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How the Expressive Power of Title IX Dilutes Its Promise

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How the Expressive Power of Title IX Dilutes Its Promise

Dionne L. Koller¹

ABSTRACT

Title IX is widely credited with shaping new norms for the world of sports by requiring educational institutions to provide equal athletic opportunities to women. The statute and regulations send a message that women are entitled to participate in sports on terms equal to men. For several decades, this message of equality produced dramatic results in participation rates, as the number of women interested in athletics grew substantially. Despite these gains, however, many women and girls, especially those of color and lower socio-economic status, still do not participate in sports, or remain interested in participating, in numbers comparable to their male counterparts. Indeed, in recent years the gains in participation rates brought about by Title IX seemingly have leveled off while the childhood obesity crisis, especially among girls, has grown. Title IX scholarship and popular advocacy efforts often focus on greater Title IX enforcement as the way to continue attracting women and girls to participate in competitive sports.

This Article examines whether greater enforcement of Title IX's equality mandate is the answer, by looking at the signals the statute and regulations send to prospective female athletes. In doing so, this Article explains that a key feature of Title IX theory is that discrimination in the form of fewer opportunities for women as compared to men, as well as sub-par conditions for participation, "sends a message" to girls that discourages them

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from participating. This negative message is the prevailing explanation for why women still do not participate in sports at rates comparable to men. Implicit in this argument is that strong Title IX enforcement can produce the opposite result, continuing to signal that women are entitled to participate in sports on terms equal to men, and that such a positive message will stimulate interest in participation. This Article seeks to push beyond such assumptions to examine with more nuance how Title IX speaks to women about sports and how the law's expressive content affects women's interest in participating. Using the expressive theory of the law, this Article takes the position that Title IX powerfully "speaks" beyond its remedies, and the message today is much more complex than that of simply empowering women through a message of equality. Instead, this article asserts that Title IX in fact sends a mixed message, communicating both that women and girls are entitled to participate in athletics under the same conditions as their male counterparts, but also that such participation opportunities are within a model for athletics that serves to exclude those who lack the interest, ability and/or resources to meet its demands. As a result, while Title IX communicates an empowering message that can in many cases stimulate women's interest in sports, it also sends a message that drives many more women, especially those of color and lower socio-economic status, away.

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I. INTRODUCTION

Recently, I taught a class on Title IX² to students in a Law and Feminism course. In preparation, I imagined that I need not spend much time on the benefits of Title IX or its justifications, as I often do when I teach Title IX in other courses. I concluded, incorrectly and perhaps in hindsight unfairly, that the women in Law and Feminism would not need to be “sold” on Title IX. I was wrong. In reading the reflection essays I assigned to gauge the students’ understanding of the readings, I was alarmed at how many women saw Title IX in a negative light. It wasn’t that they believed that Title IX unfairly hurt men — a common critique of Title IX opponents — it was that among these largely twenty-something women, Title IX offered nothing for them. Specifically, the women wrote about resentment at being pushed to excel in sports and the perception that competitive sports were only for those who were uniquely talented. Some discussed having little or no access to sports that gained popularity post-Title IX, such as soccer, lacrosse and softball. Only the woman in class who was old enough to remember that growing up in her Midwestern town, women’s basketball was a half-court game, found Title IX to be an important topic. The rest were quite skeptical of its inclusion as a topic in the class, as for them, Title IX was largely irrelevant.

Of course, not every woman thinks so. Since its enactment in 1972, Title IX’s ability to change the culture surrounding women’s participation in athletics and bring steadily-increasing numbers of women into sports has been dramatic.³ Courts have consistently upheld Title IX’s mandates,⁴ and statistics have demonstrated powerfully that creating opportunities for girls and women in athletics inspires them to participate. Before Title IX, fewer

² 20 U.S.C. §§ 1681–1688 (2006).

³ Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 16–18 (2001).

⁴ See *Equity in Athletics, Inc. v. Dep’t of Educ.*, 504 F. Supp. 2d 88, 102 (W.D. Va. 2007).

than 32,000 women participated in intercollegiate athletics.⁵ Now, there are more than 174,000 female intercollegiate athletes.⁶ Female participation in interscholastic athletics has grown by more than 920%,⁷ with about 294,000 girls participating in high school athletics in 1971, and over 3 million in 2007-2008.⁸ Yet despite more than three decades of growth in women's participation in sports, it seems that Title IX has not continued to have the wide-ranging impact on women's sports participation that would produce equivalent participation rates to men. Social science research shows that while large numbers of girls participate in sports during the elementary and middle school years, many stop participating in adolescence.⁹ Perhaps most troubling, many more girls and women do not participate at all.¹⁰ This is especially true for girls and women of color and those from disadvantaged socio-economic backgrounds.¹¹ For women and girls with disabilities,

⁵ 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).

⁶ DENISE M. DEHASS, NCAA, PARTICIPATION: 1981-82-2006-07 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>.

⁷ See Samuels, *supra* note 5, at 242; NAT'L FED'N OF STATE HIGH SCH. ASS'NS, 2007-2008 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY 48 (n.d.), available at <http://www.nfhs.org/content.aspx?id=3282>.

⁸ NAT'L FED'N OF STATE HIGH SCH. ASS'NS, *supra* note 7, at 48.

⁹ DON SABO & PHIL VELIZ, WOMEN'S SPORTS FOUNDATION, GO OUT AND PLAY: YOUTH SPORTS IN AMERICA 128 (2008), available at <http://www.womenssportsfoundation.org/home/research/articles-and-reports/mental-and-physical-health/go-out-and-play>.

¹⁰ *Id.* at 133; see also B. Glenn George, *Forfeit: Opportunity, Choice, and Discrimination Theory Under Title IX*, 22 YALE J.L. & FEMINISM 1, 3 (2010); NAT'L COAL. FOR WOMEN AND GIRLS IN EDUC., TITLE IX AT 35: BEYOND THE HEADLINES 10 (2008), available at <http://ncwge.org/PDF/TitleIXat35.pdf>.

¹¹ ANGELINA KEWALRAMANI ET AL., NAT'L CTR. FOR EDUC. STATISTICS, STATUS AND TRENDS IN EDUCATION OF RACIAL AND ETHNIC MINORITIES 92 (2007), available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2007039> ("White females were more likely to participate in interscholastic sports (51 percent) than were females of any other race/ethnicity, while Black females (40 percent) were more likely than Hispanic (32 percent) or Asian/Pacific Islander females (34 percent) to take part in these sports."); Matthew J. Taylor et al., *The Impact of Sports Participation on Violence and Victimization among Rural Minority Adolescent Girls*, 19 WOMEN SPORT & PHYSICAL ACTIVITY J., Spring 2010, at 3, 7 (In this study, 50.6% of white girls, 30.4% of African American girls, and 36.5% of Hispanic girls participated in structured sports in and outside of school); Will J. Jordan, *Black High School Students' Participation in School-Sponsored Sports Activities: Effects on School Engagement and Achievement*, 68

sports opportunities are almost non-existent.¹² For all of these women and girls, as it was for most of the students in my class, Title IX seemingly is more irrelevant than empowering.

