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Not Just One of the Boys: A Post-Feminist Critique of Title IX's Vision for Gender Equity in Sports

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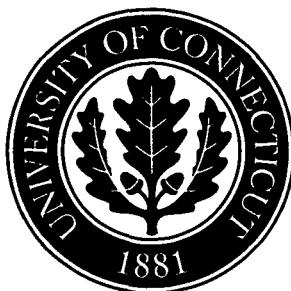
Not Just One of the Boys: A Post-Feminist Critique of Title IX's Vision for Gender Equity in Sports

DIONNE L. KOLLER

Title IX as applied to athletics is a high-profile, controversial public policy effort that has opened up the world of athletics to millions of girls and women. Yet as it is both celebrated for the opportunities it has created for women, and decried as going too far at the expense of men, a reality persists that women do not pursue or remain committed to sport in numbers comparable to men. This Article seeks to explore this phenomenon by moving the discourse beyond the debate over whether women are inherently as "interested" in sport as men to examine the conception of equality incorporated into Title IX and how this might affect women's interest in participating in sport. In doing so, this Article asserts that it is not at all clear that greater Title IX enforcement alone can serve to stimulate interest in the population of girls and women who do not currently participate in sport. This is because Title IX's anti-discrimination mandate only serves to secure opportunities for females to assimilate into a model for sport—emphasizing elite ability and commercial appeal—which was constructed by and for males. This model, incorporated into Title IX through the requirement that schools must only provide opportunities to female athletes who are "interested" and have the "ability" to play varsity-level sport, can in many cases create what this Article describes as an "interest paradox," extinguishing the interest of those girls and women who would engage in sport, but are not willing to assimilate into the current model. While this Article supports the position that greater Title IX enforcement is a worthy goal, it argues that the time has come for a new sport policy that can incorporate fully women's voices in education-based athletics and redefine norms for sport participation so that the benefits of such participation may be enjoyed by a greater population of females.

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DIONNE L. KOLLER*

I. INTRODUCTION

In the 1989 movie *Field of Dreams*,¹ Kevin Costner plays an Iowa corn farmer who hears voices which he interprets as urging him to build a baseball field on his property. The movie made popular the phrase, “[i]f you build it, [they] will come,” and indeed, once Costner’s character built the field, the ghosts of several legendary baseball players appeared and enjoyed the game once more.² The narrative of Title IX has focused on the power of the “if you build it, they will come” mantra, with advocates stressing and courts reinforcing the notion that creating opportunities will attract women and girls to participate in sport.³ Like the magical appearance of the players in *Field of Dreams*, it is said that simply providing opportunities for women to participate in education-based athletics programs on an equal basis with men will encourage legions of women to develop the interest and ability to play.

The “Field of Dreams” theory has to an impressive extent worked. Prior to the enactment of Title IX, less than 32,000 women participated in intercollegiate athletics.⁴ Now, there are more than 174,000 female

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¹ FIELD OF DREAMS (Universal Pictures 1989).

² *Id.*

³ DEBORAH L. BRAKE, GETTING IN THE GAME: TITLE IX AND THE WOMEN’S SPORTS REVOLUTION 94 (2010) (“Our experience with Title IX in recent decades serves as empirical evidence that the court’s instincts in *Cohen v. Brown University*[, 101 F.3d 155 (1st Cir. 1996)] were right on the mark: if you build it, they will come.”); NANCY LEVIT & ROBERT R.M. VERCHICK, FEMINIST LEGAL THEORY 113 (2006) (explaining that the theory of equality espoused in Title IX cases “exemplifies what we might call the *Field of Dreams* approach to women’s sports programs: ‘if you build it, they will come’”).

⁴ Jocelyn Samuels, *Reviewing the Play: How Faulty Premises Affected the Work of the Commission on Opportunity in Athletics and Why Title IX Protections Are Still Needed to Ensure Equal Opportunity in Athletics*, 3 MARGINS 233, 242 (2003).

intercollegiate athletes.⁵ Female participation in interscholastic athletics has grown by more than 900%,⁶ with about 294,000 girls participating in high school athletics in 1971, and over three million in 2007–2008.⁷ However, the goal of full, robust athletic participation for women on par with that for men still has not been realized.⁸ Acknowledging this fact, the scholarly discourse on Title IX largely has focused on the debate between those who say that women *are* interested in sports, and that lagging participation rates reflect continuing discrimination, and those who argue that, in fact, women are simply *not* as interested in sports as men. Thus, Title IX critics assert that there are inherent differences in the level of interest in athletics between men and women, rather than discrimination by educational institutions.⁹ In their view, Title IX is being implemented in a way that discriminates against male athletes by requiring institutions to impose gender-based quotas that short-change male athletes in order to give participation opportunities to less-interested females.¹⁰ Title IX proponents defend Title IX against this backlash¹¹ by citing the law's

⁵ DENISE M. DEHASS, 1981–82 TO 2006–07 NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 61 (2008), available at <http://www.ncaapublications.com/p-4124-participation-rates-1981-82-2006-07-ncaa-sports-sponsorship-and-participation-rates-report.aspx>.

⁶ Samuels, *supra* note 4, at 242; WOMEN'S SPORTS FOUND., PLAY FAIR: A TITLE IX PLAYBOOK FOR VICTORY 4 (2009) [hereinafter WOMEN'S SPORTS FOUND., PLAY FAIR], available at <http://www.womenssportsfoundation.org/Content/Articles/Issues/Title-IX/P/Playing-Fair-A-Guide-to-Title-IX.aspx>.

⁷ WOMEN'S SPORTS FOUND., PLAY FAIR, *supra* note 6, at 4.

⁸ LEVIT & VERCHICK, *supra* note 3, at 109 (explaining Title IX's success but noting that "much work remains").

⁹ Ross A. Jurewitz, *Playing at Even Strength: Reforming Title IX Enforcement in Intercollegiate Athletics*, 8 AM. U. J. GENDER SOC. POL'Y & L. 283, 332–33 (2000) (asserting that female students are not as interested in athletics as male students and that men compete at all levels in far greater numbers than women); see also JESSICA GAVORA, TILTING THE PLAYING FIELD: SCHOOLS, SPORTS, SEX AND TITLE IX 68 (2002) (explaining that female students do not sign up for sports because they do not want to sit on the bench); George A. Davidson & Carla A. Kerr, *Title IX: What Is Gender Equity?*, 2 VILL. SPORTS & ENT. L. FORUM 25, 29 (1995) (explaining that "[o]ther evidence suggests that a greater percentage of men have an interest in making athletic competition a part of their college experience"); Michael Straubel, *Gender Equity, College Sports, Title IX and Group Rights: A Coach's View*, 62 BROOK. L. REV. 1039, 1041–42 (1996) ("In each of my ten years of coaching, despite coming from a student body that is regularly more female than male . . . more men consistently have turned out to participate than women. While broader social forces may be at work, the encouragement and support for the women here appears to be equal . . . Yet more men than women choose to participate in athletics at the college level. This is not an experience limited to my school. It is a national experience." (footnotes omitted)).

¹⁰ See, e.g., Jurewitz, *supra* note 9, at 335 (describing how Title IX compliance methods "discriminately affect male athletes").

¹¹ Erin E. Buzuvis, *Survey Says . . . A Critical Analysis of the New Title IX Policy and a Proposal for Reform*, 91 IOWA L. REV. 821, 860–61 (2006) ("Pervasive rhetoric maintains that Title IX is 'reverse discrimination' that benefits female athletes only at the expense of men. This erroneous belief has fueled political and judicial challenges to the proportionality prong of OCR's compliance test." (footnotes omitted)). This backlash has included numerous lawsuits seeking to challenge Title IX and its implementing regulations, such as *National Wrestling Coaches Ass'n v. Department of Education*, 366 F.3d 930, 933 (D.C. Cir. 2004), as well as Congressional testimony urging a change to the statute and implementing regulations. See *Hearing on Title IX of the Education Amendments of 1972 Before the Subcomm. on Postsecondary Educ., Training and Life-Long Learning of the H. Comm. on Econ.*

successes and asserting that women are just as interested in sports as men.¹² They counter the critics by arguing that lower levels of interest and participation are the result of continuing discrimination by educational institutions and societal forces which discourage girls' and women's participation in sport.¹³ These scholars and advocates call for increased Title IX enforcement to realize what is thought to be Title IX's full potential—greater overall participation in sport for women and girls.¹⁴ Congress and courts thus far have adopted this view, uniformly rejecting the notion that women are not as interested in athletics as men.¹⁵ This polarization of positions—between those who say women are not as interested in sport as men and those who assert they are—has prevented a more nuanced examination of what girls and women may or may not be interested in when it comes to participation in sports, and how the current structure of education-based¹⁶ athletics programs might shape that interest. Indeed, what is lost in the debate over how far Title IX has gone to remedy discrimination in athletics, and how far it needs to go, is whether Title IX's anti-discrimination mandate, even if fully enforced, can deliver the benefits it is hoped to deliver. That is, while an equality framework might be necessary to secure the benefits of sports participation for women and girls, given its current form, is it sufficient?

This Article seeks to answer that question by deconstructing Title IX to determine whether its conception of discrimination in sports, and corresponding “Field of Dreams” approach to gender equity, is still sufficient to produce the hoped-for goal of encouraging women and girls to participate in sports and reap its benefits. In doing so, this Article acknowledges that there can be little doubt that discrimination in the form of second-class treatment for female athletes is still a fact of life. There

and Educ. Opportunities, 104th Cong. 146 (1995) (statement of T.J. Kerr, President of the National Wrestling Coaches Association) (“The unfair and discriminatory [Office of Civil Rights] rules are creating anger and resentment among males . . .”).

¹² Samuels, *supra* note 4, at 242 (“The factual record confirms that the notion that women are not interested in athletics is simply an outmoded stereotype.”).

¹³ Gayle I. Horwitz, *Athletics*, 5 *GEO. J. GENDER & L.* 311, 314 (2004) (“Women’s groups . . . argue that women participate in sports at lower rates than men due to past discrimination.”).

¹⁴ Deborah Brake, *Revisiting Title IX’s Feminist Legacy: Moving Beyond the Three-Part Test*, 12 *AM. U. J. GENDER SOC. POL’Y & L.* 453, 458 (2004) [hereinafter Brake, *Feminist Legacy*] (“Title IX’s legacy is not one of unmitigated success. Like other social institutions, sport has been resilient in preserving male privilege in its deepest structures.”); Samuels, *supra* note 4, at 237 (“[D]espite dramatic gains since the enactment of Title IX, the playing field is still far from level.”).

¹⁵ See Samuels, *supra* note 4, at 240 (“However, as Congress and the courts have consistently recognized, the stereotype that women are less interested in sports than men as well as the use of interest surveys to bolster that assumption, is belied by the purpose of Title IX and contradicted by its history.”).

¹⁶ Although sports participation occurs in many different settings, such as through private clubs, AAU leagues, and the like, it is sports in the educational setting that has the greatest impact because high schools, colleges, and universities support most organized sports programs in the United States. It is this setting, of course, to which Title IX applies, because these institutions receive the federal funding that is a condition precedent to application of the statute.

can also be little doubt that this second-class treatment is at least part of the reason why women do not take up, or continue in, sport at the same rate as men. The question then is not whether Title IX's premise that women are entitled to equal athletic opportunity is correct, but whether the conception of equality embedded in Title IX is sufficient to reach that goal. This Article asserts that Title IX in fact cannot effectuate what is thought to be its full promise, because the conception of equality underlying Title IX assumes that women will be interested in assimilating¹⁷ into the model for sport created by and for men. As a result, women who might be interested in athletics are forced to either assimilate into the male-constructed model for sport which emphasizes elite ability, commercial appeal, and a win-at-all-costs mentality, or not play at all. Such a fact produces what I refer to as an "interest paradox," whereby Title IX's participation opportunities at the interscholastic and intercollegiate levels¹⁸ serve to extinguish interest in sports participation for the very group of women that the statute and regulations are intended to reach. Accordingly, while purporting to address gender discrimination in sport, Title IX perpetuates gender discrimination of a different character by denying women and girls the opportunity to enjoy a model for sport which speaks equally to males and females.

Part II of this Article explains the promise of Title IX, through the statute, regulations and its theoretical underpinnings which assume that creating opportunities for women to be student-athletes will encourage more women to be involved in sport. This Part also explains the important lifetime benefits of sports participation and the problem as it exists today, with a continuing lack of participation by girls and women seemingly signaling that they are still not as interested in sport as boys and men. Part III deconstructs Title IX with an eye toward explaining what a potential female athlete might be interested in. This Part asserts that Title IX's conception of equality is far more limited than commonly believed, with the statute and regulations ultimately resting on a formal equality approach which requires women and girls to assimilate into the male-constructed, varsity model for sport. This Part explains that the prevailing view that creating more opportunities to assimilate will develop women's interest in sports relies on an essentialized understanding of what women want from

¹⁷ See Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1143 (1986) (explaining that the equal treatment or equality doctrine used to create change in the workplace assumed the goal was assimilation into the male model).

¹⁸ Because "[t]he United States is one of the few countries in the world that operates the majority of its public sport programs within schools and universities," the kind of opportunities for sport that are offered through educational programs are important in shaping interest and setting the standard for ability to participate in sports. *Amateur Sports Act: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. on Commerce, Sci., and Transp.*, 104th Cong. 183-84 (1995) (statement of Donna Lopiano, Executive Director, Women's Sports Foundation).

sports. This limited conception of equality combined with an essentialized understanding of women and sport can create an “interest paradox,” so that opportunities created in the varsity sports model can actually serve to discourage participation for those the law hopes to inspire. Part IV offers suggestions for mitigating the interest paradox, by moving to a more gender-neutral, broad-based model for education-based sports.

II. TITLE IX: THE PROMISE AND THE PROBLEM

Title IX’s story is a complex one. In one respect, the statute and implementing regulations have been an enormous success. Opportunities for female athletes and support for female athletic participation have never been greater. The term “Title IX” itself connotes female power and success in athletics.¹⁹ On the other hand, there remains a troubling reality that female athletic participation still lags far behind that for males, and data show that girls and women are at greater risk for suffering the social and physical consequences of a sedentary lifestyle than boys and men.²⁰

Courts and commentators adopt the view that providing equality of opportunity to participate in education-based athletics programs will spark an interest in athletic participation and encourage even more females to get off the sidelines.²¹ Nearly four decades after Title IX was passed, the narrative of opportunity to participate as a catalyst for developing interest

¹⁹ See *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 773 (9th Cir. 1999) (“And the victorious athletes understood as well as anyone the connection between a 27-year-old statute and tangible progress in women’s athletics.”). It has even been noted that “Title IX may be the first federal law to have achieved true pop status.” LEVIT & VERCHICK, *supra* note 3, at 107.

²⁰ JOHN CHESLOCK, WOMEN’S SPORTS FOUND., WHO’S PLAYING COLLEGE SPORTS? TRENDS IN PARTICIPATION 3 (2007) [hereinafter CHESLOCK, WHO’S PLAYING COLLEGE SPORTS?], available at <http://www.womenssportsfoundation.org/Content/Research-Reports/Whos-Playing-College-Sports.aspx> (“Women’s participation still lags far behind men’s participation levels. For the average higher education institution in the complete four-year/1,895 institutions sample, the female share of undergraduate enrollment in 2004–05 was 55.8% while the female share of athletes was only 41.7%. For the complete four-year/1,895 institutions sample, the reported number of men’s participants in 2004–05 was 291,797, while the corresponding number for women was 205,492. In combination, these figures demonstrate that as of 2004–05, only 41% of athletic participants were women and 151,149 female athletes would need to have been added (assuming no reduction in male participants) to reach a share of 55%, the female share of full-time undergraduates in the fall of 2004.”); WOMEN’S SPORTS FOUND., GENDER GAP—RANK ORDER 2007–2008, (2009) [hereinafter WOMEN’S SPORTS FOUND., GENDER GAP], available at <http://www.womenssportsfoundation.org/Content/Articles/Issues/Participation/M/Mind-the-Gap-Women-Still-Underrepresented-in-High-School-Athletics.aspx> (“Girls receive over 1.3 million less participation opportunities than boys at the high school level.”); WOMEN’S SPORTS FOUND., HER LIFE DEPENDS ON IT: SPORT, PHYSICAL ACTIVITY AND THE HEALTH AND WELL-BEING OF AMERICAN GIRLS 4 (2004) [hereinafter WOMEN’S SPORTS FOUND., HER LIFE DEPENDS ON IT], available at <http://www.womenssportsfoundation.org/Content/Research-Reports/Her-Life-Depends-On-It-II.aspx> (stating that “[i]n]early one out of every two high school boys plays sports, while only one in three high school girls participates”).

²¹ Marcia D. Greenberger & Neena K. Chaudhry, *Worth Fighting For: Thirty-Five Years of Title IX Advocacy in the Courts, Congress and the Federal Agencies*, 55 CLEV. ST. L. REV. 491, 492 (2007) (stating that “the lesson of Title IX is that young women have flocked to play sports when given the chance”).

has continued, with the assertion that while there are now more women and girls than ever participating in sports, there is still more work to be done to eliminate discrimination and realize fully gender equity in sports.²² How best to achieve equality of opportunity and secure the benefits of sports participation for females that have long been enjoyed by males is both the promise and problem confronted by Title IX.

A. *The Statute and Regulations*

Title IX was enacted by Congress in 1972 to prohibit discrimination on the basis of gender in all education programs receiving federal financial assistance.²³ The purpose of the statute is to guarantee that “all students . . . have equitable opportunities to participate in [an] educational program.”²⁴ It was enacted as a response to “evidence of ‘massive, persistent patterns of discrimination against women in the academic world.’”²⁵ The statute states that: “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”²⁶

Title IX was not specifically targeted at nor does it mention athletics programs. Therefore, the statute itself does not provide a vision for equality in athletics. Indeed, the issue of discrimination against women in education-based athletic programs was only a brief part of the congressional debates on Title IX.²⁷ After the statute was passed, however, there were attempts to limit its effect on athletic programs,²⁸ with the strongest resistance to Title IX coming from the National Collegiate Athletic Association (“NCAA”), at that time the governing body for men’s intercollegiate sports.²⁹ Those efforts ultimately failed and Congress

²² Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 18–19 (2001) [hereinafter Brake, *Sex Equality*]; Greenberger & Chaudhry, *supra* note 21, at 501.

²³ Horwitz, *supra* note 13, at 312.

²⁴ Letter from Dr. Mary Frances O’Shea, Nat’l Coordinator for Title IX Athletics, to Nancy S. Footer, Gen. Counsel, Bowling Green State Univ. (July 23, 1998) [hereinafter O’Shea Letter], available at <http://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html>.

²⁵ Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ., 366 F.3d 930, 934 (D.C. Cir. 2004) (quoting 118 CONG. REC. 5804 (1972) (statement of Sen. Bayh)).

²⁶ 20 U.S.C. § 1681(a) (2006).

²⁷ McCormick *ex rel. Geldwert v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004) (citing 117 CONG. REC. 30,407 (1971) (statement of Sen. Bayh); 118 CONG. REC. 5807 (1972) (statement of Sen. Bayh)).

