
ERA v. Title IX: Should Male-Student Athletes be Allowed To Compete on Female Athletic Teams?

*“Permitting boys to play on girls’ teams will impede the progress in reaching full athletic competition that girls are seeking to achieve. Although promoting equal opportunity in sports for females by excluding males may suffer from the backlash of reverse discrimination or carry with it the ‘baggage of sexual stereotypes,’ a better alternative has yet to be formulated by the courts or regulatory agencies.”*¹

I. INTRODUCTION

Two separate, but related, stories represent a growing debate permeating throughout the competitive atmosphere of Massachusetts high school athletics.² At the 2010 Western Massachusetts Division I girls’ field hockey championship game, the two title contenders were engaged in a highly competitive match with the score tied late in the game.³ With time running out, a player broke free from the field and scored the championship-winning goal as the player collided into the opposing team’s goaltender.⁴ Both the play and ensuing result appear relatively normal until it is revealed that a male student-athlete, a standout performer in both ice hockey and lacrosse, scored the game-winning goal, and that the female goaltender suffered a concussion as a result of the collision.⁵

1. Polly S. Woods, Comment, *Boys Muscling in on Girls’ Sports*, 53 OHIO ST. L.J. 891, 906-07 (1992) (footnotes omitted).

2. See Mike Cullity, *Equal Rights vs. Title IX*, ESPN (June 15, 2012), <http://espn.go.com/espn/print?id=8055704&type=Story&imagesPrint=off> (describing male athlete impact on 2010 Massachusetts girls’ field hockey and swimming competitions); see also *Playing Like a Girl is Goal for Boys*, WASH. TIMES (Sept. 25, 2003), <http://www.washingtontimes.com/news/2003/sep/25/20030925-115149-6790t/?page=all> (commenting on male high school students’ participation on Maryland female field hockey team).

3. See Bob Holmes, *Quite a Lot to This Mix: MIAA Weighing How Boys Play in Field Hockey*, BOS. GLOBE (June 8, 2011), http://www.boston.com/sports/schools/articles/2011/06/08/miaa_weighing_how_boys_play_in_field_hockey/?page=1 (summarizing events surrounding 2010 Western Massachusetts girls’ field hockey championship).

4. See *id.* (describing game-winning goal at 2010 field hockey championship). The goal scorer’s stick was level with the goaltender’s head as the two collided at full speed. See *id.*

5. See Cullity, *supra* note 2 (discussing athletic background of male athletes competing on female field hockey team); Holmes, *supra* note 3 (addressing effect of male athletes on female field hockey teams in Massachusetts). Two brothers, both standouts in ice hockey and lacrosse, were members of the South Hadley High School girls’ field hockey team. See Cullity, *supra* note 2. For the game-winning goal, the two brothers emerged on a breakaway, passing from one to the other to set up the shot. See Holmes, *supra* note 3. As a

One year later, at the 2011 Massachusetts Women's South/Central Sectional Swimming and Diving Championships, one of the top female swimmers in the meet, who had trained all year to receive the honors and accolades associated with an individual championship, was forced to settle for second place.⁶ Competing in the fifty-yard freestyle, the female swimmer was the fastest female in the field but was out-touched by one of the several male athletes competing in the event.⁷ The male athlete, whose time would have failed to qualify for the Massachusetts Boys' Swimming and Diving State Championship, received all of the individual accolades associated with an individual championship while the fastest female swimmer in the meet had to content herself with second place.⁸

These two situations represent a unique and controversial aspect of Massachusetts high school athletics.⁹ As a result of the state's adoption of the Equal Rights Amendment (ERA) in the 1970s, the Massachusetts Supreme Judicial Court, applying a strict scrutiny standard of review, held that the Massachusetts Interscholastic Athletic Association's (MIAA) rule prohibiting males from competing on female athletic teams was unconstitutional for violating the ERA.¹⁰ States across the country are unanimous in their view that

result of the collision that followed the shot, the female goaltender suffered a severe concussion resulting in loss of memory, chronic headaches, and routine consultations with neurology specialists. *See id.* Not quite coincidentally, the brother that scored the game-winning goal led all of western Massachusetts for goals scored on the season. *See id.* *But see Playing Like a Girl is Goal for Boys*, *supra* note 2 (suggesting limited negative impact of male-student athletes competing on female field hockey teams). In Maryland, two male-student athletes competed on their school's field hockey team with limited negative impact because the two had never before competed in organized field hockey, and while enthusiastic members, they were not considered the stars of the team. *See id.*

6. *See 2011 South Division Fall Girls Swimming and Diving Results*, MASS. INTERSCHOLASTIC ATHLETIC ASS'N (Nov. 14, 2011), <http://www.miaa.ezstream.com/index.cfm?ChnID=314&SubID=-1&itemid=6688&parid=-1&Org=MIAA&CFID=6141960&CFTOKEN=40614098> (providing official results for 2011 South Division Swimming and Diving Championship).

7. *See id.* (listing results of women's fifty-yard freestyle event); *see also* Emily Sweeney, *Swimming in Confusion Over Boys' Role on Girls' Teams*, BOS. GLOBE (Nov. 27, 2011), http://www.boston.com/sports/schools/articles/2011/11/27/school_officials_to_discuss_boys_competing_in_girls_swim_meets/?page=1 (acknowledging negative effect male participants had on girls' swimming state championship meet).

8. *See* Karen Crouse, *Boys Swimming on Girls Teams Find Success, Then Draw Jeers*, N.Y. TIMES (Nov. 18, 2011), http://www.nytimes.com/2011/11/19/sports/boys-swimming-on-girls-teams-find-success-then-draw-ire.html?_r=0&pagewanted=print (discussing impact of males winning events at girls' meets). Not only do male swimmers knock female participants off the awards podium, but they also make it far more difficult for female swimmers to qualify for all-star honors. *See id.* As one female swimmer described the negative impact: "The way it is now, the boys are taking recognition away from girls who have worked hard and deserve it." *Id.*

9. *See* Cullity, *supra* note 2 (discussing unique nature of males competing on female teams in Massachusetts athletics); Rick Reilly, *Not Your Average Skirt Chaser*, SPORTS ILLUSTRATED (Nov. 26, 2001), <http://www.si.com/vault/2001/11/26/314458/not-your-average-skirt-chaser> (highlighting controversial nature of Massachusetts high school athletics).

10. *See* Attorney Gen. v. MIAA, 393 N.E.2d 284, 296 (Mass. 1979) (applying state-adopted ERA to strike down MIAA ban on males competing on female teams).

females should not be prohibited from competing on male athletic teams.¹¹ Massachusetts is one of the few states, however, that has found a constitutional violation when prohibiting males from joining female teams.¹² The current and quite controversial MIAA rule, adopted in response to the Supreme Judicial Court's 1979 decision, is a representation of constitutional concerns usurping common sense; and it stands in direct opposition to the federally enacted gender equality legislation—Title IX of the Education Amendments of 1972 (Title IX)—and often leads to unfair sporting event outcomes that conflict with the competitive sportsmanship environment that high school athletics are designed to foster.¹³

This Note focuses on the MIAA's regulation allowing males to compete on female athletic teams when the particular sport is not offered in the school for male athletes.¹⁴ Part II.A begins with a historical overview of the Federal Equal Protection Clause and the Massachusetts ERA, focusing heavily on the societal factors leading to the adoption of the ERA.¹⁵ Part II.B shifts focus to the federally enacted Title IX legislation, concentrating on the historical development of the legislation as it relates to Title IX's impact on athletics.¹⁶ Part II.D narrows the discussion to specifically focus on the development of gender-equality issues in Massachusetts high school athletics and the Supreme Judicial Court's application of the ERA to such issues.¹⁷ Part III of this Note will then consider the contradiction between the Federal Title IX legislation and the current MIAA regulation permitting male athletes to compete on female teams, centering largely on the effect the regulation has on female sporting events.¹⁸ Finally, this Note will recommend a solution for

11. See Marielle Elisabet Dirx, Comment, *Calling an Audible: The Equal Protection Clause, Cross-Over Cases, and the Need To Change Title IX Regulations*, 80 MISS. L.J. 411, 428 (2010) (noting substantial success for females using equal protection to gain access to male sports teams).

12. See Adam S. Darowski, *For Kenny, Who Wanted To Play Women's Field Hockey*, 12 DUKE J. GENDER L. & POL'Y 153, 166 (2005) (highlighting Massachusetts as only state to constitutionally provide males right to play on female teams).

13. See MASS. INTERSCHOLASTIC ATHLETIC ASS'N, RULES AND REGULATIONS GOVERNING ATHLETICS: A HANDBOOK FOR PRINCIPALS AND ATHLETIC DIRECTORS OF SCHOOLS THAT ARE MEMBERS OF THE MASSACHUSETTS INTERSCHOLASTIC ATHLETIC ASSOCIATION pt. 3, § 43, at 40 (July 1, 2011 – June 30, 2013), available at http://www.miaa.net/gen/miaa_generated_bin/documents/basic_module/MIAAHandbook1113.pdf [hereinafter MIAA HANDBOOK] (declaring current MIAA rule allowing male-student athletes to compete on female athletic teams); see also *infra* Part III (contrasting Massachusetts ERA with Title IX and respective effects on high school athletics).

14. See *infra* Parts II-IV (developing background information about and suggesting changes to males competing on female sports teams).

15. See *infra* Part II.A (outlining historical development of Federal Equal Protection Clause and Massachusetts ERA).

16. See *infra* Part II.B (summarizing enactment of Title IX and subsequent effect on high school athletics).

17. See *infra* Part II.D (analyzing progression of gender-equality issues in Massachusetts high school athletics).

18. See *infra* Part III (comparing Title IX to Massachusetts ERA and effect current MIAA rule has on female athletics).

Massachusetts high school athletics that conforms to constitutional concerns and represents a more common sense approach that will uphold the competitive sportsmanship crucial to the success of all high school athletics.¹⁹

II. HISTORY

A. Fourteenth Amendment and the Equal Rights Amendment

1. The Equal Protection Clause

The Fourteenth Amendment to the U.S. Constitution provides that no state shall, “make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws;*” the emphasized clause is commonly referred to as the Equal Protection Clause.²⁰ Although the Equal Protection Clause was adopted in 1866, the Supreme Court failed to recognize gender as a protected class under the amendment until 1971, when the Court, in the landmark case of *Reed v. Reed*,²¹ applied the Equal Protection Clause to prohibit gender-based discrimination.²² In the later case of *Craig v. Boren*,²³ the Supreme Court expanded the scope of gender-based protection under the Federal Constitution by determining that under the foregoing Equal Protection Clause, all gender-based classifications would be subject to an intermediate level of judicial scrutiny.²⁴ In other words, in order to pass federal constitutional review under the Fourteenth Amendment, a gender-based classification “must serve important governmental objectives and must be substantially related to achievement of those objectives.”²⁵ For several

19. See *infra* Part IV (suggesting new MIAA rule that more closely conforms to Title IX regulation).

20. U.S. CONST. amend. XIV, § 1 (emphasis added) (providing for federal constitutional protection of equal rights under the law).

