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THE WOMEN'S RIGHT TO PARTICIPATE IN THE GAME OF BASEBALL

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I. INTRODUCTION

When most Americans think of women's sports and female athletes, several names generally come to mind more than the rest. Mia Hamm, Lisa Leslie, and Annika Sorenstam are certainly members of that list; as are Nancy Kerrigan, Jackie Joyner Kersee, Danica Patrick, and Michelle Wie. This country has seen female World Cup Champions on the soccer field, Olympic gold medal winners in basketball, ice skating, and figure skating, world record holders in track and field and swimming, and even a fifteen year-old girl who could play against professional male golfers. However, of all the athletes mentioned above, none are known for their prowess in the sport of baseball, America's pastime.

In the past century, women in the United States have made enormous strides in many aspects of life. Women and women's rights have progressed a great deal in a relatively short period of time: a woman's right to vote is now viewed as commonplace in the United States and is often taken for granted in twenty-first century American society. To many, it seems unfathomable that women had to wait for a constitutional amendment to be granted a right which today seems so fundamental.¹ But while women's rights have advanced rapidly in some areas, it has been far more of a struggle in other areas. One of those areas is the world of sports, specifically baseball. While the progress and success of women in sports like basketball, soccer, and golf is apparent, it is almost impossible to see any gains being made on the baseball diamond.

To aid in showing the plight of the women's right to play baseball alongside their male counterparts, I have identified and will discuss three key areas of law where this type of litigation is likely to take place. The first of those areas is Title IX of the Education Amendments of 1972.² Title IX was enacted to ensure that federal funding received by educational programs is not used to support sexually discriminatory practices.³ The statute effectively bars any educational program that

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¹ U.S. CONST. amend. XIX, § 1.

² 20 U.S.C. § 1681 (2009).

³ U.S. Dep't of Justice, Title IX of the Education Amendments of 1972, *available at* <http://usdoj.gov/crt/cor/coord/titleix.htm> (last visited Mar. 17, 2009).

receives federal funding from discriminating on the basis of sex, subject to certain enumerated exceptions.⁴

Second, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is critical to this discussion, as it declares that states may not deny persons within their jurisdictions “the equal protection of the law.”⁵ Much of the legislation in this area has centered upon the ways in which courts have interpreted the meaning of this clause. As we will see, these interpretations play a vital role in determining exactly what rights citizens have in many instances. The final piece of law that I will discuss is the Civil Rights Act of 1871.⁶ While the statute does not confer any additional substantive rights, the fact that the Civil Rights Act of 1871 does provide a private cause of action in either law or equity for violations of “any rights, privileges, or immunities secured by the Constitution” is tremendously important.⁷

After providing a legislative background, this Note will discuss some of the current roles women play in the American sports landscape and look at the history of women in the sport of baseball. I will then provide an in-depth look at much of the case law that has developed in this area. After looking at all of the different sources of law—constitutional, statutory, and case law—and the policies behind them, I will recommend how state and local governments should work with amateur baseball programs to permit and encourage more young women to get involved and participate on the baseball diamond itself.

⁴ 20 U.S.C. § 1681. “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.” *Id.*

⁵ U.S. CONST. amend. XIV, § 1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

Id.

⁶ 42 U.S.C. § 1983 (2009).

⁷ *Id.* Section 1983 reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

II. THE CURRENT STATUS OF FEMALE ATHLETES IN PROFESSIONAL SPORTS

A. The Recent Successes of Women in Other Sports

As in many areas of society, women have made tremendous strides in sports. This is evidenced by the exposure that television networks such as ESPN—which refers to itself as the “Worldwide Leader in Sports”—have been providing.⁸ In July of 2001, the network and the National Collegiate Athletic Association (“NCAA”) entered into an agreement by which ESPN agreed to televise twenty-one national collegiate championship events.⁹ Included among those twenty-one events are the Division I Women’s Basketball semifinals and championship, the Division II Women’s Basketball championship, the Division I Men’s and Women’s Indoor Track and Field championships, as well as the Division I Women’s Soccer, Swimming and Diving, Tennis, and Volleyball championships.¹⁰ The President of the NCAA, Cedric Dempsey, stated that “this new agreement allows the Association to continue its relationship with the network that has helped establish the Division I Women’s Basketball Championship as a premier event.”¹¹ Dempsey went on to discuss the importance of the greater exposure the deal brought to college sports during prime viewing hours and cited women’s basketball as a particular example.¹²

The growth of women’s sports in America—women’s basketball in particular—is also evidenced by the advent of the Women’s National Basketball Association (“WNBA”) which was approved by the Board of Governors of the National Basketball Association on April 24, 1996.¹³ The league continues to thrive today, thanks in part to some of the stars who became household names playing American college basketball, such as the University of Connecticut’s Diana Taurasi, now of the Phoenix Mercury and Louisiana State University’s Seimone Augustus, who currently plays for the Minnesota Lynx.¹⁴ The WNBA was formed in 1997 with only eight teams. Today, the league includes fourteen teams in some of America’s largest cities, including New York, Los Angeles, and Chicago.¹⁵ Through its WNBA Cares program, the league encourages young women to be active in sports and to “develop a life-long passion for the game of basketball” through partnerships with organizations like the Girl Scouts of America and the

⁸ ESPN: The Worldwide Leader in Sports, <http://espn.go.com/> (last visited Oct. 2, 2007).

⁹ Staci D., *Kramer ESPN Scores 200M Deal for NCAA Games*, CABLE WORLD, July 9, 2001, available at http://findarticles.com/p/articles/mi_m0DIZ/is_28_13/ai_76626528.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ WNBA.com, WNBA’s Greatest Moments, http://www.wnba.com/about_us/greatest_moments_020508.html (last visited Oct. 12, 2007).

¹⁴ *Id.*

¹⁵ *Id.*

YMCA.¹⁶ While the WNBA is unlikely to eclipse the men's NBA in terms of popularity and television ratings for the foreseeable future, the league is initiating and participating in many positive endeavors for young women in this country.