²⁸ For instance, Senator Tower attempted to limit the coverage of Title IX to non-revenue producing sports. See 120 CONG. REC. 15,323 (1974) (statement of Sen. Tower) (“The amendment will except only those sports which provide gross revenues and only to the extent that the revenues are necessary to support such revenue-producing athletic activities.”).

²⁹ SUSAN K. CAHN, COMING ON STRONG: GENDER AND SEXUALITY IN TWENTIETH-CENTURY WOMEN’S SPORT 254 (1994) (stating that NCAA executive director Walter Byers announced “that Title IX would spell the ‘possible doom of intercollegiate sports’”).

instead directed the Department of Health, Education, and Welfare³⁰ to prepare regulations implementing Title IX, including in the area of “intercollegiate athletic activities.”³¹ These regulations provide the framework through which equality in athletics is mandated. The final regulations, which were published and went into effect in 1975, provide that: “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”³²

Neither the statute nor the regulations interpreting Title IX require that covered educational programs give preferential treatment to women.³³ Instead, Title IX requires entities that receive federal financial assistance to “provide equal athletic opportunity for . . . both sexes.”³⁴ Notably, the regulations evidence the fact that athletics is a unique context in which to impose an equality mandate.³⁵ Therefore, schools are permitted to have separate athletic programs for men and women.³⁶ Moreover, Title IX does

³⁰ In 1979, the Department of Health, Education, and Welfare split into the Department of Education, which now has the authority to enforce Title IX, and the Department of Health and Human Services. Department of Education Organization Act, Pub. L. No. 96-88, § 201, 93 Stat. 668, 671 (1979) (codified at 20 U.S.C. § 3411 (2006)) (establishing the Department of Education); *id.* § 509(a), 93 Stat. at 695 (codified at 20 U.S.C. § 3508(a) (2006)).

³¹ Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (codified at 20 U.S.C. § 1681 (2006)). Although the regulations and policy interpretations frequently speak of “intercollegiate” athletics, courts have interpreted the provisions to apply to interscholastic athletics as well. *McCormick*, 370 F.3d at 290 (applying policy interpretation to interscholastic athletics); *Horner v. Ky. High Sch. Athletic Ass’n*, 43 F.3d 265, 273 (6th Cir. 1994) (“The Policy Interpretation states that its general principles will often apply to interscholastic athletic programs, and has been held to apply to such programs.”).

³² 34 C.F.R. § 106.41(a) (2009).

³³ *See Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ.*, 366 F.3d 930, 934 (D.C. Cir. 2004) (“Title IX does not require recipients of federal funding to grant preferential treatment to members of one sex”); *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 771 (9th Cir. 1999) (“After all, § 1681(b) states that Title IX does not *require* any education institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity”); *Cohen v. Brown Univ.*, 101 F.3d 155, 164 (1st Cir. 1996) (“Title IX also specifies that its prohibition against gender discrimination shall not ‘be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist’ between the total number or percentage of persons of that sex participating in any federally supported program or activity, and ‘the total number or percentage of persons of that sex in any community, State, section, or other area.’”); *Pederson v. La. State Univ.*, 912 F. Supp. 892, 908 (M.D. La. 1996) (“After establishing that sex discrimination is prohibited, Title IX then proceeds to clarify that efforts to remedy historical sex discrimination shall not include preferential or disparate treatment of one sex over another”).

³⁴ 34 C.F.R. § 106.41(c) (2009).

³⁵ BRAKE, *supra* note 3, at 19, (citing WELCH SUGGS, *A PLACE ON THE TEAM: THE TRIUMPH AND TRAGEDY OF TITLE IX* 42–43 (Princeton Univ. Press 2005)).

³⁶ *See* 34 C.F.R. § 106.41(b) (2009) (“[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.”); O’Shea Letter, *supra* note 24 (“Title IX requires that [intercollegiate athletic] scholarships be made available to the separate men’s and women’s athletic programs in a manner which is ‘substantially proportionate’ to the participation rates of male and female athletes.”).

not require institutions to offer males and females the same sport offerings or mandate that male and female sports programs receive equal funding.³⁷ Title IX requires, however, that opportunities for separate programs be equitable.³⁸

To determine whether a school provides equal athletic opportunity, the regulations state that it must be determined “whether the selection of sports and levels of competition³⁹ effectively accommodate the interests and abilities of members of both sexes.”⁴⁰ In 1979, the Department of Health, Education, and Welfare issued a Policy Interpretation which explained that for the purposes of athletics, Title IX compliance was measured in three areas: (1) athletic scholarships; (2) other program areas (represented by factors two through ten as listed in the regulations);⁴¹ and (3) the accommodation of the interests and abilities of male and female students (derived from the first factor of the regulations).⁴²

Effective accommodation of male and female students’ interests and abilities through adequate participation opportunities is measured by compliance with the well-known “three-part test,” outlined in the 1979 Policy Interpretation, which provides that an institution effectively accommodates the interests and abilities of its male and female students if it meets any one of three benchmarks:

³⁷ ELLEN J. VARGYAS, NAT’L WOMEN’S LAW CTR., *BREAKING DOWN BARRIERS: A LEGAL GUIDE TO TITLE IX 21, 26* (1994) (explaining that “[t]he number of teams offered to men and women is irrelevant,” institutions are generally not required to offer any particular sport, and discrimination is determined not by the “amount of money spent, but what the money buys”).

³⁸ O’Shea Letter, *supra* note 24 (stating that Title IX “requires institutions to provide equitable opportunities to both male and female athletes in all aspects of its two separate athletic programs”).

³⁹ See VARGYAS, *supra* note 37, at 15 n.69 (“Title IX also prohibits discrimination in intramural and club (non-varsity) athletics. However, opportunities in intramural and club teams cannot be used to offset a lack of opportunities in varsity intercollegiate athletics.”).

⁴⁰ 34 C.F.R. § 106.41(c) (2009). The regulations list ten factors to consider in determining whether equal opportunities exist: “(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) The provision of equipment and supplies; (3) Scheduling of games and practice time; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutoring; (6) Assignment and compensation of coaches and tutors; (7) Provision of locker rooms, practice and competitive facilities; (8) Provision of medical training facilities and services; (9) Provision of housing and dining facilities and services; (10) Publicity.” *Id.*

⁴¹ Policy Interpretation of Title IX, 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979) (noting that “the governing principle” in determining “Compliance in Other Program Areas” is that “male and female athletes should receive equivalent treatment, benefits, and opportunities”); see also 34 C.F.R. § 106.41(c) (listing the ten factors that are represented in the policy interpretation).

⁴² Policy Interpretation of Title IX, 44 Fed. Reg. at 71,414 (stating that one section of the policy interpretation governs “Compliance in Meeting the Interests and Abilities of Male and Female Students”); see also 34 C.F.R. § 106.41(c) (stating that the first factor to be considered when determining whether equal opportunities are available is “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes”). Claims in this area are often “referred to as ‘accommodation’ claims and generally relate to a school’s allocation of athletic participation opportunities to its male and female students.” McCormick *ex rel.* Geldwert v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 291 (2d Cir. 2004) (internal citation omitted). Most circuit court opinions have dealt with this area of compliance. *Id.*

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion . . . whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.⁴³

Every court to consider the issue has held that the regulations and Policy Interpretation are entitled to deference.⁴⁴ Courts have stated that “[t]he degree of deference is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX.”⁴⁵ Moreover, every court to consider the issue has held that the regulations and Policy Interpretation are constitutional.⁴⁶ While the regulations and policy interpretations apply directly to high school and college athletics programs whose institutions receive federal funding, their reach is even greater. As one sports scholar

⁴³ Policy Interpretation of Title IX, 44 Fed. Reg. at 71,418. In 1996, the Department of Education Office for Civil Rights issued a Policy Clarification, which explained that the first prong of the test is a “safe harbor” and not a requirement. Dear Colleague Letter, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, Norma V. Cantú, Assistant Sec’y for Civil Rights, (Jan. 16, 1996), available at <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

⁴⁴ See *McCormick*, 370 F.3d at 288, 290 (stating that the Department of Education’s regulations interpreting Title IX are entitled to deference, that the parties agree the Policy Interpretation is entitled to deference, and that other circuits have deferred to the Policy Interpretation); *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002) (“Consistent with the precedent of this court and various other courts, we conclude that the Policy Interpretation is entitled to deference.”); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1047 (8th Cir. 2002) (stating that the Policy Interpretation is entitled to deference); *Horner v. Ky. High Sch. Athletic Ass’n*, 43 F.3d 265, 273 (6th Cir. 1994) (stating that the Policy Interpretation is entitled to “substantial deference by the courts”); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 271 (7th Cir. 1994) (explaining that 34 C.F.R. § 106.41 is entitled to deference); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993) (“We defer substantially to an agency’s interpretation of its own regulations.”); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 171 (3d Cir. 1993) (stating that the Policy Interpretation is accorded “appreciable deference”); *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) (stating that the Policy Interpretation is accorded “appreciable deference”).

⁴⁵ *McCormick*, 370 F.3d at 288 (internal quotation marks omitted).

⁴⁶ *Id.*; *Equity in Athletics, Inc. v. Dep’t of Educ.*, 504 F. Supp. 2d 88 (W.D.Va. 2007).

has explained “[w]hile Title IX would have no official impact beyond federally-funded educational institutions, its clearly stated stance against discrimination advanced a principle of equality” which serves to pressure amateur and professional sports organizations to provide greater access and valuation of women’s athletics.⁴⁷

B. *The Goals of Title IX*

In addition to understanding the statute and regulations, it is useful to review Title IX’s goals and the reasons why equality of opportunity to participate in athletics matters. Courts and scholars have stated that Title IX’s goal is to encourage women to participate in sports by giving them equal participation opportunities.⁴⁸ There are several reasons why this is important. There is, of course, the fact that “equality” as a value is an important end in itself. Education-based athletics are high-profile activities sponsored by taxpayer-supported institutions, and allocating resources inequitably on the basis of gender is morally unjust because gender provides no relevant basis to distinguish between athletes who are entitled to participation opportunities and those who are not. The problem, of course, is that athletic participation opportunities cannot simply be distributed like a loaf of bread or article of clothing. To take advantage of the opportunity being distributed, the recipient must be interested in it and commit to receive it. That is, she must want to engage in sports. Feminist legal scholars and Title IX advocates therefore have focused on the benefits that are derived from developing such interest and commitment.

First, Kimberly Yuracko has argued that distributing athletic participation opportunities through the proportionality requirement of the three-part test is justified because of government’s important role in promoting “certain widely shared conceptions of the good in order to improve the quality of individuals’ lives.”⁴⁹ Yuracko argues that the proportionality prong of the three-part test may be justified as “one key part in a larger project of cultural transformation” that will “reconstruct the

⁴⁷ CAHN, *supra* note 29, at 251.

⁴⁸ See, e.g., *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 768 (9th Cir. 1999) (“[A] central aspect of Title IX’s purpose was to *encourage* women to participate in sports: The increased number of roster sports and scholarships reserved for women would gradually increase demand among women for those roster spots and scholarships.”); BRAKE, *supra* note 3, at 79 (explaining that courts have consistently applied the third prong of the three-part test “in accordance with the law’s goals of encouraging the growth of opportunities for women and nurturing the development of women’s athletic interests and abilities”).

⁴⁹ Kimberly A. Yuracko, *One for You and One for Me: Is Title IX’s Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731, 789–90 (2003) (citing GEORGE SHER, *BEYOND NEUTRALITY: PERFECTIONISM AND POLITICS* 3 (1997)); *id.* at 791 (“The proportionality requirement may be best understood and explained as an attempt to promote certain widely shared values about the kinds of skills and attributes that girls and boys should be encouraged to develop.”).

social reality and social meanings” that devalue women’s participation in athletics.⁵⁰ Thus, Yuracko explains that equitable distribution of athletic opportunities is important because it may:

[E]ncourage girls to think of themselves and their bodies in a different way by tagging competitive physical activity as an equal part female, rather than exclusively male. [Equitable distribution] may, therefore, be part of a larger project to change the social meaning attached to femaleness from passive beauty or sex object to strong physical agent.⁵¹

Beyond the larger social goals associated with gender equity in sports, distributing equitably education-based sports opportunities is crucial because studies have shown that sports participation provides important lifetime benefits to participants.⁵² As a result, the importance of Title IX and the urgency to provide gender equity in sport is directly tied to the fact that sports participation can provide important life lessons and help develop significant life skills—lessons and skills that have long been enjoyed almost exclusively by males.⁵³ Indeed, there is a substantial body of literature that documents the benefits of sport participation. For instance, sport is said to teach important life lessons such as discipline, teamwork, time management, and leadership that “further long-term personal growth, independence and wellbeing.”⁵⁴ Moreover, athletic opportunities are said to create numerous benefits for women and girls, including better physical and mental health, higher self-esteem, a lower rate of depression, and positive body image, as well as the development of responsible social behaviors, greater educational success, and inter-

⁵⁰ *Id.* at 795–96.

⁵¹ *Id.* at 796.

⁵² See Brake, *Sex Equality*, *supra* note 22, at 458 (describing the physical, academic, and social benefits girls receive when they compete in sports); Tara Parker-Pope, *As Girls Become Women, Sports Pay Dividends*, N.Y. TIMES WELL BLOG (Feb. 15, 2010, 4:05 PM), <http://well.blogs.nytimes.com/2010/02/15/as-girls-become-women-sports-pay-dividends/> (describing studies that provide strong evidence that team sports “can result in lifetime improvements to educational, work and health prospects”).

⁵³ See Jessica E. Jay, *Women’s Participation in Sports: Four Feminist Perspectives*, 7 TEX. J. WOMEN & L. 1, 1–2 (1997) (citing Eleanor Mallet, *Everywoman: Letting Girls Have a Sporting Chance*, PLAIN DEALER (Clev.), Oct. 3, 1995, at 1E (quoting a Nike advertisement transcript in which girls on a swing set ask boys to let them play catch so they can reap the benefits of sports)); *id.* at 10–17 (discussing the documented benefits of participation in sports); Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 444–45 (2000) (explaining that without equal athletic opportunity, women will “necessarily be dominated by their physically more developed and stronger [male] mates”).

⁵⁴ See Deborah L. Brake & Verna L. Williams, *The Heart of the Game: Putting Race and Educational Equity at the Center of Title IX*, 7 VA. SPORTS & ENT. L.J. 199, 235 (2008) (explaining that a good “case for expanding girls’ sports opportunities would examine how sports help all young people learn important lessons”).

personal skills.⁵⁵ Research shows that physical activity reduces female risk of cardiovascular disease⁵⁶ and physically active women are less likely to get diseases such as breast cancer.⁵⁷ Athletic activity, especially as a youth, is believed to stimulate healthy bone growth.⁵⁸ Research also shows that athletic activity promotes positive social behaviors, including better academic performance⁵⁹ and lower rates of smoking, drug use, and pregnancy.⁶⁰

Sports participation also provides social benefits that are carried throughout life,⁶¹ including a woman's professional life.⁶² Studies have shown that girls' participation in sport had a powerful impact on women's education and employment, with sport participation accounting for twenty percent of the increase in women's education and forty percent of the increase in women's employment for women twenty-five to thirty-four years old.⁶³ Moreover, some studies have shown that girls' sport participation led to a lower risk of obesity twenty to twenty-five years later.⁶⁴ Given the growing numbers of children, and especially girls, who are overweight and suffering the lifelong physical and emotional effects, equal opportunity to participate in sport—both encouraging an interest in it

⁵⁵ See *Implementation of the Amateur Sports Act of 1978: Hearing on P.L. 95-606 Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. on Commerce, Sci. and Transp.*, 104th Cong. 1218 (Oct. 18, 1995) (statement of Norma V. Cantú, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ.) (“[G]irls who participate in sports are three times more likely to graduate from high school, 80 percent less likely to have an unwanted pregnancy, and 92 percent less likely to use drugs.”); Greenberger & Chaudhry, *supra* note 21, at 492 (“Females who participate in athletics benefit from greater academic success, responsible social behaviors, a multitude of health benefits, and increased personal skills. Female student-athletes have higher grades, are less likely to drop out, and have higher graduation rates than their non-athletic peers.” (footnotes omitted)); Samuels, *supra* note 4, at 242 (“Competitive sports promote physical and psychological health, responsible social behaviors, greater academic success, and better personal skills.” (footnotes omitted)).

⁵⁶ WOMEN'S SPORTS FOUND., *HER LIFE DEPENDS ON IT*, *supra* note 20, at 8.

⁵⁷ *Id.* at 9.

⁵⁸ *Id.* at 12.

⁵⁹ *Id.* at 30; see also Council on Sports Med. and Fitness and Council on School Health, *Active Healthy Living: Prevention of Childhood Obesity Through Increased Physical Activity*, 117 PEDIATRICS 1834, 1836 (2006), available at <http://pediatrics.aappublications.org/cgi/content/full/117/5/1834> (explaining that the health benefits of athletics for children include weight loss and improved insulin sensitivity, blood pressure, and self-esteem); *Cardiovascular Benefits of Daily Exercise in School Children Are Evident Even After One Year*, SCIENCE DAILY, (May 10, 2009), <http://www.sciencedaily.com/releases/2009/05/090508045318.htm> (explaining that children as young as eleven benefit from daily exercise).

⁶⁰ WOMEN'S SPORTS FOUND., *HER LIFE DEPENDS ON IT*, *supra* note 20, at 3-4.

⁶¹ *Amateur Sports Act: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce & Tourism of the S. Comm. on Commerce, Sci. & Transp.*, 104th Cong. 190 (1995) (statement of Donna A. Loppiano, Exec. Dir., Women's Sports Found.); see also Council on Sports Med. and Fitness and Council on Sch. Health, *supra* note 59, at 1834-38.

⁶² Sangree, *supra* note 53, at 444 (“[Eighty percent] of women identified as key leaders in Fortune 500 companies participated in sports during their childhood and self-identified as having been ‘tomboys.’ . . . Several studies describing the glass ceiling in corporations conclude that women's lack of competitive team sports experience disadvantages them for career advancement.”).

⁶³ Parker-Pope, *supra* note 52.

⁶⁴ *Id.*

and sustaining it—is an important public policy issue.

C. *The Problem*

Since its enactment in 1972, Title IX as applied to athletics has received much-deserved acclaim. The law's ability to change the culture surrounding women's participation in athletics and bring increasing numbers of women into sport has been dramatic.⁶⁵ Courts consistently have upheld Title IX's anti-discrimination mandate, and statistics have demonstrated that eliminating discrimination by creating opportunities for girls and women to participate in athletics can inspire greater interest in participation. Indeed, at least some scholars have stated that "Title IX is generally viewed as having fixed the problem of gender equality in sports"⁶⁶

Yet despite the encouraging statistics, it seems that Title IX has not continued to have the wide-ranging impact on sports participation for which advocates and public officials hoped. Indeed, social science research paints a troubling picture of females' participation in sport, with large numbers participating during the elementary school years and then quitting as teenagers.⁶⁷ Many more do not participate at all.⁶⁸ Indeed, over the last decade, women and girls' participation in sport has plateaued.⁶⁹ Moreover, social scientists have noted that children's participation in sport has resulted in what can be described as a "bi-modal" curve.⁷⁰ On one

⁶⁵ Brake, *Sex Equality*, *supra* note 22, at 18.

