for segregation. Moreover, not only the nature of the sport but also the nature of the competition should be taken into consideration. There may be a reason to segregate Olympic level swimming not present in middle school club swim teams, or even in college athletics.

Finally, from a legal perspective, if the regulatory entity is governmental, then relevant constitutional provisions and federal laws, including the Equal Protection Clause and Title IX, already reflect this obligation. And even when the regulatory entity is private, a test analogous to intermediate scrutiny should be required to justify sex segregation as a matter of policy.

A. *Women's Sports in Court*

In this section I will explain how courts have interpreted both the Equal Protection Clause and Title IX. Although the jurisprudence in this area is

183. In this way, my proposal does not go as far as that of another commentator who has argued for the end of sex segregation in school sports. B. Glenn George argues that we should end sex segregation in sports and require all teams to be half male and half female participants. My concern is that such an approach would unconstitutionally mandate a quota system and would impose an unnecessarily rigid requirement on the way that sports are played. B. Glenn George, *Fifty/Fifty: Ending Sex Segregation in School Sports*, 63 OHIO ST. L.J. 1107, 1107 (2002).

inconsistent, the most logical extension of existing precedent would prohibit a default of sex segregation in sports.¹⁸⁴ Moreover, the norms captured by both constitutional and statutory provisions counsel against a default of sex segregation as a matter of policy, even when sex segregation is not forbidden by existing laws.

The Equal Protection Clause provides an overarching presumption against governmental discrimination on the basis of sex. Classifications on the basis of sex have been struck down in a wide variety of settings: in determining who can inherit money;¹⁸⁵ in determining which spouse receives financial support following a divorce;¹⁸⁶ in determining who can attend a school¹⁸⁷; in determining who is eligible for a job and what they can be paid.¹⁸⁸ In particular, the Equal Protection Clause has been held to mean that segregation on the basis of sex is unlawful in a number of settings.¹⁸⁹

Of course, not all sex-based classifications by the government are unconstitutional. The Supreme Court has applied only intermediate scrutiny to sex-based classifications, in which the government must show that a particular sex-based classification is substantially related to an important governmental interest. This standard is less demanding than the strict scrutiny applied to classifications on the basis of such characteristics as race and religion—and analysis that requires a compelling governmental interest and a regulation narrowly tailored to further it.¹⁹⁰

Courts have reached an inconsistent pattern of holdings regarding sex-segregated sports. Some have held that sex segregation presents no problem under the Equal Protection Clause. In *O'Connor v. Board of Education*, for example, the Supreme Court ruled against a sixth grade girl who wanted to try out for the boys basketball team, holding that it was permissible for a school board to use sex as one criterion for eligibility for athletic programs.¹⁹¹ The same was often true for men who wanted to play sports

184. Title VII similarly operates to prohibit sex discrimination in professional sports position—for example, unequal pay for female athletes or female coaches *Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions*, EEOC NOTICE (October 29, 1997), <https://www.eeoc.gov/policy/docs/coaches.html>. The focus of this Article is on athletes in general, not necessarily professional athletes, and not coaches, so I will save an examination of the specific application of Title VII for future work while noting that it could certainly operate to prohibit sex discrimination in positions consisting of “employment” here.

185. *Reed v. Reed*, 401 U.S. 934 (1971).

186. *Orr v. Orr*, 440 U.S. 268 (1979).

187. *United States v. Virginia*, 518 U.S. 515 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

188. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1986).

189. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996).

190. *See, e.g., Brown v. Board of Educ.*, 349 U.S. 294 (1954).

191. *O'Connor v. Board of Educ.*, 449 U.S. 1301 (1980). On remand, the district court held that sex-segregation was permissible under Title IX even if a sex-integrated team would better match the girl's abilities—her talents were assessed as equal to or better than male eighth grade players. 645 F.2d 578. *See also Cape v. Tenn. Secondary Sch. Athletic Assoc.*, 563 F.2d 793 (6th Cir. 1977) (holding

only offered to women, although the reasoning was different: in 1982, the Ninth Circuit held that a school that did not offer men's volleyball did not have to allow men to play on the women's team because the men would have an "undue physical advantage."¹⁹²