The growth of women's sports is further evidenced by the current state of women's soccer in America. The sport's route to success in this country has been vastly different than that of women's basketball. While the United States Men's Senior National Soccer Team has never even participated in a World Cup championship match,¹⁷ their female counterparts have enjoyed tremendous success.¹⁸ The FIFA Women's World Cup has only been played five times, but the United States team has won that tournament twice and has never failed to finish in the top three.¹⁹ By comparison, the men's team has been unable to finish in the top three in a World Cup since 1930.²⁰

Buoyed by the United States' dramatic Women's World Cup victory on American soil in 1999 and the sport's burgeoning popularity, the Women's United Soccer Association ("WUSA") was created and began play in 2001.²¹ The league was the first premier women's soccer league in history and featured many of the top female soccer players from around the world, including many recognizable stars from the U.S. Women's National Team such as Mia Hamm and Brandi Chastain.²² The eight-team league looked to build on the success of the national team and the WNBA.²³ However, the WUSA ran into financial problems and was forced to suspend its operations in September of 2003.²⁴

¹⁶ WNBA.com, WNBA Fact Sheet, http://www.wnba.com/community/WNBA_Cares_Fact_Sheet.html (last visited Oct. 12, 2007). Other aspects of WNBA Cares include the WNBA Be Smart - Be Fit - Be Yourself campaign, the WNBA Breast Health Awareness program, the Read to Achieve initiative, and the Jr. WNBA. *Id.* The WNBA Be Smart - Be Fit - Be Yourself campaign uses health and fitness-related programs to encourage women to learn more about physical fitness and the importance of it. *Id.* The Breast Cancer Awareness program focuses on generating awareness about breast cancer, WNBA teams have raised just short of two million dollars in support of the program and the fight against breast cancer. *Id.* Read to Achieve is a joint venture with the National Basketball Association that teaches the values and importance of literacy and encourages parents to read with their children. *Id.* The program is responsible for donating reading materials and creating reading centers all over the world. WNBA.com, WNBA Fact Sheet, http://www.wnba.com/community/WNBA_Cares_Fact_Sheet.html (last visited Oct. 12, 2007). The Jr. WNBA aims to develop passion for the game of basketball by encouraging participation and sportsmanship. *Id.*

¹⁷ FIFA.com, Previous FIFA World Cups, <http://www.fifa.com/worldcup/archive/index.html> (last visited Sept. 28, 2007).

¹⁸ WUSA.com, <http://wusa.com/about/> (last visited Sept. 28, 2007).

¹⁹ FIFA.com, Tournaments, <http://www.fifa.com/tournaments/archive/tournament=103/awards/index.html> (last visited Sept. 28, 2007).

²⁰ FIFA.com, *supra* note 17.

²¹ WUSA.com, *supra* note 18.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

All hope is not lost for professional women's soccer in America, however, as re-launch efforts are in full swing and appear to be making some headway.²⁵ With the help of an organization known as the Women's Soccer Initiative, Inc. ("WSII") whose function is to aid in the revival of professional women's soccer in the United States, the WUSA announced in April 2007 that the league was planning to resume play in 2008 in eight American cities.²⁶ It now appears that professional women's soccer will not return to the United States until the spring of 2009, at which point a new league, temporarily titled Women's Soccer LLC, will be formed.²⁷

B. The History of Women on the Baseball Diamond

While baseball is generally regarded as a national pastime of the American population, female on-field participation in the sport has been less prevalent than the aforementioned examples. However, professional women's baseball is not completely devoid of history.²⁸ In fact, women have been participating in the sport since the 1860s.²⁹ While women presumably attended the games to ensure that the male players minded their manners, several of the women grew tired of sitting on the sidelines and desired to participate on the field of play.³⁰ Soon, several colleges created baseball clubs exclusively for women.³¹ Unfortunately, this era of prosperity was short lived.³² After many mothers and physicians voiced their concerns over the injury risks to women, the baseball clubs lost their support and were forced to shut down.³³

Thereafter, the woman's role in baseball, at least in terms of on-field participation, remained dormant until the 1880s.³⁴ In 1883, two female Philadelphia teams, named the Red Stockings and the Blue Stockings—the Bloomer Girls—were formed.³⁵ The Bloomer Girls grew in popularity and began traveling across the country to face other teams.³⁶

There was no league. Bloomer Girls teams rarely played each other, but "barnstormed" across America, challenging local town, semi-pro, and

²⁵ ESPNsoccer.net, WUSA to Relaunch in 2008 With Eight Teams, <http://soccer.net.espn.go.com/news/story?id=422934&cc=5901> (last visited Sept. 28, 2007).

²⁶ *Id.*

²⁷ Boston Breakers to Launch Play in Spring 2009, http://bostonbreakers.com/spring_2009.html (last visited Oct. 27, 2007).

²⁸ Matthew J. McPhillips, "Girls of Summer": A Comprehensive Analysis of the Past, Present, and Future of Women in Baseball and a Roadmap to Litigating a Successful Gender Discrimination Case, 6 SETON HALL J. SPORT L. 304 (1996).

²⁹ GEOFFREY C. WARD & KEN BURNS, *BASEBALL: AN ILLUSTRATED HISTORY* 18 (Knopf Publishing Group 1996) (1994).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ WARD & BURNS, *supra* note 29, at 18.

³⁵ *Id.*

³⁶ *Id.*

minor league men's teams to an afternoon on the diamond. Bloomer Girls frequently won, playing good, solid competitive hardball. The teams were integrated when it came to gender; although most of the players were women, each roster had at least one male player.³⁷

One such example of a male player was a sixteen year-old boy named Rogers Hornsby.³⁸ In the summer of 1912, Hornsby "barnstormed" through Texas with a team called the Boston Bloomer Girls.³⁹ Hornsby's case is significant not because of any on-field achievements with the team, but for what he would go on to accomplish in Major League Baseball. Playing most of his twenty-three year career for the St. Louis Cardinals, Hornsby would go on to become a Hall of Fame player.⁴⁰ No Major League player in over one-hundred years has topped Hornsby's 1924 batting average of .424.⁴¹ Hornsby is cited by many as the greatest hitter ever to pick up a bat.⁴² The fact that a player of this magnitude essentially began his career playing for the Boston Bloomer Girls is an astounding testament to how capable the Bloomer Girls actually were.

After the success of the Bloomer Girls, the popularity of women's baseball increased dramatically throughout the next half-century.⁴³ Females began playing with and against their male counterparts, instead of only amongst themselves.⁴⁴ In an effort to generate fan interest and notoriety, a men's team in Reading, Pennsylvania hired a young woman named Lizzie Arlington to pitch for the club.⁴⁵ The ploy turned out to be an unabashed success. Her debut was attended by over one thousand people, including over two-hundred women.⁴⁶ The throng of fans did not leave disappointed, as Arlington managed to hurl a scoreless inning.⁴⁷ Many other women followed Arlington's lead, including a sixteen year-old pitcher in

³⁷ Exploratorium.edu, http://www.exploratorium.edu/baseball/girls_2.html (last visited Mar. 25, 2009).

³⁸ Encyclopedia of World Biography, Rogers Hornsby Biography, <http://www.bookrags.com/biography/rogers-hornsby/> (last visited Jan. 4, 2008).