⁶⁶ EILEEN McDONAGH & LAURA PAPPANO, PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS 29 (2008).

⁶⁷ WOMEN'S SPORTS FOUND., GO OUT AND PLAY: YOUTH SPORTS IN AMERICA 128 (2008), available at <http://www.womenssportsfoundation.org/Content/Research-Reports/Go-Out-and-Play.aspx> (showing that by sixth grade more girls than boys begin to drop out of sports).

⁶⁸ *Id.* at 129 (showing that from third to twelfth grade, regardless of their community, generally more girls than boys had never participated in organized sport).

⁶⁹ BRAKE, *supra* note 3, at 223 (explaining that women's college athletic participation rates have "stayed relatively flat since 2003" and that "gains at the high school level also appear to be diminishing").

⁷⁰ Frank Brady, *Children's Organized Sports: A Developmental Perspective*, J. PHYSICAL EDUC. RECREATION & DANCE, Feb. 2004, at 35, 36 (discussing how the early introduction to and subsequent rise in sports participation is accompanied by the premature departure of a substantial number of the young participants, and noting how data indicate that sports participation peaks at age eleven, and is then followed by steady decline through the remainder of the teen years); Laura J. Burton, *Rethinking a Commitment to Olympic Sports for Girls*, J. PHYSICAL EDUC. RECREATION & DANCE, Nov.–Dec. 2008, at 5, 5; Russell Ellis, *Sports Participation in Children: When to Begin?*, NATIONAL CENTER FOR SPORTS SAFETY, <http://www.sportsafety.org/articles/print/children-sports-participation> ("On the one hand, our children are becoming more sedentary compared to children of past generations, which helps to explain a corresponding rise in the prevalence of childhood obesity. On the other hand, childhood participation in organized sports is at an all-time high and the participants, especially those training to become 'elite' athletes, are getting younger and younger."); *Health Benefits for Children Who Play Sports*, ATHLETIC SCHOLARSHIPS, <http://www.athleticscholarships.net/benefits-risks-youth-sport.htm> (last visited Nov. 5, 2010) (noting the "very real contradiction that while too many kids are inactive—contributing to an increased risk of obesity and diabetes . . . kids who are active are experiencing

curve are children who fail to meet minimum daily physical activity requirements as set by numerous sport and health organizations.⁷¹ Included in this curve are a significant percentage of girls who are classified as overweight.⁷² Data show that girls in high school are significantly less likely than boys to meet daily physical activity recommendations.⁷³ In contrast, on the other curve are the children who are over-training and over-specializing in sport at far too young an age, with the result being an alarming rate of over-use and traumatic injuries.⁷⁴ In short, the data show that girls still substantially lag behind boys when it comes to sport participation, and those who do participate are products of the youth sport culture that is characterized by as many problems as benefits. Thus, despite strong endorsement by courts of the regulations implementing Title IX, girls and women still do not participate in athletics at the same rate as boys and men.⁷⁵

As it stands, both Title IX's supporters and its critics have offered differing explanations for the persistent lag in participation rates. Critics of Title IX argue that females are still not participating at the level of males because females are simply not as "interested" in sports as males. They argue the problem is that Title IX's equality mandate goes too far because, on a fundamental level, males and females are not similarly situated with

increasing pressures specialize in one sport and become 'bigger, better, faster and stronger' to obtain college sports scholarships at progressively younger ages").

⁷¹ Am. Acad. of Pediatrics, Comm. on Nutrition, *Prevention of Pediatric Overweight and Obesity*, 112 PEDIATRICS 424, 424-30 (2003) [hereinafter Am. Acad. of Pediatrics, *Prevention*] ("American children and adolescents today are less physically active as a group than were previous generations . . .").

⁷² *Id.*; Burton, *supra* note 70, at 5-6.

⁷³ Am. Acad. of Pediatrics, *Prevention*, *supra* note 71, at 1835 (noting that "inactivity is twice as common among females (14%) as males (7%)" and that "[b]oys were approximately 20% more active than girls, and mean activity levels decreased with age by 2.7% per year in boys compared with 7.4% per year in girls"); Burton, *supra* note 70, at 5.

⁷⁴ Am. Acad. of Pediatrics, Comm. on Sports Med. & Fitness, *Intensive Training and Sports Specialization in Young Athletes*, 106 PEDIATRICS 154, 154-57 (2000) [hereinafter Am. Acad. of Pediatrics, *Intensive Training*]; Am. Acad. of Pediatrics, Comm. on Sports Med. & Fitness, *Medical Concerns in the Female Athlete*, 106 PEDIATRICS 610, 610-13 (2000) (explaining that female athletes are at risk for what the American Academy of Pediatrics calls the "female athlete triad": disordered eating, amenorrhea, and osteoporosis); Am. Acad. of Pediatrics, Comm. on Sports Med. & Fitness, *Strength Training by Children and Adolescents*, 107 PEDIATRICS, 1470, 1470-72 (2001) ("From 1991 to 1996, an estimated 20,940 to 26,120 [strength training] injuries occurred each year in individuals under 21 years old.").

⁷⁵ WOMEN'S SPORTS FOUND., HER LIFE DEPENDS ON IT, *supra* note 20 ("Nearly one out of every two high school boys plays sports, while only one in three high school girls participates."); WOMEN'S SPORTS FOUND., WHO'S PLAYING COLLEGE SPORTS? TRENDS IN PARTICIPATION 3 (2007), available at <http://www.gogirlworld.org/binary-data/reportcard/fullreport.pdf> ("Women's participation still lags far behind men's participation levels. For the average higher education institution in the complete four-year/1,895 institutions sample, the female share of undergraduate enrollment in 2004-05 was 55.8% while the female share of athletes was only 41.7%. . . . [T]he reported number of men's participants in 2004-05 was 291,797, while the corresponding number for women was 205,492. In combination, these figures demonstrate that as of 2004-05, only 41% of athletic participants were women . . .").

respect to interest in sport.⁷⁶ Title IX supporters challenge this assertion and argue that such views reflect the continuing effect of discrimination against girls and women in sport. The argument is that females are not participating in sport at the same rate as males because society continues to devalue women's sport participation, and discrimination in the form of fewer participation opportunities and unequal treatment of female athletes dampens interest. As currently defined by proponents of gender equity in sport, the "problem" faced by Title IX is that its equality mandate is not fully enforced.⁷⁷ This view holds that greater enforcement and continued development of opportunities to participate in sport, as defined by Title IX, is the solution.

Yet the characterization of the issue as "interested" versus "not interested," and thus whether women are similarly situated to males, obscures a more complex analysis of what might shape women's desire to participate in athletics and whether Title IX's anti-discrimination framework, even if fully enforced, can help. Viewed in this way, continuing to assert the "sameness" of women to men in terms of being interested in sport may lead to an intractable theoretical and practical problem that obscures better solutions for achieving gender equity in sport. Accordingly, like those feminist scholars who sought to move beyond the sameness/difference debate of the 1980s,⁷⁸ this Article seeks to move beyond the interested/not interested debate to deconstruct Title IX and its effect on stimulating interest in sport to explore whether it is time to reconsider the "Field of Dreams" narrative and ask whether Title IX's conception of equality is the solution to stimulating interest and increasing females' participation in sport.

III. DECONSTRUCTING TITLE IX: EQUALITY, ESSENTIALISM, AND THE INTEREST PARADOX

Although it universally has been presumed to increase women's participation in athletics through its "Field of Dreams" conception of equality, a closer look at Title IX's theoretical underpinnings is helpful to understanding how it might affect women's interest in participating in athletics. Such an analysis reveals several issues. First, although it is commonly lauded for taking a substantive approach to equality, Title IX at

⁷⁶ LEVIT & VERCHICK, *supra* note 3, at 114–15.

⁷⁷ *Id.* at 109 (stating that although Title IX has had a great deal of success, "much work remains").

⁷⁸ MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 39 (2003) ("Much of the theorizing in the 1980s attempted to explain why the liberal feminist approach of the Equality Stage was inadequate, particularly that the inclusion of women into male-dominated sites was not the exclusive meaning of equality."); Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 828–29 (1990); Mary Joe Frug, *Sexual Equality and Sexual Difference in American Law*, 26 NEW ENG. L. REV. 665, 673–74 (1992); Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 PAC. L.J. 1493, 1498 (1992).

its core takes a formal equality approach, with the regulations comparing women athletes' "sameness" to men and requiring would-be female student-athletes to assimilate into the male model for sport, which is unquestionably considered the norm. Second, this approach to gender equity in sport relies on an essentialized understanding of what a prospective female student-athlete's interests, abilities, and experiences are. This essentialized vision of a female student-athlete, along with the male norm for sport it has reinforced, has become the dominant message sent by Title IX to females who would be athletes. The result is an "interest paradox," whereby Title IX has served in many cases to extinguish the interest of those women and girls that the statute and regulations are presumed to reach.

A. Title IX and the Limits of Formal Equality

Understanding Title IX's theoretical approach to equality is important because it is the content of equality in education-based athletics, as guaranteed by Title IX that can have an impact on interest in participating in sport. Such an examination reveals the limits of Title IX's conception of equality as a basis for change, as it requires female athletes to assimilate into a male model of sport.⁷⁹

Feminist scholars have articulated two versions of equality. The first is "formal" equality, which is based on the principle that "like cases should be treated alike,"⁸⁰ and, therefore, "unlike cases should be treated differently."⁸¹ The principle of formal equality is, however, limited in that it fails to define the substance of how "like" individuals should be treated.⁸² Thus, under a "formal" equality approach, if men's more favorable treatment were changed to correspond with women's less favorable treatment, "formal" equality would be satisfied. Although so-called "leveling down" is permitted,⁸³ the aspiration of Title IX is that women be brought into the framework for athletics that men have long enjoyed, not that the framework itself be changed. As scholars have

⁷⁹ These limits have been thoughtfully examined by feminist scholars in such contexts as the workplace, but not in sport. See generally Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201; Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984).

⁸⁰ Finley, *supra* note 17, at 1142 ("The ideal of equality—that similarly situated individuals should be treated alike—is basic to our political and legal system."); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1294 (1987) ("The hornbook definition of equal protection is 'that those who are similarly situated be similarly treated' . . ."); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 539 (1982).

⁸¹ Cain, *supra* note 78, at 818.

⁸² *Id.* at 819; Westen, *supra* note 80, at 545-46.

⁸³ BRAKE, *supra* note 3, at 129 ("Cutting men's sports to comply with Title IX is a classic 'leveling down' remedy.").

explained, “[i]n the context of athletics, the statute likely is best known as a tool to ensure that girls and women are treated the same as their male counterparts.”⁸⁴ To do this, a formal equality approach requires making comparisons between those for whom equal treatment is sought.⁸⁵ Thus, arguments appealing to this version of equality require emphasizing the similarities between men and women—that men and women are “similarly situated.”⁸⁶ This form of equality is described as the “right to equal treatment”⁸⁷ and was strongly advanced by feminists in the early 1970s, during the time that Title IX was passed. The formal equality approach marks what is referred to as the “Equality Stage” of feminism.⁸⁸ In this period, feminists relied on formal equality arguments to secure access for women in many traditionally male-dominated areas such as the professions, higher education, and the blue-collar workforce.⁸⁹

In the 1980s, feminists began exploring the limits of a formal equality analysis to effect real, meaningful change for women.⁹⁰ For instance, feminist legal scholars debated whether women needed equality with men or special treatment, particularly in the context of workplace leave policies for childbearing.⁹¹ Many argued that “sameness” feminists, or those committed to formal equality, “were wrong.”⁹² This view is evidenced most notably by the work of Lucinda Finley and Christine Littleton describing the limits of a formal equality analysis,⁹³ which Littleton called a “symmetrical” approach to gender equality.⁹⁴ Littleton explained that one of the forms of the symmetrical vision of equality is the “assimilation model,” or “assimilationism,”⁹⁵ which is founded on the “notion that women, given the chance, really are or could be just like men.”⁹⁶ A central

⁸⁴ Brake & Williams, *supra* note 54, at 212.

⁸⁵ Cain, *supra* note 78, at 818–19; Westen, *supra* note 80, at 537–38 (“[E]quality is comparative, deriving its source and its limits from the treatment of others.”).

⁸⁶ Cain, *supra* note 78, at 819.

⁸⁷ *Id.* at 819–20.

⁸⁸ CHAMALLAS, *supra* note 78, at 23.

⁸⁹ *Id.* at 37.

⁹⁰ Menkel-Meadow, *supra* note 78, at 1506 (“[E]liminating ‘gender bias’ by neutralizing husbands and wives and mothers and fathers into more equal spouses and parents (that ignored the situated differences of these roles) helped expose how formal and rhetorical equality was not entirely responsive to women’s needs for substantive, actual or outcome equality.” (footnote omitted)).

⁹¹ See, e.g., Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?*, 9 J. CONTEMP. LEGAL ISSUES 279, 280–82 (1998).

⁹² *Id.* at 279.

⁹³ Finley, *supra* note 17, at 1120; Littleton, *supra* note 80, at 1291–92.

⁹⁴ Littleton, *supra* note 80, at 1291–92 (“[One feminist approach to equality has been] to consider the two sexes symmetrically located with regard to any issue, norm, or rule. This response, which I term the ‘symmetrical’ approach, classifies asymmetries as illusions, ‘overbroad generalizations,’ or temporary glitches that will disappear with a little behavior modification.” (footnote omitted)).

⁹⁵ Williams, *supra* note 91, at 298.

⁹⁶ Littleton, *supra* note 80, at 1292. Littleton explains that “[s]ymmetry appears to have great appeal for the legal system” and that if society “wholeheartedly embraced the symmetrical approach of assimilation—the point of view that ‘women are just like men’—little would need to be changed in our

goal of “sameness” feminists was therefore “to allow women to assimilate into institutions designed around masculine norms.”⁹⁷

Accordingly, feminists pointed out that the prevailing equality analysis was limited in its ability to effect change because it was built around comparing women to a male-constructed norm. Feminists argued that an equality analysis reflects social meanings that were constructed by a male-dominated society. As such, “the rhetoric of equality compares women to men. Women are either the same as men or different, and in either case men have set the standard.”⁹⁸ Carrie Menkel-Meadow reinforced this view, explaining that with respect to education-based sport, advocates

had to argue that girls should be able to play with boys on teams, while school systems argued that “physical differences” hindered safety and other concerns that required separation for nonequal skills. . . . [They had] called this the claim for equality based on the sex of one; that is that women could be equal to men, with the male gender defining the norm.⁹⁹

Thus, some feminist scholars questioned whether an equality analysis could produce meaningful change for women.¹⁰⁰ Although later feminist writers have explained that all feminists “acknowledge the existence of male norms, and argue for a world restructured to eliminate them,”¹⁰¹ many have pointed out that early feminist efforts were aimed at “claiming equality through the attributes of ‘sameness’—men and women are the same and should have equal rights.”¹⁰² This approach, of course, has produced great success.¹⁰³ Feminist scholars have noted, however, that “[d]espite its possibilities, the meaning of equality . . . [reflected in the law is] limited to the concept of formal equality.”¹⁰⁴

In contrast, feminist scholars have viewed Title IX as being something

economic or political institutions except to get rid of lingering traces of irrational prejudice.” *Id.* at 1293, 1301.

⁹⁷ Williams, *supra* note 91, at 298. Lucinda Finley calls this the “‘ideal of homogenous assimilation’ into the male norm.” *Id.*

⁹⁸ Cain, *supra* note 78, at 805.

⁹⁹ Menkel-Meadow, *supra* note 78, at 1498–99 (footnote omitted).

¹⁰⁰ As stated by Patricia Cain: “Debates about equality have unmasked the fact of the male standard, but seem to me unlikely to change the standard.” Cain, *supra* note 78, at 806; *see also* Becker, *supra* note 79, at 201–02; Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 43 (1990) (focusing on how differences among women may be used as a justification for continued exclusion).

¹⁰¹ Williams, *supra* note 91, at 300.

¹⁰² Menkel-Meadow, *supra* note 78, at 1497–98.

¹⁰³ Feminist scholars have recognized that “[b]y appealing to equality and the doctrine of anti-discrimination, women have been able to make great strides toward the goal of improving their social status and power. Equality theory has been particularly useful for gaining access to traditionally male prerogatives within the public sphere.” Finley, *supra* note 17, at 1142.

¹⁰⁴ Cain, *supra* note 78, at 803.

of an exception to the formal equality approach that predominates in American law. This is because Title IX is said to go beyond formal equality to achieve a kind of substantive equality as well.¹⁰⁵ As a result, Title IX's theoretical approach to equality, unlike that taken by Title VII and other civil rights statutes, is thought to deliver more meaningful change for women.¹⁰⁶ Substantive equality is an approach which "looks to a rule's results or effects. It points out that equal treatment leads to outcomes that are unequal because of differences between men and women."¹⁰⁷ Indeed, it has been asserted that Title IX "takes an approach to sex equality that is markedly different from the dominant approach reflected in sex discrimination law generally."¹⁰⁸

To some extent, this is the case. Courts and scholars have long recognized that a purely formal equality interpretation of Title IX would achieve little, because sport traditionally has been constructed to provide few opportunities for women.¹⁰⁹ As a result, it was unrealistic to think that women would have the same "interest" and "ability" to engage in sport when opportunities to do so historically have been limited. The result of limited opportunity is that females over time have been conditioned not to seek athletic opportunities and participate in sports, because social structures have worked to "anti-normalize" sports participation by women and girls.¹¹⁰ Not surprisingly, this led to fewer females interested in sport participation than males. Seizing on this, Title IX critics have argued that women are less interested in sport and therefore not "like" men, so that it is not necessary to take steps to achieve equal opportunity.¹¹¹ Title IX

¹⁰⁵ See, e.g., Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL'Y 1, 5 (1994) ("Some substantive equality advocates favor equal treatment in some situations and special accommodation in others, insisting, for example, on equal access for women to men's athletic teams, private clubs, and colleges, but on separate teams, clubs, and colleges for women to meet their special needs."); Brake & Williams, *supra* note 54, 212-13 (stating that Title IX "has substantive equality aspects that seek to reform the institutional structures that facilitate inequality"); Buzuvis, *supra* note 11, at 846-47 (discussing how "formal equality requires consideration of [how] . . . gender difference is constructed by social structures"); David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 263 (2005) ("Title IX, on the other hand, looks beyond formal equality and reaches into the realm of substantive equality.")

¹⁰⁶ CHAMALLAS, *supra* note 78, at 65 ("The structuralist approach found in Title IX . . . fits comfortably under 1980s-style cultural and dominance feminist frameworks . . ."); CATHARINE MACKINNON, *SEX EQUALITY* 365 (2000) (stating that "women's income relative to men's has barely moved; occupational segregation remains stubbornly in place for most women; women and their children remain poor after divorce; sexual harassment, although now resisted by law, is as common as it was before it was made illegal. But women's everyday athletic reality has changed.")