Title IX discourse focuses on discrimination against female athletes as the reason why women still do not show an interest in sports participation at the same rate as men.¹³ As a result, many Title IX supporters assert that the remedy for women's persistent lack of participation in sports is greater Title IX enforcement. They particularly emphasize proportional representation of women in college athletic programs and upgrades to athletic offerings and facilities that will "send a message" that women's athletics are as valued as men's.¹⁴ This is, without question, important to achieving equality for those women who choose to participate in sports, and that work is certainly far from done. However, in my previous work, I examined whether Title

J. NEGRO EDUC. 54, 60 (showing similarly-tiered White, African American, and Hispanic participation rates for both males and females); Minda Monteagudo, *Why Too Few Hispanic Girls Play Sports — and What To Do About It*, FAIR GAME NEWS (June 3, 2010, 5:56 AM), <http://fairgamenews.com/2010/06/why-hispanic-girls-rarely-play-sports-and-what-to-do-about-it/> ("According to the NCAA, Hispanic females make up just 3.9 percent of college athletes (Hispanics are more than 8 percent of college enrollments)."); JEFFREY OWINGS ET AL., NAT'L CTR. FOR EDUC. STATISTICS, WHO REPORTS PARTICIPATION IN VARSITY INTERCOLLEGIATE SPORTS AT 4-YEAR COLLEGES? 2-3 (Dec. 1996), available at <http://nces.ed.gov/pubsearch/pubinfo.asp?pubid=97911> ("Among members of the 8th-grade class of 1988 . . . High socio-economic status (SES) students were 10 times as likely to report participation at Division I schools as were low SES students (5.0 percent compared to 0.5 percent). Black students were just as likely as white students to report participation in intercollegiate sports at Division I schools (2.5 percent for blacks and 2.3 percent for whites). Among the high school graduates from the 8th-grade class of 1988 . . . Three out of each 10 (30.4 percent) elite high school varsity athletes from advantaged backgrounds (high SES) reported participation in intercollegiate sports at 4-year colleges. Among elite high school varsity athletes, those from more advantaged backgrounds . . . were 3.5 times more likely to report intercollegiate athletic participation at NCAA Division I schools as were those from less advantaged backgrounds . . . 14.7 percent as compared to 4.1 percent." Examining intercollegiate athletic participation by SES reveals "5.0 percent of high SES cohort members reported participation [in intercollegiate athletics] as compared to 1.5 percent for middle SES and 0.5 percent for low SES 8th-grade students . . . High SES students were 10 times as likely to report participation in intercollegiate athletics as were low SES students.").

¹² NAT'L COAL. FOR WOMEN AND GIRLS IN EDUC., *supra* note 10, at 11.

¹³ *Id.* at 2-3.

¹⁴ *Id.* at 7 (stating that "improved enforcement of Title IX and diligent efforts to advance women and girls in sports are still necessary to achieve truly equal opportunity on the playing fields").

IX's conception of equality was up to the task of continuing to generate women's interest in sports participation. I concluded that in many cases, Title IX could not effectuate what is thought to be its full promise because its anti-discrimination mandate requires girls and women to assimilate into a model for sports that was developed and is administered primarily by and for men.¹⁵ The result, I argued, was an "interest paradox," whereby Title IX served to extinguish interest in sports participation among the very population it was meant to serve.¹⁶

This Article takes the discussion one step further by explaining how the interest paradox takes shape. Using the expressive theory of law, this article explains that Title IX has a significant expressive dimension beyond its sanctions, so that the statute, regulations and cases interpreting them communicate with girls and women in a way that shapes norms for sports participation. While it is widely believed that Title IX signals to females that they are entitled to and should participate in athletics, in fact its expressive meaning amounts to a mixed message. This Article asserts that by deferring to educational institutions to define the content of their sports programs — as long as opportunities for women are equivalent to those for men — participation opportunities created in the name of Title IX send a second signal to girls and women that dilutes the law's empowering message. Shaped by the socio-economic context of the varieties of women who might participate in sports, this message is that there is an exclusive, and for many women unattainable, conception of who a student-athlete can be. This message, like the signals sent by gender discrimination, contributes to discouraging many women and girls from participating in sports.

Part I of this article provides a brief overview of Title IX and its theoretical underpinnings which assume that creating opportunities for women to be student-athletes in the current model for education-based sports programs will encourage more women to participate. Part II seeks to explain how Title IX's expressive dimension sends a dual message to females about sports participation. This part asserts that while an important and enduring message sent by Title IX is that women are entitled to participate in sports on terms equal to men, Title IX also powerfully communicates the social construction of who a qualified student-athlete is. This part explains how this dual message can contribute to an "interest paradox," so that opportunities created in the name of Title IX actually can serve to discourage participation in sports by those the law should inspire. Part III offers suggestions

¹⁵ Dionne L. Koller, *Not Just One of the Boys: A Post-Feminist Critique of Title IX's Vision for Gender Equity in Sports*, 43 CONN. L. REV. 401, 439-40 (2010).

¹⁶ *Id.*

for a new sport policy that can help shape new norms for education-based sports programs and send a message that better aligns with the goal of gender equity in sports.

II. TITLE IX OVERVIEW

A. *The Statute and Regulations*

Congress enacted Title IX in 1972 to prohibit discrimination on the basis of gender in all education programs receiving federal financial assistance.¹⁷ The purpose of the statute is to guarantee that all students have equitable opportunities to participate in an educational program.¹⁸ Title IX neither targets nor mentions athletics programs. The statute states quite simply that “[n]o 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”¹⁹ The statute itself does not detail the content of an equitable education-based sports program. Indeed, the issue of discrimination against women in education-based athletics programs was only a brief part of the congressional debates on Title IX.²⁰ Efforts to limit Title IX’s effect on athletic programs failed,²¹ and Congress subsequently directed the Department of Health, Education, and Welfare²² to prepare regulations implementing Title IX, including in the area of “intercollegiate athletic activities.”²³ These regulations provide the framework for gender equity in sports. The final regulations, which went into effect in 1975, provide that:

¹⁷ Gayle I. Horwitz, *Athletics*, 5 GEO. J. GENDER & L. 311, 312-13 (2004).

¹⁸ Letter from Norma V. Cantú, Assistant Sec’y for Civil Rights, Dep’t of Educ., to Nancy S. Footer, General Counsel, Bowling Green State Univ. (Jul. 23, 1998), available at <http://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html>.

¹⁹ 20 U.S.C. § 1681(a) (2006).

²⁰ *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004) (citing 117 CONG. REC. 30,407 (1971) (statement of Sen. Birch Bayh)); 118 CONG. REC. 5807 (1972) (statement of Sen. Birch Bayh).

²¹ For instance, Senator Tower attempted to limit the coverage of Title IX to non-revenue producing sports. 120 CONG. REC. 15,322-23 (1974) (statement of Sen. Tower).