³⁹ *Id.* ("Hornsby spent the summer of 1912 wearing a wig and knickers so he could barnstorm through Texas with the Boston Bloomer Girls, an all-women's team").

⁴⁰ Baseball-Reference.com, Rogers Hornsby Statistics, <http://www.baseball-reference.com/h/hornsro01.shtml> (last visited Jan. 4, 2008) (stating that Hornsby was inducted into the National Baseball Hall of Fame in 1942).

⁴¹ Baseball-Reference.com, Single Season Leaders & Records for Batting Average, http://www.baseball-reference.com/leaders/BA_season.shtml (last visited Jan. 4, 2008) (stating that perhaps an even greater accomplishment lies in the fact that of the one-hundred highest single-season batting averages in Major League History, seven belong to Hornsby).

⁴² Encyclopedia of World Biography, Rogers Hornsby Biography <http://www.bookrags.com/biography/rogers-hornsby/> (last visited Jan. 4, 2008) (stating that the great Ted Williams, a Hall of Famer in his own right, once referred to Hornsby as "the greatest hitter for average and power in the history of baseball").

⁴³ McPhillips, *supra* note 28, at 306.

⁴⁴ *Id.*

⁴⁵ WARD & BURNS, *supra* note 29, at 306.

⁴⁶ *Id.*

⁴⁷ McPhillips, *supra* note 28 (stating that Lizzie Arlington pitched the ninth inning and gave up two hits and a walk).

Ohio named Alta Weiss who generated tremendous interest. Perhaps the high point of Weiss' career was a performance in Cleveland, during which over three thousand people came to see her pitch.⁴⁸

The next great chapter in the history of women's baseball did not begin until the 1940s.⁴⁹ That chapter involved the advent of the All-American Girls Professional Baseball League, the nation's first all-female professional baseball league.⁵⁰ By the early 1940s, many young American men were being drafted into the armed services to serve their country during World War II.⁵¹ While the young men were certainly needed to fight for the country, their absence left gaping holes in the American workforce.⁵² Men's professional baseball was no different, and the loss of so many players forced many minor league teams to discontinue their operations.⁵³ The loss of these minor league teams espoused a great fear among ownership that the same thing could happen to their major league counterparts.⁵⁴

That fear spurred Philip K. Wrigley, the owner of the Chicago Cubs, to search for alternative means of entertainment, should Major League Baseball be forced to alter or halt its operations.⁵⁵ The best idea that Mr. Wrigley and his brainstorming committee could come up with was a girls' softball league which could play in major league parks to keep attendance figures up in the event that men's baseball lost too many marquee players to the war.⁵⁶ Hundreds of women tried out for positions in the league, which was immediately able to field four teams in the Midwest.⁵⁷ The league would both change its name and amend its rules several times over the next few seasons, but became popularly known as the All-American Girls Professional Baseball League.⁵⁸ Seeking to liven up the game and attract more people to come see the women play, the league eventually adopted more common men's baseball rules, permitting the use of overhand pitching and mandating the use of a smaller ball.⁵⁹

While the women were certainly skilled athletes, the All-American Girls Professional Baseball League made little attempt to be a pure substitute for Major League Baseball. An interesting aspect of the league was how league management dealt with the feminine qualities of their players.⁶⁰ Team owners were quite

⁴⁸ WARD & BURNS, *supra* note 29, at 280.

⁴⁹ McPhillips, *supra* note 28.

⁵⁰ All-American Girls Professional Baseball League History [hereinafter All-American Girls Professional Baseball], <http://www.aagpbl.org/league/history.cfm> (last visited Oct. 25, 2007).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ All-American Girls Professional Baseball, *supra* note 50.

⁵⁶ *Id.*

⁵⁷ WARD & BURNS, *supra* note 29, at 280.

⁵⁸ All-American Girls Professional Baseball, *supra* note 50.

⁵⁹ *Id.*

⁶⁰ McPhillips, *supra* note 28, at 307.

conscious of how the players appeared aesthetically and did not want their players conveying an image that could in any way be construed as masculine.⁶¹ The players were not only required to excel in terms of their on-field skills, but also had to work hard to ensure that they projected a feminine image.⁶² The league mandated the players to follow a dress code, attend charm school classes, and follow “proper” etiquette.⁶³ The players’ appearances were obviously distinct from those of their male counterparts, and led to monikers such as the “Girls of Summer” and the “Belles of the Ball Game.”⁶⁴ The glamorous nature of the players and of the All-American Girls Professional Baseball League is perhaps the most noteworthy and recognizable aspect of the history of women’s baseball in America. These traits were immortalized in the 1992 film, “A League of Their Own.”⁶⁵

However, the All-American Girls Professional Baseball League was not entirely style without substance. In 1943, the league held its first spring training session in Chicago, where players were rigorously tested and selected to participate in the league on the basis of their basic baseball skills.⁶⁶ Those “highly skilled” players—several as young as fifteen years-old—who were selected to participate were signed to professional contracts, which paid them anywhere between forty-five and eighty-five dollars for the season.⁶⁷ The players were then assigned to

⁶¹ WARD & BURNS, *supra* note 29, at 280.

⁶² *Id.*

⁶³ All-American Girls Professional Baseball, *supra* note 50. The league mandated charm classes and feminine uniforms:

In addition, femininity was a high priority. Wrigley contracted with Helena Rubenstein's Beauty Salon to meet with the players at spring training. After their daily practices, the women were required to attend Rubenstein's evening charm school classes. The proper etiquette for every situation was taught, and every aspect of personal hygiene, mannerisms and dress code was presented to all the players. In an effort to make each player as physically attractive as possible, each player received a beauty kit and instructions on how to use it . . . Mrs. Wrigley, Wrigley's Art Designer, Otis Shepard, and Ann Harnett collaborated to design special uniforms for the League. Ann Harnett, Chicago softball star and the first girl to sign a contract with the league, became a model for the new uniforms. The one-piece short-skirted flared tunic was fashioned after the figure skating, field hockey, and tennis costumes of the period. Satin shorts, knee-high baseball socks and baseball hat completed the uniform. Each city had a different colored uniform and its own symbolic patch decorated the front of the uniform.

Id.

⁶⁴ WARD & BURNS, *supra* note 29, at 280.

⁶⁵ *Id.* at 77.

⁶⁶ All-American Girls Professional Baseball, *supra* note 50. The All-American Girls Professional Baseball League tested each player during spring training:

Spring training was set for May 17, 1943, at Wrigley Field in Chicago. All the players stayed at the Belmont Hotel close to Wrigley Field. The final selection process began on the first day. League officials systematically scrutinized each player. They were tested on playing their field position, throwing, catching, running, sliding and hitting. At the end of the day, no one wanted to answer the phone for fear of being told they would have to pack and go home.