¹⁰⁷ Bartlett, *supra* note 105, at 4.

¹⁰⁸ Brake, *Sex Equality*, *supra* note 22, at 24.

¹⁰⁹ See generally Neal v. Bd. of Trs., 198 F.3d 763 (9th Cir. 1999); Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997); Brake, *Sex Equality*, *supra* note 22.

¹¹⁰ Buzuvis, *supra* note 11, at 827.

¹¹¹ Brake, *Feminist Legacy*, *supra* note 14, at 457-58 (explaining that when Title IX was adopted, opponents argued that creating opportunities for women to participate in athletics would be foolish because women would not be interested); Horwitz, *supra* note 13, at 314 (noting how some groups

supporters, however, argue that any difference between men and women that results in lack of interest in athletics is the result of social relationships and institutional practices that “construct” such differences.¹¹² Accordingly, because social structures have long privileged male athletes over females, and therefore dampened female interest in participating, a more substantive approach to equality is necessary.¹¹³

Scholars have explained the ways that Title IX, as written and interpreted, has accounted for this social conditioning by taking a substantive, instead of purely formal, equality approach. This approach is sometimes referred to as “structuralism,”¹¹⁴ and it maintains that to the extent interest can adequately be measured, women’s interest historically has been lower because of past discrimination which resulted in few meaningful athletic participation opportunities for women.¹¹⁵ A “structural” equality approach therefore does not equally weigh women’s expressed “interest” in athletics with men’s because such “interest” might instead be the result of social factors which discourage interest rather than the result of real choices.¹¹⁶ Accordingly, advocates argue that eliminating traditional manifestations of discrimination by creating opportunities for women to participate in athletics will develop women’s interest in participation.¹¹⁷

Title IX incorporates this substantive, or “structural” approach to

associated with men’s “minor sports” oppose the statute, arguing that girls are “not as interested in sports as boys”).

¹¹² Brake, *Sex Equality*, *supra* note 22, at 28–29 (“Feminists working within both relational and anti-subordination approaches have focused on how gender difference is socially constructed. One school of thought, particularly relevant for Title IX analysis, is loosely identified as structuralism, or new structuralism It analyzes difference not as inherent, but as constructed through social relationships and institutional practices.” (footnote omitted)).

¹¹³ Brake, *Sex Equality*, *supra* note 22, at 73–74; Deborah L. Brake, *Title IX as Pragmatic Feminism*, 55 CLEV. ST. L. REV. 513, 537, 535–41 (2007) [hereinafter Brake, *Pragmatic Feminism*].

¹¹⁴ CHAMALLAS, *supra* note 78, at 64 (explaining that Title IX doctrine is “‘structuralist’ in orientation because the courts in these cases seem to appreciate the important role that the current structure of athletic programs and opportunities play in creating interest among students to participate in sports”); Brake, *Sex Equality*, *supra* note 22, at 29–30 (“[A] structuralist interpretation of discrimination law centers the legal analysis on how institutions and organizations construct sex difference and inequality.”).

¹¹⁵ Horwitz, *supra* note 13, at 314–15.

¹¹⁶ Brake, *Sex Equality*, *supra* note 22, at 29 (“Structuralist approaches are reluctant to center equality law around the equal valuation of women’s preferences when those preferences themselves may be the products of social constraint rather than authentic choices.”).

¹¹⁷ Horwitz, *supra* note 13, at 314–15. As commentators have explained:

Any measure that purports to compare the interest of women and men in participating in sports will be affected by the present mix of opportunities for men and women. For example, the answers given by high school students to questions about what college sports they want to participate in will inevitably be affected by what sports they have had a chance to play in high school. These answers, in turn, will have been influenced by their opportunities for college athletic scholarships and the mix of sports offered at the college level.

Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL’Y 51, 79 (1996).

equality primarily through the so-called “three-part test”¹¹⁸ for compliance. Through the three-part test, schools are required to create opportunities for girls and women to participate in sport to stimulate females’ interest in participating.¹¹⁹ Title IX therefore does not require gender-blind assessments of athletic ability, but instead allows institutions to offer separate male and female teams.¹²⁰ More than that, Title IX has a substantive equality element in that it does not require institutions to offer the same sports for men and women, and Title IX grants women greater rights to try out for a men’s team—and is much more restrictive in allowing men to try out for a women’s team—because of the history of discrimination against women in sports.¹²¹ As a result, Title IX has been applauded for taking a “more comprehensive view of equality” than the Equal Protection Clause.¹²²

Courts frequently have endorsed the substantive, or “structural” equality elements of Title IX.¹²³ These cases often cite the overwhelming statistics indicating that simply creating opportunities for women to participate in sport has led to increased interest.¹²⁴ For instance, in the landmark case *Cohen v. Brown University*, the First Circuit stated that:

To assert that Title IX permits institutions to provide fewer athletics participation opportunities for women than for men, based upon the premise that women are less interested in sports than are men, is . . . to ignore the fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women’s interests and abilities.¹²⁵

The court in *Cohen* went on to explain that women’s lower rate of participation in sports was not because of an inherent lack of interest, but was because historically, opportunities for such participation have been limited.¹²⁶ Other courts have echoed this theme.¹²⁷ Thus, courts,

¹¹⁸ Brake, *Sex Equality*, *supra* note 22, at 49–50.

¹¹⁹ Brake, *Pragmatic Feminism*, *supra* note 113, at 537; Brake & Williams, *supra* note 54, at 213–14; Buzuvis, *supra* note 11, at 858.

¹²⁰ BRAKE, *supra* note 3, at 22.

¹²¹ *Id.* at 43.

¹²² Cohen, *supra* note 105, at 260.

¹²³ Brake, *Sex Equality*, *supra* note 22, at 50–51; Buzuvis, *supra* note 11, at 825 (explaining that the Department of Education’s Office of Civil Rights and courts have “recognized that social structures, including colleges and universities, have constructed women’s interests in sports”).

¹²⁴ McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 286 (2d Cir. 2004) (“The participation of girls and women in high school and college sports has increased dramatically since Title IX was enacted. In 1971, before Congress enacted the statute, approximately 300,000 girls and 3.67 million boys played competitive high school sports nationwide. In 2002, 2.86 million girls and 3.99 million boys played competitive high school sports nationwide.”); Boucher v. Syracuse Univ., 164 F.3d 113, 119 n.12 (2d Cir. 1999) (“Statistics show that by 1992, in comparison to when Title IX was enacted, the number of young women participating in sports had multiplied six times.”).

¹²⁵ Cohen v. Brown Univ., 101 F.3d 155, 178–79 (1st Cir. 1996).

¹²⁶ *Id.* at 178.

commentators and sports administrators have emphasized that it is the opportunity to participate in sport that drives interest, thereby turning female athletes into the “likes” that are entitled to be treated equally with males. Statistics have shown that this has worked to a large extent,¹²⁸ as “[t]he unprecedented growth of women’s sports in the post-Title IX years has demonstrated the extent to which interest depends on opportunity structures.”¹²⁹

Yet despite the content of the regulations and the willingness of courts to interpret Title IX in a way that in some respects goes beyond formal equality, Title IX’s supporters have far too easily concluded that this conception of gender equity in sport can continue to produce meaningful change for women in sport. Although Title IX has important substantive or “structural”¹³⁰ equality elements, Title IX’s dominant theoretical underpinning, and the theoretical approach that directly affects “interest” in education-based sport, is in fact formal equality. This is because the structuralist approach to equality admittedly does nothing to change the model for sport offered to women.¹³¹ As will be explained below, this

¹²⁷ For instance, the court in *Pederson v. Louisiana State University* echoed these themes, stating that:

[LSU] argue[d] brazenly that the evidence did not demonstrate sufficient interest and ability in fast-pitch softball at LSU The heart of this contention is that an institution with no coach, no facilities, no varsity team, no scholarships, and no recruiting in a given sport must have on campus enough national-caliber athletes to field a competitive varsity team . . . before a court can find [a Title IX violation].

213 F.3d 858, 878 (5th Cir. 2000). In *Neal v. Board of Trustees of the California State Universities*, the court similarly discounted assertions that women were not as interested as men, stating that:

[A] central aspect of Title IX’s purpose was to *encourage* women to participate in sports: The increased number of roster spots and scholarships reserved for women would gradually increase demand among women for those roster spots and scholarships. . . .

. . . .

Title IX has altered women’s preferences, making them more interested in sports, and more likely to become student athletes.

198 F.3d 763, 768–69 (9th Cir. 1999). The court further explained that

[m]en’s expressed interest in participating in varsity sports is apparently higher than women’s at the present time—although the “interest gap” continues to narrow—so permitting gender-conscious remedies until the proportions of students and athletes are roughly proportional gives universities more remedial freedom than permitting remedies only until expressed interest and varsity roster spots correspond.

Id. at 767. Moreover, in testimony before Congress, one college athletic administrator stated that “[A]fter Title IX was passed, and opportunities became available, women’s participation skyrocketed. If we have learned anything from this experience, it is that women are interested in playing sports and that interest expands as opportunities expand.” *Amateur Sports Act: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. on Commerce, Sci. & Transp.*, 104th Cong. 12, 204 (1995) (statement of Peggy Bradley-Doppes).

¹²⁸ Brake & Catlin, *supra* note 117, at 82.

¹²⁹ Brake, *Feminist Legacy*, *supra* note 14, at 458.

¹³⁰ CHAMALLAS, *supra* note 78, at 65.

¹³¹ As Deborah Brake has explained, “[t]he different voice model of equality has made no inroads in nudging the hyper-competitive model of sports . . . that places a higher value on broadly inclusive

model is one that was created by and for males. Such a realization should not be surprising. Feminist legal scholars have long recognized “[t]he limitations of equality analysis as a transformative device,”¹³² because the benchmark in an equality analysis has been the male norm.¹³³ Nowhere is this more apparent than in sports, a traditionally male domain. Because the definition of discrimination adopted by Title IX is the failure to create sufficient opportunities for women within the existing male-shaped model for sport, the model itself was left untouched by Title IX’s equality mandate. As a result, to enjoy the opportunities secured by Title IX, women must still demonstrate that they are similarly situated, or the same as, men in that they must be interested in and have the ability to be “varsity” athletes, as that term is defined by the predominately male and male-influenced actors that dominate our education-based sports programs.

For instance, in assessing compliance with the “effective accommodation of student interests and abilities” prong, the Department of Education states that the “interests and abilities” that count for purposes of assessing compliance with Title IX are, as stated in the regulations, “the expressed interests of students capable of intercollegiate competition”¹³⁴ who are members of an underrepresented sex.¹³⁵ “Interest” and “ability” are not defined by the statute, regulations, or policy interpretations, but are in fact defined by the institution sponsoring the athletic program, as it is the institution that sets the goals for the program, hires coaches, and evaluates success. Indeed, courts explicitly defer to educational institutions to design their own athletic programs.¹³⁶ While this provision allows for the possibility that males and females might be interested in different sports, this provision does not presume or allow for the fact that

participation, learning new skills, cooperative teamwork, and the joy of playing.” Brake, *Pragmatic Feminism*, *supra* note 113, at 541.

¹³² Finley, *supra* note 17, at 1148; Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 14 WOMEN’S RTS. L. REP. 151, 151 (1992) (“In an important sense, then, courts will do no more than measure women’s claim to equality against legal benefits and burdens that are an expression of white male middle-class interests and values. This means, to rephrase the point, that women’s equality as delivered by the courts can only be an integration into a pre-existing, predominantly male world.” (footnote omitted)).

¹³³ Finley, *supra* note 17, at 1158.

¹³⁴ Although the regulations and policy interpretations frequently speak of “intercollegiate” athletics, courts have interpreted the provisions to provide guidance on interscholastic athletics as well. *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 290–91 (2d Cir. 2004).

¹³⁵ Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,417 (Dec. 11, 1979).

¹³⁶ *Equity in Athletics, Inc. v. Dep’t of Educ.*, 504 F. Supp. 2d 88, 101, 112 (W.D. Va. 2007) (noting that courts should be cautious about interfering in an educational institution’s decisions on its athletic program offerings and that colleges and universities should be left alone “to chart their own course in providing athletic opportunities without judicial interference or oversight”). This deference is also seen in cases involving the remedy to be fashioned for a Title IX violation. See *Cohen v. Brown Univ.*, 101 F.3d 155, 187–88 (1st Cir. 1996) (“Our respect for academic freedom and reluctance to interject ourselves into the conduct of university affairs counsels that we give universities as much freedom as possible in conducting their operations consonant with constitutional and statutory limits.”).

male and female athletes might have different interests and abilities with respect to the model of sport offered. Accordingly, the regulations, policy interpretations, and clarifications make clear that to be entitled to equal treatment, benefits, and opportunities, prospective female athletes must meet the standard for “varsity” competition that is defined by the institution.¹³⁷

The formal equality nature of Title IX therefore is evident in that regardless of what sport women play, whether it is the same or different from men, they must be interested in and play at the “varsity” level as constructed by the institution. Accordingly, while Title IX does not allow schools to assume that women are not as interested in sports as men, and requires schools to create opportunities for women, it does allow schools to assume that the only athletes entitled to equal treatment are those who assimilate into the male model for sport that dominates education-based athletics. As a result, allowing institutions to provide sex-segregated teams is not as far beyond formal equality as one might think, because those separate women’s teams functionally are not different from men’s sports. That is, if women athletes expressed an interest and had the ability to engage in varsity athletics for the sake of social connection and health benefits, and were not as concerned with winning or commercial appeal (and they were not capable of performing at the high levels sought by coaches and athletic administrators), they would not be entitled to a place on the team. In addition, sex segregation of teams, while in some respects valuing women athletes for their own abilities, serves to preserve the male norm as the standard for athletic excellence.

Thus, the assertion that Title IX’s formal equality dimension overshadows its substantive or “structural” equality features is not just an academic exercise. The content of gender equity in sport is not defined by the statute or regulations, but is given meaning by the institutions which determine whether an athlete is “interested” and has the “ability” to participate. The content of such equality therefore is directly tied to what women might be interested in when contemplating participation, or continued participation, in sport. In this way, Title IX’s conception of equality, which has shown such promise in opening up sports to women, is now showing its limit. This is because a conception of equality that requires assimilation ultimately will fall short of achieving true gender equity in sport because it relies on evaluating prospective female athletes according to a standard that was long defined by males.¹³⁸ Accordingly, as

¹³⁷ VARGYAS, *supra* note 37, at 15 (explaining that the focus of Title IX is intercollegiate opportunities).

¹³⁸ CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 119 (1987) (“Radical feminism is not satisfied with women emulating the existing image of the athlete, which has been a male image.”).

feminist scholars discovered in other contexts, “[equality theory] works well and should continue to be the guide when the goal is assimilation of women into male institutions. Assimilation, however, too often means the creation of ‘a world in which persons of both genders are encouraged to act as men currently do’”¹³⁹ This has made impossible any debate about the model for sport offered in our educational institutions or how a model which takes into account women’s interests and priorities might be different. More than that, the equality approach taken by Title IX has reinforced the current model—reaffirming the fact that the motivations for sport participation and attributes displayed by the male student-athlete are the norm.

B. *The Male Norm for Sport*

It may be that the theoretical limits of the formal equality analysis are not problematic in the Title IX context because women might simply be “interested” in assimilating into the male model for sport. Certainly, this is true for many if not most of the women who have taken advantage of Title IX’s opportunities. For this sub-set of women, the hybrid equality approach of Title IX, focusing on creating opportunities in the existing sports framework, is sufficient to create interest. However, for the large subset of women who do not participate in sport, or do not continue their participation, it is important to examine how the model for sport within which Title IX’s equality mandate operates can affect interest in participating. Such an examination reveals that by deferring to institutions to define the content of intercollegiate or interscholastic “varsity” athletics, Title IX incorporates a model for sport that was constructed by males for the purpose of developing socially-constructed characteristics of masculinity.¹⁴⁰

To begin, the Title IX regulations, policy interpretations, and clarifications make clear that to be entitled to equal treatment, benefits and opportunities, prospective female athletes must be the same as men and be able to engage in the level of competition that the institution defines as “varsity.”¹⁴¹ For instance, compliance in terms of levels of competition

¹³⁹ Finley, *supra* note 17, at 1142; *see also* MACKINNON, *supra* note 138, at 118 (“Liberal feminist strategies for change correspond to its critique: ignore or eliminate irrational differences. To the extent that differentiation is irrational, assimilation or integration is recommended. Those things that men have been, psychologically and physically, so also women should be allowed to become.”).

¹⁴⁰ Some scholars would argue as well that the current institution of sport was constructed to perpetuate and reinforce men’s power over women. MACKINNON, *supra* note 138, at 117–20.

¹⁴¹ Thus, to assess compliance with the “effective accommodation of interests and abilities” prong, the Department of Education will examine: the determination of athletic interests and abilities of students, the selection of sports offered, and the levels of competition available, including the opportunity for team competition. The “interests and abilities” that count for purposes of assessing compliance with Title IX are, as stated in the regulations, “the expressed interests of students capable of intercollegiate competition.” Title IX of the Education Amendments of 1972; a Policy

offered is assessed by determining whether men's and women's teams have "equivalently advanced competitive opportunities" or whether the institution has a practice of upgrading the competitive opportunities available to women athletes to meet the developing abilities.¹⁴² Moreover, in a 2008 clarification letter, the Department of Education's Office of Civil Rights stated that in determining which activities can be counted as interscholastic or intercollegiate sports, OCR will consider, essentially, whether the activity resembles currently-existing varsity sports.¹⁴³ Moreover, in attempting to meet prong two of the three-part test, an institution's compliance is measured by adding and upgrading teams to varsity status.¹⁴⁴ In addition, in describing compliance with the third prong of the three-part test, OCR has stated that an institution is deemed to be fully and effectively accommodating its underrepresented students' athletics interests and abilities unless there is a sport(s) that meets the following conditions: "(1) unmet interest sufficient to sustain a varsity team in the sport(s); (2) sufficient ability to sustain an intercollegiate team in the sport(s); and (3) reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region."¹⁴⁵

To determine compliance, OCR looks at the "concrete and viable" interests of the underrepresented sex, with the focus on whether there exists interest in varsity athletics competition and the ability to sustain a team with a reasonable expectation of competition in the school's usual competitive region.¹⁴⁶ OCR's regulations on measuring interest and ability provide that in assessing students' interests and abilities, institutions must use methods that will measure interest sufficient to sustain a varsity team. Assessments by athletic directors and coaches regarding ability to perform

Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,417 (Dec. 11, 1979); see also VARGYAS, *supra* note 37, at 15 (indicating the need for Title IX to address discrimination in intercollegiate level athletic programs).

¹⁴² Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

¹⁴³ Dear Colleague Letter, Athletic Activities Counted for Title IX Compliance, Stephanie Monroe, Assistant Sec'y for Civil Rights (Sept. 17, 2008), available at <http://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-20080917.html>.