²² 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. See 20 U.S.C. §§ 3401-3510 (2006).

²³ Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974).

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 recipient²⁴

Title IX does not require that covered educational programs give preferential treatment to women.²⁵ Instead, Title IX requires entities that receive federal financial assistance to “provide equal athletic opportunity for . . . both sexes.”²⁶ This does not require educational institutions to have gender-integrated sports teams or the same teams for men and women. However, where a school has separate programs for men and women, Title IX requires that those separate opportunities be equitable.²⁷

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 competition effectively accommodate the interests and abilities of members of both sexes.”²⁸ In 1979, the Department of Health, Educa-

²⁴ 34 C.F.R. § 106.41(a) (2011).

²⁵ Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ., 263 F. Supp. 2d 82, 95 (D.D.C. 2003); Pederson v. La. State Univ., 912 F. Supp. 892, 908 (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.”); Neal v. Bd. of Trs., 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.”) (internal quotation marks omitted).

²⁶ 34 C.F.R. § 106.41(c).

²⁷ Cantú, *supra* note 18.

²⁸ 34 C.F.R. § 106.41(c). 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.*

tion and Welfare issued a Policy Interpretation which explained that, for purposes of athletics, Title IX compliance was measured in three areas that directly impact the student-athlete experience: (1) athletic scholarships; (2) other program areas (represented by factors two through ten as listed in the regulations);²⁹ and (3) accommodating the interests and abilities of male and female students (derived from the first factor of the regulations).³⁰

Effective accommodation of male and female students' interests and abilities in terms of 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:

- (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 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.³¹

²⁹ Policy Interpretation, 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979) (noting that "the governing principle" in determining compliance is that "male and female athletes should receive equivalent treatment, benefits and opportunities.")

³⁰ Claims in this area are often referred to as "accommodation" claims and "relate to a school's allocation of athletic participation opportunities between its female and male students." *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 291 (2d Cir. 2004). Most cases have dealt with this area of compliance. *Id.*

³¹ Policy Interpretation, 44 Fed. Reg. at 71,418. In 1996, the Department of Education issued a Policy Clarification which explained that the first prong of the test is a "safe harbor" and not a requirement. Letter from Norma V. Cantú, Assistant Sec'y for Civil Rights, Dep't of Educ., to Colleague (Jan. 16, 1996), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html#two>.

Every court to consider the issue has held that the regulations and Policy Interpretation are entitled to deference.³² Courts have stated that “the 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.”³³ Moreover, every court to consider the issue has held that the regulations and Policy Interpretation are constitutional.³⁴ Importantly, however, while the equality mandate itself has been defined through interpretations of Title IX and its implementing regulations and policy clarifications, the content of the equality mandate is left to be defined by the institutions sponsoring athletic programs.³⁵

As explained in Part II below, because Title IX case law and regulations defer to institutions to shape their athletic programs, the definition of an athlete deserving of equal athletic opportunity is given meaning not by the law, through Title IX, but by the institutions subject to Title IX. This meaning is subsequently communicated to prospective female athletes in a variety of ways. The method this Article is concerned with is how Title IX incorporates the social construction of an athlete entitled to equal athletic opportunity and sends a message that can shape norms for women’s sports participation and, as a result, women’s interest in participating.

B. *Why Title IX is Important and How it Purports to Work*

Title IX’s goals are said to be two-fold. First, the statute and regulations seek to guarantee equal athletic opportunity for women and girls currently participating in education-based sports programs. The second goal is to send a message through equal athletic opportunity to prospective female athletes, on the theory that providing gender equity in athletics will develop

³² *McCormick*, 370 F.3d at 290; *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1047 (8th Cir. 2002); *Horner v. Ky. High Sch. Athletic Ass’n*, 43 F.3d 265, 273 (6th Cir. 1994); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993); *Williams v. Sch. Dist.*, 998 F.2d 168, 171 (3d Cir. 1993); *Cohen v. Brown Univ.*, 991 F.2d 888, 896–97 (1st Cir. 1996); *Equity in Athletics, Inc. v. Dep’t of Educ.*, 504 F. Supp. 2d 88, 102 (W.D. Va. 2007).

³³ *McCormick*, 370 F.3d at 289 (internal citations omitted).

³⁴ *Equity in Athletics, Inc.*, 504 F. Supp. 2d at 102.

³⁵ The Office of Civil Rights has explained that the three-part test allows institutions to “maintain flexibility and control over their athletic programs” Letter from Russlyn Ali, Assistant Sec’y for Civil Rights, Dep’t of Educ., to Colleague (April 20, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf>.

women's interest in participation. This has been called the "trickle down" theory³⁶ and it is assumed that in this way Title IX will not simply guarantee equality, but will also shape norms for sports participation in a way that inspires women and girls to participate.³⁷

Social scientists and scholars have long pointed out that equitably distributing education-based³⁸ sports opportunities is important because sports participation provides significant and well-documented lifetime benefits.³⁹ As a result, the importance of Title IX and the urgency to provide gender equity in sport is premised on the fact that participation in sports⁴⁰ can provide important life lessons and help develop significant life skills — lessons and skills that have long been enjoyed by males.⁴¹ Indeed, a substantial body of literature documents the benefits of sport participation. For instance, sports participation is said to "help all young people learn important lessons" such as discipline, teamwork, time management and leadership that "further long-term personal growth, independence and well-being."⁴² Studies have demonstrated that students who participate in high school sports perform better academically and have an increased probability of at-

³⁶ Wendy Olson, *Beyond Title IX: Toward an Agenda for Women and Sports in the 1990's*, 3 YALE J.L. & FEMINISM 105, 116 (1991).

³⁷ Brake, *supra* note 3.

³⁸ Although sports participation occurs in many different settings, such as through private clubs, AAU leagues and the like, it is sport in the educational setting that has the greatest impact because high schools and colleges/universities support most organized sports programs in the United States. It is this setting, of course, to which Title IX applies because most high schools, colleges and universities receive the federal funding that is a condition precedent to application of the statute.

³⁹ 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).

⁴⁰ Some scholars recently have begun to question whether this type of varsity, competitive sports opportunities are necessary to provide these benefits. George, *supra* note 10.

⁴¹ Jessica E. Jay, *Women's Participation in Sports: Four Feminist Perspectives*, 7 TEX. J. WOMEN & L. 1, 1–2, 10–17 (1997) (describing a Nike advertisement in which girls on a swing set ask boys to let them play so they can reap the benefits of athletics too; discussing the documented benefits of athletics for women); 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 "be dependent upon men for care and protection" and "will necessarily be dominated by their physically more developed and stronger [male] mates").

⁴² 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).

tending college.⁴³ Moreover, athletic participation is said to create numerous benefits for women and girls, including better physical and mental health, higher self-esteem, a lower rate of depression, a more positive body image, greater educational success, and stronger inter-personal skills.⁴⁴ Research shows that physical activity reduces female risk of cardiovascular disease,⁴⁵ and physically active women are less likely to get diseases such as breast cancer.⁴⁶ Research also shows that participation in athletics promotes positive social behaviors, including better academic performance,⁴⁷ lower rates of smoking, drug use and pregnancy, and higher levels of self-esteem. Sports participation also provides social benefits that are carried throughout life,⁴⁸ including a woman's professional life.⁴⁹ Given the growing numbers

⁴³ Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71 (2008).