Id.

⁶⁷ *Id.*

four teams in an effort to ensure that the teams were of roughly equal talent.⁶⁸ The 108-game regular season commenced on May 30, 1943, and ended with the Racine Belles becoming the inaugural World Champions of the All-American Girls Professional Baseball League.⁶⁹ Fans, commentators, members of the media, and even National League officials were pleasantly surprised at the quality of the league's play and the support that the young women received from fans of the host cities.⁷⁰

The All-American Girls Professional Baseball League continued to flourish well after 1943.⁷¹ The league added two expansion teams in Milwaukee and Minnesota, and the two teams became the first women's teams to play regularly in Major League stadiums.⁷² The expanded league saw even greater success and an aggregate increase in fan attendance during the 1944 season.⁷³ As World War II came to a close and it became clear that Major League Baseball would not be forced to disband, the league continued to reach new heights in attendance as the rules of the game moved closer to those of professional men's baseball.⁷⁴ Ironically, this was one of the contributing factors in the league's demise, as finding skilled female baseball players proved to be quite difficult for the

⁶⁸ *Id.* The League Office assigned managers, players and chaperones to teams. *Id.* It was their intent to balance the talent on each city's team to make league play highly competitive. *Id.* Players were often traded in mid-season to maintain that balance. *Id.*

⁶⁹ *Id.* The top teams then competed in a series of play-off games to determine the League Champion. *Id.* At the end of the 1943 season, the Kenosha Comets played a 5-game series against the Racine Belles for the Championship. *Id.* Racine won and became the first World Champions of the All-American Girls Baseball League. *Id.*

⁷⁰ *Id.*

⁷¹ All-American Girls Professional Baseball, *supra* note 50.

⁷² *Id.* There was, however, a wide discrepancy in how the new and old teams were treated and perceived by the fans:

The differences were obvious. Media coverage was a big difference. The smaller cities received extensive media support. Like the men's teams, all the games were reported with articles and box scores and sometimes the papers even ran photographs. In the large cities, the games were often not even mentioned or received negative publicity. The fans sat very close to the field and the dugouts and became friendly with the players as individuals in the smaller cities. In the large stadiums, the distances between the fans and the player did not give the women this advantage. Even the size of the field itself was a handicap to the women who could not hit the ball over the fences for homeruns. This sharp contrast between the men playing faster regulation baseball on certain nights, and the women basically playing a modified softball fast pitch on others, did not favor the women. Even though the larger cities offered a greater population base, there was also a much greater diversity of entertainment opportunities from which people could choose to spend their leisure time. Attempts to add pre-game entertainment of all kinds, including novel symphony performances, failed to increase attendance. Another factor in the failure of the Minneapolis and Milwaukee teams may have been Wrigley's decision to 'go it alone' in these cities or his inability to recruit local guarantors to subsidize teams there. In any case, he didn't have the nucleus of leading businessmen in Minneapolis and Milwaukee to support and promote their AAGPBL teams as had been accomplished in the smaller cities.

Id.

⁷³ *Id.*

⁷⁴ *Id.*

increasingly decentralized league.⁷⁵ The league soldiered on until 1954, when the then-five-team league halted play for good.⁷⁶ However, the league's legacy is such that it remains an enduring part of American baseball lore to this day.⁷⁷

The All-American Girls Professional Baseball League gave over 600 female athletes the opportunity to play professional baseball and to play it at a level never before attained. The League operated from 1943 to 1954 and to this day, even with the incredible popularity of Major League Baseball, still represents one of the most unique aspects of our nation's baseball history.⁷⁸

After the All-American Girls Professional Baseball League was dissolved in 1954, the women's role as professional players on the baseball diamond was essentially non-existent for the next forty years.⁷⁹ However, all-women's professional baseball made a triumphant return to the American sports landscape in 1993 in the form of the Colorado Silver Bullets, the first all-women's professional team since the All-American League folded.⁸⁰ The team announced that they would begin play on May 8, 1994, and would face off against a host of men's minor league, semi-pro, and college teams during their season. Managed by Phil Niekro⁸¹—a former pitcher elected to the National Baseball Hall of Fame—the Silver Bullets were only victorious in six of forty-four contests in their inaugural season.⁸² However, the team's winning percentage climbed each of their next three seasons, culminating with a 23-22 season in 1997, which would go down as the Silver Bullets' only winning campaign.⁸³ Following the 1997 season, however, the

⁷⁵ *Id.*

At the end of the 1950 season, team directors voted to purchase the AAGBBL from Arthur Meyerhoff and operate their teams independently. Max Carey resigned as League President and was replaced by his assistant, Fred Leo. With no centralized control of publicity, promotion, player procurement, and equalization of player talent, the League began to break down. Individual team owners' financial circumstances declined and hindered their ability to operate on deficit spending resulting from declining attendance. The shrinking of the local fan base resulted in part from the rise of other forms of recreation and entertainment and the advent of televised major league games in the early 1950s.

Id.

⁷⁶ All-American Girls Professional Baseball, *supra* note 50.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ McPhillips, *supra* note 28.

⁸⁰ All-American Girls Professional Baseball, *supra* note 50.

⁸¹ MLB.com, http://mlb.mlb.com/mlb/history/mlb_history_halloffame.jsp (last visited Mar. 25, 2009). Niekro was inducted to the National Baseball Hall of Fame in 1997. *Id.* During his distinguished career, Niekro compiled 318 wins and was selected to participate in the Major League Baseball All-Star game five times. <http://www.baseballhalloffame.org/hofers/detail.jsp?playerId=119786> (last visited March 28, 2009).

⁸² 1994 Colorado Silver Bullets Season, http://homepage.mac.com/umber_/SilverBullets/94season.html (last visited Oct. 9, 2007).

⁸³ *Id.* The Silver Bullets record was 11-33 in 1995. 1995 Colorado Silver Bullets Season, http://homepage.mac.com/umber_/SilverBullets/95season.html (last visited Oct/ 9, 2007). They went 18-34 in 1996. 1996 Colorado Silver Bullets Season,

team's chief sponsor, Coors Brewing Co., decided to discontinue their relationship with the team, and the Silver Bullets were forced to halt their operations and disband.⁸⁴ While the team no longer plays, their legacy, like that of the All-American League, is enduring.⁸⁵ As Silver Bullets co-owner Paul Beckham stated at the time, "[y]ou ask people to name two minor-league baseball teams and they can't do it, but a lot of people can name the Silver Bullets."⁸⁶

III. THE CURRENT STATE OF THE LAW AS TO THE WOMEN'S RIGHT TO PARTICIPATE IN BASEBALL

Since Title IX⁸⁷ applies only to educational programs and not youth baseball associations such as Little League Baseball, a majority of the relevant cases originate from the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution⁸⁸ and the Civil Rights Act of 1871.⁸⁹ Thus, I will focus more directly on these two pieces of legislation as well as the relevant case law in moving forward.