¹⁴⁴ Dear Colleague Letter, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, Norma V. Cantú, Assistant Sec'y for Civil Rights (Jan. 16, 1996), available at <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

¹⁴⁵ Dear Colleague Letter, United States Dep't of Educ. Office of Civil Rights, Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—Part Three (Mar. 17, 2005) [hereinafter Dear Colleague Letter, Mar. 17, 2005], available at http://www.nacua.org/documents/AdditionalClarificationThreePartTest_2005.pdf. According to OCR, from 1992–2002, about two-thirds of the 130 schools that were investigated for Title IX violations came into compliance with the statute through part three of the test. *Id.* On April 20, 2010 the OCR withdrew the Dear Colleague Letter. See Dear Colleague Letter, United States Dep't of Educ. Office of Civil Rights (Apr. 20, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf>.

¹⁴⁶ Dear Colleague Letter, Mar. 17, 2005.

at the varsity level will be “presumed valid.”¹⁴⁷ The ways in which OCR determines whether there is sufficient ability include students’ athletic experience and achievement, students’ self-assessment of his or her ability to compete at the varsity level, and the opinions of coaches and administrators.¹⁴⁸ OCR has noted that “[a]lthough a student’s experience in a particular sport may be a good indicator of ability, it does not necessarily reflect the student’s ability to compete on a team at the higher level required of intercollegiate athletes.”¹⁴⁹ In contrast, a student’s assessment of lack of ability to compete at the varsity level is presumed to be evidence of lack of ability.¹⁵⁰

Understanding that Title IX requires assimilation into the institution’s construction of the “varsity” model for sport then begs the inevitable question: what is “varsity” sport? Given what we know about the role of sport generally in shaping the male identity, it is clear that “varsity” level athletics is not an objective standard, but a social construct—one created by and for men.

1. *Sport and Masculinization*

Feminist scholars have asserted that “all social constructs . . . are products of a patriarchal society.”¹⁵¹ More specifically, feminist scholars have asserted that sport is “a patriarchal institution that reinforces men’s power over women.”¹⁵² Sport, however, is most widely held to be an institution that is important in developing men’s gender identity and establishing hierarchies between men,¹⁵³ as it is “a social institution constructed by men.”¹⁵⁴ Sport has long been thought of as a forum “for the development of masculine behaviors . . . [and is] one of the most important sites of masculinising practice and socializ[ing] boys into many of the values, attitudes, and skills considered so important in the adult world of men.”¹⁵⁵ As a result, masculinity and athletics are often seen as one and the same, especially in the educational context,¹⁵⁶ as education-based sport

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Cain, *supra* note 78, at 808.

¹⁵² MICHAEL A. MESSNER, POWER AT PLAY: SPORTS AND THE PROBLEM OF MASCULINITY 17 (1992); *see also* MACKINNON, *supra* note 138, at 117–20 (describing how athletics have been designed “to maximize attributes that are identical with what the male sex role values in men”).

¹⁵³ MESSNER, *supra* note 152, at 19.

¹⁵⁴ *Id.* at 16; MATTHEW MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 12, 19 (2005). “Sport has long been perceived as a masculine domain and is one of the primary sites for the social construction of masculinity in contemporary Western society.” Murray J.N. Drummond, *Sport and Images of Masculinity: The Meaning of Relationships in the Life Course of “Elite” Male Athletes*, 10 J. MEN’S STUD. 129, 129 (2002).

¹⁵⁵ Drummond, *supra* note 154, at 131.

¹⁵⁶ David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. 135, 161–62 (2009).

defines “a pattern of aggressive and dominating performance as the most admired form of masculinity.”¹⁵⁷ Thus, athletic competition demonstrates that men’s bodies can “sustain physical punishment and engage in violence in ways that [make] them superior to women’s bodies,”¹⁵⁸ so that scholars have explained that the institution of sport establishes and “perpetuate[s] the notions of male dominance at the expense of women.”¹⁵⁹ Therefore, scholars have explained that “[i]n a society where winning is generally afforded the privilege of perceived dominance, sport offers its male participants a number of incentives.”¹⁶⁰ As Catharine MacKinnon explained, “most athletics, particularly the most lucrative of them, have been internally designed to maximize attributes that are identical with what the male sex role values in men.”¹⁶¹

In addition to understanding that the current model was shaped by and for males, it is important to further deconstruct the normative content of varsity athletics to determine what women who might take up sport might be interested in and must be able to do. In this regard, a review of the social construction of youth sport can provide assistance in determining what women and girls would be interested in as they set out to claim what Title IX has promised them. Social science data and popular media accounts illustrate that today’s student-athlete quite likely has her interest in sport and ability shaped through the social construction of sport that encourages early specialization and over-training, commercial appeal, and elite athlete status—a model built by and for masculinizing males.¹⁶²

2. *Early Specialization and Overtraining*

One fact of intercollegiate and, increasingly, interscholastic sports is that there are finite opportunities. That is, educational institutions do not have unlimited budgets for athletic programs, which are, at best, an extension of the educational mission of the institution. As a result, there is a natural scarcity which creates a competitive situation for those athletes who hope to claim a position on an institution’s sports team. The prevailing perception among parents, coaches, and the media is that a child is best positioned to claim such a scarce position on a high school and, most importantly, college or university team if he or she starts participating

¹⁵⁷ *Id.* at 161. “[O]rganized, competitive sports were perceived as being sites in which boys were taught to be tough while creating men who fit dominant forms of masculinity.” Drummond, *supra* note 154, at 131. “Organized team sports in particular have often been revered as a central site for the construction of masculinity.” *Id.* at 132.

¹⁵⁸ *Id.* at 131 (citation omitted).

¹⁵⁹ *Id.* at 136.

¹⁶⁰ *Id.*

¹⁶¹ MACKINNON, *supra* note 138, at 120.

¹⁶² *Id.* at 117–20.

in competitive sports at an early age,¹⁶³ specializes in sport at an early age, and trains year-round. Title IX scholars have noted as much, observing that there is an “increasingly competitive environment for women’s intercollegiate sports where there are very few opportunities for female college athletes to ‘walk on’”¹⁶⁴ to a sports team. This competitive environment means that, as a practical matter, “[i]t takes years and years of competitive play to have the necessary skill to take advantage of the sports opportunities Title IX has created at the college level.”¹⁶⁵ Accordingly, the hope for a college scholarship, or even a professional career, can motivate athletes and their parents to commit to specialized sports training regimens at an early age. Such programs often could be considered extreme even for adults.¹⁶⁶ To gain the years of competitive play necessary to be a student-athlete, children interested in sports, with the support of their parents, participate in organized sports programs.¹⁶⁷ While organized sports programs can have significant physical and social benefits, the American Academy of Pediatrics (AAP), among other groups, has warned that “[o]rganization of sports . . . can . . . create demands and expectations that exceed the readiness and capabilities of young participants.”¹⁶⁸ Indeed, the AAP article notes that “in organized sports, inappropriate or overzealous parental or adult influences can have negative effects.”¹⁶⁹ “Unfortunately, when demands and expectations of the sport exceed the maturation or readiness of the participant, benefits of participation are offset. The shift from child-oriented goals to adult-oriented goals can further negate positive aspects of organized sports.”¹⁷⁰ One of the negative aspects is early specialization and overtraining, with numerous reports of girls in

¹⁶³ James White & Gerald Masterson, *Problems in Youth Sports*, FAMILYRESOURCE.COM, www.familyresource.com/parenting/sports/problems-in-youth-sports (last visited Oct. 12, 2010) (“Starting ages for youth in competitive sports have lowered dramatically in the past two decades.” An estimated “40 million children are involved in competitive sports. It’s not just the numbers that are staggering, but the manner in which kids are playing.”).

¹⁶⁴ Brake & Williams, *supra* note 54, at 201.

¹⁶⁵ *Id.*

¹⁶⁶ Am. Acad. of Pediatrics, *Intensive Training*, *supra* note 74, at 154; see also Bob Condon, *Pushing the Limits: Exploring Just How Much is Too Much in Youth Sports*, SEATTLE POST-INTELLIGENCER, Sept. 27, 2004, at F1 (emphasizing that young athletes sometimes “push too hard”); Andrew Ferguson et al., *Inside the Crazy Culture of Kids Sports*, TIME (July 12, 1999), available at <http://www.time.com/time/magazine/article/0,9171,991464,00.html> (explaining the rise in expectations); Steven W. Gray, *Sport Specialization by Children*, TOWNSHIP LACROSSE (June 16, 2009) available at http://www.townshiplacrosse.com/uploads/Sport_Specialization.pdf (“A main reason for the rise in sport specialization by children athletes is the increasing commercialization of sport.”); Detavius Mason, *Age of Specialization: One Sport vs. Multisports*, GUILFORD ORTHOPEDIC AND SPORTS MEDICINE CENTER (last visited Oct. 12, 2010), http://www.guilfordortho.com/age_of_specialization.htm (explaining the result of physical and psychological burnouts).

¹⁶⁷ Specifically, children who have the social-economic means to pursue youth sports.

¹⁶⁸ Amer. Acad. of Pediatrics, Comm. on Sports Med. & Fitness & Comm. on Sch. Health, *Organized Sports for Children and Preadolescents*, 107 PEDIATRICS 1459, 1459 (2001).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1461.

sports like basketball and soccer training year-round, and suffering the injuries that come from such a schedule.¹⁷¹ One youth sports organization has summed up the problems by explaining that “[o]ne of the biggest issues in youth sports today is the professionalization of children’s sports Examples of this professional model include adults pressuring kids to win at early ages, along with single-sports specialization and year-round training”¹⁷²

Sport specialization is defined as “athletes limiting their athletic participation to one sport which is practiced, trained for, and competed in throughout the year.”¹⁷³ Social scientists have long discussed the “alarming trend” of specialization, which has been described as “simply inconsistent with a high school’s educational goals and objectives.”¹⁷⁴ While high school coaches and administrators are charged with providing a sound athletic program to augment educational goals, they are also expected to field teams that win.¹⁷⁵ Specialization is believed to increase an athlete’s chances of success and therefore is believed to benefit athletic programs. Studies have shown that high school coaches frequently are a source of pressure on athletes to specialize, as these coaches believe it will raise the athletes’ skill level and benefit the program.¹⁷⁶ It is also believed that specialization will make the athlete competitive for a college scholarship.¹⁷⁷

¹⁷¹ See Jack Kelly, *A World of Hurt; More Girls Playing Sports Means More Injuries, Especially in the Knees*, PITTSBURGH POST-GAZETTE, May 28, 2008, at C-8 (“Girls are specializing in a sport much younger than they have been in the past Constant pressure to perform is putting them at greater risk” for injury.); B.J. Koubaroulis, *Scholarships with a Cost: Soccer Standouts Play Year-Round at Frenetic Pace*, WASH. POST, May 21, 2009, at D01 (“[P]ressures from parents, coaches and other athletes often cause players to over-indulge during such a critical developmental stage.”).

¹⁷² Press Release, Nat’l Collegiate Athletic Ass’n, Alliance Issues ‘Poor Grades’ on National Youth Sports Report Card (Nov. 9, 2005), http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/Media+and+Events/Press+Room/News+Release+Archive/2005/Announcements/Alliance+Issues+Poor+Grades+on+National+Youth+Sports+Report+Card.

¹⁷³ Jay Watts, *Perspectives on Sport Specialization*, J. PHYSICAL EDUC., RECREATION & DANCE, Oct. 2002, at 33, 33.

¹⁷⁴ *Id.*

¹⁷⁵ David Susanj & Craig Stewart, *Specialization in Sport: How Early . . . How Necessary?*, COACHESINFO, http://www.coachesinfo.com/index.php?option=com_content&view=article&id=303:specialization&catid=91:general-articles&Itemid=170 (last visited Sept. 4, 2010).

¹⁷⁶ *Id.* (“Many believe to earn athletic scholarships and consistently have winning programs, athletes must spend significant time outside the regular season working on sport-specific skills. The perception of most coaches and parents is that if all the other athletes are doing it and you aren’t, in time, you won’t be able to compete.” (citation omitted)).

¹⁷⁷ Watts, *supra* note 173, at 33–34. Nevertheless, social scientists have noted that “although . . . specialization enhances individual and team performance, it undermines the basic purpose of high school athletics.” Susanj & Stewart, *supra* note 175. Indeed, while it is generally accepted that sports participation is a beneficial activity, there are “numerous negative effects” from sport specialization. Critics point out that specialization “conflicts with the educational mission of schools whose goals should be to provide athletic programs that lead to the greatest personal growth for the greatest number of students.” *Id.* It has also been suggested that specialization leads to burnout, as the pressure to succeed as well as failure or injuries can be “devastating” to a sport specialist. Sports specialization can also lead to overuse injuries. Moreover, it is not clear that sport specialization can help an athlete

3. Commercialization and Emphasis on Winning over Academics.

Another aspect of the varsity sport model is the structure of sport that emphasizes winning over participation. Winning has taken center-stage in the model for high school and college sports because winning sports programs provide spectator interest and commercial appeal. As explained by one observer, “[h]igh school and college programs have concentrated the vast majority of their resources on sports for which there is considerable public interest and the prospect of professional sports opportunities.”¹⁷⁸ This has led to the well-known, now familiar issue of playing-to-win subverting academic pursuits in the lives of student-athletes. As one media outlet characterized it, “[s]chools admit athletes with dismal academic records, then spend millions to keep them eligible Even so, graduation records are an embarrassment at some schools And academic fraud continues to plague major programs”¹⁷⁹ This familiar assessment now applies to some women’s sports as well, with reports that women’s basketball players are having “widespread” problems with academics.¹⁸⁰ The emphasis on athletics over academics is reinforced by the fact that athletic scholarships are only for one year. Thus, athletic performance matters, and students who want to keep their scholarships

become better at her sport. *Id.* (“The pressure to succeed in sports often leads to burnout and dropout The one-dimensional self-concept that develops with specialized athletes creates a developmental dead end. Young athletes feel trapped in a role and identity that depends on their success as an athlete.”); Watts, *supra* note 173, at 35 (“Burnout begins when the perceived, stress-induced costs of participating in a sport outweigh the rewards of participation.”).

¹⁷⁸ *Amateur Sports Act: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce & Tourism of the S. Comm. on Commerce, Sci. & Transp.*, 104th Cong. 187 (1995) (statement of Donna A. Lopiano, Exec. Dir., Women’s Sports Found.).

¹⁷⁹ Gilbert M. Gaul & Frank Fitzpatrick, *Rise of the Athletic Empires: At Schools Such as Penn State, Corporate Sponsors and Boosters Fund an Athletic Juggernaut*, PHILA. INQUIRER, Sept. 10, 2000, at A01; see also Timothy Davis, *Absence of Good Faith: Defining a University’s Educational Obligation to Student-Athletes*, 28 HOUS. L. REV. 743, 753, 756–57 (1991) (“An unjustifiably high number of student-athletes leave institutions of higher education without degrees.” This is “not surprising because [schools] often admit student-athletes with low academic predictors and then fail to provide . . . support services” Additionally, student-athletes are “often encouraged and counseled to take courses that will enable them to maintain their athletic eligibility, even though such courses will not provide them with substantive educational benefits.” (footnote omitted)); Christopher M. Parent, *Forward Progress? An Analysis of Whether Student-Athletes Should Be Paid*, 3 VA. SPORTS & ENT. L.J. 226, 256 (2004) (arguing for some sort of compensation for collegiate athletes); Orion Riggs, *The Façade of Amateurism: The Inequities of Major-College Athletics*, 5 KAN. J.L. & PUB. POL’Y 137, 141 (1996) (explaining the hypocrisy of the NCAA encouraging athletics as a part of education when many student-athletes are unprepared for the rigors of the schools they attend and were often admitted only after the school lowered its academic standards for the athlete); Jill Lieber Steeg et al., *Athletes Guided Toward ‘Beating the System’; New NCAA Rules Lead to Clusters in Certain Majors*, USA TODAY, Nov. 19, 2008, at 1A.

¹⁸⁰ Ian Begley & Mitch Abramson, *Girls Game Gone Wild: Increased Opportunity on Court Brings Familiar Pitfalls Off of It*, N.Y. DAILY NEWS, Nov. 26, 2008, at 6 (quoting one player as stating that “[i]n high school it was hard to balance school work with basketball. . . . We’d practice until nine at night, and then I’d come home and I was too tired to study. I was exhausted. I was trying to do my homework while I was in school the next day. It didn’t work.”).

must make sports their main focus.¹⁸¹ The problem of commercialization and athletics over academics has continued to grow to the point that one former college president stated that “[w]e’re in show business We’re not providing opportunities for students. If we were really in the business of providing opportunities for students, we’d be investing in intramural athletics. That’s for students.”¹⁸²

Title IX does nothing to change this phenomenon, and in fact even reinforces it. Because Title IX serves to ensure that girls will not be denied the same opportunity for commercialized athletics participation as men, the regulations state that a school cannot “limit the potential for women’s athletic events to rise in spectator appeal.”¹⁸³ That spectator appeal is an important part of athletics (and considered a measurement for whether an athlete’s participation has been a success) is reflected in the cases. For instance, one court in a decision upholding Title IX explained that: “This past summer, 90,185 enthusiastic fans crowded into Pasadena’s historic Rose Bowl for the finals of the Women’s World Cup soccer match. . . . The victory sparked a national celebration and a realization by many that women’s sports could be just as exciting, competitive, and lucrative as men’s sports.”¹⁸⁴ Whether an individual’s sport participation is exciting to watch and lucrative is thus incorporated, almost unconsciously, into Title IX as a justification for providing equal participation opportunity. As some scholars have said, “[i]n a commercialized model of sports, in which winning is valued above the experience of the game, athletes are essentially commodities, useful only to the extent they advance the goal of winning.”¹⁸⁵

4. *Elite-Level Ability*

Intercollegiate and interscholastic varsity sport is also characterized by the fact that those who participate must usually have elite-level ability. Deborah Brake has explained that Title IX implicitly incorporates the model of “elite competitive sports as the baseline measure of equality.”¹⁸⁶ Accordingly, while courts have noted that “[n]othing in Title IX requires

¹⁸¹ Allen L. Sack, *Big-Time Athletics vs. Academic Values: It’s a Rout*, CHRON. HIGHER EDUC., Jan. 26, 2001, at B7.

¹⁸² Ian Herbert, *Selling Their Soles: The Commercialization of College Sports*, MICH. DAILY (Sept. 22, 2005), <http://www.michigandaily.com/content/selling-their-soles-commercialization-college-sports?page=0,1>. Indeed, as one Title IX scholar has noted, “nothing about sports as played in today’s educational institutions is ‘natural’—not even what counts as a ‘sport.’ The popularity and revenue-producing potential of a sport is certainly not natural; it is carefully promoted and nurtured by the machinery of college (and professional) athletics.” Brake, *Feminist Legacy*, *supra* note 14, at 481.

¹⁸³ Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,416 (Dec. 11, 1979).

¹⁸⁴ Neal v. Bd. of Trs. of the Cal. State Univs., 198 F.3d 763, 773 (9th Cir. 1999).