⁴⁴ Samuels, *supra* note 5, at 242; *Amateur Sports Act: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism of the S. Comm. on Commerce, Science, and Transp.*, 104th Cong. 12 (1995) (statement of Norma Cantú, Assistant Secretary, Office for Civil Rights, Department of Education) (“[G]irls who participate in sport 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”); 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) (explaining that “[f]emales who participate in athletics benefit from greater academic success, responsible social behaviors, a multitude of health benefits, and increased personal skills” and noting that “[f]emale student-athletes have higher grades, are less likely to drop out, and have higher graduation rates than their non-athletic peers”).

⁴⁵ WOMEN'S SPORTS FOUND., *HER LIFE DEPENDS ON IT: SPORT, PHYSICAL ACTIVITY AND THE HEALTH AND WELL-BEING OF AMERICAN GIRLS* 8 (2004).

⁴⁶ *Id.* at 9.

⁴⁷ *Id.* at 30; *see also* Council on Sports Med. and Fitness and Council on Sch. Health, Am. Acad. of Pediatrics, *Active Healthy Living: Prevention of Childhood Obesity Through Increased Healthy Living*, 117 PEDIATRICS 1834, 1836 (2006) (discussing the health benefits of athletics for all children from weight reduction, to insulin sensitivity, to blood pressure, to 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>.

⁴⁸ *Amateur Sports Act: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism of the S. Comm. on Commerce, Science, and Transp.*, 104th Cong. 183–199 (1995) (statement of Donna A. Lopiano, Executive Director, Women's Sports Foundation) [hereinafter *Amateur Sports Act: Hearings*]; *see* Council on Sports Med. and Fitness and Council on Sch. Health, Am. Acad. of Pediatrics, *supra* note 47.

⁴⁹ Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 444 (2000) (“80% of women identi-

of children, and especially girls, who are overweight and suffering the resultant lifelong physical and emotional effects, sports participation — both encouraging an interest in it and sustaining it — is an important public policy issue.

Title IX addresses this issue by prohibiting discrimination on the basis of gender in education-based sports programs. In doing so, scholars have explained that Title IX goes beyond a formal equality approach to achieve a kind of substantive equality as well,⁵⁰ so that Title IX “take[s] an approach to sex equality that is markedly different from the dominant approach reflected in sex discrimination law generally.”⁵¹ This is because, as courts and scholars have long recognized, a purely formal equality interpretation of Title IX would achieve little, as differences between men’s and women’s interest in athletics are the result of discriminatory social relationships and institutional practices that “construct” such differences.⁵² Historically, only men had the opportunity to develop the interest and ability to participate in sports. Women were conditioned not to seek athletic opportunities or participate in sports, and opportunities for them to do so were severely limited.⁵³ As a result, the law had to account for the fact that women naturally would not have the same interest and ability to engage in sports because of significant past discrimination. Title IX is said to do so by taking a substantive equality approach. This approach is sometimes referred to as

fied as key leaders in Fortune 500 companies participated in sports during their childhood and have self-identified as ‘tomboys.’ . . . Several studies describing the glass ceiling in corporations conclude that women’s lack of competitive team sports experience disadvantages them for career advancement.”)

⁵⁰ David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 263 (2005) (stating that “Title IX, on the other hand, looks beyond formal equality and reaches into the realm of substantive equality”); Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL’Y 1, 5 (1994) (noting that “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 42, at 212–213.

⁵¹ Brake, *supra* note 3, at 24.

⁵² Brake, *supra* note 3, 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 differences not as inherent, but as constructed through social relationships and institutional practices.”)

⁵³ Erin Buzuvis, *Survey Says . . . A Critical Analysis of the New Title IX Policy and a Proposal for Reform*, 91 IOWA L. REV. 821, 825 (2006).

“structuralism,”⁵⁴ or “structural equality,” and it is based on the notion that women’s expressed “interest” in athletics cannot be weighted equally with men’s because such “interest” might instead be the result of social factors which discourage women’s athletic participation, rather than the result of real choices.⁵⁵ Instead, the theory has been that changing the structure of athletics by creating opportunities for women to participate and removing stigmas against such participation is what is needed to develop women’s interest in sports.⁵⁶

Title IX incorporates this substantive, or “structural,” approach to equality primarily through the so-called “three-part test”⁵⁷ for compliance. Through the three-part test, schools are required to create opportunities for girls and women to participate in sports to stimulate females’ interest in participating.⁵⁸ Title IX therefore does not require gender-neutral assessments of athletic ability, but instead allows institutions to offer separate

⁵⁴ Brake, *supra* note 3, at 29–30 (writing that “a structuralist interpretation of discrimination law centers the legal analysis on how institutions and organizations construct sex difference and inequality”); MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 64 (2003) (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”).

⁵⁵ Brake, *supra* note 3, at 29–30 (“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.”).

⁵⁶ Horwitz, *supra* note 17, at 314–15. As commentators have explained:

Any measure that purports to compare the interest of women and men 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).

⁵⁷ Brake, *supra* note 3, at 49–50.

⁵⁸ Brake & Williams, *supra* note 42, at 213–14; Buzuvis, *supra* note 53, at 826; Deborah L. Brake, *Title IX as Pragmatic Feminism*, 55 CLEV. ST. L. REV. 513, 537 (2007).

male and female teams.⁵⁹ 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 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.⁶⁰ As a result, Title IX has been applauded for taking a "more comprehensive view of equality" than the Equal Protection clause.⁶¹

Courts frequently have endorsed the "structural" equality elements of Title IX,⁶² often citing the overwhelming statistics indicating that simply creating opportunities for women to participate in sport has led to increased interest.⁶³ For instance, in the landmark case of *Cohen v. Brown University*, the court 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 to remedy discrimination that results from stereotyped notions of women's interests and abilities.⁶⁴

The court in *Brown* went on to explain that women's lower rate of participation in sports resulted not from an inherent lack of interest, but because historically, opportunities for such participation have been limited.⁶⁵ Other

⁵⁹ DEBORAH L. BRAKE, *GETTING IN THE GAME: TITLE IX AND THE WOMEN'S SPORTS REVOLUTION* 15 (2010).

⁶⁰ *Id.* at 42.

⁶¹ Cohen, *supra* note 50, at 260.

⁶² Brake, *supra* note 3, at 50–51; Buzuvis, *supra* note 53, 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").

⁶³ 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 (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.")

⁶⁴ Cohen v. Brown Univ., 101 F.3d 155, 178–79 (1st Cir. 1996).