Others have disagreed, holding that sex-segregation fails the requirements set forth in the Equal Protection Clause. As early as the 1970s, some judges were willing to recognize that sex-segregation did not survive a standard of review resembling rational basis,¹⁹³ and after intermediate scrutiny became the standard for gender classification, such classifications were struck down more assertively.¹⁹⁴ In recent years, women have tended to win in their efforts to play on men's teams—as long as there is no women's team on which they can compete.¹⁹⁵ Likewise, courts generally find an Equal Protection violation when women's sports are treated differently and worse, or when different rules are imposed on women's sports for no reason.¹⁹⁶

As a complement to the Equal Protection clause, Title IX prohibits certain forms of gender inequality in sports regardless of whether those instances of inequality would also be Equal Protection violations. In some instances, courts have held that Title IX mandates inclusion of women on men's teams.¹⁹⁷ For example, a number of plaintiffs have won suits alleging gender disparity in scheduling and other benefits and opportunities.¹⁹⁸ Likewise, female athletes have won injunctions against elimination of the

that differences in physical abilities between the sexes justified excluding a high school girl from the boys' basketball team); *Hoover v. Meiklejohn*, 430 F. Supp. 164 (D. Colo. 1977) (holding against female soccer players on the ground that schools have broad discretion to structure their programs).

192. *Clark v. Ariz. Interscholastic Assoc.*, 695 F.2d 1126, 1131 (9th Cir. 1982).

193. *Brenden v. Indep. Sch. Dist.*, 477 F.2d 1292 (8th Cir. 1973) (holding, under rational basis review, that women had the right to participate in men's non-contact sports where no teams were available for women);

194. *See, e.g., Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020 (W.D. Mo. 1983) (female football player wins right to compete on school football team).

195. *See, e.g., Beattie v. Line Mt. Sch. Dist.*, 992 F. Supp. 2d 384 (M.D. Pa. 2014) (holding that excluding female high school wrestler from all-male wrestling team violated the Equal Protection Clause)

196. *See, e.g., Cmty. for Equity v. Mich. High Sch. Ath. Ass'n*, 459 F.3d 676 (6th Cir. 2006); *Dodson v. Ark. Activities Assoc.*, 468 F. Supp. 394 (E.D. Ark. 1979) (female basketball player wins in challenge to different rules for different gender divisions).

197. *See, e.g., Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020 (W.D. Mo. 1983) (female football player wins).

198. *See, e.g., McCormick ex. rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275 (2d Cir. 2004) (parents of girls soccer players successfully sued school on the grounds that timing of their season precluded participation in regional and state level competition and the same was not true of the boys' soccer season); *Parker v. Franklin Cty. Cmty. Sch. Corp.*, 667 F.3d 910 (7th Cir. 2012) (acknowledging possibility of valid claim and remanding for fact-finding after female high school basketball players alleged gender disparity in scheduling); *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843 (9th Cir. 2014) (granting relief where female high school athletes alleged unequal treatment, benefits and opportunities, and retaliation).

sports that they play.¹⁹⁹ While progress from women's complete exclusion from high school and college sports has been neither direct nor swift, we have reached a point where both the Equal Protection Clause and Title IX provide potentially potent remedies against sex segregation in sports.

Existing jurisprudence leads us to two primary questions. The first question is whether a woman who wishes to play on the men's team instead of the women's team is legally entitled to do so. That is, should Katie Ledecky be able to try out for the U.S. men's swimming team if she wants? The second, more important question is whether maintaining separate men's and women's teams is constitutional in the first place, given that—like other forms of sex-segregation—separate teams would need to be justified by an important state interest. That is, are there any reasons important enough to justify sex-segregated wrestling teams, when it is clear that women can compete with men and sometimes defeat them? In the next section, I explain why we should answer the first question in the affirmative, and that we should sometimes answer the second question in the affirmative as well.

B. A Better Playing Field

Our default for sports should be one of sex integration, not sex segregation. If some division is necessary to promote the purpose of the sport, wherever possible we should strive to use facially sex- and gender-neutral criteria for such divisions—criteria such as height, weight, muscle mass, anthropometric specifications, hormone levels, and so on—rather than adopting sex or gender as a crude proxy for such differences. There may well be situations when there should be separate divisions, competitions, or events for men and women.²⁰⁰ But in other contexts we have determined that “separate but equal” is, in reality, rarely equal.²⁰¹ So we should treat sex-segregated divisions skeptically and inquire rigorously into their intended purpose, rather than treat them as an unquestioned default.