21. 404 U.S. 71 (1971).

22. See *id.* at 74-77 (recognizing gender-based classifications as subject to Fourteenth Amendment protection). In *Reed*, an Idaho statute granted a mandatory preference to males over females when deciding upon estate administrators when both male and female members of the same entitlement class filed applications. See *id.* at 74-75. The Supreme Court stated that the Equal Protection Clause does not allow a state to place individuals into different classes that are completely unrelated to the goal of the statute. See *id.* at 75-76. Utilizing a rational basis standard of review, the Court held that a gender-based classification did not bear a rational relationship to the state objective of reducing workload on probate courts. See *id.* at 76-77; see also Lindsay N. Demery, Note, *What About the Boys? Sacking the Contact Sports Exemption and Tackling Gender Discrimination in Athletics*, 34 T. JEFFERSON L. REV. 373, 383-84 (2012) (addressing historical development of Equal Protection Clause in application to gender-based classifications).

23. 429 U.S. 190 (1976).

24. See *id.* at 197 (recognizing gender-based classifications subject to intermediate judicial scrutiny under Federal Equal Protection Clause).

25. *Id.* (defining intermediate scrutiny standard of review in gender-based classifications). The Court held that a gender-based classification enabling females to purchase alcohol at a younger age than males could not withstand intermediate judicial scrutiny and therefore violated equal protection under the Fourteenth

decades, the Court followed this intermediate level of scrutiny, upholding several gender-based classifications that were founded upon a reasonable distinction between the sexes and those that redressed claims of past discrimination or differences in opportunity.²⁶ However, in the 1996 case of *United States v. Virginia*,²⁷ the Court suggested a transition to a more stringent standard for gender-based classifications when it held that the state must provide an “exceedingly persuasive” justification for such classifications.²⁸

2. Massachusetts Equal Rights Amendment

Prior to 1976, the Massachusetts Constitution simply required gender-based distinctions to bear a “fair and substantial relation to the object of the legislation.”²⁹ In 1976, however, when it was clear that efforts to adopt a federal equal rights amendment would be unsuccessful, Massachusetts

Amendment. *See id.* at 210; *see also* Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1211 (2005) (analyzing intermediate scrutiny standard of review). Under the intermediate scrutiny standard articulated by the Court, the availability of other methods that are less discriminatory than the adopted legislation is not fatal to the constitutional review. *See* Wharton, *supra*.

26. *See, e.g.*, *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) (upholding male-only draft registration); *Dothard v. Rawlison*, 433 U.S. 321, 333-37 (1977) (upholding exclusion of women from contact positions in all-male prisons); *Califano v. Webster*, 430 U.S. 313, 317 (1977) (upholding provision in Social Security Act providing women with more advantageous benefits than men). In *Califano*, the Court stated the financial benefits provided to women were not based on stereotypes but rather were designed to further the goal of redressing the longstanding “disparate” treatment of women. *See* 430 U.S. at 317 (quoting *Califano v. Goldfarb*, 430 U.S. 199, 209 n.8 (1977)); *see also* *Nguyen v. I.N.S.*, 533 U.S. 53, 65 (2001) (upholding gender-based classification though different requirements based on unmarried mothers and fathers’ biological differences); *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975) (upholding naval regulation allowing female officers not receiving promotion to serve longer than male counterparts). In *Nguyen*, the Court recognized that there was a greater opportunity for a mother, rather than the father, to establish a relationship with their children. *See* 533 U.S. at 65.

27. 518 U.S. 515 (1996).

28. *See id.* at 532-34 (adopting stricter standard for gender-based classifications under Federal Equal Protection Clause). Justice Ginsburg, writing for the Court, first stated that while gender classifications have not been equated to classifications based on race and national origin, the reviewing court must still carefully inspect all gender-based classifications. *See id.* at 532. Furthermore, Justice Ginsburg recognized that the Court’s current direction regarding gender-based classifications requires an “exceedingly persuasive” justification, with that demanding burden falling entirely upon the state. *See id.* at 532-33. Justice Ginsburg then articulated several scenarios in which the state would be unable to meet this heightened burden including: justifications hypothesized or invented post hoc in response to litigation; overbroad generalizations of the talents, capacities, or preferences of males or females; and classifications to create or perpetuate the legal, social, and economic inferiority of women. *See id.* at 533-34; *see also* Demery, *supra* note 22, at 384-85 (addressing heightened scrutiny in context of gender-based classification in athletics). *But see* Wharton, *supra* note 25, at 1212 (suggesting courts still sharply divided on application of intermediate scrutiny standard to gender-based classifications).

29. *See* *Commonwealth v. MacKenzie*, 334 N.E.2d 613, 615-16 (Mass. 1975) (articulating standard of review applicable to gender-based classifications in Massachusetts prior to ERA adoption). Looking to the standard of review utilized by the U.S. Supreme Court under the Equal Protection Clause, the Supreme Judicial Court recognized that gender-based classifications require a standard of review that is stricter than traditional equal protection standards. *See id.* at 615.

amended article one of its constitution to state that “[e]quality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.”³⁰ Recognizing that the amendment—commonly referred to as the ERA—groups gender-based discrimination with other prohibited bases for discrimination that are subject to strict judicial scrutiny under the U.S. Constitution, the Supreme Judicial Court, in *Commonwealth v. King*,³¹ held that the degree of scrutiny for gender-based classifications under the ERA must be at least as strict as the scrutiny required for racial classifications under the Fourteenth Amendment.³² Therefore, under the Massachusetts Constitution, gender-based classifications are only permissible “if they further a demonstrably compelling [state] interest and limit their impact as narrowly as possible.”³³ Under this strict scrutiny standard of review, the Supreme Judicial Court has continued to uphold gender-based classifications that are designed to address the ongoing effects of past gender discrimination.³⁴ Additionally, the court has analyzed several factors to determine if an action is narrowly tailored to ensure that the “‘means chosen ‘fit’ [the government’s] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate . . . prejudice or stereotype.”³⁵

30. MASS. CONST. pt. 1, art. I, amended by MASS. CONST. amend. art. CVI (implementing ERA into Massachusetts Constitution).

31. 372 N.E.2d 196 (Mass. 1977).

32. *See id.* at 205-06 (adopting strict judicial scrutiny as standard of review for gender-based classifications). The text of article CVI classified gender-based classifications into the same grouping as race, color, creed, and national origin. *See* MASS. CONST. amend. art. CVI. The court reasoned that as a result of this grouping, the citizens of Massachusetts must have viewed gender-based discrimination with the same level of disapproval as they view racial, ethnic, and religious discrimination. *See King*, 372 N.E.2d at 206. Therefore, because racial, ethnic, and religious discrimination are all subject to strict judicial scrutiny, the adoption of the ERA must have been intended to apply the same level of scrutiny to gender-based classifications. *See id.*

33. *King*, 372 N.E.2d at 206 (articulating standard to which gender-based classifications must adhere under Massachusetts Constitution). *But see* Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 889-93 (1971) (analyzing purpose behind adoption of Federal Equal Rights Amendment). The authors of this landmark article suggested that while the basic principle of a federal equal rights amendment would be to establish that “sex is not a permissible factor in determining the legal rights of women, or of men,” this principle would not preclude legislation that was designed to account for the physical characteristics unique to one sex. *See id.*

34. *See Brackett v. Civil Serv. Comm’n*, 850 N.E.2d 533, 550 (Mass. 2006) (articulating compelling state interest sufficient to uphold gender-based classification). The court held that a Massachusetts Bay Transportation Authority (MBTA) rule designed to promote qualified minorities and women to higher ranks within the police department served the compelling state interest of addressing racial and gender discrimination in the hiring and promotion practices of the MBTA. *See id.* at 551-52.

35. *See id.* at 550 (alterations in original) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)) (addressing goal of narrowly tailored requirement). The court articulated several factors that should be considered in determining whether a gender-based classification is narrowly tailored, including:

“[T]he extent to which (i) the beneficiaries of the order are specially advantaged; (ii) the legitimate expectancies of others are frustrated or encumbered; (iii) the order interferes with other valid state or local policies; and (iv) the order contains (or fails to contain) built-in mechanisms which will, if time

3. Nationwide Overview of Equal Rights Amendment

By adopting the state ERA, Massachusetts joined twenty-one other states in declaring that equality under the law shall not be denied as a result of sex.³⁶ An overwhelming majority of these state amendments were adopted in the 1970s, coinciding with the attempted adoption of a federal equal rights amendment and a general push for stronger constitutional protection for the equal rights of women.³⁷ A strong majority of states that have adopted an equal rights amendment have interpreted the provision as providing greater constitutional protection for gender-based classifications than that provided by the Equal Protection Clause of the Fourteenth Amendment.³⁸ While a few states originally entertained the adoption of an absolutist standard in which all gender-based classifications are deemed unconstitutional unless they are based on physical differences between the sexes, only one state currently employs this standard.³⁹ Additionally, a few states have followed federal equal protection law when construing their ERAs and have opted for the intermediate scrutiny standard.⁴⁰

and events warrant, shrink its scope and limit its duration.”

Id. at 550-51 (quoting *Bos. Police Superior Officers Fed’n v. City of Bos.*, 147 F.3d 13, 23 (1st Cir. 1998)).

36. See Wharton, *supra* note 25, at 1202 (providing general overview of state equal rights amendments).

37. See *id.* (suggesting many state adoptions of equal rights amendments coincided with push to expand federal protection); see also Brown et al., *supra* note 33, at 872 (suggesting discrimination against women in 1970s was “deep and pervasive”); Paul Benjamin Linton, *State Equal Rights Amendments: Making a Difference or Making a Statement?*, 70 TEMP. L. REV. 907, 909-10 (1997) (analyzing factors surrounding adoption of many state equal rights amendments). A co-sponsor of the Illinois equal rights provision stated: “Women have not been treated like ‘persons’ for such a long time that we prefer to have this matter spelled out specifically, rather than leaving to a court interpretation whether or not women are, in fact, ‘persons’ and entitled to equal protection of the laws.” 5 RECORD OF PROCEEDINGS: SIXTH ILLINOIS CONSTITUTIONAL CONVENTION: VERBATIM TRANSCRIPTS: AUGUST 6, 1970 TO SEPTEMBER 3, 1970, at 3669 (1972), available at <http://www.idaillinois.org/cdm/compoundobject/collection/isl2/id/6263/rec/35> (capturing comments of Odas Nicholson).