⁶⁵ *Id.* at 179.

courts have endorsed this view.⁶⁶ Thus, courts, scholars, and Title IX advocates have emphasized that Title IX works to eliminate gender discrimination by providing women the opportunity to participate in athletics and thereby generating interest in athletic participation. I have argued previously that, while necessary, Title IX's equality mandate is limited in its effectiveness in stimulating females' interest in athletic participation, as it guarantees women the right merely to assimilate into a male model of sport.⁶⁷ The following section of this article extends this analysis by explor-

⁶⁶ For instance, the court in *Pederson v. Louisiana State University* echoed these themes, stating that:

[LSU] argues brazenly that the evidence did not indicate 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 teams, 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 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, 769 (9th Cir. 1999). The court further explained:

[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; *see also* *Roberts v. Colo. State Univ.*, 814 F. Supp. 1507, 1514 (D. Colo. 1993) ("Acceptance [of Colorado's] argument also would implicitly condone the attitude that female athletes at CSU should be satisfied with their current opportunities given the pre-1970 lack of participation opportunities for women in intercollegiate athletics."). 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, Science, and Transp.*, 104th Cong. 201 (1995) (statement of Peggy Bradley Doppes, Nat'l Ass'n of Collegiate, Women Athletic Adm'rs).

⁶⁷ Koller, *supra* note 15.

ing how Title IX's equality framework communicates with or "sends a message" to women in a way that can affect their interest in sports participation.

III. TITLE IX AND THE EXPRESSIVE POWER OF THE LAW

Title IX's ability to continue to effect change in female athletic participation rates can be evaluated by looking at its theoretical foundation combined with its expressive effects. Expressive theories of the law focus on the "statements" made by the law and how those statements might affect social norms.⁶⁸ Indeed, a significant amount of Title IX's legal and popular discourse is focused on the messages sent to women and girls about sports participation. Understanding fully the ways in which Title IX can send messages to girls and women about sports is therefore crucial to appreciating the ways in which the law can stimulate interest in participating, or not, in sports. Accordingly, since the premise behind Title IX's theory of structural equality is that increased participation opportunities will encourage females to take up and continue engaging in sports, it is important to examine what and how opportunities created in the name of Title IX communicate with women to determine whether the law's message is consistent with its goals.

While examining Title IX's expressive dimension, it is important to note that the law in general, and Title IX in particular, is of course only one influence on girls' and women's interest in sports. Therefore, it might be suggested that other factors are at work which encourage, or discourage, participation in sports. This is certainly true,⁶⁹ and it would be a mistake to assume that the law has the sole effect on women's motivation to participate in sports. However, it is still important to look at the law's role in shaping women's interest in sports for two reasons. First, Title IX historically has had a significant impact on women's participation, and its status in popular culture has carried an important message that, statistics clearly demonstrate, can affect women's interest in sports. Second, given that Title IX has always strongly communicated that women are entitled to participate in sports, it is important to explore whether a message of equality and entitlement to participate is still sufficient to actually develop the interest in participating, and if not, what role might the law play in stimulating even more broad-based interest.

In this respect, an examination of Title IX's message to prospective female athletes is a useful exercise, not just theoretically but practically. As

⁶⁸ Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024-25 (1995).

⁶⁹ George, *supra* note 10, at 25-29.

will be explained below, such an examination reveals that Title IX now signals two different, and likely for many potential female athletes, conflicting messages. The first and most prominent is that girls and women can, should, and are entitled to participate in athletics on a basis equal to boys and men. The second and less-examined message is that such participation opportunities are contingent upon meeting the demands of the socially-constructed model for sports that dominates in our educational institutions, and serves to exclude many. As new generations of women grow up knowing they are legally entitled to participate in sports, it is this second message that takes on greater significance in shaping women's desire to participate in sports.

A. *The Expressive Power of the Law*

Scholars have explained that “there can be no doubt that law, like action in general, has an expressive function” and that its expressive dimension goes beyond its coercive effects.⁷⁰ Thus, the expressive theory of the law “focuses on what law says rather than the sanctions law threatens.”⁷¹ Law is said to create public meanings and shared understandings between the government and public.⁷² As a result, many scholars have explained that the law has the power to shape social norms⁷³ and influence behavior.⁷⁴

⁷⁰ Cass R. Sunstein, *Law, Economics and Norms: In the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2051 (1996) (“Many debates over the appropriate content of law are really debates over the statement that law makes, independent of its (direct) consequences.”); see also Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 339 (2000) (“Legal theorists sometimes posit that law affects behavior ‘expressively’ by what it says rather than by what it does.”); Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 37 (2002).

⁷¹ Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043, 1046 (2005).

⁷² Anderson & Pildes, *supra* note 70, at 1571.

⁷³ As Richard McAdams has stated:

“The expressive effect thus gives law a significant potential for managing norms. One of the necessary conditions of a norm is that people generally realize that others will, at the least, approve or disapprove of them for engaging in certain conduct. Where the approval pattern is not well known, a legislative proclamation can publicize it and create a norm. Even where the approval pattern is already known and the norm exists, legislation can still strengthen the norm by causing individuals to adjust upward their beliefs about the strength of the consensus underlying the norm . . . [T]hose who observe the signal will update their prior beliefs about public

However, expressive meanings are not determined in isolation, but are “socially constructed,” so that the meanings are given shape by the other norms, practices and understandings in a particular community.⁷⁵

For instance, law has the ability to communicate important value judgments⁷⁶ and can serve to educate individuals about socially preferred or harmful behavior. Law then may cause individuals to change their behavior by “signaling the underlying attitudes of a community or society.”⁷⁷ Because people are motivated to gain approval and avoid disapproval, the information signaled by legislation and other law can cause individuals to change their behavior to conform with popular norms.⁷⁸ Court decisions also have an expressive effect, because they, too “often reflect public attitudes.”⁷⁹ Accordingly, because individuals value approval,⁸⁰ law can affect behavior by signaling what behavior will generate approval,⁸¹ causing individuals “to update their prior beliefs about the approval pattern.”⁸² A notable example of this involved workplace sexual harassment.⁸³ Catharine MacKinnon has

attitudes in the direction of expecting more disapproval for behavior the law condemns. Expecting disapproval for the behavior provides an incentive, independent of legal sanctions, to comply with the law.”

McAdams, *supra* note 70, at 371–72.

⁷⁴ Geisinger, *supra* note 70, at 37 (“[S]cholars note that laws affect behavior not only by making the behavior more costly, but also by affecting social norms and, consequently, by changing an individual’s preferences for undertaking particular acts.”); McAdams, *supra* note 70, at 389 (“In a democratic society, legislation and other law can change what people believe about the approval patterns in their community or society; the law operates as a signal of popular opinion.”); Sunstein, *supra* note 70 (arguing that the expressive function of law shapes social norms).

⁷⁵ Anderson & Pildes, *supra* note 70, at 1525.

⁷⁶ Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 949 (1996).

⁷⁷ McAdams, *supra* note 70, at 340.

⁷⁸ Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 755 (1998); Sunstein *supra* note 70, at 2022.

⁷⁹ Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 341 (2000).