A. The Role of the Equal Protection Clause and the Civil Rights Act of 1871 in Gender Litigation

i. An Equal Protection Clause Background

The Equal Protection Clause prohibits the states from providing different protections to similarly situated people within their respective jurisdictions.⁹⁰ It states: "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws."⁹¹ However, determining what that clause means has caused much consternation.⁹² Due to the rarity of women on the baseball diamond, the uncertain language of the Fourteenth Amendment, and the lack of guidance from the Supreme Court, the case law in this area is rare. It is extremely difficult to predict how courts will deal with Equal Protection Clause claims in the realm of sports in the future. It is important to note that the language

http://homepage.mac.com/umber_/SilverBullets/96season.html (last visited all Oct. 9, 2007).

⁸⁴ Silver Bullets Stranded, http://homepage.mac.com/umber_/SilverBullets/sponsor.html (last visited all Oct. 9, 2007) (stating that the team had hoped to continue playing but apparently could not find a replacement sponsor).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ 20 U.S.C. § 1681 (2009).

⁸⁸ U.S. CONST. amend. XIV.

⁸⁹ 42 U.S.C. § 1983 (2009).

⁹⁰ U.S. CONST. amend. XIV.

⁹¹ *Id.*

⁹² McPhillips, *supra* note 28, at 301.

of the Equal Protection Clause “applies only to action by state government or officials and those significantly involved with them.”⁹³

A useful starting point in case law is the case of *Reed v. Reed*, in which the Supreme Court of the United States, for the first time, recognized that gender discrimination falls under the purview of the Equal Protection Clause of the Fourteenth Amendment.⁹⁴ Justice Burger stated that “the Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.”⁹⁵

A subsequent case that is more relevant to this note is that of *Craig v. Boren*, decided in 1976 by the United States Supreme Court.⁹⁶ *Craig* had nothing to do with gender equality in baseball, or even with women’s sports in general.⁹⁷ Rather, *Craig* dealt with an Oklahoma statute which prohibited the sale of a certain type of beer to men who were less than twenty-one years of age, but permitted the sale of the same beer to females that were eighteen years of age.⁹⁸ Following *Reed*, the *Craig* court looked at the statute in question and found that it did not meet the standard articulated in *Reed*.⁹⁹ In doing so, the Court elaborated on the central holding of *Reed*, that an intermediate level of scrutiny is required when a case of gender discrimination is brought under the Equal Protection Clause.¹⁰⁰ “To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”¹⁰¹ Thus, the state of the law going forward from *Craig* is that not only must the government means be substantially related to the legislation in question, but the objectives themselves must be

⁹³ *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 189 (1970) (Brennan, J., concurring in part) (“For example, a person may be deprived of a right secured by the Constitution and 42 U.S.C. § 1982 by a private person acting completely independently of state government”).

⁹⁴ *Reed v. Reed*, 404 U.S. 71, 77 (1971).

⁹⁵ *Id.* at 75. The Idaho statute sought to compel a preference that males be named administrators of estates over females. *Id.* at 73.

⁹⁶ *Craig v. Boren*, 429 U.S. 190 (1976).

⁹⁷ *Id.* Title 37, section 241 of the Oklahoma Statutes barred the sale of 3.2% beer to males under the age of twenty-one, and females who under the age of eighteen. *Id.* The plaintiff asserted that men of the ages eighteen, nineteen, and twenty were denied the equal protection of the laws in that they were not allowed to purchase a product that similarly situated females of the same age could purchase. *Id.*

⁹⁸ *Id.* at 191. Title 37, section 241 of the Oklahoma Statutes stated:

It shall be unlawful for any person who holds a license to sell and dispense beer . . . to sell, barter or give to any minor any beverage containing more than one-half of one per cent of alcohol measured by volume and not more than three and two-tenths (3.2) per cent of alcohol measured by weight.

Craig, 429 U.S. at 191. Section 245 defined a minor as a “female under the age of eighteen (18) years, and a male under the age of twenty-one (21) years.” *Id.*

⁹⁹ *Id.* at 199 (“We turn then to the question whether, under *Reed*, the difference between males and females with respect to the purchase of 3.2% beer warrants the differential in age drawn by the Oklahoma statute. We conclude that it does not.” (Brennan, J)).

¹⁰⁰ McPhillips, *supra* note 28, at 334.

¹⁰¹ *Craig*, 429 U.S. at 197.

important and legitimate. Much of the analysis hinges on exactly how courts define terms like "important" and "legitimate," and how broad of a meaning they are willing to give them. If courts are loathe to find that the government objectives in implementing and defending such statutes meet the "important" standard, then more Equal Protection claims will be successful. If courts are more liberal in deciding whether the objectives are "important," then winning cases on Equal Protection grounds will often prove to be quite difficult.

ii. Is Excluding Young Girls From Participating in Little League "Rational"?

Focusing on cases involving Little League Baseball and similar organizations, Congress enacted Public Law 88-378 on July 16, 1964, making Little League Baseball a federal corporation.¹⁰² Interestingly, however, the organization's charter stated that its purpose was to "promote, develop, supervise, and voluntarily assist in all lawful ways the interest of boys who will participate in Little League Baseball."¹⁰³ The charter was subsequently amended to add the interests of "girls" to its stated purpose.¹⁰⁴ However, that amendment would not put a stop to future litigation in this area.¹⁰⁵

Fortin v. Darlington Little League, Inc., decided by the United States Court of Appeals for the First Circuit in 1975, is an extremely important case in this area.¹⁰⁶ In *Fortin*, the district court found that while there was state action involved, the league did not have to allow ten year-old Allison Fortin to participate.¹⁰⁷ The decision rested in part on the fact that Little League's charter did not explicitly apply to girls at the time.¹⁰⁸ Additionally, the league's exclusion of girls was found to be "rational."¹⁰⁹ "In the court's view, if girls were to play a

¹⁰² McPhillips, *supra* note 28, at 313-14.

¹⁰³ Pub. L. No. 88-378, 78 Stat. 325.

¹⁰⁴ McPhillips, *supra* note 28, at 314.

¹⁰⁵ See generally *id.*

¹⁰⁶ *Fortin v. Darlington Little League, Inc.*, 514 F.2d 344 (1st Cir. 1975).