¹⁸⁵ Brake & Williams, *supra* note 54, at 235.

¹⁸⁶ Brake, *Pragmatic Feminism*, *supra* note 113, at 541–42 (explaining that the elite model of sports is “dominant”).

an institution to create a 'top flight' varsity team,"¹⁸⁷ the converse is also true: there is nothing in Title IX which prevents a school from creating and striving for "top-flight" status. Given the external pressures that reward only winning programs, it is no surprise that most education-based sport programs seek to develop, and strive to maintain, "top-flight" programs.¹⁸⁸ Thus, for instance, in *Kelley v. Board of Trustees of the University of Illinois*, the court noted that the University of Illinois athletic department's goal was to "field only teams 'capable of competing for championships in the Big Ten Conference.'"¹⁸⁹ It is in this way that Title IX incorporates the prevailing norms about what it means to be a student-athlete and participate in education-based sports programs.¹⁹⁰ Colleges are spending ever-increasing funds to recruit elite athletes, including female athletes, for their athletic programs.¹⁹¹ As noted in the *Chronicle of Higher Education*, recruitment spending has doubled or tripled as athletics departments seek

¹⁸⁷ *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 835 (10th Cir. 1993) (explaining that the district court exceeded its authority in ordering the university to play an exhibition season as well as field a women's softball team during the regular season, so that the team would be more competitive).

¹⁸⁸ See Robert C. Farrell, *Title IX or College Football?*, 32 HOUS. L. REV. 993, 998 (1995) ("For football, an overemphasis on winning and profits has produced a game that often appears to be very far removed from the educational function of the university."); Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 520 (2008) (describing the increase in spending in budgets for Division I athletic programs); Chad W. Pekron, *The Professional Student Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 HAMLINE L. REV. 24, 43-46 (2000) (arguing that collegiate athletes should be compensated for their work based on the exorbitant amount of money schools make off football and basketball, the extreme salaries of coaches, the sponsorship deals schools make for uniforms, and the "world-class facilities" schools build to entice players to join their programs); Karan Arakotaram, *College Sports' Warped Finances*, YALE DAILY NEWS, Sept. 30, 2008, available at <http://www.yaledailynews.com/articles/view/25469> (noting that the highest paid state government employee in Texas is the UT football coach, who gets a bonus if his team reaches a fifty percent graduation rate—the prior season the graduation rate was just forty-two percent—and arguing for a adjustment to that system); Gaul & Fitzpatrick, *supra* note 179, at A01 ("Games have become marketing tools to promote the college brand and gain national acclaim. Entertaining alumni and boosters has become more important than encouraging enjoyment and participation among students and athletes—the original idea behind college sports."); *Making Money Off High School Kids? Texas Prep Football Squad a Cash Machine*, USA TODAY, Sept. 14, 2006, available at http://www.usatoday.com/sports/preps/football/2006-09-13-southlake-carroll_x.htm (explaining the result of "priceless publicity"); Julie Sabatier, *Corporate Money in School Sports Favors Boys, May Violate Law*, NEW STANDARD, (June 26, 2006), <http://www.commercialexploitation.org/news/corporatemoneyfavorsboys.htm> (explaining that "companies like Nike . . . began looking for outstanding players to sponsor at the high school level in the mid-1990s").

¹⁸⁹ *Kelley v. Bd. of Trs.*, 35 F.3d 265, 269 (7th Cir. 1994).

¹⁹⁰ The regulations and Policy Interpretation make clear that varsity, competitive athletic opportunities is the focus of Title IX. See *supra* note 134 and accompanying text. That is, although the regulations mention "club" and "intramural" as falling within the purview of the equality mandate, these opportunities in no way substitute for varsity opportunities and, in fact, because there is still not, at most institutions, equality between men's varsity opportunities and those for women, any club or intramural opportunity provided for women's sports would be eyed for elevation to varsity status. Of course, because of the commercial potential of varsity sport, it is the preferred model of sport offered in the intercollegiate setting.

¹⁹¹ Libby Sander, *Have Money, Will Travel: The Quest for Top Athletes*, CHRON. HIGHER EDUC., Aug. 1, 2008, at 1.

to pursue "elite athletes" on a "national . . . scope."¹⁹² Title IX cases involving scheduling of high school sports reflect this trend, with girls successfully arguing that scheduling their sport in an "off season" or "non-traditional" season amounts to discrimination because the scheduling of sports can affect girls' visibility and access to college recruiters, a benefit that boys' teams have long enjoyed.¹⁹³ Indeed, one of the hoped-for effects of Title IX, as expressed in Congress, was that it would help increase our supply of female Olympians.¹⁹⁴

Many Title IX cases reflect the social construction that a student-athlete is one who has specialized training, can contribute to an athletic program that cultivates commercial appeal, and has developed elite ability. For instance, in *McCormick v. School District of Mamaroneck*, a group of female athletes challenged the scheduling of soccer in the spring for girls, while it was scheduled in the fall for boys.¹⁹⁵ The court held that the players demonstrated that they were irreparably harmed by being forced to play in the spring season, which necessarily meant that they could not compete for the state championship.¹⁹⁶

Notably, the court highlighted the fact that the plaintiffs were part of the Olympic Development program for "girls with exceptional ability in soccer."¹⁹⁷ The court explained in detail how the boys who were involved in the Olympic Development Program did not have the same issues as the girls, because the program was scheduled for the spring.¹⁹⁸ Since the girls' high school soccer program was scheduled for the spring, however, they faced a conflict. It was also noted that the girls participated on elite "club" soccer teams and that the scheduling presented by spring, instead of fall, soccer made competing on both teams difficult.¹⁹⁹ In addition, playing soccer in the spring, it was alleged, disadvantaged the girls in terms of college recruiting, because many coaches do recruiting at club games in the spring. Girls who are playing both for their club and their high school team in the spring are therefore "not at their best" because they have not

¹⁹² *Id.*

¹⁹³ *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 302 (2d Cir. 2004); *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 836-38 (W.D. Mich. 2001).

¹⁹⁴ As stated by Norma Cantú, former Assistant Secretary for Civil Rights at the Department of Education:

Senator Hatch has perhaps best captured the essence of the meaning and promise of Title IX. In 1984, on the Senate floor, he observed that there were few, if any, Senators who did not want "Title IX implemented so as to continue to encourage women throughout America to develop into Olympic athletes . . ."

Amateur Sports Act: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce & Tourism of the S. Comm. on Commerce, Sci. & Transp., 104th Cong. 12 (1995) (statement of Norma V. Cantú, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ.).

¹⁹⁵ *McCormick*, 370 F.3d at 279.

¹⁹⁶ *Id.* at 302.

¹⁹⁷ *Id.* at 281.

¹⁹⁸ *Id.* at 280.

¹⁹⁹ *Id.* at 281.

been able to practice as much with their club team, they are injured from “playing too much soccer” and, at that point in the year, “many are burned out.”²⁰⁰ Also of note is that in *McCormick*, the school district argued that the plaintiffs’ claim reflected an unhealthy “single mindedness” with respect to soccer. The court rejected this argument, stating that the students’ level of commitment to their sport was “not relevant.”²⁰¹ The court did, however, praise the athletes, stating that “many would include ‘single mindedness’ in a list of those traits possessed by great athletes. Few would choose the trait well-rounded.”²⁰²

Similarly, in *Biediger v. Quinnipiac University*, the plaintiffs were challenging the university’s decision to eliminate its varsity volleyball team.²⁰³ The court explained in great detail who, in terms of ability, the affected athletes were, starting with the recruitment process for intercollegiate volleyball, noting that “[t]he recruiting process for Division I volleyball can begin as early as a player’s sophomore year in high school.”²⁰⁴ In order to eventually be recruited, the athletes testified that they “began playing volleyball on a competitive basis in fourth or fifth grade. In addition to playing volleyball for their high school teams, those recruited plaintiffs played for club teams during the off-season, traveling to interstate competitions on the weekends and thereby maintaining a year-round commitment to volleyball.”²⁰⁵ Moreover, the plaintiffs testified that they chose Quinnipiac because they felt a “bond” with the team, which was crucial because “playing Division I volleyball is a time-intensive activity, akin to a ‘full-time job.’ Given the number of hours spent practicing, playing, and traveling with the team,” the court noted that their relationship with the coach and each other was important.²⁰⁶ The court ultimately entered a preliminary injunction prohibiting the university from eliminating the volleyball team, noting that the plaintiffs would suffer irreparable harm because of

the loss . . . even a year of competition would have on the skills and competitiveness of elite Division I athletes such as the student plaintiffs in this case.

The plaintiffs in this case have devoted a significant portion of their lives to training for the opportunity to

²⁰⁰ *Id.* at 282.

²⁰¹ *Id.* at 296.

²⁰² *Id.* None of this is to suggest that the school district was treating the male and female athletes in the school district equally by scheduling women’s soccer, but not men’s, in a season where the women could not compete for the state championship. The court’s discussion, however, powerfully illuminates the underlying norms of sport participation that exist in education-based sport programs.

²⁰³ *Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d 277, 278 (D. Conn. 2009).

²⁰⁴ *Id.* at 282.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

compete on a Division I volleyball team in college, spending countless hours competing on high school and club teams and participating in the rigorous and time-consuming recruiting process

. . . As explained above, losing a year of competition would cause unquantifiable harm to their elite volleyball training and skill development.²⁰⁷

The dominance of the elite model of sport is also seen in cases and commentary celebrating Title IX for this very fact. For instance, part of the Title IX narrative has long been the recitation of the number and success of elite female athletes on the Olympic and World Championship level. For example, the court in *Cohen v. Brown University* stated that:

One need look no further than the impressive performances of our country's women athletes in the 1996 Olympic Summer Games to see that Title IX has had a dramatic and positive impact on the *capabilities* of our women athletes, particularly in team sports. These Olympians represent the first full generation of women to grow up under the aegis of Title IX. The unprecedented success of these athletes is due, in no small measure, to Title IX's beneficent effects on women's sports What stimulated this remarkable change in the *quality* of women's athletic competition was not a sudden, anomalous upsurge in women's interest in sports, but the enforcement of Title IX²⁰⁸

It is therefore apparent that courts have served to reinforce the message that Title IX opportunities reflect the prevailing norm that education-based sport is for elite athletes whose focus is on winning, as it appears above question that, in the words of the Second Circuit, "[a] primary purpose of competitive athletics is to strive to be the best."²⁰⁹

Thus, although the regulations implementing Title IX have been interpreted to require schools to create opportunities to stimulate demand, the opportunities created are based on the male norm, operated through the "varsity" model for sport. That is, Title IX's regulations and interpretations provide nothing more than a chance for female athletes to assimilate, not define the way in which they will participate in sport. The notion that sex-segregated teams and a different selection of sports for

²⁰⁷ *Id.* at 292.

²⁰⁸ *Cohen v. Brown Univ.*, 101 F.3d 155, 188 (1st Cir. 1996) (emphasis added).

²⁰⁹ *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 294–95 (2d Cir. 2004).

males and females gives women a meaningful voice in the structure and type of opportunities offered through Title IX overlooks the fact of the male norm as defining the standard for education-based sport. This is because although the selection of sports may be different, the way in which they are played, with the expectations of the socially constructed “varsity athlete,” reflecting characteristically male values and expectations, remains the same. Accordingly, a female athlete must functionally be the same as a male athlete. Moreover, to be the same as a male athlete, a female athlete must be interested in and have the ability to participate in a model of sport that is uniquely male—historically shaped by male coaches and athletic administrators and reflecting what are considered to be male characteristics and values.²¹⁰

In sum, under Title IX, prospective female student athletes necessarily have to be “interested” in and have the “ability” to participate in the model of varsity sport long played by male athletes and favored by educational institutions.²¹¹ Although some commentators have noted that Title IX and the implementing regulations accommodate gender differences by allowing schools to sex segregate teams and offer a different selection of sports for male and female athletes,²¹² this does not offer as much accommodation of difference as might be assumed. A school could offer a very different mix of sports for men and women, with the goal that all teams, regardless of gender, perform at a certain level or be competitive for championships. Thus, the difference being accommodated is really only in taste in sports, but not how those sports are played. As explained below, this has a significant impact on women’s and girls’ interest in sport.

C. *The Interest Paradox*

Title IX in many ways is a product of its time. In the early 1970s, when Title IX was passed and its implementing regulations promulgated, feminist scholars were securing victories for women in various areas of life through the use of a formal equality approach, arguing that in all relevant respects, women were the “same” as men.²¹³ This “sameness” approach is apparent throughout the regulations which are the heart of Title IX. Yet the recognition that Title IX relies upon a conception of equality that requires assimilation into a model for sport that was constructed by males, for the purpose of masculinizing men, sheds new light on the ability of

²¹⁰ MESSNER, *supra* note 152, at 13–17.

²¹¹ VARGYAS, *supra* note 37, at 53 (explaining that although Title IX prohibits discrimination in intramural and club (non-varsity) athletics, the emphasis is on varsity athletics).

²¹² *Id.*

²¹³ Menkel-Meadow, *supra* note 78, at 1497–98 (“[E]arly feminist work, including both litigation and the legal theories that supported it were based on claiming equality through the attributes of ‘sameness’—men and women are the same and should have equal rights.” (footnotes omitted)).

Title IX to stimulate women's interest in sport. Seen in this way, the "Field of Dreams" narrative shows its limits, because it rests on two faulty premises: first, that there exists a neutral, non-gendered model of "sport" in our educational institutions that equally could attract male and female participants, and second, that all women want the same sport experience. Given this, the question for Title IX today is not whether women are inherently interested in a so-called objective experience called "sport," but instead whether women are interested in assimilating into a model for sport constructed by and for men.

It is recognized by both Title IX's critics and supporters that substantial numbers of women are in fact not so interested. However, the structural theory of equality, which explains lagging participation rates as discriminatory social conditioning and not the product of authentic choice, produces a paradoxical effect. Such a theory discounts women's choices to opt out of sport and argues for creating more opportunities for women to participate in a model for sport that does not resonate with them. It is a Catch-22: instead of developing interest in sport participation, Title IX is producing an "interest paradox," dampening interest in sports participation in the very population the statute and regulations are meant to reach. Therefore, if Title IX is, as courts and legal commentators suggest, meant to develop and encourage women's participation in athletics,²¹⁴ it is not fully succeeding.

This interest paradox, of course, does not apply to all women. It is apparent that there are some women who are interested in assimilating into the male-constructed model for sport. Title IX's participation statistics, showing steady increases since the statute and regulations were implemented, tell the story of these women well. There are, however, two other groups of women, represented in the statistics which repeatedly show large numbers of girls and women not participating, with whom we should be concerned. The first are those who try to assimilate into the male-constructed, "varsity" model for sport but fall victim to one of its common outcomes, known as "burnout." The second group of girls and women are those who do not participate at all, getting the message from Title IX that if they are not willing to submit to the prevailing sport culture, they should stay on the sidelines.

The first group of women, those who try to assimilate into the "varsity" model, have their stories told through statistics on sport "burnout." "Burnout" is not a natural, inevitable result of sport training, but is a phenomenon associated with the male-constructed, "varsity" sport

²¹⁴ See *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 768 (9th Cir. 1999) ("[A] central aspect of Title IX's purpose was to *encourage* women to participate in sports . . .").

model predominating in American educational institutions.²¹⁵ “Burnout” is defined as “the athlete’s natural response to chronic, ongoing stress.”²¹⁶ According to researchers, burnout starts to manifest at age thirteen, with children quitting sports they had long enjoyed.²¹⁷ The effects of burnout can be long term, with individuals often permanently leaving all organized sports activity.²¹⁸ Youth sports groups report that between twenty and forty million children per year sign up for competitive sports.²¹⁹ The data, however, also show that seventy percent of these children quit playing competitive sports by age thirteen, and do not play again. An executive with the National Youth Sports Coaches’ Association states that “[t]he number one reason (why they quit) is that it stopped being fun,”²²⁰ because, as commentator Carleton Kendrick states, “‘fun’ takes a back seat to winning.”²²¹ A sizeable literature on youth sports shows that it is at this age that the effects of being an “athlete” set in, leading the child to reject participation in any sport.²²²

Thus, even for those who wish to assimilate, Title IX may have extinguished interest in sport by reinforcing male norms about sport

²¹⁵ Niesha Lofing, *Kids, Sports, Stress: Watch for Overtraining and Burnout*, SACRAMENTO BEE, July 20, 2009, at D3.

²¹⁶ White & Masterson, *supra* note 163.

²¹⁷ *Id.*

²¹⁸ Jacqueline Stenson, *Pushing Too Hard Too Young*, MSNBC.COM (Apr. 29, 2004, 11:23 AM), <http://www.msnbc.msn.com/id/4556235> (“Not only are these youngsters at risk for emotional burnout, they may also develop injuries that plague them for a lifetime. Some will turn to steroids or other performance-enhancing substances to try to gain an edge. And some may give up on sports—and exercise—altogether.”); Tom Withers, *Study: Kids Burn Out with Focus on Sports*, DESERET MORNING NEWS (Salt Lake City), Jan. 8, 2006.

²¹⁹ Catherine Holecko, *Sportsmanship: Teach Your Kids About Winning and Losing in Sports*, ABOUT.COM, <http://familyfitness.about.com/od/motivation/ss/sportsmanship.htm> (last visited Sept. 2, 2010) (noting that forty million children per year participate); Carleton Kendrick, *Why Most Kids Quit Sports*, FAMILYEDUCATION.COM, <http://life.familyeducation.com/sports/behavior/29512.html> (last visited Sept. 2, 2010) (noting that twenty million children per year participate in youth sports).

²²⁰ Kendrick, *supra* note 219.

²²¹ *Id.*

²²² See Joel S. Brenner & the Council on Sports Med. & Fitness, *Overuse Injuries, Overtraining, and Burnout in Child and Adolescent Athletes*, 119 PEDIATRICS 1242, 1243 (2007) (“The pediatric athlete may also have fatigue, lack of enthusiasm about practice or competition”); Heyward L. Nash, *Elite Child-Athletes: How Much Does Victory Cost?*, 15 PHYSICIAN & SPORTSMEDICINE 129, 129 (1987) (“[L]iving up to the standards of must-win situations is taking its toll on some child-athletes, because it has added a large measure of stress to their lives.”); Thomas D. Raedeke et al., *Understanding Athlete Burnout: Coach Perspectives*, 25 J. SPORT BEHAV. 181, 182 (2002) (explaining that the term “burnout” suggests “the image of bright, promising young athletes who get fed up with sport participation and stop competing at what should be the top of their career”); Peter Cary, *Think Twice About Travel Teams*, U.S. NEWS & WORLD REP., Dec. 25, 2006, at 72 (“Burnout is a real concern to coaches—some kids who have played intensively since age 10 are just flat-out tired of the sport.”); Christy Damio, *Playing it Safe*, SCHOLASTIC ACTION, Nov. 13–27, 2006, at 34 (“Feeling overworked and overtired is one of the main reasons teens give for quitting a sports team.”); Barbara Kantrowitz et al., *Don’t Just Do it For Daddy*, NEWSWEEK, Dec. 9, 1996, at 56 (“Often it is during adolescence when parental pressure can produce burnout.”); Ron Kozlowski, *Staying in the Game*, SARASOTA MAG., Dec. 1, 2000, at 147 (“When kids drop a sport cold turkey, coaches and parents often decide it’s burnout.”).

participation that, social science research shows, leads to “burnout.” For these women, rather than being turned off of sport participation because the culture persists, to some degree, in “anti-normalizing” sport participation for women, it might be the result of the cost exacted by forced assimilation into the male model for sport. As a result, guaranteeing “equal opportunity to participate” is not a meaningful opportunity at all, because women do not have the same incentives as men to persist in a model for sport that was built by men for the purpose of masculinizing men. The personal cost of such a model is too great for many women, and ignoring this cost and advocating for ever more opportunities for women to participate in it sends a message that the choice is assimilate or do not participate at all.