⁸⁰ McAdams, *supra* note 70, at 343 (“There are at least two reasons why approval motivates behavior. An individual may value approval intrinsically because it satisfies a preference for esteem or instrumentally because it helps achieve other ends.”).

⁸¹ McAdams, *supra* note 70, at 342.

⁸² *Id.* at 359.

⁸³ Danielle Keats Citron, *Law’s Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009).

explained that court decisions changed the social meaning of sexual harassment by labeling it a form of gender discrimination.⁸⁴

Feminist scholars have long highlighted ways that law's expressive effect can play a role in subordinating women. For example, Nadine Taub and Elizabeth Schneider have explained that:

[B]eyond its direct, instrumental impact, the insulation of women's world from the legal order also conveys an important ideological message to the rest of society . . . the law's absence devalues women and their functions . . . In short, the law plays a powerful role, though certainly not an exclusive role, in shaping and maintaining women's subordination.⁸⁵

Law therefore has served to "legitimate and perpetuate oppressive social systems through its expressive function by sending messages about the kind of people and the institutions that we value."⁸⁶ Likewise, information about the kind of athletes that are valued by education-based sports programs is communicated forcefully in the name of Title IX.

B. The Expressive Power of Title IX

The first step in understanding Title IX's expressive dimension is to understand the mechanism by which Title IX communicates or creates understandings about women and sports. On the surface, it is clear that Title IX as applied to sports does little "speaking" through its own provisions. The statute itself does not address sports programs and the legislative history is sparse.⁸⁷ We know, at least intuitively, however, that Title IX does communicate in a way that shapes norms for women's sports participation. Indeed, Title IX is said to be the "first federal law to have achieved true pop status."⁸⁸ The words "Title IX" have become synonymous with female ath-

⁸⁴ *Id.* at 407–08.

⁸⁵ Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW* (David Kairys ed., 3d ed. 1998).

⁸⁶ Andrew A. Taslitz, *What Feminism has to Offer Evidence Law*, 28 *SW. U. L. REV.* 171, 179 (1999).

⁸⁷ Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 *YALE L.J.* 1254, 1255 (1979).

⁸⁸ Nancy Levit & Robert R.M. Verchick, *FEMINIST LEGAL THEORY: A PRIMER* 107 (2006). See also Brake, *supra* note 59, at 1, 13 (stating that "appeals to Title IX resonate broadly in American Popular culture" and that "Title IX has remained a remarkably popular law precisely because it has been so effective in changing cultural norms to support greater opportunities for girls and women in sports").

letic achievement and power.⁸⁹ There is even a company named “Title IX” which markets upscale women’s athletic clothing. Moreover, although the actual requirements of the statute and regulations are often not widely understood,⁹⁰ there is no question that Title IX communicates beyond its sanctions.⁹¹

Therefore, despite statutory language that does not address sports programs, Title IX carries important messages about sports participation through its equality mandate. This is because the statute and its implementing regulations require only that women’s sports programs be equivalent to men’s. Accordingly, the regulations contemplate and courts give great deference to educational institutions to define the content of their athletic programs. In this way, Title IX sends messages, or “speaks,” through the educational institutions which create participation opportunities in the name of Title IX compliance. In addition, Title IX speaks through Congress, courts, and other government actors who speak in the name of Title IX when supporting and enforcing the law. Both of these mechanisms shape the understandings that have developed about Title IX and work to create the messages sent about Title IX and women’s athletics. As will be explained in the next part, Title IX has signaled two different, and likely for many potential female athletes, arguably conflicting messages. The first message is one of equality and empowerment: that girls and women are entitled to participate in athletics on a basis equal to boys and men. The second, less-examined message is far more complex. It is that the natural and expected goal of sports participation is to be a highly skilled athlete capable of winning. Unpacking this message and how it is interpreted by different groups of women is critical to understanding Title IX’s ability to continue developing women’s interest in sports.

⁸⁹ NAT’L COAL. FOR WOMEN AND GIRLS IN EDUC., *supra* note 10, at 7.

⁹⁰ For instance, popular media reports often state that Title IX requires “equal funding” for men’s and women’s athletics. BRAKE, *supra* note 59, at 2.

⁹¹ Note, *supra* note 87, at 1267 (explaining sport’s “symbolic role” and stating that “the symbolic importance of sports in American society is undoubted”). See also SUSAN K. CAHN, *COMING ON STRONG: GENDER AND SEXUALITY IN TWENTIETH-CENTURY WOMEN’S SPORTS* 251 (1994) (explaining that Title IX’s equality principle had an impact outside of the federally-funded institutions to which the statute applies).

1. Title IX's First Message: Equality, Empowerment and Entitlement to Participate

Title IX has been said to be “a symbol of hope for women and sports”⁹² Indeed, much of what has made Title IX successful is its expression of new norms for women’s sports participation.⁹³ One is that women can be athletes. Another is that women are entitled to participate in sports with dignity and under conditions equal to men. At the time Title IX was enacted, such notions were nearly revolutionary. Prior to the passage of the statute, the message to females, taken as a seemingly natural understanding and reinforced by the law, was that sports were for boys and men only.⁹⁴ Sports programs played a “symbolic role” in reinforcing these gender stereotypes⁹⁵ by signaling that sports participation by women was not normal.⁹⁶ An early case involving a girl seeking to join a Little League baseball team illustrates this well. Just after Title IX was passed, in 1974, Allison Fortin was denied the opportunity to join the Pawtucket, Rhode Island Little League team on the basis of gender. She brought suit alleging violations of her Fourteenth Amendment rights to Equal Protection. The district court denied her claim, stating that the exclusion of girls was perfectly rational, because if girls were to play Little League baseball, there was too much of a risk that they might be hurt.⁹⁷ The district court credited the testimony of an orthopedic surgeon who admitted that he had little experience with female athletes, but nevertheless opined that girls were “more sedentary” and “likely to be in poorer condition than boys.”⁹⁸ He also concluded, among other things, that girls “lacked the capacity to throw over-

⁹² Olson, *supra* note 36, at 106.

⁹³ BRAKE, *supra* note 59, at 7.

⁹⁴ Note, *supra* note 87, at 1254 (“Intercollegiate athletics have been and continue to be a male domain that is particularly vulnerable to charges of sex discrimination.”); EILEEN McDONAGH & LAURA PAPPANO, *PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS* (2008).

⁹⁵ Note, *supra* note 87, at 1265.

⁹⁶ McDONAGH & PAPPANO, *supra* note 94, at 247; M. Marie Hart, *On Being Female in Sport*, in *OUT OF THE BLEACHERS: WRITINGS ON WOMEN AND SPORT* 24 (Stephanie L. Twin ed., 1979) (“Although we have isolated and studied ‘Women in Sport,’ we have not so separated ‘Men in Sport’ as a special topic. This is because the latter is accepted, rather than the exception, in sport discussions.”); Buzuvis, *supra* note 53, at 821.

⁹⁷ Fortin v. Darlington Little League, 514 F.2d 344, 346 (1st Cir. 1975).