38. See Wharton, *supra* note 25, at 1227 (providing overview of state court interpretations of state equal rights amendments). According to Wharton, “a critical difference between state ERA jurisprudence and federal precedent is the higher standard of review applied to claims of sex discrimination.” *Id.* at 1240; see also Robert I. Berdon, *Connecticut Equal Protection Clause: Requirement of Strict Scrutiny When Classifications are Based Upon Sex, Physical Disability or Mental Disability*, 64 CONN. B.J. 386, 387-88 (1990) (footnotes omitted) (“If this intermediate review, which was already guaranteed under the federal equal protection clause, is to be the standard, then most of the purposes for adopting the ERA would wash down the drain. Such an intermediate judicial review takes the heart out of . . . the ERA”); Martha F. Davis, *The Equal Rights Amendment: Then and Now*, 17 COLUM. J. GENDER & L. 419, 435 (2008) (suggesting federal equal rights amendment would likely adopt strict scrutiny standard for gender-based classifications).

39. See Davis, *supra* note 38, at 433 (analyzing various levels of judicial scrutiny under state equal rights amendments). The State of Washington currently employs the absolute scrutiny test under the state adopted equal rights amendment. See *id.* Maryland originally entertained the absolute standard, but courts abandoned the stringent test in favor of the more familiar strict scrutiny standard of review. See *id.*

40. See *Archer v. Mayes*, 194 S.E.2d 707, 711 (Va. 1973) (holding state equal rights amendment provides same level of protection as Federal Equal Protection Clause).

B. Title IX

1. Societal Factors Leading to Adoption of Title IX

In addition to the Federal Equal Protection Clause and various state equal rights amendments, gender equality in high school athletics is also governed on the federal level by the Title IX legislation, adopted by the United States Congress in 1972.⁴¹ The text of Title IX does not specifically mention athletics; instead it applies a general standard to all educational programs: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”⁴² The ultimate goal of Title IX was to mirror the impact that Title VI of the Civil Rights Act of 1964 had on racial discrimination by providing more opportunities for women in the academic environment.⁴³ After the House Special Subcommittee on Education conducted extensive hearings in 1970, Congress determined that there was a “pervasive discrimination” against women in relation to educational opportunities and adopted Title IX to combat this discrimination.⁴⁴ Senator Birch Bayh, commonly referred to as the father

41. See Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 373-74 (codified as amended at 18 U.S.C. § 1681 (2012)) (prohibiting gender discrimination in educational institutions receiving federal financial assistance); see also David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 246 (2005) (suggesting Title IX provides greater constitutional protection against gender-based discrimination than Equal Protection Clause). Title IX was intended to be “remedial” legislation to address the shortcomings of the Equal Protection Clause. See Cohen, *supra*. Therefore, Congress must have intended for Title IX to provide greater protection than the Equal Protection Clause against gender-based classifications or else the legislation would have essentially no purpose. See *id.*

42. Education Amendments of 1972 § 901(a), 20 U.S.C. § 1681(a) (2014) (regulating gender equality broadly across all educational activities in federally funded academic institutions); see also Darowski, *supra* note 12, at 159 (analyzing historical application of Title IX to interscholastic athletic programs). In addition to not mentioning athletics in the text of the statute, there was very little congressional discussion of the legislation’s impact on athletics prior to its enactment in 1972. See Darowski, *supra* note 12, at 159.

43. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979) (holding Title IX modeled after Title VI to prevent using federal resources in discriminatory practices); Robert R. Hunt, *Implementation and Modification of Title IX Standards: The Evolution of Athletics Policy*, 1999 BYU EDUC. & L.J. 51, 58-59 (1999) (stating Title IX originally introduced as amendment to Title VI); Jeffrey H. Orleans, *An End to the Odyssey: Equal Athletic Opportunities for Women*, 3 DUKE J. GENDER L. & POL’Y 131, 133-34 (1996) (analyzing similarities between Title VI and Title IX). Title VI of the Civil Rights Act of 1964 was enacted with a primary motivation to combat racial discrimination in public schools, and it attempted to accomplish this goal through a prohibition of racial discrimination in all activities receiving federal funds. See Orleans, *supra*, at 133. Congress specifically utilized the same language in Title IX as that used in Title VI in an attempt to apply the same standard to racial and gender discrimination. See Darowski, *supra* note 12, at 159 (noting substantial relationship between text in Title VI and Title IX).

44. See *Cohen v. Brown Univ.*, 101 F.3d 155, 165 (1st Cir. 1996) (addressing historical background leading to enactment of Title IX in context of application to athletics). Through the introduction of Title IX, Congress hoped to provide individual citizens protection against the use of federal financial assistance in support of gender-based discriminatory practices. See *id.*; see also *Cannon*, 441 U.S. at 695 n.16 (discussing gender equality issues leading to Title IX adoption). Throughout the course of the congressional hearings, which were heavily relied upon during the Title IX debate in Congress, it was routinely suggested that

of Title IX and the statute's sponsor on the Senate floor, suggested that the intended purpose of Title IX was to:

[P]rovide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.⁴⁵

2. Title IX and Athletics

a. Application of Title IX to Athletics

Despite initial confusion regarding the application of Title IX to athletics, the Department of Health, Education, and Welfare (DHEW), which Congress chose to interpret the new legislation, explicitly included high school athletic teams under the broad scope and protection of Title IX.⁴⁶ In 1974, the DHEW issued a final regulation of Title IX that required all academic institutions receiving federal funds to provide equal opportunities throughout their athletic programs.⁴⁷ As academic institutions struggled to fully comprehend the equal opportunity requirement, the DHEW issued an athletics policy interpretation in 1979 as a guide to assess an institution's compliance with the regulations.⁴⁸ The policy interpretation was designed with the goal of fostering full women's

educational institutions were the primary source of gender-based discrimination complaints. *See Cannon*, 441 U.S. at 695 n.16.

45. 118 CONG. REC. 5808 (1972); *see also* B. Glenn George, *Fifty/Fifty: Ending Sex Segregation in School Sports*, 63 OHIO ST. L.J. 1107, 1116 (2002) (analyzing gender disparity in athletics prior to Title IX adoption). In 1971, one year before Title IX was enacted, female athletes constituted only seven percent of all high school athletic participants. *See* George, *supra*, at 1116. Title IX was specifically designed to address such extreme disparities between male and female opportunities. *See id.*

46. *See* Hunt, *supra* note 43, at 61-64 (discussing interpretation of Title IX and application to athletic programs). The DHEW interpretation significantly expanded the reach of Title IX from a narrow, program-specific standard to one that broadly reached institutions through indirect federal financial assistance. *See id.* at 61. This broad interpretation prompted the introduction of several amendments in Congress, which attempted to exclude athletic programs from Title IX protection over concerns that the required expansion of women's programs would limit resources to preexisting men's programs. *See id.* at 64.

47. *See* Demery, *supra* note 22, at 378 (discussing historical evolution of Title IX and subsequent effect on athletic programs). The DHEW included a ten-factor list within the regulations to determine if an academic institution is providing equal opportunities in their athletic programs. *See id.* Included among those factors are: whether the sports offered accurately reflect the skills and interests of both genders, the administration of equipment and supplies, and the compensation of coaches. *See* 34 C.F.R. § 106.41(c) (2014).

48. *See* Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,423 (Dec. 11, 1979) (providing DHEW interpretation of Title IX's effect on athletics). The policy interpretation was designed with intercollegiate athletics in mind; however, it specifically notes that the interpretation will also apply to high school athletic programs. *See id.* at 71,413. Included within the interpretation is a discussion of the historical pattern of participation rates within intercollegiate athletics, leading to the conclusion that male athletic programs have received a far greater emphasis than women's programs. *See id.* at 71,419.

participation in athletics without limiting the opportunities provided to male athletes.⁴⁹ As a result of the relatively undeveloped athletic landscape in the 1970s, Title IX and the resulting policy interpretation suggested that separate-sex teams should be used to achieve ultimate equality in all forms of athletic programs.⁵⁰ This approach has led some commentators to believe that Title IX, in contrast to its original intent, permits discrimination against one gender to provide equal opportunities to the other.⁵¹

b. Previously Limited Athletic Opportunities

While a great deal of the initial interpretation regarding the DHEW regulations dealt with the broad equal opportunity requirement, the regulations also specifically address the conflict surrounding males competing on female athletic teams.⁵² Subsection (b) outlines the requirements regarding school's offering a sport for one gender, without having a corresponding team for the other:

(b) Separate Teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is

49. See Orleans, *supra* note 43, at 135 (discussing athletic landscape surrounding 1979 policy interpretation).

50. See *id.* (addressing use of separate-sex teams to achieve gender equality in athletics). Mr. Orleans, a principal author of the DHEW regulations implementing Title IX, suggested that Title IX requires the use of separate-sex teams to remain effective "because a single competitively-based team in most sports is likely to be all male at any level." *Id.*

51. See Demery, *supra* note 22, at 379 (analyzing effect of 1979 policy interpretation on original intent of Title IX). While the original intent of Title IX was simply to eliminate gender-based discrimination, in order to remain in compliance with Title IX regulations, academic institutions often choose to keep a women's athletic program at the expense of a men's team. See *id.* at 379 n.38.