Broadly speaking, we should apply the searching inquiry associated with intermediate scrutiny to all sex-segregated sports organized by government entities. And where sports are organized by private entities, those entities

199. See, e.g., *Biediger v. Quinnipiac Univ.*, 691 F.3d 85 (2d Cir. 2012) (collegiate women's volleyball players successfully obtained permanent injunction against elimination of their sport on the grounds that it would violate Title IX).

200. A useful analogy is the legal regime surrounding sex-segregated K-12 public education, which courts have upheld when schools proffer a justification rooted in empirical evidence as well as an option for parents to send their children to co-ed schools. See, e.g., *A.N.A. v. Breckinridge Cty. Bd. of Educ.*, 833 F.Supp. 2d 673 (2011) (holding that Title IX allows single-sex classes in certain limited circumstances); 34 C.F.R. § 106.34 (providing exception to prohibition on sex-segregation for physical education classes involving bodily contact and portions of classes involving human sexuality).

201. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

should voluntarily adopt a standard analogous to intermediate scrutiny to determine whether the sport indeed justifies sex segregation.

This analysis offers answers to the two questions I posed in the previous section. First, we should allow female athletes to compete on men's teams as long as they can meet the applicable standards. So, if Katie Ledecky demonstrates that she can swim at the same level as men—as she did in the 1500 meter freestyle for the 2016 men's Olympic Trials²⁰²—she should be able to compete against men if she wishes. There is no reason—let alone an important reason—to prevent her from doing so: the point is to find the fastest swimmers in the fastest division, and if both men and women fall into that category they should be allowed to compete against one another.

The more important and controversial question is whether sex-segregated sports should exist at all. Here, the answer should depend on the purpose of the sport, the level of competition, and the reasons for segregation and integration. If sex segregation is necessary because women simply cannot compete with men, or if there are demonstrated safety concerns with integrated competition, segregation may be justified. It seems likely that some sports will meet this standard. As I have discussed throughout this Article, however, many sports where the current default is segregation may not meet the standard. Moreover, even if different divisions are necessary as a sufficiently important interest to further the purpose of the sport, intermediate scrutiny requires that government regulation be closely tailored. Thus, before the government can use sex or gender as a category, it must demonstrate that other metrics—height, weight, and so on—would not work as well or better.

Importantly, the intermediate scrutiny standard and its functional equivalents allow for voluntary sex-segregation in some circumstances. Dana Robinson, for instance, has examined whether women *want* sex-segregated sports.²⁰³ Generally speaking, the answer seems to be that some women do and some don't. Indeed, some commentators have argued that voluntary sex-segregation, against a default background regime of integration, actually signifies a more evolved attitude towards sports—people *can* play sports limited to those of their own gender, but they don't *have* to do so.²⁰⁴ It is worth asking whether those women who prefer sex-segregated sports in domains where no physical reason requires sex-

202. Philip Hersh, *Man, Oh, Man, Katie Ledecky Was Fast*, CHI. TRIB. (June 22, 2014), <http://www.chicagotribune.com/sports/chi-katie-ledecky-meets-mens-qualifying-standards-for-2016-olympic-trials-20140922-story.html>.

203. Dana Robinson, *A League of Their Own: Do Women Want Sex-Segregated Sports?*, J. CONTEMP. LEG. ISSUES 323 (1998).

204. EILEEN McDONAGH & LAURA PAPPANO, *PLAYING WITH THE BOYS* (2008).

segregation prefer segregation simply because it is traditional, and traditions die hard. If the default costume for female gymnasts is a sparkly leotard and for male gymnasts a plain tunic and white pants, people may resist changes to that attire even when there is literally no reason for the default. But the important point is that the intermediate scrutiny standard surely does not require immediate and involuntary sex desegregation of every sport, regardless of the wishes of those involved.

With those caveats in mind, this relatively brief section is not intended to answer definitively whether each sport should be sex-segregated. Rather, I map an agenda for sex-desegregating sports by articulating four categories of sports that are currently sex-segregated and that, I believe, generally should not be, either as a matter of law or as a matter of good policy. These realms of athletic endeavor provide a useful starting point for challenging the norms of sex-segregation that permeate sports more generally.

First, consider subjectively judged sports in which men and women are rewarded for performing essentially the same skills, yet compete in separate events. Two prime examples are artistic gymnastics and figure skating.