The second group of women whose interest in sport is paradoxically affected by Title IX’s Catch-22 consists of those women who do not participate at all. For these women, the question of whether they might be interested in assimilating into the male model for sport is complex, and one must consider the many ways in which men and women may be the same or different with respect to the male model for sport currently offered by our educational institutions to determine whether a formal equality approach, guaranteeing a right to assimilate, would provide opportunities for sport that are as appealing to women as they are to men. That is, perhaps women are, in all relevant respects, the “same” as men with respect to sport. If so, an assimilation approach to equality should work to attract women to sport. It is apparent, however, that women and men are not completely the same when it comes to expressing themselves through athletic participation.

To begin, the aspect of “sameness” that seems to animate arguments in favor of gender equity in sport is that women have the same capacity to benefit from sport as do males. Thus, proponents of Title IX point out that sport participation can be a vehicle for learning important life lessons and sport participation leads to better health and social outcomes.²²³ There is little doubt that in this respect, men and women are the same, and there is no relevant basis upon which to suggest that men have a greater capacity to benefit from or entitlement to the benefits of sport.

The capacity to benefit from sport, however, may not be the only basis upon which we should consider whether men and women are the “same” with respect to participation in sport. A second way to view the issue, and one that is also embraced by proponents of gender equity in sport, is whether men and women are the same in terms of *ability to play sport*. It is on this basis that, historically, women have been prevented from participating in sport. Unfounded stereotypes about sport being dangerous

²²³ See *supra* Part II.B discussing the better physical and mental health and lower rates of teen pregnancy and drug use among females who participate in sports.

for women or ill-suited to women's physicality because of their childbearing role and supposedly delicate, frail nature have been soundly debunked by Title IX.²²⁴ Although it might be said that physical differences between men and women may lead to different styles of play, this is not a relevant basis upon which to say that women are different from men in terms of ability to play. Since Title IX, it has been accepted that women's bodies are able to engage in sport in the same way that men's are.

Both the capacity to benefit from sport and ability to participate provide powerful bases to assert that women are the same as men when it comes to sport and being attracted to participate. These are not, however, the only relevant bases for comparing women and men in terms of developing the interest to participate in the male-constructed model for sport that is incorporated into Title IX. As a result, both Title IX critics and proponents of gender equity in sport miss the mark. Given the fact that sport is socially constructed, and social conditioning historically has discouraged women's participation in sport, women's lagging participation rates cannot be used as evidence of an inherent disinterest in sport. Yet discrimination in the form of a lack of enough participation opportunities or social conditioning that devalues women's participation also is too facile an explanation. While such factors are partially the case, they fail to account for the fact that while women have been conditioned not to pursue sport, they also enjoy the freedom to opt out of the current model for sport. This is because women, unlike males, do not need to participate in the current model for sport to build, reinforce, or defend their gender identity.²²⁵ As a result, a difference-maker with respect to participation rates between the genders likely is that, as studies show, boys often need the model for athletics offered by our educational institutions to establish and fulfill their socially-constructed gender identity, and girls do not.²²⁶ Thus, because the model offered by our educational institutions is one constructed with a primary purpose of masculinizing males, it should not

²²⁴ See BRAKE, *supra* note 3, at 47–48 (“Title IX has fueled the culture that has heightened women’s interest in playing contact sports and society’s acceptance of them when they do. . . . The increasing participation of female athletes in other contact sports, including football and ice hockey, both reflects and reinforces Title IX’s transformative impact on the culture.”). *But see* MCDONAGH & PAPPANO, *supra* note 66, at 183 (“Women also have been hampered by the presumption that they are more frail than males and need protection. This protective impulse is embedded in Title IX regulations . . .”).

²²⁵ See MESSNER, *supra* note 152, at 8 (“Sport participation does offer young males a way into a world of masculine values, rituals, and relationships.”).

²²⁶ Patricia A. Adler et al., *Socialization to Gender Roles: Popularity Among Elementary School Boys and Girls*, 65 SOC. OF EDUC. 169, 170 (1992) (“[B]oys’ activities (e.g., sports) emphasiz[e] such masculine values as achievement, toughness, endurance, competitiveness, and aggression and girls’ activities (e.g., cheerleading) foster[] emotional management, glamour, and a concern with appearance.”); Lisa A. Harrison & Amanda B. Lynch, *Social Role Theory and the Perceived Gender Role Orientation of Athletes*, 52 SEX ROLES 227, 228 (2005) (“[B]oys were more likely to wish to be remembered as an athletic star, whereas girls were more likely to wish to be remembered as a school leader.”).

be surprising that men appear to be more interested in *that* construct. Therefore, boys, despite the difficulties presented by the organized youth sports culture and the prevailing education-based athletics model, tend to continue their athletic participation in greater numbers than girls.²²⁷ This does not mean that boys are more interested or deserving of athletic opportunities, only that they have a greater incentive to withstand the perils of the youth sport culture and exploitation²²⁸ of the varsity-athlete model. Women, on the other hand, have the social freedom to opt out, and they do.

On this point, then, Title IX's "Field of Dreams" narrative breaks down for two reasons. First, it is built on an essentialist view of what women are interested in when it comes to sport participation. Second, it assumes that women and girls are simply victims of discrimination when it comes to sport, so that their choices not to participate reflect this victimization instead of an exercise of their agency, which they are using to reject a model for sport that is, for many, destructive and unappealing.²²⁹ Essentialism in feminist legal discourse is of course not new, but the fact that it can serve to produce such a paradoxical effect in the Title IX context by undermining efforts to increase women's participation in sport runs counter to the conventional wisdom. Feminist legal scholars have stated that Title IX is "anti-essentialist" in that it has re-defined what it means to be a student-athlete, from only male to male or female.²³⁰ While this is true, in a far more powerful way, Title IX falls into the essentialist

²²⁷ *Amateur Sports Act: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce & Tourism of the S. Comm. on Commerce, Sci., & Transp.*, 104th Cong. 196 (1995) (statement of Donna Lopiano, Exec. Dir., Women's Sport Found.).

²²⁸ Sean Hanlon & Ray Yasser, "J.J. Morrison" and His Right of Publicity Lawsuit Against the NCAA, 15 VILL. SPORTS & ENT. L.J. 241, 266 (2008); Tanyon T. Lynch, *Quid Pro Quo: Restoring Educational Primacy to College Basketball*, 12 MARQ. SPORTS L. REV. 595, 602 (2002) ("Many basketball players enter college academically deficient. Add to this deficiency, forty to sixty hours per week of athletic activities, and missed classes, and the result is an athlete unlikely to graduate. In fact, only forty-three percent of all NCAA basketball players graduate within six years and, of those athletes who do graduate, many do not receive a meaningful degree. As a result, some critics condemn Division I basketball programs for exploiting athletes until the end of their eligibility and then summarily discarding them." (footnotes omitted)); Eric J. Sobocinski, *College Athletes: What Is Fair Compensation?*, 7 MARQ. SPORTS L.J. 257, 272-73 (1996) ("[C]olleges and universities compete for the recruitment of athletes. Herein lies the root for unethical behavior by colleges and universities. The win-at-all-costs attitude is emphasized at some universities and colleges, resulting in an extreme compromise of ethics. By overemphasizing winning, colleges and universities compromise their academic mission of producing true student-athletes. Colleges and universities engaging in neglectful behavior are merely exploiting the student-athlete for their own profit." (footnotes omitted)).

²²⁹ See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 330-32 (1995) (explaining the views of some female writers that "[w]omen are actors capable of making choices for themselves, notwithstanding the fact that they may be subject to various gender-based pressures and dangers"); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 613 (1990) ("[T]he story of woman as passive victim denies the ability of women to shape their own lives, whether for better or worse.").

²³⁰ Cohen, *supra* note 156, at 180 ("Ultimately, Title IX is, in substantial part, a statute about anti-essentialism."); see also BRAKE, *supra* note 3, at 36-38 ("In the final analysis, Title IX has chosen the right priority: expanding girls' and women's participation in sports through a substantive approach to measuring equality in athletic opportunities.").

tendencies of the early feminist movement. The notion of “essentialism” can be traced to critiques of early feminist discourse²³¹ which were said to “essentialize” women—assuming that a “unitary, ‘essential’ women’s experience can be isolated and described” independent of the realities of experience.²³² Thus, feminist scholars have explained that early feminist legal theory, particularly the work of Catharine MacKinnon and Robin West, assumed that there is “an essential ‘woman’ beneath the realities of differences between women.”²³³ So-called “second phase” feminist theorists pointed out that, in fact, previous descriptions of what it meant to be a “woman” were often descriptions of the experiences of white, middle-class women.²³⁴ Thus, feminist analysis progressed to account for inequalities that were not simply traced to gender oppression against middle-class white women, but were experienced in relation to other “axes of power” such as race, class, age, and sexuality.²³⁵

To some extent, there has been an accounting of the essentialism embedded in Title IX. For instance, scholars have explained that Title IX, like other early feminist work, in many ways leaves out African American women and girls.²³⁶ Yet even these critiques do not express what is Title IX’s central flaw, which is that the “structural,” “Field of Dreams” theory of equality relies on an essentialized understanding of what women want from sport. Indeed, Title IX theory and advocacy assumes that in the context of sport, there is one, unitary experience for all females in that all females are “interested” in becoming “varsity” athletes and assimilating into the male-constructed model for sport. Accordingly, although Title IX may have an “anti-essentialist” feature, the statute and regulations, and those who support them, have in an important way essentialized women once again—instead of assuming women cannot or do not want to be athletes, Title IX reflects the view that all women want the same experience from sport. In fact, women and girls likely experience sport in multiple ways, with power being wielded through sport not simply through the fact of gender alone, but through male-created and dominated

²³¹ Maxine Eichner, *On Postmodern Feminist Legal Theory*, 36 HARV. C.R.-C.L. L. REV. 1, 34 (2001).

²³² Harris, *supra* note 229, at 585 (referring to the practice as “gender essentialism”); see also Eichner, *supra* note 231, at 34 (“[T]hese theorists argued that many first-phase descriptions assumed an essence and a mode of oppression common to all women.”).

²³³ Harris, *supra* note 229, at 591–92 (critiquing MacKinnon’s “dominance theory” as “flawed by its essentialism” because “in describing the experiences of ‘women’ issues of race, class, and sexual orientation can . . . be safely ignored”).

²³⁴ Eichner, *supra* note 231, at 34; Menkel-Meadow, *supra* note 78, at 1511 (“Echoing developments in general feminist theory that writers assumed a white middle class woman in their theorizing about women’s conditions, women of color and lesbians demonstrated that feminist legal theory seemed to be assuming a feminist essentialism.” (footnote omitted)).

²³⁵ Eichner, *supra* note 231, at 34.

²³⁶ Alfred Dennis Mathewson, *Black Women, Gender Equity and the Function at the Junction*, 6 MARQ. SPORTS L.J. 239, 241–43 (1996).

structures that privilege “winners” and “elites,” regardless of gender, and denigrate those who engage in athletics simply for the sake of participation, social connection, community building, or health and well being. This essentialization, long thought to be a hallmark of feminist theorizing of the 1970s and 1980s, persists in Title IX today, so that the post-modern critiques of feminist legal theory seemingly have not infiltrated theory and practice on this front.²³⁷

In addition, the “Field of Dreams” theory breaks down because it assumes women are simply victims of discrimination when it comes to choosing whether to participate in sport, instead of rational actors exercising agency in determining whether to continue participating in the flawed education-based sport culture or authentically rejecting such participation at all. Thus, the existing scholarly and popular discourse, rooted in the structural equality theory, holds that women and girls today have their interest in sports participation “extinguished” because of the continuing presence of sex discrimination in sport.²³⁸ As one Title IX advocate put it, “[r]esearch shows that . . . by the age of 14, girls drop out of sport at a significantly greater rate than men. Little wonder. Girls and women simply do not receive the same opportunities as boys to play or the same positive reinforcement about their sports participation.”²³⁹ Similarly, it has been said that “[s]ocial structures, including signals from universities that devalue women’s sports as compared to men’s, have influenced women’s interests in athletics and are responsible, to some degree, for lack of athletic interest among women.”²⁴⁰ Accordingly, scholars have explained that “taking into account women’s lack of interest in athletics relative to their male peers is ineffective and circular.”²⁴¹ While such reasoning is undoubtedly a partial explanation for women and girls’ lack of sustained participation in sport, it wholly ignores the possibility that women and girls are not just victims of discrimination, but are making choices to opt out of a model for sport that does not speak to them. Accordingly, the structural theory of equality fails to account for the many

²³⁷ That this “first-phase” feminist limitation has not been addressed in Title IX could be due to the fact that, as Martha Chamallas states, Title IX has not captured the interest of feminist thinkers. See CHAMALLAS, *supra* note 78, at 63 (“In the area of sports, feminists have not regarded gender integration of elite men’s teams as the primary goal . . .”). It seems that Title IX is seen as a feminist success (albeit with unfinished business) and has been discounted as an area where more theoretical work needs to be done.

²³⁸ *Amateur Sports Act: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce & Tourism of the S. Comm. on Commerce, Sci., & Transp.*, 104th Cong. 185 (1995) (statement of Donna Lopiano, Exec. Dir., Women’s Sport Found.) (explaining that discriminatory emphasis on men’s football and basketball has “limited the aspirations and access to sports of girls and women with considerable talent and interest, thereby undermining the possibilities of lifelong active lifestyles as well as Olympic sports participation”).

²³⁹ *Id.* at 196.

²⁴⁰ Buzuvis, *supra* note 11, at 825.

²⁴¹ *Id.*

voices that have spoken, through the culture of burnout or no participation at all. In fact, the structural theory of equality de-legitimizes these voices of disinterest, by arguing that they are simply the product of social conditioning.²⁴² By not giving full consideration to the voice of a girl who fails to take up sports, or who, after participating, gives it up, we have fallen into the same, all-too-familiar pattern of assuming that the experience of one type of woman—in this case, the type that seeks²⁴³ and enjoys currently-constructed notions of varsity sport—represents all women who might be interested in the experience of sport. We also miss an important opportunity to consider what model might speak to more women and girls, and advocate for that, instead of simply more of the same.

As a result, Title IX creates and perpetuates an interest paradox because of several faulty premises with respect to women and sport. The first is the false neutrality of the content of “varsity” athletics and a student-athlete with the “ability” to play.²⁴⁴ It is apparent that such descriptions are not neutral at all, but are constructed by and for males and the process of masculinization. Second, the interest paradox develops because Title IX advocates—and the structural theory of equality incorporated into Title IX—rely upon an essentialized vision of what women want from “sport.” Finally, the interest paradox develops because the theory of equality embedded in Title IX assumes that women solely develop a relationship with sport, or not, based on the presence or absence of gender discrimination in the form of too few opportunities to participate or too little benefits if they do. Accordingly, assuming women are interested in assimilating into a falsely neutral model for sport designed by and for men has resulted in the perpetuation of a model for sport in our educational institutions that seemingly, based on participation statistics,²⁴⁵ does not speak to a significant number of girls and women—whatever their needs and interests in sport may be. This is a type of gender discrimination in sport that is not addressed by Title IX, and current participation and obesity statistics for women and girls show it begs a response.²⁴⁶

IV. AVOIDING THE INTEREST PARADOX: SOME SUGGESTIONS FOR THE FUTURE

To be sure, it is clear that Title IX has done a great deal of good to stir

²⁴² This can be traced to the “dominance” theory of power put forth most notably by Catharine MacKinnon, which “conceives of women, their wants and needs, as completely constructed by patriarchal power.” Eichner, *supra* note 231, at 9.

²⁴³ And, of course, has the socio-economic means to do so.

²⁴⁴ See Menkel-Meadow, *supra* note 78, at 1513 (explaining that scholars have unmasked the “disempowering, unequalizing effect” of standards that appear to have “neutral objectivity”).

²⁴⁵ See *supra* note 219 and accompanying text.

²⁴⁶ See *supra* notes 73–75 and accompanying text.

interest in athletics and open up the student-athlete experience for women who are genuinely interested in assimilating into the male-constructed, varsity model of sport (or who see assimilation as a better alternative than not participating at all). As a result, this Article should not be read to suggest that Title IX enforcement is not an important legal and public policy matter. For this subset of females, existing case law and legal scholarship, as well as popular advocacy efforts, do well to advance their cause. This Article, however, is concerned with the persistent—and substantial—population of females who do not pursue “varsity” athletics, or who initially participate and then quit. For this group, the “Field of Dreams” theory of equality is limited—little in sport is being built by or for women, or even with women in mind. This is because, in the final analysis, Title IX merely guarantees an opportunity to assimilate and be “one of the boys.” To realize deeper change and allow women and girls to find their identity within education-based athletic programs, we must look for solutions that will serve as meaningful encouragement for more women and girls to take up and benefit from sport to the same extent that the current model does for men. We must, therefore, go beyond Title IX to fully realize gender equity in sport.

Moving beyond Title IX should not be, as some might fear, threatening to the cause of gender equality in sport. To the extent such advocacy is viewed as an implicit acknowledgement that women are not as interested in sport as men, and therefore not deserving of participation opportunities to the same extent as men, the answer is simply that it should be expected that women’s interest lags behind that of males. The model of sport offered by our educational institutions is a model that was created by and for men. As a result, there has never been, and due to the equality structure of Title IX, there will not under current law be, much room for women’s voices in the prevailing model of education-based sport. The question, therefore, can no longer be whether women are “interested” in a so-called objective experience known as “sport.” Instead, the question now is whether, and when, women will be permitted to shape the educational sporting experience to the same extent historically enjoyed by men. Only then can we discuss “interest” in any respect beyond an interest in assimilation. Moving beyond Title IX, then, is not a threat to achieving gender equity in sport. It is essential to achieving it.

Moreover, calling for an education-based sport policy beyond Title IX does not mean women need “special treatment” or that women are inherently less interested in highly competitive sport. The recognition that women differ from males in the sense that women do not need the current model of sport offered in our educational institutions to establish their gender identity is not to suggest that women are either not deserving of gender equity in sport or the converse, that they require “special treatment” with respect to sport in the form of a different model from that which is

provided to men. It does mean, however, that educational institutions should no longer sponsor athletic programs that are designed only with men in mind.²⁴⁷ Because women have only in the last few decades been admitted to the world of athletics, and their admission came into a world constructed by males, it is now time to move to a level of equality that gives women an equal opportunity to shape the student-athlete experience—to define what a student athlete is and should be.²⁴⁸ Accordingly, the issue should no longer be whether women are interested in sport, but what model of sport they might be interested in.