52. See 34 C.F.R. § 106.41(b) (permitting single-sex athletic teams unless gender subject to previously limited opportunities). The regulation begins with a general ban on gender discrimination that closely mirrors the broad language of Title IX:

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

34 C.F.R. § 106.41(a). The remaining sections of the regulation deal with specific requirements relating to access to equipment, facilities, and coaching. See 34 C.F.R. § 106.41(c).

a contact sport.⁵³

There are two important points to this subsection: Single-sex athletic teams are explicitly allowed under Title IX, and mixed-gender teams are required when the historical opportunities for one gender have been limited.⁵⁴ Therefore, to determine whether Title IX requires high school athletic programs to allow male athletes to compete on female athletic teams, one must determine whether or not athletic opportunities for males have been previously limited.⁵⁵

Courts have generally utilized two different approaches to determine if male students have historically had limited athletic opportunities.⁵⁶ The broad approach compares the overall number of male athletes to female athletes in the athletic department, disregarding disparities in a particular sport, to see if males have had limited opportunities to compete on athletic teams.⁵⁷ Under this broad method, courts have almost unanimously found that males have not had limited athletic opportunities.⁵⁸ Some courts have taken a more narrow

53. 34 C.F.R. § 106.41(b) (2014) (providing regulations on legality of gender-based athletic teams under Title IX); *see also* Jamal Greene, Article, *Hands Off Policy: Equal Protection and the Contact Sports Exemption of Title IX*, 11 MICH. J. GENDER & L. 133, 169 (2005) (advocating for elimination of previously limited opportunities stipulation). An interesting proposal calls for elimination of the previously limited athletic opportunity requirement from the text of Title IX. *See* Greene, *supra*, at 169. The author of this proposal believes that the skill gap between male and female athletes is a sufficient justification for the ban on male athletes competing on female teams. *See id.* The so-called “contact sports exemption” contained within this section has been subject to substantial debate but is beyond the scope of this Note. *See generally* Demery, *supra* note 22 (providing broad discussion of Title IX contact sports exemption).

54. *See* 34 C.F.R. § 106.41(b) (addressing legality of single-sex athletic teams under Title IX).

55. *See* Darowski, *supra* note 12, at 161 (outlining factors relevant to whether high school can prevent males from competing on female teams); George, *supra* note 45, at 1114-15 (analyzing limited historical opportunities as applicable to both male and female athletes). It is generally accepted that female athletes have historically had limited opportunities to compete in athletics, and as such, Title IX requires academic institutions to allow women to tryout for male athletic teams when there is no comparable female team. *See* George, *supra* note 45, at 1114-15.

56. *See* Darowski, *supra* note 12, at 161-62 (analyzing two different approaches to Title IX athletic opportunity requirement).

57. *See* Mularadelis v. Haldane Cent. Sch. Bd., 427 N.Y.S.2d 458, 461-62 (N.Y. App. Div. 1980) (holding athletic opportunity standard to require general review of previous athletic opportunities). In *Mularadelis*, the male plaintiff argued that Title IX required his high school to allow him to tryout for the female tennis team. *See id.* at 459. Interpreting subsection (b) of the Office for Civil Rights regulations, the court held that the language included within the section required a determination that the regulations apply to athletic opportunities on a general level, regardless of the prior opportunities afforded to compete in the specific sport at issue in the case. *See id.* at 461-62.

58. *See, e.g.*, *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 174-75 (3d Cir. 1993) (holding previously limited athletic opportunities requires general look at all athletic opportunities available at school); *Kleczek v. R.I. Interscholastic League, Inc.*, 768 F. Supp. 951, 955 (D.R.I. 1991) (holding Title IX requires general review of previous athletic opportunities); *Mularadelis*, 427 N.Y.S.2d at 463-64 (holding male opportunities not limited when school offers eleven male teams and six female teams). The court in *Kleczek* held that the plain language meaning of the Title IX regulation clearly required a general view of all athletic opportunities, not just those specific to the sport in question. *See* 768 F. Supp. at 955. Additionally, the court noted that under the evidence provided, it was clear that athletic opportunities were limited for females but not for males. *See id.* Furthermore, the court in *Williams* specifically rejected a previous holding that found males

approach, however, where they look only to the opportunities offered in a particular sport.⁵⁹ Under this standard, courts have found males to have limited opportunities in sports that have generally been geared towards female students, such as field hockey.⁶⁰

Despite the two separate approaches, courts have generally adopted the first, broad approach.⁶¹ As a result, courts across the country have interpreted Title IX to not require academic institutions to allow male athletes to tryout for female sports teams.⁶² This approach is consistent with the view that Title IX reduces male athletic opportunities; however, there are several commentators who still believe that there is an underlying bias in athletics against women.⁶³ While participation rates for female athletes are at an all-time high, these commentators suggest that Title IX has not fully addressed the long history of discrimination against female athletes.⁶⁴

C. *The Massachusetts Interscholastic Athletic Association*

1. *Organizational Structure*

The MIAA is a private, nonprofit organization comprised of 372

to have limited athletic opportunities simply because females could theoretically tryout for all sports teams under Title IX while males could only tryout for the male teams. *See* 998 F.2d at 175. The court stated that athletic opportunities means “real opportunities” not illusory ones. *See id.*

59. *See* *Gomes v. R.I. Interscholastic League*, 469 F. Supp. 659, 665 (D.R.I.) (holding previously limited athletic opportunities requires analysis of opportunities available in particular sport in question), *vacated*, 604 F.2d 733 (1st Cir. 1979).

60. *See id.* (holding limited athletic opportunities for males in volleyball). In an attempt to avoid a question of constitutional validity in its interpretation, the court in *Gomes* held that athletic opportunities for males to compete in volleyball had been severely limited, and Title IX therefore required the school to offer males an opportunity to compete on the female team. *See id.*

61. *See supra* note 58 (describing multiple courts’ interpretation of limited athletic opportunity regulation).

62. *See supra* note 58 (providing decisions where Title IX not interpreted to mandate male participation on female teams).

63. *See* Aaron J. Hershtal, Note, *Does Title IX Work After School? California Applies the Three Part Test to Municipal Sports*, 12 *CARDOZO J.L. & GENDER* 653, 661 (2006) (discussing Commission of Opportunity in Athletics 2002 report on Title IX impact). In 2002, the United States Secretary of Education commissioned a review on the impact of Title IX and its effect on gender equality in athletics. *See id.* The Commission’s report identified one of the main areas of concern as the reduction in male athletic opportunities. *See id.* Two prominent female members, however, Olympians Julie Foudy and Donna de Varona, resigned from the commission and authored their own minority report. *See id.* According to this minority report, there continues to be an underlying bias against females in athletics and “[t]he dramatic increases in participation at both the high school and college levels since Title IX was passed show that when doors are opened to them, women and girls will rush through.” Donna de Varona & Julie Foudy, *Minority Views on the Report of the Commission on Opportunity in Athletics*, NAT’L WOMEN’S L. CTR. 3 (Feb. 26, 2003), <http://www.nwlc.org/sites/default/files/pdfs/MinorityReportFeb26.pdf>.

64. *See* Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 *U. MICH. J.L. REFORM* 13, 18-22 (2001) (discussing limits to positive effects of Title IX on female athletics). Professor Brake suggests that societal factors continue to lead educational institutions to provide more, and qualitatively distinct, opportunities to male athletes at the expense of female athletes. *See id.* at 19.

Massachusetts secondary schools.⁶⁵ It is a self-governing organization that coordinates and promotes education-based programs for high school students.⁶⁶ An overwhelming majority of Massachusetts's secondary schools are members of the MIAA and, by delegation of authority by their local school committees, agree to adhere to MIAA rules and regulations regarding competitive sports.⁶⁷

Since 1950, the Massachusetts Interscholastic Athletic Council (MIAC), whose members are drawn from a combination of statewide school committees, superintendents, administrators, and principals, has acted as both the rulemaking and appellate body of the MIAA.⁶⁸ Through its role as the rulemaking body, the MIAC is responsible for the rules governing all aspects of Massachusetts interscholastic athletics.⁶⁹ In addition to the MIAC, the MIAA Board of Directors also plays a critical role in the rulemaking process, as they are responsible for recommending changes in the rules to the MIAC.⁷⁰ The Board of Directors, with sixteen voting members, also holds the enforcement power and can impose a variety of sanctions on offending member schools and student athletes.⁷¹

2. *Historical Evolution of Mixed Gender Teams*

Prior to 1976, the MIAA took a harsh stance against males and females competing on the same athletic team, as the rules provided for strict gender segregation.⁷² In 1976, however, in response to regulations instituted by the State Board of Education and the adoption of the Massachusetts ERA, the MIAA adjusted its stance on strict gender segregation and amended its rules so that a student could not be prohibited from team tryouts as a result of his or her gender unless the school offered a “separate but equal” team.⁷³ In accordance

65. See *What is the MIAA?*, MASS. INTERSCHOLASTIC ATHLETIC ASS'N 1 (Sept. 2, 2014), http://www.miaa.net/gen/miaa_generated_bin/documents/menu/ASSOCIATIONPROFILE9214.pdf (explaining purpose and organizational structure of MIAA).

66. See *id.* “The mission of the Massachusetts Interscholastic Athletic Association is to serve member schools and the maximum number of their students by providing leadership and support for the conduct of interscholastic athletics which will enrich the educational experiences of all participants.” *Id.* at 3.

67. See *Attorney Gen. v. MIAA*, 393 N.E.2d 284, 286 (Mass. 1979) (outlining significance of MIAA in Massachusetts interscholastic athletics). All member schools pay dues to the MIAA in accordance with their student populations. See *id.*

68. See *MIAA HANDBOOK*, *supra* note 13, at 14 (describing rule making and governing process of MIAA).

69. See *MIAA*, 393 N.E.2d at 286 (describing function of MIAC). Rules promulgated by the MIAC include, for example, practice time, recruitment, age requirements, academic eligibility, and residence requirements. See *id.*

70. See *MIAA HANDBOOK*, *supra* note 13, at 14 (describing administrative function of MIAA Board of Directors).

71. See *id.* (providing rule enforcement powers to the MIAA Board of Directors).

72. See *MIAA*, 393 N.E.2d at 287 (describing historical evolution of MIAA stance on males and females competing on same athletic team).

73. See *Attorney Gen. v. MIAA*, 393 N.E.2d 284, 287 (Mass. 1979) (analyzing MIAA 1976 rule change on gender segregation). The 1976 revision implemented a three-part rule that closely mirrored rules 6.02, 6.07,

with the rule change, schools throughout Massachusetts began to allow male students to participate on female teams when the school did not offer a corresponding male team.⁷⁴ This practice motivated the Massachusetts Division of Girls' and Women's Sports to protest the new MIAA rule and file lawsuits designed to prevent teams with male athletes from competing in female state tournaments.⁷⁵

Allegedly in response to the pressure created by the Massachusetts Division of Girls' and Women's Sports, the MIAA Board of Directors recommended to the MIAC that a subdivision be added to the 1976 revision that would prohibit males from competing on female teams, while at the same time allowing females to compete on male teams.⁷⁶ The MIAC adopted the proposed subdivision, which became effective on July 1, 1978, and provided that: "With due regard to protecting the welfare and safety of all students participating in MIAA athletics: 1) No boy may play on a girls' team. 2) A girl may play on a boys' team if that sport is not offered in the school for the girl."⁷⁷ Following passage of this new subsection, several schools found themselves in a difficult position; the schools had begun to allow boys to compete on female teams for which there were no male counterpart—in accordance with the 1976 revision—but were now found to be in violation of the new rule.⁷⁸ To further complicate matters, the MIAA issued an interpretative memorandum stating that all schools remaining in violation of the new subsection would be required to record each contest where the rule was violated as a loss.⁷⁹ Several schools

and 6.08 promulgated by the Board of Education. *See id.* at 287 n.9. The preceding rules by the Board of Education essentially legitimate "separate but equal" teams. *See id.* at 286 n.6.