¹⁰⁷ *Id.* at 347. The District Court found state action based on the following findings:

the Slater Park diamonds, laid out and maintained by the City to Little League specifications, were primarily for the benefit of Darlington and only incidentally for other groups of youth and the general public; that they were made available at specific times for practice and games; that a new diamond was being laid out at City expense primarily for Darlington; that while others required diamonds of different dimensions, there was no evidence that the City of Pawtucket dedicated its resources to these groups on a scale approaching that afforded Darlington; that a significant proportion of the Slater Park diamonds are prepared to meet the needs of Darlington and other Little League groups; and that as a result of Darlington's use of diamonds five nights a week and on Saturdays throughout the baseball season, the general public is often precluded from utilizing the facilities.

Id. Additionally, the district court found that the league was carrying out a governmental function to the extent that it served the interests of the city of Pawtucket. *Id.*

¹⁰⁸ *Id.* at 346.

¹⁰⁹ *Fortin*, 514 F.2d at 346.

'contact' sport like baseball with boys, there was a serious risk that the girls would be hurt."¹¹⁰ The district court cited the physical differences between boys and girls between the ages of eight and twelve, such as: bone strength, musculature, pelvic structure, tendon and ligament strength, and reaction time as justification for why the means of the statute were rational to effectuate the legitimate ends of protecting the safety of the league's would-be participants.¹¹¹ Subsequent to the district court's ruling and before the appeal was heard, Congress amended Little League's charter to include girls.¹¹² However, the case still went forward and was not adjudged to be moot because the Darlington Little League still did not permit Allison to participate.¹¹³

The First Circuit agreed with the district court that significant state action was involved.¹¹⁴ However, the First Circuit disagreed with the lower court on the issue of whether the league was violating the Equal Protection Clause.¹¹⁵ While the lower court found that defendants carried their burden by providing evidence of the injury risk faced by young girls, the appeals court disagreed.¹¹⁶ Allison and her father were able to present evidence that girls as young as Allison could safely play

¹¹⁰ *Id.*

¹¹¹ *Id.* ("In the court's view, if girls were to play a 'contact' sport like baseball with boys, there was a serious risk that the girls would be hurt" (Campbell, C.J.)).

¹¹² *Id.* at 346. The court recognized that the charter now included the term "young people" and omitted the terms "boys" and "manhood." *Id.* The Court also seemed to be influenced by the legislative history of the amendment. The House Committee on the Judiciary's report stated the following:

[y]oung girls, although they may have desired to play Little League Baseball, in the past were prohibited Over the years frustration developed until, in 1974, these young girls, through their parents, sought to participate in this activity by petitioning the courts for equal opportunities to play Little League Baseball. Twenty-two class action suits were filed across the country It was while many of these lawsuits were pending that the Little League Baseball organization petitioned Congress to amend their Federal charter to include girls in this far-reaching program. This fine organization . . . will now be expanded to include all of our young people. With this change in their charter, we can look forward to unhindered local Little League programs, where boys and girls can play side-by-side. Stressed during the hearing on the amendment to this Federal charter was the intent of Congress that this federally chartered organization should treat girls equally with boys, and that Congress would not tolerate separate but equal programs The proposed legislation, as amended, will accomplish the goal of girls' participation on an equal basis with boys in Little League Baseball, Inc.

H.R. REP. No. 93-1409, 2d. Sess., at 1 (1974).

¹¹³ *Fortin*, 514 F.2d at 346.

¹¹⁴ *Id.* at 347.

¹¹⁵ *Id.* at 348.

¹¹⁶ *Id.* at 349. The lower court found that:

there are material physical differences between boys and girls in the eight to twelve age bracket regarding musculature, bone strength, strength of the ligaments and tendons, pelvic structure, gait and reaction time, and . . . these differences could undoubtedly result in serious injuries to girls in said age bracket who participated in a contact sport such as baseball The goal of safety is a legitimate concern of the defendant Darlington Little League, Inc. and this Court cannot say that its rule excluding girls between the ages of eight to twelve years . . . is not rationally related to the effectuation of that reasonable goal.

Fortin v. Darlington Little League Inc., 376 F.Supp. 473, 479 (D.C. R.I. 1974).

baseball with girls her age, and that Allison herself was physically fit and able to play.¹¹⁷

The First Circuit disagreed with the district court, as they felt that the league's evidence was flimsy.¹¹⁸ While the district court appeared to rely heavily on the opinion of one particular expert witness—an orthopedist—the First Circuit was not nearly as persuaded by his testimony.¹¹⁹ The expert spoke of physical differences between genders, but the court referred to this comparison as merely “impressionistic.”¹²⁰ The court poked several holes in the testimony and the lower court's reliance on it, pointing out that the orthopedist had worked primarily with males and had never seen a girl play baseball.¹²¹ The court was also skeptical about whether the witness' testimony was based only on his medical opinion, noting that “it is difficult to tell how much of Dr. Crane's deposition rested on personal views, to which he admitted, that it was the normal activity of a young lady to keep off baseball fields and play with dolls, and how much on science.”¹²² The court mentioned in a footnote that such gender-based classifications are no longer sufficient to justify such exclusionary measures.¹²³ Furthermore, the court felt that the lower court was not justified in rejecting the testimony of a qualified pediatrician with a contradictory opinion.¹²⁴

There were other factors at play in the court's decision as well. The court made note of the fact that both doctors were deposed and that the district judge did not view either of their testimonies, which calls into question the reasons for discrediting the contradicting opinion.¹²⁵ It was also significant that the league did not attempt to exclude any male competitors on the basis of poor physical condition or because of any handicaps.¹²⁶ The Court reasoned that if safety was a main concern for the league in excluding girls, then the league would take steps to

¹¹⁷ *Fortin*, 514 F.2d at 349.

¹¹⁸ *Id.* at 350.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

Dr. Crane, it is true, deposed that boys generally were stronger, being, he thought, more active. His basis for comparison, however, was entirely impressionistic. He admitted never having observed girls playing baseball and to a medical practice with emphasis upon male patients. He further agreed, with only a few qualifications, that the bones and bodies of girls were essentially as resistant to blows as those of boys, and that girls from ten to twelve would experience a growth spurt ahead of boys. No statistical data whatever was presented tending to show greater female than male susceptibility to injury in the eight to twelve group.

Id.

¹²² *Fortin*, 514 F.2d at 350.

¹²³ *Id.* at n.5.