Given Title IX's limits, shaping an education-based sporting experience that speaks to women as much as our current model speaks to men will require Congress, for the first time, to articulate a policy²⁴⁹ for such sport that addresses Title IX's unfinished business.²⁵⁰ To do this, Congress must reconsider the deference traditionally given to educational institutions to construct their athletic programs²⁵¹ and reconsider the prevailing view that sport is essentially a matter for the private sector.²⁵² Such a "hands off," deferential approach is no longer justified given the significant public health benefits that accrue to individuals who participate in sport. Instead, unlike Title IX itself, a new legislative initiative should define in clearer terms a substantive content for education-based sports programs which goes beyond the current "varsity" model and draws on principles and values that are more inclusive than the male-constructed,

²⁴⁷ See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991) ("[I]mplicit in certain strands of feminist and racial liberation movements, for example is the view that the social power in delineating difference need not be the power of domination; it can instead be the source of social empowerment and reconstruction.").

²⁴⁸ For example, Deborah Brake has explained that the lack of female coaches and athletic administrators coaching women in the post-Title IX years threatens to transform women's sports into another area where men control women. She states that "[w]hen male coaches and administrators abuse their power over female athletes, it has the potential to transform athletics from a physically and psychologically liberating activity to one that exacerbates women's relative powerlessness in relation to men." Brake, *Sex Equality*, *supra* note 22, at 90–91.

²⁴⁹ Williams, *supra* note 131, at 151 ("[T]o the extent that the law of the public world must be reconstructed to reflect the needs and values of both sexes, change must be sought from legislatures rather than the courts. And women, whose separate experience has not been adequately registered in the political process, are the ones who must seek the change.").

²⁵⁰ One comment responding to a recent *New York Times* story on the long-term benefits of sport participation for women summed it up well. It stated that:

[Title IX is] great for girls who are athletic. But the girls who are clumsy and last picked for teams are the girls who need the benefits most. How does this help them? This makes me feel that we haven't come any further. We're just including athletic [sic] popular girls in the mainstream It has to be made so that all kids—boys and girls want to be involved in some sports.

Former New Yorker, Comment to *As Girls Become Women, Sports Pay Dividends*, N.Y. TIMES WELL BLOG (Feb. 15, 2010, 4:05 PM), <http://well.blogs.nytimes.com/2010/02/15/as-girls-become-women-sports-pay-dividends/>.

²⁵¹ Dionne L. Koller, *Frozen in Time: The State Action Doctrine's Application to Amateur Sports*, 82 ST. JOHN'S L. REV. 183, 220, 229 (2008).

²⁵² *Id.* at 203–04.

competitive sports model that is incorporated into Title IX. As a starting point in this effort, as explained below, such a policy should resist an essentialized vision of what women and girls are interested in or want from athletic programs. Second, any public policy effort must clearly define the priorities for education-based sport programs as encouraging participation, fitness, and positive life lessons more than elite competition and commercial appeal. Third, such a policy should be constructed by listening to a diverse group of women's voices, beyond the predominantly white, middle-class population that traditionally has enjoyed a large proportion of Title IX's benefits. Finally, a new education-based sport policy must offer more participation opportunities and choices in the elementary and middle school years.

As a first step in creating this new education-based sport policy, it is imperative that we stop asserting that women are "interested" in athletics using an essentialized vision of women athletes and what women want from athletic participation. Instead, Congress should shape a policy that provides for a variety of experiences that appeal to a diverse population of women and girls. This is, of course, easier said than done. For instance, recently it was reported that flag football for girls has achieved great popularity in some high schools across the country.²⁵³ Some scholars, however, are concerned about schools adding the sport, viewing it as a cynical attempt to comply with Title IX.²⁵⁴ While the flag football example may in fact be an attempt by schools to comply with Title IX that is not in the spirit of the law or consistent with a model of athletics that emphasizes elite opportunities and commercial appeal, we must not be so quick to dismiss these initiatives. With the flag football example, thousands of girls have turned out to play. We should try to understand why a new sport like this is appealing, and offer more opportunities that spark such interest. Moreover, we must give voice to those who are not currently interested in participating in sport by recognizing that the social conditioning which influences participation in sport goes beyond gender discrimination, and includes the model for sport which predominates in our educational institutions. Thus, rather than viewing them exclusively as victims of discrimination, women and girls who fail to participate in sport should be viewed as exercising at least partial agency by making authentic choices. These choices include rejecting a model for sport with few, if any, attributes which reflect a broader range of women's needs and experiences, and which serves to alienate a sizeable number of females and

²⁵³ Katie Thomas, *No Tackling, but a Girls' Sport Takes Some Hits*, N.Y. TIMES, May 16, 2010, at A1.

²⁵⁴ *Id.*

males alike.²⁵⁵ As it stands, we do not fully listen to or value the voice of non-participants, because we have assumed that it is not authentic. A new education-based sport policy should therefore not be so quick to assume that more of the same when it comes to the model for sport offered will yield greater interest in participation.

Moreover, to incorporate more women's voices into any proposed public policy solutions for increasing women's participation in sport, we must look beyond the voices of white, middle-class women and understand the needs of women who historically and persistently have been excluded from the Title IX success story, such as women and girls of color,²⁵⁶ women of different ethnic backgrounds, women from disadvantaged socio-economic backgrounds, and women with physical challenges. For instance, research shows that Latina girls face particular barriers to participation in athletics and might be interested in models that do not demand the single-mindedness and time commitments of the traditional varsity model.²⁵⁷ In addition, physically-challenged women have been left out of the gender equity in sport movement almost completely. The male-crafted varsity model for sport ensures this exclusion, by reinforcing an ideology of able-bodiedness and a definition of ability to engage in sport that denies the possibility of meaningful sport participation for those who do not possess current social constructs of sport "skill" and "talent." Taking into account these experiences and considering the sporting needs of a wider group of women and girls will require us to step back from our preconceived notions of what sport is and what sport is for, to envision a policy that casts a far wider net and provides far more opportunities for physical expression than our current varsity model does. Moreover, while we look with pride on the many, many women who have successfully assimilated into the male, varsity model, we must not let that pride help define what women should be interested in or have the ability to do.

In addition to moving beyond our essentialized vision of women and sport, a new education-based sport policy must clearly define the priorities

²⁵⁵ Kathryn Abrams, *Afterword: Critical Strategy and the Judicial Evasion of Difference*, 85 CORNELL L. REV. 1426, 1428 (2000) ("[T]he subjects of inequality are not simply acted upon, but manifest a partial agency which, like their identities more generally, may vary in its expression in different contexts. The subject of inequality is disadvantaged and constrained; but she is also capable of making choices within that constraint and resisting stigmatization to some degree." (footnote omitted)); see also Abrams, *supra* note 229, at 306 n.11 (explaining the use of the term "agency").

²⁵⁶ See Mathewson, *supra* note 236, at 250-51 (discussing the increased level of female minority participation in collegiate athletics). Research shows that athletic opportunity is particularly important for minority women, as "[m]inority female athletes experience higher levels of self-esteem, are more likely to participate in extracurricular activities, and are more likely to become leaders in their communities than minority girls who do not play sports." Minority girls who are involved in athletics are also more likely to graduate from college. LEVIT & VERCHICK, *supra* note 3, at 108.

²⁵⁷ MaryJo Sylwester, *Breaking Cultural Traditions: Culture, Family Play Role in Sports for Latina Girls*, in WOMEN AND SPORTS IN THE UNITED STATES: A DOCUMENTARY READER 201, 202-03 (Jean O'Reilly & Susan K. Cahn eds., 2007).

for athletic programs conducted in this context. The “interest paradox” fostered by Title IX occurs because, in a sense, we expect Title IX to deliver benefits that it is not constructed to deliver. On the one hand, arguments in support of Title IX state that gender equity in sport is necessary to bring the benefits of sport participation to women and girls. The prevailing varsity model for sport incorporated into Title IX, however, is neither necessary nor sufficient to deliver these benefits to a large segment of women and girls. This is because the varsity model, based on elite competition and commercial appeal, is not the only model that can promote an increased sense of physical agency, physical fitness, and healthy self-esteem. Moreover, the varsity model will only attract a certain population of girls and women who want to meet its professional-level demands. Title IX’s “Field of Dreams” approach therefore conflates the benefits of sport participation with the benefits of varsity level competition. While both sport models can deliver important life experiences and lessons that government should encourage women to seek,²⁵⁸ both do not stir women’s interest in sport equally effectively, and the creation of more elite opportunities to participate at the college level has not as effectively attracted a larger population of females to seek out the benefits of sport participation. A new education-based sport policy should therefore define what the priorities are—to give some individuals an elite athlete experience? To emphasize values such as participation and fitness? Our current approach makes Title IX responsible for all of this and more, and the result is the “interest paradox,” with seemingly greater numbers of women and girls getting turned off to sport rather than developing a lasting commitment to it.

Similarly, while crafting an education-based sport policy that includes more voices in terms of the type of model offered, and clearly defines what the goals for education-based sport are, we must acknowledge that the current model is not the only objective way to structure education-based athletics, and be open to alternatives. Of course, the current model has been long criticized for its emphasis on commercialism over academics²⁵⁹ and its propensity for exploiting athletes, especially in revenue-generating sports.²⁶⁰ Little has been written, however, about whether the model is one that equally can attract the interest of both men and women. Thus, alternative models for sport in the educational setting must be considered with gender equity firmly in mind. For instance, research on sport motivation has shown that “American college athletes develop competitive

²⁵⁸ Yuracko, *supra* note 49, at 742–43, 767–68 (discussing the value of the two sport models and how the two are related).

²⁵⁹ MITTEN, *supra* note 154, at 11–12; BRIAN L. PORTO, A NEW SEASON: USING TITLE IX TO REFORM COLLEGE SPORTS 2–3 (2003).

²⁶⁰ Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615, 634–35 (1995).

motives for sport participation, with males generally expressing a greater competitive motivation than females.²⁶¹ Similarly, social science research has shown that men place greater importance on the competitive motive for sport participation.²⁶² Indeed, the “socialization of American males into competitive sport carries with it an emphasis on skill and victory.”²⁶³ Yet while typical varsity athletes enjoy the benefits of sports participation, they must also endure the perils of the varsity sport culture, such as sport-related injuries and having to adopt a win-at-all costs attitude.²⁶⁴ Instead, in defining a new education-based sport policy, Congress should look beyond elite competitive values for models that emphasize other motivations for sport participation, such as health and fitness, social connection, and community building.²⁶⁵ Indeed, there were alternate models for education-based sport put forth by women athletic administrators prior to Title IX.²⁶⁶ To the extent models of sport emphasizing these values might resonate with a greater population of females, and be more consistent with the academic mission of the institutions which sponsor athletics programs, Title IX allows no guarantee of equal opportunity to advance them. Moreover, while it is difficult to find any models for sport in the United States that do not stress competition,²⁶⁷ this thinking must change if we are to develop interest in participating in a greater population of females. A new sport policy that seeks to distribute the benefits of sport to more women must therefore establish new norms for sport that speak to a broader population.

In addition to considering a greater range of models for education-based sport, we must develop a policy that includes more choices for sport participation in the elementary and middle school years. This is important for several reasons. First, more choices through schools in earlier years will help eliminate socio-economic barriers to sport participation. In addition, more education-based sport in elementary and middle school settings will reinforce a norm of participation from the bottom up, instead

²⁶¹ Timothy Jon Curry & Otmar Weiss, *Sport Identity and Motivation for Sport Participation: A Comparison Between American College Athletes and Austrian Student Sport Club Members*, 6 SOC. SPORT J. 257, 257 (1989).

²⁶² *Id.* at 260.

²⁶³ *Id.* at 267.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 258.

²⁶⁶ CAHN, *supra* note 29, at 247 (“[W]omen leaders of the 1980s argued that male-dominated collegiate sport was marred by crass commercialism, corruption, and win-at-all costs attitudes.”); Welch Suggs, *Heroines as Well as Heroes*, in EQUAL PLAY: TITLE IX AND SOCIAL CHANGE 14, 15 (Nancy Hogshead-Makar & Andrew Zimbalist eds., 2007) (discussing the efforts of women athletic administrators to impose their vision of sport for women prior to Title IX, because “[t]he women in the sixties were historians, students of what had happened in intercollegiate athletics” and “[t]hey knew highly competitive sport for women was going to come in an educational construct, and that they needed to control it and keep it educational”).

²⁶⁷ Curry & Weiss, *supra* note 261, at 258.

of relying on inspiration in the form of elite college and Olympic athletes to drive interest from the top down. Moreover, more athletic participation in elementary and middle schools will provide more opportunities for women to be involved in charting a direction for education-based sports. Perhaps more than anything, allowing women to administer athletic programs and coach athletes, both male and female, is enormously important and has ramifications well beyond the individual woman who holds the position. It is administrators and coaches who define which athletes will have access to athletic resources and what those athletes will have to do to continue having access. It is those administrators who set the agenda for how athletics will fit into the educational structure of the institution. After Title IX, women athletic leaders largely were sidelined by men in sports leadership positions.²⁶⁸ Indeed, it has been explained that one result of Title IX is that "most women's athletic programs are now governed by the NCAA, where control is largely in the hands of men."²⁶⁹ Also, since Title IX was enacted, the proportion of women athletic administrators and coaches has declined in both high schools and universities,²⁷⁰ and women continue to be excluded from most positions of power and influence in education-based sports contexts.²⁷¹ Accordingly, increasing women's voices in athletics must not rely simply on an approach whereby we increase the numbers of women who participate in sport. Efforts must also be made to increase the numbers of women who administer sport programs and coach female (and male) athletes, so that women's voices are injected from the top down as well.²⁷²

More opportunities at the elementary and middle school levels will also provide a means for integrating sports teams. Indeed, it is hard to imagine women's voices becoming equally valued in structuring the way in which athletics is conducted in the educational setting given that through segregated teams, men still enjoy the privilege of setting the standard for

²⁶⁸ CAHN, *supra* note 29, at 247; MACKINNON, *supra* note 138, at 122 ("Title IX has been extremely important. But the minute women claim something for ourselves and it is seen as powerful and important, especially if it becomes profitable, it immediately gets claimed and taken over by men.").

²⁶⁹ Nancy Theberge & Susan Birrell, *Structural Constraints Facing Women in Sport*, in O'Reilly & Cahn, *supra* note 257, at 167, 170.

²⁷⁰ LEVIT & VERCHICK, *supra* note 3, at 109 ("Ironically, while Title IX has dramatically expanded opportunities for female athletes, it appears to have diminished the opportunities for female administrators and coaches."); Theberge & Birrell, *supra* note 269, at 171.

²⁷¹ Theberge & Birrell, *supra* note 269, at 171.

²⁷² This "top down" approach also applies in terms of hierarchy of sport, as women's representation in decision-making capacities at the Olympic level of sport is still an enormous problem. As one sports scholar has stated "male supremacy in the International Olympic Committee has ensured that, throughout the history of the modern Olympics, men have made decisions about women's participation, and male standards have become generalized standards." Jennifer Hargreaves, *Olympic Women: A Struggle for Recognition*, in O'Reilly & Cahn, *supra* note 257, at 3, 13. This lack of representation at the top of the Olympic hierarchy is important because in the United States, Olympic sport federations govern amateur athletics at all levels of sport outside of the educational context.

how sport should be. That is, by maintaining their separate teams, men maintain their dominance over the model of sport offered, because it is they who set the definition of what a student-athlete is, and it is acknowledged that women cannot compete with them, for the standards are set to reward male physical dominance. Traditional arguments in favor of the separate teams philosophy is that for women to have a chance to make teams (and play safely), they must be given their own teams because men, due to their size and strength advantages, will always dominate sports teams. Such arguments are based on the unstated assumption that athletics has as its purpose elite-level performance and an emphasis on competition instead of participation. Because concerns over size and strength advantages of males over females are not as immediate, if they are present at all, in younger children, gender integration of sports teams at these levels can be used as a means to further erode the standard of male supremacy and the male performance norm in sports. Moreover, institutions could be mandated to structure their teams based on levels of play, size, or age, instead of using gender as a proxy for size and ability.

Thus, whatever the details, it is apparent that it is time to seek public policy solutions in addition to Title IX to address the percentage of girls and women who do not participate in sport in rates equivalent to boys and men. Because sport is merely a social construct,²⁷³ and not an absolute, we should be open to new models emphasizing a greater array of values than those which are intended to be for the socialization of males.²⁷⁴ Such solutions would have the benefit not only of opening up the world of athletics to an even greater population of women, but to the many men who are left out of our current elite, competitive model for sport as well.

V. CONCLUSION

Title IX was a product of its time. Like other feminist efforts of the early 1970s, Title IX ultimately is built on a formal equality framework. Notwithstanding the “substantive” or “structural” equality elements requiring educational institutions to create opportunities and develop interest in sport participation, Title IX did not require that the model for sport offered, constructed by and for men, change. Indeed, it requires that women be similarly situated to males in that women must be “interested” and have the “ability” to play varsity-level sport, as that is defined by

²⁷³ M. Ann Hall, *The Discourse of Gender and Sport: From Femininity to Feminism*, 5 SOC. SPORT J. 330, 331 (1988) (“Like all other forms of culture, sport is a creation of human agency and it can be transformed.”).

²⁷⁴ As Deborah Brake explains, “[m]any of the benefits of sports, including improved physical fitness, socialization opportunities and leadership development might be better promoted by a more inclusive model of sports that values widespread participation and enjoyment in sports over elite competition.” Brake, *Pragmatic Feminism*, *supra* note 113, at 541.

institutions sponsoring sports programs. An examination of the normative content of varsity sport shows that it was defined without the benefit of women's voices or experiences, but only with the needs and desires of male athletes, and men, in mind. The result is that Title IX requires women to assimilate into the male model for sport, something that many women have benefitted from, but many more reject.

Prevailing theoretical understandings of Title IX, told through the "Field of Dreams" narrative, posits that more opportunities to participate in the male model for sport will serve to inspire more girls and women to participate. This Article suggests that such an approach reflects an essentialized view of what women want from sport, and it discounts the many voices of women who might benefit from and be interested in a model that emphasizes values broader than those traditionally associated with making "boys" into "men." As a result, Title IX's conception of equality has created an interest paradox—discouraging interest in athletics in the very population Title IX is meant to serve.

This Article suggests that this interest paradox should be acknowledged, so that discussions of gender equity in sport can move from polarizing, and ultimately unproductive debates about whether women are, or are not, inherently interested in athletics, to a more nuanced discussion of exactly what models of athletics a greater population of women might be interested in. Thus, it is only when women have an equal opportunity to participate in creating and defining the social construct that is athletics will we have realized gender equity in sport.