74. *See id.* at 287 (describing MIAA member schools' response to 1976 revision). For example, Newton South High School allowed two male students to compete on the female softball team, as no male interscholastic softball teams were available. *See id.*

75. *See id.* (examining Massachusetts Division of Girls' and Women's Sports response to 1976 rule revision). One such lawsuit was filed in hopes of preventing the Newton South softball team from competing in the state softball tournament, however, the court denied the temporary restraining order. *See id.* at 287 n.10.

76. *See id.* (recognizing MIAA Board of Directors recommendation to MIAC). The MIAA claimed to work closely with the Board of Education in consideration of the new subdivision; however, it was also suggested that the rule change was promulgated in response to the pending litigation in opposition to the current rule. *See id.* at 287 n.11.

77. *See MIAA*, 393 N.E.2d at 287 (describing Rule 17, subdivision D, adopted by MIAA on July 1, 1978). Of particular interest is that the MIAA explicitly used the safety of the student athletes as the purported justification for the addition of subdivision D. *See id.*

78. *See id.* at 287-88 (discussing various schools in violation of MIAA rules after addition of new subsection in 1978). For example: Easthampton High School was allowing males to compete on the female swim team because the school did not offer boys swimming; Pioneer Valley Regional High School was allowing males to compete on the female field hockey team; and Amherst Regional, Greenfield, and Northampton high schools were all allowing males to compete on the female volleyball team. *See id.*

79. *See Attorney Gen. v. MIAA*, 393 N.E.2d 284, 288 (Mass. 1979) (describing MIAA interpretation of 1978 subdivision prohibiting males from competing on female teams). Issued on October 31, 1978, the interpretative memorandum stated "(s)chools [sic] with girls' teams on which a boy or boys participated during any interscholastic competition must record each contest where 17-d-1 was violated as a loss." *Id.* (alteration in original).

approached the MIAA to receive a waiver of the rule, but their requests were ultimately denied.⁸⁰

D. Supreme Judicial Court's Response to MIAA Regulations

1. Prohibiting Females from Competing on Male Teams

The Massachusetts courts first addressed the issue of gender-based separation on high school athletic teams in the 1977 *Opinion of the Justices to the House of Representatives*.⁸¹ The Massachusetts House of Representatives asked the Supreme Judicial Court to address the constitutionality of a proposed bill that would prohibit females from competing with males in the contact sports of football and wrestling.⁸² Specifically concerned with the constitutionality of the proposed bill in regards to the newly enacted ERA, the court—in following the precedent set forth in *King*—applied a strict scrutiny standard of review in which the proposed bill would be permissible only if it furthered a demonstrably compelling state interest and limited its impact as narrowly as possible.⁸³

Following the opinions of several state and federal courts, the Supreme Judicial Court held that the absolute prohibition of all females from voluntarily competing in a particular sport was unconstitutional.⁸⁴ The court concluded that such an absolute prohibition served no compelling state interest.⁸⁵ The court, however, explicitly noted that it expressed no opinion at the time on whether a statute that was more limited in its impact would serve a compelling state interest.⁸⁶

80. *See id.* (examining effects of 1978 rule on MIAA member schools and student athletes).

81. 371 N.E.2d 426, 427 (Mass. 1977) (discussing participation of girls with boys in high school sports).

82. *See id.* at 427 (addressing constitutionality of proposed legislation prohibiting females from competing on male contact sports teams). The bill was proposed as an amendment to General Laws ch. 76, § 5, which prohibits exclusion on account of gender from the advantages and privileges of the course of study in a public school. *See id.*

83. *See id.* (articulating standard of review applicable when addressing constitutionality of legislation in alleged violation of ERA). The court reiterated the notion that the ERA was adopted at a time when gender-based classifications were already subject to a standard of review somewhere between rational basis and strict scrutiny, and therefore to provide any effect to the adoption of an ERA, a strict scrutiny test is required. *See id.* at 428.

84. *See id.* at 429-30 (holding absolute ban on females from competing in male contact sports unconstitutional under Massachusetts ERA); *see also* Commonwealth by Packel v. Pa. Interscholastic Athletic Ass'n, 334 A.2d 839, 841 (Pa. Commw. Ct. 1975) (invalidating rule prohibiting females from competing against males in any athletic contest); *Darrin v. Gould*, 540 P.2d 882, 883-84 (Wash. 1975) (holding regulation prohibiting girls from competing in interscholastic contact football unconstitutional under state ERA). *But see* *Cape v. Tenn. Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 794 (6th Cir. 1977) (upholding school rule prohibiting females from competing on male team when no female equivalent).

85. *See Opinion of the Justices to the House of Representatives*, 371 N.E.2d at 429-30 (applying strict scrutiny standard of review to prohibition of females from male contact sports teams).

86. *See id.* (leaving possibility open that more limited statute might pass constitutional review under Massachusetts ERA).

2. *Prohibiting Males from Competing on Female Teams*

In response to the ever-changing MIAA regulations, the State Board of Education, in connection with the Attorney General, brought suit in 1979 against the MIAA to combat its prohibition against males competing on female teams in *Attorney General v. Massachusetts Interscholastic Athletic Association*.⁸⁷ Addressing the constitutionality of the ban in light of the recently enacted Massachusetts ERA, the court immediately noted its skepticism of the rule by declaring that it “attacks a small problem with heavy artillery,” and that in most cases, “‘separate but equal’ teams” adequately accommodates both sexes.⁸⁸ Despite the initial skepticism, however, the court did recognize that the MIAA rule and its proposed justifications presented the need for a separate constitutional review from that provided to the proposed legislation in the recently decided *Opinion of the Justices*.⁸⁹ The challenged legislation in *Opinion of the Justices*, proposing a ban on females athletes competing on male athletic teams, has been routinely rejected on constitutional grounds in courts throughout the country.⁹⁰

Following the lead of the U.S. Supreme Court, the court considered whether a lighter standard of review should be applied because a remedial explanation was offered for the gender-based classification; however, the court ultimately concluded that under the ERA any purported justification must be weighed with “great care.”⁹¹ As a result, the court applied the now familiar strict

87. See 393 N.E.2d 284, 285 (Mass. 1979) (addressing procedural background leading to constitutional challenge of MIAA rule 17, subsection d).

88. See *id.* at 288 (noting relatively small impact of challenged rule). *Contra* Clark v. Ariz. Interscholastic Ass’n, 886 F.2d 1191, 1193 (9th Cir. 1989) (comparing ban on males competing on female volleyball team to goal of equal athletics participation). In stark contrast to the Massachusetts Supreme Judicial Court, the Ninth Circuit declared that while the issue of males competing on female teams might be small in numbers, by simply having one female athlete displaced by a male, the goal of equal participation is hampered. See *id.*

89. See *MIAA*, 393 N.E.2d at 289-91 (recognizing purported justifications for male exclusion differ from those offered for female exclusion); see also Dirx, *supra* note 11, at 427-28 (describing justifications for exclusion of males from female teams). Courts have generally recognized two justifications for the exclusion of males from female teams: protecting female athletes from injury and encouraging the growth of female athletics. See Dirx, *supra* note 11, at 427-28. Neither of these justifications are pertinent to the exclusion of females from male teams. See *id.* at 428.

90. See, e.g., Brenden v. Indep. Sch. Dist., 477 F.2d 1292, 1302 (8th Cir. 1973) (rejecting Minnesota high school rule prohibiting females from competing on male teams); Morris v. Mich. State Bd. of Educ., 472 F.2d 1207, 1209 (6th Cir. 1973) (affirming district court decision allowing females to compete on noncontact male teams); Leffel v. Wis. Interscholastic Athletic Ass’n, 444 F. Supp. 1117, 1123 (E.D. Wis. 1978) (finding violation of Equal Protection Clause through ban on females competing on male teams). Courts generally reject the outright ban of females competing on male athletic teams regardless of whether the state has adopted an ERA. See *MIAA*, 393 N.E.2d at 289.

91. See *MIAA*, 393 N.E.2d at 293 (explaining standard required under ERA); see also Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287-305 (1978) (discussing standard of review applicable to affirmative action justification for classification). The justices of the Court were unable to reach a consensus on the level of review to apply. See *Bakke*, 438 U.S. at 287-305; see also Dunn v. Blumstein, 405 U.S. 330, 335 (1972) (suggesting multi-factored standard of review); *MIAA*, 393 N.E.2d at 292-93 (discussing standard of review

scrutiny standard of review found in both *King* and *Opinion of the Justices*.⁹² After settling on the appropriate level of constitutional review, the court then addressed each of the three purported justifications for the MIAA rule: sex as a proxy for function, safety, and protection of girls' participation in sports.⁹³ Promptly dismissing all three, the court held that the outright exclusion of males from female teams was not narrowly tailored to a necessary state interest and was therefore unconstitutional under the Massachusetts ERA.⁹⁴

The MIAA's first defense proffered that the prohibition was not governed by the ERA because the classification was based on biological differences, not gender.⁹⁵ Recognizing that some biological circumstances provide athletic

applied to affirmative action justification). While the court did recognize some legitimacy in using Justice Marshall's multi-factored test when assessing gender-based athletic classifications, the court ultimately concluded that the Massachusetts ERA demanded a strict scrutiny level of review. *See MIAA*, 393 N.E.2d at 292 n.33.

92. *See MIAA*, 393 N.E.2d at 291 (articulating standard of review applicable to ERA challenge). *But see Kleczek v. R.I. Interscholastic League, Inc.*, 612 A.2d 734, 738 (R.I. 1992) (applying intermediate scrutiny to gender classifications affecting athletic opportunities). While the Rhode Island Constitution also specifically mentions gender-based classifications within its equal protection clause, the Supreme Court of Rhode Island disagreed with the analysis presented in *MIAA* and held that intermediate scrutiny is the correct standard for gender classifications affecting athletic opportunities. *See id.*

93. *See Attorney Gen. v. MIAA*, 393 N.E.2d 284, 293-96 (Mass. 1979) (articulating three MIAA justifications for use of gender-based classification).