¹²⁴ *Id.* at 350. “As Dr. Crane testified only through deposition, it is hard to see why his testimony should receive dispositive weight.” *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

exclude those boys who were at an increased safety risk.¹²⁷ Furthermore, the league's position seemed to ignore the idea that responsible parents will not blindly allow their daughters to play a sport if the risks are overly dangerous.¹²⁸ The court seemed to prefer leaving such decisions in the hands of the parents, not the organization.¹²⁹ Finally, the court seemed influenced by the fact that girls have participated in Little League ball elsewhere without a rash of calamitous injuries.¹³⁰ These considerations—coupled with congressional intent to involve young girls in Little League Baseball—weighed in Allison's favor. The league's contention and the district court decision that excluding girls to prevent injury constituted a rational basis for exclusion was thus rejected.¹³¹

iii. *Magill v. Avonworth* and the "State Action" Threshold

The Equal Protection Clause of the Fourteenth Amendment, by its own terms, applies only to the states.¹³² For the clause to have any effect, it must first be shown that the state itself is denying a private citizen the equal protection of the laws. Thus, the plaintiff must prove that there was some "state action" on the part of or on behalf of the defendant. However, exactly what discriminatory action does and does not constitute "state action" is not nearly as simple as taking a look at who is the named defendant of a lawsuit.

The test for whether the "state action" threshold has been met was further refined in the case of *Magill v. Avonworth Baseball Conference*.¹³³ In *Magill*, a ten year-old girl named Pamela McGill was not permitted to participate in a private baseball conference's summer league on the basis of her gender.¹³⁴ It is important to note that unlike *Fortin v. Darlington Little League*, Little League Baseball was not involved here.¹³⁵ The United States District Court for the Western District of Pennsylvania found that there was no state action on the part of the summer baseball program and that even if there had been a finding of state action, no constitutional right would have been violated.¹³⁶

The Third Circuit agreed with the district court's ruling that there was no state activity because the case at hand did not fall within any of the three enumerated categories of cases where state action exists even though the discriminating actor or actors were private entities.¹³⁷ The Third Circuit articulated the three classes as

¹²⁷ *Fortin*, 514 F.2d at 350.

¹²⁸ *Id.* "Should girls find Little League baseball too demanding, the problem would seem self-regulating in that the girls would withdraw." *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 350-51.

¹³² U.S. CONST. amend. XIX, § 1.

¹³³ *Magill v. Avonworth Baseball Conference*, 516 F.2d 1328 (3rd Cir. 1975).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 1330.

¹³⁷ *Id.*

follows: "(1) where state courts enforced an agreement affecting private parties; (2) where the state 'significantly' involved itself with the private party; and (3) where there was private performance of a government function."¹³⁸ The first class of cases is not applicable here, as there clearly is no agreement among private parties that is being enforced by the state courts.¹³⁹ Similarly, the third enumerated class is inapplicable because the baseball program was not performing a government function in the government's stead.¹⁴⁰

Finally, the court looked at the second class of cases, where the task is to determine whether there was significant state involvement with the private party in question. Following the Supreme Court's lead, the court performed a case-specific analysis in which there were no clear-cut rules that would decide the case for one side or the other.¹⁴¹ Thus, the mere use of public fields by the conference would not be dispositive of the issue, and the court took a closer look at the intricacies of this case.¹⁴² The analysis hinged on "whether the state involvement in the challenged action is 'significant.'" ¹⁴³ The court continued by stating that "because a nexus test is necessarily one of degree, we must conduct a detailed inquiry into, and a thorough sifting of, the record facts."¹⁴⁴

Looking at the facts of this particular case, the court agreed with the district court that there was no significant state action here such that the Equal Protection Clause scrutiny should apply.¹⁴⁵ While it is likely true that the league would have been forced to shut itself down without the use of public fields, the court held that the simple use of public lands was not dispositive of the issue.¹⁴⁶ When looking at the aid provided by the state, the court also pointed out that while only a few citizens would be able to function without at least some public benefits such as fire and police protection and electricity, that has not transformed other private actions into state actions for Equal Protection Clause purposes.¹⁴⁷ Avonworth Baseball Conference's argument that the state did not lose any money by assisting the conference was also accepted by the court, which observed that the conference actually provided its own labor, as well as up to two-hundred dollars to make improvements to one of the public fields.¹⁴⁸ On these facts, the court found that the facts here did not fall within the second of the three aforementioned categories of cases, and thus Equal Protection scrutiny was inapplicable.¹⁴⁹

¹³⁸ *Magill*, 516 F.2d at 1331.

¹³⁹ *Id.* at 1332.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Magill*, 516 F.2d at 1332.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1333.

¹⁴⁷ *Id.*

¹⁴⁸ *Magill*, 516 F.2d at 1334.

¹⁴⁹ *Id.* at 1336.

However, it is important to note that the circuit court differed from the district court in one respect. While the district court found that there would have been no constitutional violation even if there had been state action, the Third Circuit Court of Appeals chose not to discuss whether there would have been a constitutional violation because it was unnecessary for the court to reach that question.¹⁵⁰

iv. *Croteau v. Fair* and the Right to Play on a School Team

Finally, in *Croteau v. Fair*, a high school student named Julie Croteau brought suit for injunctive relief in the United States District Court for the Eastern District of Virginia because she felt she had been unfairly discriminated against on the basis of gender when she was cut from her school's baseball team.¹⁵¹ While agreeing with plaintiff's contention that she should be free of state-inflicted gender discrimination, the court pointed out that "there is no constitutional or statutory right to play any position on any athletic team."¹⁵² There is only the right to compete for such a position on equal terms and to be free from sex discrimination in state action."¹⁵³ Because Croteau could not prove any discriminatory intent on the part of the Defendant, the court denied her relief and dismissed her case.¹⁵⁴

This case is an excellent illustration of the limits of the use of the Equal Protection Clause in certain types of cases, because discrimination in terms of who is picked or not picked to play for a particular team is hard to prove. *Croteau* seems to be an example of courts simply recognizing that a large amount of discretion that must be left to coaches in these situations or courts will be overrun with lawsuits, and that the Equal Protection Clause should not be applied to choose who is good enough to play for a high school varsity team in lieu of the coach.

This case is also a good illustration of the law in this area and what plaintiffs will need to prove in order to win a gender discrimination case in the sports world. The *Croteau* court explicitly required a finding of intentional discrimination on the part of the defendant in order for the plaintiff to win.¹⁵⁵ "Discriminatory intent can be measured by considering the following four factors: (1) the historical background of the decision; (2) the specific sequence of events; (3) the departure from normal procedures; and (4) contemporary statements by the individual(s) making the decision."¹⁵⁶ While the ability of courts to infer discriminatory intent from these sources somewhat lessens the burden on plaintiffs, proving intent can prove to be an extremely difficult challenge to overcome.