⁹⁸ *Id.* at 349.

hand.”⁹⁹ The doctor’s opinions were also based on the fact that “it was the normal activity of a young lady to keep off baseball fields and play with dolls.”¹⁰⁰ Similarly, in 1976, one year after Title IX’s regulations went into effect, Victoria Ann Cape brought suit under the Equal Protection Clause challenging the Tennessee Secondary School Athletic Association’s rules that required six instead of the usual five players on each girls’ basketball team, restricted the game to half-court and permitted only forwards to shoot the ball.¹⁰¹ The state claimed several rationales for the rule, including that it sought to protect the female players “who are weaker and incapable of playing the full-court game from harming themselves”; “to provide the opportunity for awkward and clumsy student athletes to play defense only”; and to ensure a better game for the fans and continued fan support, because the fans were “accustomed to a split-court game.”¹⁰² The athletic association ultimately prevailed, as the court held that there was “no evidence of any intent to discriminate against” female high school basketball players.¹⁰³

This once natural understanding that it was not normal or safe for women to participate in sports was strongly reinforced by the state in that government-funded institutions, the primary provider of sports opportunities in the United States, had little or no participation opportunities for women. The effect of this sex discrimination was to dampen women’s interest in sports “often to the extent that they d[id] not even consider the possibility of participation.”¹⁰⁴ Through Title IX and its implementing regulations, Congress and the Executive Branch established sanctions for discriminating against women in educational programs, and also hoped to express and cultivate a new norm for sports participation that ended such sex stereotyping. The result is that Title IX is widely credited with sending a message that encourages women’s participation in sports.¹⁰⁵

Title IX expressed a new definition of who an athlete can be in several ways. To begin, Congress firmly endorsed gender equity in sports, by supporting the regulations drafted by the Department of Health, Education, and Welfare (now administered by the Department of Education) and re-

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 350.

¹⁰¹ *Cape v. Tenn. Secondary Sch. Athletic Ass’n*, 563 F.2d 793, 794 (6th Cir. 1977).

¹⁰² *Id.* at 795.

¹⁰³ *Id.*

¹⁰⁴ Note, *supra* note 7, at 1265.

¹⁰⁵ See DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, ED 409 618, TITLE IX: 25 YEARS OF PROGRESS (1997).

peatedly rejecting efforts by male sports advocates that argued Title IX would unfairly shift resources from male sports programs to women's programs.¹⁰⁶ Moreover, proposed amendments to Title IX that would have exempted revenue-producing intercollegiate sports (specifically men's football and basketball) from Title IX consistently were rejected as well.¹⁰⁷ Congress again sent the message that gender equity in sports was important with the Civil Rights Restoration Act of 1987, passed in response to the Supreme Court's decision in *Grove City College v. Bell*,¹⁰⁸ which limited Title IX's application to sports programs by holding that the statute only applied to specific programs which received federal financial assistance, not an entire institution. This effectively suspended application of Title IX to education-based sports programs, because few, if any athletic departments received direct federal aid. Congress rejected this outcome, mandating that if any part of the institution received federal financial assistance, Title IX applied to the entire institution. Courts have said that the Act "mak[es] it crystal clear that Title IX applies to athletic programs operated by any school receiving federal funding for any of its educational programs and activities, and not just to those athletic programs which directly received federal dollars,"¹⁰⁹ and emphasized that the subject of "[a]thletics featured . . . prominently" in Congress's decision to reject the Supreme Court's *Grove City* ruling.¹¹⁰ This message was buttressed by courts unanimously upholding the regulations defining Title IX's requirements with respect to athletics and rejecting constitutional challenges to its application,¹¹¹ finding that ending discrimina-

¹⁰⁶ *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 770 (9th Cir. 1999) (stating that "[a]n extensive survey of Title IX's legislative history and the regulations promulgated to apply its provisions to college athletics concluded that boosters of male sports argued vociferously before Congress that the proposed regulations would require schools to shift resources from men's programs to women's programs, but that Congress nevertheless sided 'with women's advocates' by deciding not to repeal the . . . regulations"(quoting MARY JO FESTLE, *PLAYING NICE: POLITICS AND APOLOGIES IN WOMEN'S SPORTS* 171-76 (1996))).

¹⁰⁷ *See Equity in Athletics, Inc. v. Dep't of Educ.*, 504 F. Supp. 2d 88, 95 (W.D. Va. 2007) (citing 120 CONG. REC. 15,322-23 (1974)).

¹⁰⁸ 465 U.S. 555 (1984).

¹⁰⁹ *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 263 F. Supp. 2d 82, 94 (D.D.C. 2003).

¹¹⁰ *Equity in Athletics, Inc. v. Dep't of Educ.*, 504 F. Supp. 2d 88, 103 (W.D. Va. 2007).

¹¹¹ *Id.* at 101-03 (explaining that "every circuit, in reviewing the Three-Part Test set forth in the 1979 Policy Interpretation, has concluded that it is entitled to substantial deference" and that "[l]ikewise, every Circuit, which has considered the constitutionality of the proportionality prong of the Three-Part Test, has held that

tion in education-based athletic programs is an important government interest.¹¹² Similarly, courts repeatedly have rejected challenges to Title IX brought by male athletes.¹¹³

In addition, courts have recognized Title IX's expressive value in shaping new norms for women's participation in sports. For instance, as the court stated in *Neal v. Board of Trustees of California State Universities*, "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."¹¹⁴ The court explained that this would effect change in that

[t]he creation of additional athletic spots for women would prompt universities to recruit more female athletes, in the long run shifting women's demand curve for sports participation. As more women participated, social norms discouraging women's participation in sports presumably would be further eroded, prompting additional increases in women's participation levels.¹¹⁵

Title IX also encourages women and girls to participate in sports by sending the message that women are entitled to participate in sports with dignity, and on terms equal to men, through cases that recognize the expressive

it does not offend constitutional principles of equal protection."); *See also* Blake, *supra* note 3, at 49–50 (asserting the same and citing *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993), *remanded to*, 879 F. Supp. 185 (D.R.I. 1995), *aff'd in part and rev'd in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997); *Boucher v. Syracuse Univ.*, 164 F.3d 113, 117 (2d Cir. 1999); *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332, 335–36 (3d Cir. 1993); *Pederson v. La. St. Univ.*, 213 F.3d 858, 879 (5th Cir. 2000); *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 274 (6th Cir. 1994); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 268 (7th Cir. 1994); *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 767–68 (9th Cir. 1999); *Roberts v. Colo. St. Bd. of Agric.*, 998 F.2d 824, 828–29 (10th Cir. 1993)).

¹¹² *Kelley v. Bd. of Trs.*, 35 F.3d 265, 272 (7th Cir. 1994) (stating that "[t]here is no doubt but that removing the legacy of sexual discrimination . . . in the provision of extra-curricular offerings such as athletics — from our nation's educational institutions is an important governmental objective").

¹¹³ *See e.g.*, *Chalenor v. Univ. of N. Dakota*, 291 F.3d 1042 (8th Cir. 2002); *Neal*, 198 F.3d 763 (9th Cir. 1999).