94. *See id.* at 296 (holding MIAA ban on males competing on female teams unconstitutional under Massachusetts ERA). The court was unclear as to whether there was a legitimate state interest in protecting female participation in athletics. *See id.* Focusing instead on the lack of narrow tailoring, the court only mentioned that "[u]ndoubtedly there is a problem here which is entitled to sympathetic consideration and to the extent necessary may even call for 'affirmative action.'" *Id.* *But see Clark v. Ariz. Interscholastic Ass'n*, 886 F.2d 1191, 1194 (9th Cir. 1989) (holding Arizona Interscholastic Association rule requiring single-sex volleyball teams constitutional under federal Equal Protection Clause); *Petrie v. Ill. High Sch. Ass'n*, 394 N.E.2d 855, 864-65 (Ill. App. Ct. 1979) (upholding ban on males competing on female volleyball team using strict scrutiny review); *Me. Human Rights Comm'n v. Me. Principals Ass'n*, No. CV-97-599, 1999 Me. Super. LEXIS 23, at *16 (Me. Super. Ct. Jan. 21, 1999) (suggesting substantial relationship between excluding males from female field hockey teams and equal opportunities for females); *Mularadelis v. Haldane Cent. Sch. Bd.*, 427 N.Y.S.2d 458, 463-64 (N.Y. App. Div. 1980) (holding exclusion of males from female tennis team does not violate federal equal protection); *Kleczek*, 612 A.2d at 739 (suggesting prohibiting males from competing on female field hockey team constitutional under intermediate scrutiny). Applying the Federal Equal Protection Clause, the Ninth Circuit in *Clark* utilized intermediate scrutiny to uphold the ban on male athletes from competing on female volleyball teams. *See* 886 F.2d at 1194. The court in *Petrie*, however, utilized the strict scrutiny standard of review, as required under the Illinois Constitution for gender-based classifications. 394 N.E.2d at 862. Unlike the Massachusetts Supreme Judicial Court, however, the court in *Petrie* focused more heavily on the nature of the state interest, and it held that to provide the exact same athletic opportunities to males as to females would be detrimental to the compelling state interest of equalizing athletic opportunities between genders. *See id.* at 864. As a result, the court determined that the ban on males from competing on female volleyball teams withstood strict scrutiny review and was constitutional under the Illinois Constitution. *See id.*

95. *See MIAA*, 393 N.E.2d at 293 (articulating biological justification for rule 17, subsection d); *see also Me. Human Rights Comm'n*, 1999 Me. Super. LEXIS 23, at *14 ("High school age boys are, as a group, bigger, faster and stronger and more powerful than high school girls. Physiologically they have superior cardiovascular endurance and aerobic capacity."); *Greene, supra* note 53, at 155 (suggesting physical attributes sufficient justification under intermediate scrutiny).

advantages to males, the court held that such differences were not significant enough to justify the broad use of gender as a proxy for a functional classification.⁹⁶ To avoid an “archaic and overbroad generalization,” the court concluded that a classification based on biological differences between the sexes should instead reference the specific skill variances in particular sports that provide an advantage to one group of athletes over the other.⁹⁷

The court also struck down the MIAA’s safety justification because the organization did not provide sufficient evidence to support this claim.⁹⁸ The court noted that a female, just like a male, should be entitled to take a risk, as “[a]ny notion that young women are so inherently weak, delicate or physically inadequate that the state must protect them from the folly of participation in vigorous athletics in a cultural anachronism unrelated to reality.”⁹⁹ Additionally, even if the court accepted that females were at a greater risk of injury when competing with males, under strict scrutiny review the

96. See *MIAA*, 393 N.E.2d at 293 (rejecting biological justification for gender-based classification). The court suggested that for such a justification to withstand constitutional scrutiny, all high school males must outperform all high school females in all athletic activities. See *id.* But see *Kleczek*, 612 A.2d at 738 (noting innate physiological differences between males and females); *Petrie*, 394 N.E.2d at 861 (“The evidence in this case, much like in *Gomes*, showed that, in general, high school boys are substantially taller, heavier and stronger than their girl counterparts and have longer extremities.”); *Woods*, *supra* note 1, at 902 (suggesting court overlooked “strength differential between males and females of corresponding weight or height”). The court in *Kleczek* concluded that innate physiological differences between males and females justify some gender classifications that can be based on reasoned judgment rather than prejudice. See 612 A.2d at 738. Furthermore, it has been suggested that the court in *MIAA* “ignore[d] objective evidence regarding physical differences between the sexes which generally advantage males on the same playing field.” *Woods*, *supra* note 1, at 902.

97. See *MIAA*, 393 N.E.2d at 293 (suggesting successful classification based on physical differences). The court conceded that certain biological differences such as strength and speed often provide males with an athletic advantage, however, it also recognized certain skills crucial to athletic success such as coordination, concentration, technique, or form that can favor either gender. See *id.* *Contra Petrie*, 394 N.E.2d at 862 (addressing feasibility of teams based upon physical characteristics as opposed to gender). In *Petrie*, the court discussed the possibility of using physical characteristics as a classifying factor, as suggested in *MIAA*, in the context of high school volleyball. See *id.* The court concluded that while height could be used as such a measure in volleyball, it would cause great hardship to taller girls who did not have the musculature to compete with taller boys. See *id.* As a result, the court held that to truly use physical characteristics as a means of matching athletic potential would be too difficult to implement and regulate. See *id.* Recognizing that classifications based on gender are both overbroad and underbroad, the court concluded that gender was “the only feasible classification to promote the legitimate and substantial state interest of providing for interscholastic athletic opportunity for girls.” See *id.* The use of gender was “based on the innate physical differences between the sexes” and was therefore not an archaic generalization based on “romantic paternalism.” *Id.* (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)).

98. See *MIAA*, 393 N.E.2d at 294 (rejecting safety justification for prohibition of male athletes on female athletic teams). The MIAA provided a statement by a medical advisor that purported to show a higher probability of injuries to female athletes when competing with males. See *id.* The court found this report to be inconclusive because it was full of stereotypical assumptions and generalities. See *id.*

99. See *Attorney Gen. v. MIAA*, 393 N.E.2d 284, 294 (Mass. 1979) (quoting *Hoover v. Meiklejohn*, 430 F. Supp. 164, 169 (D. Colo. 1977)) (providing justification for rejection of safety objective). The court compared the safety justification to the proposed legislation in *Opinion of the Justices*, noting that “[a] girl is surely not less exposed to injury as a member of a predominantly male team, than as one of a team predominantly female but with some male players.” *Id.*

classification must be narrowly tailored, and in the present case the rule includes sports in which safety is not of great concern and can therefore not be narrowly tailored to the safety justification.¹⁰⁰

Finally, addressing the affirmative action justification in which a gender-based classification is necessary to protect female participation in athletic competition, the court concluded that the absolute ban of male athletes was disproportionate to any potential danger.¹⁰¹ By instituting an absolute ban, the court assumed that some males with skill sets particularly suited to traditionally female sports would be left without an option to compete in competitive athletics.¹⁰² The court never concluded that the protection of female participation in athletics was not a compelling state interest; instead the court focused solely on the second prong of the strict scrutiny review, emphasizing that other, less restrictive methods were available to protect this interest.¹⁰³

100. See *id.* (noting safety justification not narrowly tailored as required under strict scrutiny review). The court specifically listed sports such as golf, gymnastics, swimming, and tennis where there is no greater risk of physical injury when males and females compete together. See *id.*

101. See *id.* (rejecting protection of girls' participation as justification for prohibition of males on female teams). But see Tracy J. Johnson, Comment, *Throwing Like a Girl: Constitutional Implications of Title IX Regarding Gender Discrimination in High School Athletic Programs*, 18 N. ILL. U. L. REV. 575, 598 (1998) (stating affirmative action justification in *Clark*). By upholding the ban on males competing on female volleyball teams in *Clark*, the Ninth Circuit concluded that if males were allowed to compete there would be a displacement of female athletes resulting in a negative impact on the ultimate goal of gender equality in athletics. See *id.*

102. See *MIAA*, 393 N.E.2d at 294 n.37 (addressing negative effect on male athletes of absolute ban instituted by rule 17, subsection d).

In contrast to various sports common to boys and girls from which the rule would exclude boys only if their school had no boys' teams, in the sports named [(field hockey and softball)] the rule means no possibility of male participation although for some boys there may be no other avenue to competitive athletics.

Id. But see Lisa M. Rufolo, Note, *Constitutional Law—Discrimination in High School Athletics—Court Prohibits Boys From Playing on Girls' Teams—B.C. on Behalf of C.C. v. Cumberland Regional School District*, 220 N.J. Super. 214, 531 A.2d 1059 (App. Div. 1987), 1 SETON HALL J. SPORT L. 325, 338 (1991) (suggesting equal protection not violated because one group granted privileges over another).

103. See *MIAA*, 393 N.E.2d at 295 (articulating less restrictive methods to ensure female participation in athletics). Such measures include: use of standards focusing on physical characteristics, limiting the number of males that could participate on a female team, and limiting the number of males that could compete in a game. See *id.* But see *Clark v. Ariz. Interscholastic Ass'n*, 886 F.2d 1191, 1194 (9th Cir. 1989) (quoting *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982)) (holding ban substantially related to state interests of equal opportunity and "redressing past discrimination"); Woods, *supra* note 1, at 902-03 ("Furthermore, the existence of various alternatives to the complete exclusion of boys does not mean that the required substantial relationship does not exist to sustain the gender-based classification at issue."). While the Ninth Circuit in *Clark* appeared to be utilizing an intermediate scrutiny level of review under the Federal Equal Protection Clause, it concluded that a substantial relationship did exist between the prohibition of males competing on female teams and the two state interests of promoting gender equality in athletics and redressing the past discrimination against females in high school athletics. See 886 F.2d at 1193-94.