¹⁵⁰ *Id.* at 1330.

¹⁵¹ *Croteau v. Fair*, 686 F. Supp. 552 (E.D. Va. 1988).

¹⁵² *Id.* at 554.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 553.

¹⁵⁵ *Id.* at 553.

¹⁵⁶ *Croteau*, 686 F. Supp. at 553.

B. The Impact of Title IX

Title IX operates to eliminate gender discrimination perpetuated by educational institutions that receive federal funding.¹⁵⁷ However, the statute itself provides little guidance as to how courts should measure compliance.¹⁵⁸ In 1979, in an attempt to clarify the meaning of the statute, the Carter Administration promulgated a policy interpretation which set forth a three-prong test of compliance.¹⁵⁹ Substantial compliance can be achieved by an organization by meeting any of the three prongs.¹⁶⁰ The first prong is “whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.”¹⁶¹ Thus, if a school’s student body is split evenly between men and women, the athletic participation opportunities must mirror that equal split.¹⁶² The second prong applies to institutions where one of the sexes has been and is currently underrepresented, and asks whether the school can show a history of expansion to meet the growing needs of the underrepresented sex.¹⁶³ The final prong applies to institutions that have failed the first two prongs, and requires that institutions show that the “interests and abilities of the members of that sex have been fully and effectively accommodated.”¹⁶⁴

In addition to Title IX, there are other restrictions imposed by 34 C.F.R § 106.41.¹⁶⁵ This section permits institutions to maintain separate teams for the two sexes if the sport is a contact sport or if participation is based on competitive skill.¹⁶⁶ If the institution only offers a team for one of the sexes, however, and the sport is not a contact sport, the institution must permit the excluded sex to try out if the excluded sex’s athletic opportunities have been previously limited.¹⁶⁷ This section designates several sports as “contact sports,” such as boxing, wrestling, and football, but does not include baseball.¹⁶⁸ The fact that baseball has been omitted from the list appears to suggest that women should be permitted to try out for school baseball teams if their school offers only one team.¹⁶⁹

¹⁵⁷ 20 U.S.C. § 1681 (2009).

¹⁵⁸ *Id.*

¹⁵⁹ Title IX 1979 Policy Interpretation on Intercollegiate Athletics, <http://www.ed.gov/about/offices/list/ocr/docs/t9interp.html> (last visited Oct. 12, 2007) [hereinafter .Title IX 1979 Policy Interpretation]

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Title IX 1979 Policy Interpretation, *supra* note 159.

¹⁶⁵ 34 C.F.R. § 106.41 (1975).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ McPhillips, *supra* note 28, at 331.

IV. CONCLUSION AND RECOMMENDATIONS

In summation, it is clear that women's sports in America are on the rise in many areas. Given the proper opportunities and exposure, women have been extremely successful in sports like basketball and soccer. In addition, many of the women participating in professional sports organizations are contributing positively to the community, as exemplified by the WNBA Cares Program. In light of the tremendous achievements that have been made by women in so many different areas of the sports world, it is simply ludicrous to exclude women and girls from playing baseball based on archaic notions of gender inequality. The brief but glamorous history of women on the baseball diamond shows us that given the opportunity to participate and the time to hone their skills, women can and will succeed in baseball.

However, the government and youth baseball programs are not doing enough to ensure that enough young women are given the opportunity to cultivate their skills. While the Equal Protection Clause does protect these rights to some extent, courts have not read the provision broadly enough to have a significant impact in this area. One way to remedy this is to interpret the phrase "state action" more broadly than the court in *Magill v. Avonworth Baseball Conference* did so that more youth organizations are forced to allow girls to participate.¹⁷⁰ A very plausible solution here would be for courts to find state action if the league is assisted by the state in any way, even if the connection between the league and the state is rather attenuated. If courts were to become more inclined to find significant state action in all situations where a league used public fields, funds, or equipment for their operations, more programs would be implicated. Another remedy that could help would be if the federal government amended Little League's charter so that Little League would be required to open its doors to girls who want to play. As we saw in *Fortin v. Darlington Little League, Inc.*, the fact that Little League removed the word "boys" from its charter did not, by itself, compel Little League to include girls.¹⁷¹ If more subtle changes such as these are made, the opportunities for young girls to play baseball will increase exponentially, and women's baseball will have a chance to duplicate the success of entities like the WNBA.

As we have seen in *Fortin*, *McGill*, and *Croteau*, plaintiffs seeking to compel youth leagues and schools parties to allow girls to participate are facing an uphill battle. As a threshold issue to any equal protection claim, *McGill v. Avonworth Baseball Conference* tells us that there must be a showing of state action on the part of the defendant.¹⁷² Often times the proprietors of these types of leagues are private actors. In such cases it will be difficult to find state action, because of the

¹⁷⁰ *Magill*, 516 F.2d at 1328.

¹⁷¹ *Fortin*, 514 F.2d at 344.

¹⁷² *Magill*, 516 F.2d at 1328.

narrowly defined set of cases in which state action may be found when the defendant is a private party.¹⁷³

Fortin v. Darlington Little League imposes another hurdle on plaintiffs. Even if state action is found and such action has discriminating effects, defendants may still prevail upon a showing that their objectives are legitimate and the means used to fulfill those objectives are important.¹⁷⁴ Thus, even blatantly discriminatory acts may pass Equal Protection muster.¹⁷⁵ One recommendation here would be for courts to be more hesitant to label such means as "substantially related." This would increase the number of cases that can be brought under the Equal Protection Clause and hamper the ability of amateur baseball leagues to discriminate.

The final hurdle is *Croteau*, which requires that plaintiffs prove discriminatory intent.¹⁷⁶ Proving intent is a very difficult burden to carry, and courts could make life a lot easier on plaintiffs by more readily inferring discriminatory intent on the part of defendants. Such behavior by courts would greatly assist plaintiffs and likely cut down on gender discrimination in this area of law.

While there is clearly a great deal of progress to be made, there is no reason to lose hope. The success of the various star female athletes and professional leagues serve as examples of the heights female athletes can reach when given the opportunity. This country has taken valuable steps in many areas of female athletics, and the next step should be facilitating the involvement of girls in youth baseball programs. If so, it is entirely possible that the next Mia Hamm or Lisa Leslie will be found not on a soccer field or basketball court, but on the baseball diamond.

¹⁷³ *Id.*

¹⁷⁴ *Fortin*, 514 F.2d at 344.

¹⁷⁵ *Id.*

¹⁷⁶ *Croteau*, 686 F. Supp. at 552.