With respect to artistic gymnastics, one obstacle to integration is that men and women compete on different events and are scored according to slightly different criteria.²⁰⁵ But there is no immediately obvious reason that a boy or man should be disqualified from competing in the events now considered women's, or vice versa. Perhaps a boy prefers to compete on balance beam, which is not currently one of the events prescribed for males, or a girl wishes to compete on pommel horse, which is not currently one of the female events. It is difficult to justify why this should not be allowed, and under the existing case law, a court should uphold a challenge by either a boy or a girl to compete in the division and on the events that he or she prefers rather than limiting them to the activities artificially assigned to their gender.

More radically, we could consider a change to the sport of gymnastics itself in which there is only one division comprising eight events—floor, vault, beam, parallel bars, uneven parallel bars, high bar, pommel horse, and rings²⁰⁶—and in which both men and women compete. It is not clear whether men or women would have an advantage in the all-around competition. Conventional wisdom about physiology suggests that perhaps in the aggregate women—due to smaller size and lower center of gravity—might have an advantage on the balance beam, while perhaps in the aggregate men—due to greater natural upper body strength—might have an advantage on the rings. But the point of gymnastics is that—at least in the

205. See *supra* Part II.B.

206. As previously noted, men currently compete on six events and women compete on four, but two are the same: floor exercise and vault.

all-around competition—the question is how well the athlete performs across several events, not only one. Were men and women to compete against one another in the eight-event competition I have described, we might well find that neither sex has an inherent advantage over the other.

Moreover, gymnastics is judged subjectively, and includes assessment of traits such as grace, agility, and flexibility. No evidence of which I know suggests that either gender would have an absolute advantage on these metrics—women tend to surpass men on measures of agility and flexibility, but this generalization is not universal. Potentially accompanying these changes to the sport would be a dismantling of the rules enforcing gender norms—for example, the rule that men wear tank tops and plain white tights, while women wear elaborate sequined costumes. Perhaps the new rules would encompass some sort of unisex attire for everyone; alternatively, and perhaps better yet, both men and women could wear whatever they like, whether it be sequins or plain tights or something else.

A similar sex-desegregation scenario could occur in figure skating. Men tend to be more proficient at jumps, while women tend to be more proficient at spins and movements requiring flexibility. Of course, this is a considerable generalization—there have been extremely strong women skaters and very graceful men.²⁰⁷ One can imagine an integrated sport of figure skating in which men and women perform routines encompassing various strengths and skills—some associated with each sex—and the judging takes into account this array of athletic accomplishment.

Other sports such as rhythmic gymnastics and synchronized swimming would also be candidates for desegregation under this reasoning. Many boys and men might enjoy these sports, and there is no physiological reason that men should be excluded from participation. As discussed previously,²⁰⁸ gender stereotypes are harmful to men as well as to women, and should concern us for many of the same reasons. Desegregating sports that reify such gender stereotypes is vital to achieving real gender equality.

Second, consider sports where available empirical evidence suggests that women and men may be able to compete against each other with no change to the existing rules. I would place in this category sports including wrestling, CrossFit, shooting, long distance swimming, obstacle court races, and many ultra events.²⁰⁹ When women wish to compete in sports where currently only a men's league exists, they should be able to do so; where

207. See, e.g., *On the Edge*, RADIOLAB (Apr. 21, 2016), <http://www.radiolab.org/story/edge/> (describing the career of highly athletic figure skater Surya Bonaly, who performed disallowed feats such as back flips).

208. See *supra* Part II.C.

209. See *supra* Part II.B.

men wish to compete in sports where currently only a women's league exists, they should likewise be able to do so.

Perhaps more importantly, where both men's and women's leagues exist, but are separate, those involved in oversight of the sport should ask whether an important or substantial interest justifies the separation, and whether sex segregation in fact serves that interest. Where the oversight body is a governmental entity, and no substantial interest justifies sex-segregation, the governmental entity must desegregate under law. If it refuses, advocates of gender equality in athletics should file suit.

Where the oversight body is not a governmental entity, the Equal Protection Clause will not require the desegregation of the sexes. Still, as a matter of policy, stakeholders should advocate for such desegregation.

With time and experience, we may learn that gender segregation is in fact the best way to further the purpose of the sport.²¹⁰ If so, then this additional empirical evidence will justify a resegregation along gender lines. But without actually attempting an integrated version of the sport, the empirical questions relevant to determining whether men and women can compete against one another will remain unanswered.²¹¹

Third, where it appears that some sort of division best serves the purpose of the sport, we should still question whether the basis of that division should be gender. Consider swimming, for example. It's true that swimmer Katie Ledecky's impressive world-record-setting performance in the women's 800 meter freestyle at the 2016 Summer Olympics was still nowhere near the best in the world when men's times are included—although it is worth noting that direct comparison is impossible because men do not swim the 800 meter freestyle at the Olympics.²¹² Some might argue that examples such as this demonstrate why women and men cannot compete against one another.