E. Athletic Participation Through the Years

When the Massachusetts Supreme Judicial Court decided *MIAA* in 1979 there were approximately 3,517,829 male high school athletes in the United States, compared to 1,750,264 female athletes.¹⁰⁴ Approximately sixty-six percent of all athletes were male, and thirty-four percent were female.¹⁰⁵ According to a recent participation survey conducted during the 2011-2012 academic year, there are 4,484,987 male high school athletes competing today, compared to 3,207,533 female athletes.¹⁰⁶ This creates a ratio of approximately fifty-eight percent male athletes to forty-two percent female athletes.¹⁰⁷ While significant historical information on the number of males competing on female teams is not readily available, Massachusetts has seen a steady rise of male athletes competing on female field hockey teams over the past ten years, increasing from a low of eighteen in the 2000-2001 academic year to a high of thirty-six in the 2009-2010 season.¹⁰⁸

III. ANALYSIS

This section will suggest that the MIAA should revisit their regulation enabling male athletes to compete on female athletic teams; and it should attempt to devise a standard that complies with the strict scrutiny level of review required by the state-enacted ERA but at the same time more closely conforms with preexisting federal regulation of gender equality in athletics.¹⁰⁹ Both the federally enacted Title IX legislation and the Massachusetts ERA seeks the same overall objective when applied to athletics: to promote gender equality throughout athletic competition.¹¹⁰ While the issue of males competing on female athletic teams is narrow in scope, regulation is necessary

104. See *2011-12 High School Athletics Participation Survey*, NAT'L FED'N OF STATE HIGH SCH. ASS'NS, <http://www.nfhs.org/ParticipationStatics/PDF/2011-12%20Participation%20Survey.pdf> (last visited Oct. 24, 2014) (providing historical high school athletics participation data). While the National Federation of State High School Associations does not supply historical data by state, provided the similar participation breakdown currently seen between states it is likely safe to assume that Massachusetts had a similar participation discrepancy between male and female athletes during the 1979 academic year. See *id.*

105. See *id.* (representing a substantial disparity between male and female athletes competing on high school athletic teams).

106. See *id.*

107. See *id.* (suggesting substantial increase in female athletic participation since *MIAA* decision in 1979).

108. See *2000-2001 MIAA Participation Totals*, MASS. INTERSCHOLASTIC ATHLETIC ASS'N, http://www.miaa.net/gen/miaa_generated_bin/documents/basic_module/Participation200001.pdf (last visited Oct. 24, 2014) (providing breakdown of male and female athletes competing in Massachusetts in 2000-2001); *2009-2010 Athletics Participation Survey*, MASS. INTERSCHOLASTIC ATHLETIC ASS'N, http://www.miaa.net/gen/miaa_generated_bin/documents/basic_module/participationsurveyresults0910.pdf (last visited Oct. 24, 2014) (outlining male and female athletic participation in 2009-2010).

109. See *infra* Part III.B.2 (proposing MIAA regulation narrowly tailored to state interest of fostering female participation in athletics).

110. Compare MASS. CONST. pt. 1, art. I (advocating for gender equality throughout Massachusetts), with 34 C.F.R. § 106.41 (2014) (requiring gender equality throughout interscholastic athletic programs).

because the issue can have a profound impact on those affected and can directly contradict the gender-equality objective of Title IX and the Massachusetts ERA.¹¹¹

A. Why is there a Need for Change?

1. Conflict between ERA and Title IX

Gender-based classifications within Massachusetts high school athletics create a unique legal problem because both equal protection and Title IX converge to govern their legality.¹¹² Courts across the country have interpreted the federally enacted Title IX legislation, which was specifically designed to address gender equality in athletics, in a manner that enables educational institutions to exclude males from participation on female teams.¹¹³ In direct contrast to the federal regulation, however, Massachusetts, under its state-adopted ERA, has applied a strict scrutiny level of review to strike down such exclusions.¹¹⁴ Rather than offering a conflicting standard, the MIAA should adopt a regulation that more closely conforms with federal regulations.¹¹⁵

Title IX was enacted in 1972 with the specific objective of providing greater opportunities for females in the academic sphere.¹¹⁶ To carry out this objective within the athletic environment, a specific section within the regulation was devoted to gender-equality in athletics.¹¹⁷ This represented an explicit attempt

111. See *supra* note 88 and accompanying text (comparing narrow scope of issue with negative impact on equal opportunity for female athletes); see also Reilly, *supra* note 9 (articulating impact of male athletes competing on female field hockey teams in Massachusetts). In the 2001 academic year, seven of the twenty-one female field hockey teams in western Massachusetts contained at least one male athlete. See Reilly, *supra* note 9. Additionally, two of the previous three female state champion field hockey teams started at least one male player. See *id.*

112. See Dirckx, *supra* note 11, at 424-27 (discussing inherent contradiction between Title IX and the Equal Protection Clause); see also Cohen, *supra* note 41, at 247 (suggesting Title IX provides greater protection against gender discrimination than Equal Protection Clause). While the Equal Protection Clause follows a formal equality doctrine, Title IX goes beyond formal equality to look at substantive equality. See Cohen, *supra* note 41, at 263. “Theories of substantive equality look to ‘a rule’s results or effects’ and ‘take account of [sex-associated] differences to avoid differential impacts that are considered unfair.’” *Id.* (alteration in original).

113. See *supra* note 58 and accompanying text (articulating refusal to extend Title IX protection to males competing on female athletic teams).

114. See Attorney Gen. v. MIAA, 393 N.E.2d 284, 296 (Mass. 1979) (utilizing strict scrutiny under ERA to hold exclusion of male athletes from female teams unconstitutional). But see Greene, *supra* note 53, at 168-69 (suggesting potential negative impact on male athletes necessary to fully support women’s athletics).

115. See Rufolo, *supra* note 102, at 336-37 (suggesting conflict between holding in *MIAA* and overall goal of Title IX). While Title IX directed its focus toward achievement of overall equal athletic opportunities between the genders, the holding in *MIAA* attempts to create equal athletic opportunity in each individual sport. See *id.* at 336.

116. See *supra* note 44 and accompanying text (describing gender-based discrimination against females in academic sphere leading to adoption of Title IX).

117. See 34 C.F.R. § 106.41 (2014) (enforcing gender equality goals of Title IX in context of interscholastic athletics); see also Demery, *supra* note 22, at 377-78 (describing specific focus Congress placed

by the federal government to encourage the “development of athletic programs that substantially expand opportunities for women to participate and compete at all levels” and to provide overall equal opportunities in athletic programs.¹¹⁸ The federal government believed that the achievement of equal opportunity in athletics did not require the participation of males in female athletic programs.¹¹⁹ Rather, as a result of the significant participation gap between male and female participation in athletics and the historically limited opportunities afforded to female athletes, equal opportunity required providing more opportunities for females to participate.¹²⁰

In contrast to the Title IX legislation, the Massachusetts ERA was adopted with the general goal of providing gender equality throughout Massachusetts without a specific focus on one arena.¹²¹ Therefore, while both Title IX and the Massachusetts ERA seek the same end result of gender equality, Title IX was narrowly tailored to achieve that result within the athletic sphere.¹²² Utilizing the broad-sweeping ERA, the court in *MIAA* reached the opposite conclusion to that of Title IX with respect to male participation on female teams.¹²³ As a result, while Title IX specifically focuses on building female participation in athletics and providing for overall equal opportunities, the conclusion reached by the Massachusetts Supreme Judicial Court interferes with that goal by

on applying Title IX legislative goals to athletic sphere). Provided the initial concern over the application of Title IX to athletic programs, Congress commissioned DHEW to create regulations specifically designed to eliminate gender-based discrimination in athletics. *See* Demery, *supra* note 22.

118. Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979) (developing guidelines to enhance gender-equality in athletics). DHEW recognized that to create equal opportunity across athletic programs there would be some instances where not all specific aspects of male and female athletic programs would be equivalent. *See id.* at 71,415; *see also* Hershtal, *supra* note 63, at 661 (describing 2002 commission evaluating impact of Title IX). The federal government has shown continued devotion towards the achievement of gender-equality in athletics, commissioning a 2002 study on the impact of Title IX and possible improvements that could be made to further the legislation’s goals. *See* Hershtal, *supra* note 63.

119. *See supra* note 58 and accompanying text (providing sample of court decisions interpreting Title IX’s historically limited opportunities standard). Looking at the plain language of the Title IX regulation, courts have interpreted the “and athletic opportunities for members of that sex have previously been limited” language to refer to athletic programs as a whole, and because male athletes have routinely maintained a higher participation rate than females, courts have held that the regulation does not require an academic institution to allow male athletes to tryout for female teams. *See Kleczek v. R.I. Interscholastic League, Inc.*, 768 F. Supp. 951, 955 (D.R.I. 1991) (interpreting Title IX as it applies to males competing on female teams).

120. *See* George, *supra* note 45, at 1114-15 (articulating Title IX requires academic institutions to allow females to tryout for male teams).

121. *See supra* note 37 and accompanying text (suggesting ERA was adopted to improve constitutional protection for equal rights of women).

122. *Compare supra* Part II.A.3 (discussing ERAs attempt to generally enhance equal rights of women), with *supra* Part II.B.2 (describing specific measures of Title IX to combat gender discrimination in athletics).

123. *Compare* Attorney Gen. v. MIAA, 393 N.E.2d 284, 296 (Mass. 1979) (holding exclusion of male athletes from female athletic teams unconstitutional under ERA), with *Mularadelis v. Haldane Cent. Sch. Bd.*, 427 N.Y.S.2d 458, 463-64 (N.Y. App. Div. 1980) (upholding exclusion of males from female field hockey team under Title IX).

allowing males to take away opportunities for female students to compete.¹²⁴

2. *Effect of Male Participation on Female Athletic Opportunities*

Revisiting the two examples discussed in the introduction, it is clear that the participation of males on female teams can have a profound impact on female athletes.¹²⁵ The 2010 field hockey state championship was dramatically impacted by the participation of brothers who also were members of their school's ice hockey and lacrosse teams.¹²⁶ Not only did their participation impact the playing time of other females on the team, but it also discouraged their female opponents.¹²⁷ As one opposing female described it, "I don't think it's fair at all I think boys have ample opportunities to play [other] sports."¹²⁸ She also said, "[t]hey play by the rules, but they just are naturally more physical It's a danger issue."¹²⁹ Similarly, at the 2011 Massachusetts girls' swimming and diving state championship, where eight males competed in the twenty-eight swimmer field for the fifty-yard freestyle, not only was the fastest female swimmer forced to compete in a different event, but the entire atmosphere surrounding the meet was diminished.¹³⁰ "[I]t has changed the atmosphere on the pool deck Coaches on the pool deck last weekend were going bloody out of their minds."¹³¹

124. See Rufolo, *supra* note 102, at 340 (discussing negative impact of holding in *MIAA*).

The decision of the Massachusetts court in *MIAA* was said to have had a disastrous impact on interscholastic athletics. Such a statement is not without justification, for an open door policy allowing boys to play on girls' athletic teams could cause safety problems, male dominance and intimidation of females, thereby frustrating the advances which women continue to make in sports. Collectively, these factors could lead to the displacement of girls in sports where they had previously participated.