But even if multiple divisions make sense as a means of improving the sport from the perspective of both athletes and spectators, we should still question why sex is the dividing line. As an alternative we might have height divisions, weight divisions, or perhaps divisions created by some combination of the two.

A perfunctory examination of the physiology of well-known swimmers offers some support for the idea that such classifications might actually provide a better way of creating divisions. Ledecky is 6'0" tall and weighs

210. As noted previously, the need for sex-segregation may vary depending on the purpose of the sport, and in this Article I do not take up the task of articulating a way of defining the purpose of the sport. See *supra* note 22.

211. See *supra* Part II.B.2.

212. Peter Aldhous, *How Katie Ledecky Stacks Up Against Male Swimmers*, BUZZFEED (Aug. 22, 2016), https://www.buzzfeed.com/peteraldhous/katie-ledecky-superhuman?utm_term=.utVpWDD58#.pfnXnVVp4.

154 pounds. Compare her size to recognized swimmers such as Michael Phelps (6'4", 194 pounds), Ryan Murphy (6'3", 185 pounds) and Ryan Lochte (6'2, 194 pounds). Moreover, Ledecky is relatively tall for a female swimmer. Other accomplished female swimmers tend to be somewhat smaller: Jazmin Carlin, a two-time runner-up to Ledecky, is only 5'9" and 126 pounds, and breaststroke gold medalist Lily King is 5'9" and 155 pounds. Perhaps the difference between elite male and female swimmers is explained, not by sex, but by height, weight, or some combination of the two. One might query how Ledecky stacks up against male swimmers who weigh under 160 pounds. And such a division might have benefits for men, as well: perhaps talented men who are substantially shorter than athletes such as Phelps would benefit from the opportunity to compete in height divisions that pitted them against athletes—both male and female—more similar to them in stature.

At a minimum, the possibility of non-sex-based divisions is worth investigating. In many sports, from boxing to wrestling to UFC fighting to Olympic lifting to powerlifting, we already recognize and view as uncontroversial the inclusion of weight classes. Indeed, some other countries incorporate these factors in the rules for even the most mainstream sports—consider, for example, the Philippine Basketball Association, whose rules include a prohibition on “imports”—non Filipino players—over 6'9" tall during playoff games, and imports over 6'5" during playoffs for the Governor's Cup.²¹³ Examining whether non-sex mechanisms for creating divisions in other sports are actually more accurate will both improve the sport and avoid reinforcing the narrative that men are universally more physically capable than women.

Fourth, and finally, advocates of sports equality should ensure that emerging sports are created with thought and care. Nothing requires that American Ninja Warrior obstacles advantage either gender's particular athletic strengths. If it appears that a sport is designed in a way that tends to favor men, we should question whether that design actually serves the purpose of the sport. As we create new athletic endeavors, we have the opportunity either to recreate existing gender asymmetries or to call those asymmetries into question. If we care about gender equality, then our goal should be the latter.

* * *

213. *About PBA*, PHILIPPINES BASKETBALL ASS'N, <http://pba.com.ph/about-us> (last visited Feb. 19, 2017).

Surely there will be resistance to these reforms. Tradition dies hard, and many will argue that we should not change sports purely because they wish to keep them the same. Indeed, it may be difficult for many people, even those dedicated to including women in sports and to gender equality more generally, to imagine the radical version of sex-desegregation I have described.

But that is precisely the point. At various points in our nation's history, it was unimaginable that women would vote with men, or attend college, or become lawyers, or own property, or serve in combat positions in the military, or hold elected office. Likewise, it was once unimaginable that men would stay at home with children, or otherwise take a supporting role to their wives' careers. Features of our society that today seem commonplace were once deemed radical as well. There is no reason to think that sports are different.

CONCLUSION

It is time to stop thinking of sports that women play as "women's sports." Indeed, it is time to stop thinking of sports that men play as "men's sports." Instead, we should devote our energies to thinking about what we want to encourage with athletic endeavors, and aim to design sports so as to best incorporate the athletes who play them.