Id. (footnotes omitted). The Executive Director of the New Jersey State Interscholastic Athletic Association noted that while the number of males competing on female teams might be small in number, their effect on the female interscholastic athletic experience has been highly detrimental. See *id.* at 340 n.118.

125. See Sweeney, *supra* note 7 (articulating impact of males competing in female state championship swim meet). According to one coach present at the 2011 Massachusetts Female Swimming and Diving State Championship, a boy's presence in the meet "changes the whole demeanor' of the event." *Id.*

126. See Cullity, *supra* note 2 (describing negative impact of males competing on female field hockey teams). The school with two males competing defeated their all-female competitors when one of the males crashed into the goaltender of the other team, scoring the game-winning goal, but giving the female goaltender a concussion in the process. See *id.*

127. See *id.* (suggesting safety concerns associated with males competing on female field hockey teams); Reilly, *supra* note 9 ("Playing with boys is awful!" one girl wrote on an Internet field hockey site. "When you win, people think it's only because of the boys on your team. It's so defeating.").

128. Cullity, *supra* note 2 (alteration in original).

129. See *id.* (addressing effect of male field hockey players on their female opponents). Nancy Hogshead-Makar, a professor at Florida Coastal School of Law, suggests that by allowing males to compete on female teams, the females will always lose opportunities. See *id.*

130. See Crouse, *supra* note 8 ("The way it is now, the boys are taking recognition away from girls who have worked hard and deserve it.").

131. *Id.* (quoting longtime coach).

B. Overcoming Strict Scrutiny Review

1. Compelling State Interest

When the Massachusetts Supreme Judicial Court approached the prohibition of male athletes competing on female athletic teams in 1979, the court never suggested that the regulation did not address a compelling state interest.¹³² Rather, the court found that the outright exclusion was simply too broad in scope to be narrowly tailored to any purported state interest.¹³³ In particular, the court's analysis of the protection of female participation in sports focused solely on available alternatives to the outright exclusion of males, suggesting that the court placed some level of credibility on this justification.¹³⁴ Recognition of this interest is also in line with opinions of courts throughout the country, which have routinely used this justification to uphold exclusions of male athletes.¹³⁵ With the significant time lapse since these cases were decided, however, it is important to look at the current high school athletics landscape to determine the applicability of this justification.¹³⁶

The nationwide participation statistics suggest that great progress has been achieved in equalizing opportunities in high school athletics.¹³⁷ In the thirty-four years since the court's decision in *MIAA*, the number of female students participating in athletics has increased by approximately 1.4 million.¹³⁸ This progress, however, does not suggest that full equal opportunity has been achieved.¹³⁹ In *Cohen v. Brown University*,¹⁴⁰ the leading case interpreting

132. See *supra* note 103 and accompanying text (observing courts focus on less restrictive methods instead of compelling state interest).

133. See *supra* note 102 and accompanying text (stating impact to males: no option to tryout for predominantly female sports). The court specifically recommended other solutions, such as the use of standards focusing on height or weight, to prevent males from displacing female athletes. See Attorney Gen. v. *MIAA*, 393 N.E.2d 284, 295 (Mass. 1979). Those solutions have been rejected by numerous courts, however, as unfeasible for any sort of practical use. See *Petrie v. Ill. High Sch. Ass'n*, 394 N.E.2d 855, 862 (Ill. App. Ct. 1979) (rejecting both height and weight based classifications).

134. See *MIAA*, 393 N.E.2d at 294 (responding to protection of female participation in athletics justification). In response to the purported justification of protecting female participation in athletics, the court merely stated that "the rule [was] out of proportion to any looming danger." *Id.*

135. See Darowski, *supra* note 12, at 176 ("[T]he courts all recognized that redressing past discrimination against girls in high school athletics is an important governmental objective.").

136. See *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (holding purported justifications should not be based on "archaic and overbroad generalizations").

137. See *supra* Part II.E (demonstrating substantial increased participation of female athletes over past thirty years).

138. *2011-12 High School Athletics Participation Survey Results*, *supra* note 104 (providing high school athletics participation data). In the 1979 academic year approximately 1,750,264 female athletes participated in high school athletics in the United States. See *id.* In 2011, that number increased to approximately 3,207,533. See *id.*

139. See Brake, *supra* note 64, at 75 (suggesting participation rate does not necessarily equate to equal opportunity). While participation rates might be steadily increasing, opportunity structure and rewards, such as resources and benefits, continue to favor male athletes throughout interscholastic athletics. See *id.*

140. 101 F.3d 155 (1st Cir. 1996).

Title IX as it applies to athletics, the First Circuit implicitly asserted that when provided with full equal opportunity to participate in athletics, females would exhibit the same level of interest in athletic participation as males.¹⁴¹ In accordance with this principle, if full equal opportunity were to be achieved in high school athletics, one would expect roughly equal participation between males and females; however, the nearly sixteen percent gap currently separating male and female participation rates suggests that full equal opportunity has yet to be reached.¹⁴²

2. Recommended Solution

Conceding that any regulation promulgated by the MIAA that differentiates on the basis of gender will have to withstand strict scrutiny review under the ERA, a regulation should be devised that is narrowly tailored to the state interest of protecting and fostering female participation in athletics.¹⁴³ Despite the aforementioned contradiction between the court's 1979 holding under the ERA and the Title IX legislation, it is unrealistic to suggest that the Supreme Judicial Court would now support an outright exclusion of all male athletes from female teams.¹⁴⁴ Therefore, in an attempt to limit the negative impact that male participation has on female athletic teams, the MIAA should adopt a regulation permitting males to compete on a female team; however, by doing so the male athlete would forfeit their opportunity to compete on any other athletic team for that academic year.¹⁴⁵ Such a regulation would likely limit the more

141. See *id.* at 178-79 (suggesting males and females have roughly equivalent interest in interscholastic athletics). The court in *Cohen* rejected Brown University's argument that females are less interested than males in competing in interscholastic athletics. See *id.* at 178. "[T]here exists the danger that, rather than providing a true measure of women's interest in sports, statistical evidence purporting to reflect women's interest instead provides only a measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports." *Id.* at 179; see also Brake, *supra* note 64, at 81 (advocating different opportunity structures provided to males and females influence their athletic interests).

142. See *supra* note 141 and accompanying text (suggesting equal athletic interests when provided with equal opportunities); see also Hershtal, *supra* note 63, at 661 (articulating 2002 report suggesting females show increased interest when provided with more opportunities); *supra* Part II.E (demonstrating substantial gap between current male and female participation rates). But see Demery, *supra* note 22, at 392-93 (suggesting increased female participation in athletics no longer important governmental interest).

143. See Attorney Gen. v. MIAA, 393 N.E.2d 284, 292-93 (Mass. 1979) (holding strict scrutiny analysis under ERA applicable to gender classification in athletic program). Of the three purported justifications offered in defense of the outright exclusion of males from female teams, the court demonstrated the most interest in the protection of female participation in interscholastic athletics. See *id.* at 294-95. But see Greene, *supra* note 53, at 136 (suggesting skills gap between male and female athletes most convincing justification). The recommendation of a skills gap justification was designed to appeal to the intermediate scrutiny level of review under the Federal Equal Protection Clause, not the strict scrutiny review required under the Massachusetts ERA. See *id.*

144. See MIAA, 393 N.E.2d at 296 (rejecting outright exclusion for lack of narrow tailoring to purported state interest); see also Sweeney, *supra* note 7 (indicating recent failure at trial court regarding attempts to limit male participation on female teams).

145. See *supra* Part III.A.2 (discussing recent negative impact of male athletes on female athletic teams); see also Greene, *supra* note 53, at 171 (advocating for strict exclusion of males from female athletic teams).

experienced athletes—such as the multi-sport brothers on the field hockey team—from participating on female teams, while simultaneously appealing to the MIAA court’s concern that an outright exclusion would prevent a male athlete with a particular interest in a primarily female sport from participating in athletics, satisfying the narrow tailoring aspect of the strict scrutiny level of review.¹⁴⁶

IV. CONCLUSION

The current MIAA regulation requiring that member secondary schools allow male–student athletes to compete on female athletic teams represents an instance where constitutional concern has overcome commonsense reasoning. The Massachusetts ERA, upon which the MIAA regulation is based, was adopted for the sole purpose of promoting gender equality. Likewise, the federally enacted Title IX legislation was implemented with the hope of achieving equal opportunities in athletic competition for both genders, creating a pseudo equal rights amendment specifically designed for athletic programs. While both ultimately attempt to reach the same result, the ERA was enacted to broadly reach all gender-based classifications while Title IX was geared specifically towards gender equality in athletics. The current MIAA regulation—in an attempt to meet the strict scrutiny requirements of the broadly designed ERA—both limits the athletic opportunities available to female students and occasionally detracts from the experience of those that are forced to compete against males, thus working against the gender equality goals of the ERA and Title IX. The regulation proposed in this Note, forcing male students to choose to compete for either male or female sports teams, attempts to alleviate some of these negative consequences while simultaneously bringing MIAA regulations closer to those contained in Title IX and adhering to the strict scrutiny requirements of the Massachusetts ERA.

Raymond Grant

Mr. Greene focuses the constitutional inquiry on the Federal Equal Protection Clause, and thus an intermediate level of review, when suggesting an outright exclusion of male athletes from female teams. *See* Greene, *supra* note 53, at 169. Through this recommendation, however, it is recognized that each time a male competes on a female team he is denying a female athlete the opportunity to compete. *See id.* at 171.

146. *See supra* note 102 and accompanying text (discussing Massachusetts Supreme Judicial Court’s concern over limited male opportunities resulting from outright exclusion); *see also* Woods, *supra* note 1, at 906-07 (advocating male participation on female teams impedes full athletic competition for females). *But see* George, *supra* note 45, at 1145 (suggesting gender-neutral athletic teams). It has been suggested that athletics should transition to the complete elimination of sex-segregated sports, making all athletic teams half male and half female. *See id.* This proposal not only contradicts the longstanding culture of American sports but would also lead to the denial of athletic opportunities to both males and females. *See* Dirx, *supra* note 11, at 435-36 (suggesting deficiencies associated with “50/50 proposal”).