¹¹⁴ 198 F.3d at 768.

¹¹⁵ *Id.* at 769 (further explaining that "Title IX has altered women's preferences, making them more interested in sports, and more likely to become student athletes").

harms¹¹⁶ inherent in second-class treatment of female athletes. Cases involving claims of “equal treatment” emphasize “the message” sent to female athletes who, for instance, must train or compete in inferior facilities or during non-traditional seasons.¹¹⁷ A case involving disparities between facilities for a girls’ high school softball team and the boys’ baseball team make this point well. In *Daniels v. School Board of Brevard County, Florida*, the court recognized numerous harms that were present through the negative messages the disparate facilities sent. The court stated that:

As with all the differences the Court addresses in this Order, the fact that the boys have a scoreboard and the girls do not sends a clear message to players, fellow students, teachers and the community at large, that girls’ varsity softball is not as worthy as boys’ varsity baseball.¹¹⁸

The court further explained with respect to the bleachers on the girls’ softball field that photographs submitted by the softball players:

starkly illustrate that the bleachers on the girls’ softball field are in worse condition and seat significantly fewer spectators, than the bleachers on the boys’ field Again, the message this sends the players, spectators and community about the relative worth of the two teams is loud and clear.¹¹⁹

¹¹⁶ Pildes, *supra* note 78, at 755 (“An expressive harm is one that results from the ideas or attitudes expressed through a government action rather than from the more tangible or material consequences the action brings about. On this view, the meaning of a governmental action is just as important as what that action does.”).

¹¹⁷ *Alston v. Va. High School League*, 144 F. Supp. 2d 526, 536 (W.D. Va. 1999) (plaintiffs characterized their alleged harm partially in terms of the “negative message” the high school athletic association’s actions sent). Other cases reflect this discourse. See, e.g., *McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 295 (explaining that “[s]cheduling the girls’ soccer season out of the championship game season sends a message to the girls on the teams that they are not expected to succeed and that the school does not value their athletic abilities as much as it values the abilities of the boys”); *Daniels v. Sch. Bd. of Brevard Cnty.*, 985 F. Supp. 1458, 1461 (M.D. Fla. 1997) (explaining that the disparity between the girls’ softball fields and the boys’ baseball fields, including the lack of lighting at the girls’ field, “sen[t] a clear message to players, fellow students, teachers and the community . . . that girls’ varsity softball [was] not as worthy as boys’ varsity baseball”); *Mason v. Minn. State High School League*, No. Civ.03-6462(JRT/FLN), 2004 WL 1630968 (D. Minn. Jul. 24, 2004) (noting that it was a question of fact for the trier to determine whether the choice of venue for girls hockey games sent a negative message to girls hockey players and their fans); *Blair v. Wash. State Univ.*, 740 P.2d 1379, 1381 (Wash. 1987) (stating that “[t]he message came through loud and clear, women’s teams were low priority”).

¹¹⁸ *Daniels*, 985 F. Supp. 1458 at 1461.

¹¹⁹ *Id.*

In entering the preliminary injunction, the court concluded that:

Each day these inequalities go unredressed, the members of the girls' softball team, prospective members, students, faculty and the community at large, are sent a clear message that girls' high school varsity softball is not as worthy as boys' high school varsity baseball, i.e., that girls are not as important as boys . . . the harm associated with that treatment as second-class athletes is significant.¹²⁰

The power of the message sent by Title IX and its immediate effect on female athletes was captured by scholar Erin Buzuvis on the "Title IX Blog" in reference to a case involving locker room facilities at several high schools in North Carolina. In those cases, the schools ultimately complied with Title IX by upgrading their facilities to be equivalent to those provided to boys' teams. The girls' basketball coach was quoted as stating about the upgraded facilities that "[m]y girls probably just felt like second-class citizens because the boys had such nice facilities, but now they feel like first-class citizens."¹²¹ As Professor Buzuvis explained, this feeling or message is directly attributable to Title IX:

To me, this quote epitomizes the intent and effect of Title IX No group should be stigmatized by second-class treatment. Discrimination in athletics, whether it be in the number of participation opportunities for each sex, or the quality of their playing fields and locker rooms, sends a clear message to students about whose athletic experience society appreciates, expects, and respects¹²²

Court decisions in the decades since Title IX was enacted continue to send the message that women and girls are entitled to participate in athletics on terms equal to men and boys. The result is that Title IX has steadily eroded the stigma that formerly attached to women's participation in sports and shifted the dynamic, so that an ever greater stigma attaches to institutions and individuals who discriminate against women athletes, at least with respect to participation.¹²³ The case of *Pederson v. Louisiana State University*¹²⁴

¹²⁰ *Id.* at 1462.

¹²¹ Erin Buzuvis, *First-Class Locker Rooms Remedy Title IX Violations at N.C. High Schools*, TITLE IX BLOG (November 28, 2010, 9:00 AM), <http://title-ix.blogspot.com>.

¹²² *Id.*

¹²³ To be sure, Title IX cases continue to demonstrate that there is not enough stigma attached to at least some forms of discrimination against women in sports, such as through sub-par facilities, game scheduling and other conditions of participation.

¹²⁴ 213 F.3d 858 (5th Cir. 2000).

illustrates this well. In that case, the athletic director refused to establish a women's softball team despite considerable interest and the athletic department being severely out of compliance with Title IX. The case included testimony that the athletic director thought soccer was a "more feminine sport" and that some at LSU were concerned about adding fast-pitch softball because the women "might get hurt."¹²⁵ Although these views of women athletes once were mainstream, the fact that norms for women's sports have changed could be seen by the fact that the institution did nothing to defend them. Instead, the university ultimately defended itself by arguing that its athletics personnel were simply "ignorant" of the law's requirements.¹²⁶

Indeed, Title IX's effect on changing norms for sports participation and stigmatizing those who would deny women the right to participate can be seen in opponents' arguments as well as public reaction to attempted changes to the law. Title IX critics often state that they agree with the principles of equality and entitlement to participate, but that Title IX's regulatory implementation has gone too far. Moreover, efforts to roll back Title IX's equality mandate have often been attempted quietly and not in full view to avoid public outcry. For instance, in 2002, the Department of Education formed a "Commission on Opportunities in Athletics" with the purpose of studying Title IX and making recommendations for changes to the implementing regulations. The Commission was widely criticized as favoring male athletic interests and Title IX opponents. The Commission issued a report in 2003 that recommended changes to Title IX enforcement that would have significantly limited Title IX's equality mandate. The reaction to the Commission's report was "public outrage,"¹²⁷ and the Department of Education ultimately rejected the Commission's recommendations. Two years later, however, the agency quietly issued a "Clarification" of Title IX's regulations that adopted two of the Commission's recommendations and allowed schools to gauge women's athletic interest via e-mail surveys. This change was resoundingly criticized and subsequently eliminated by the Obama Administration, reaffirming the message that women are entitled to participate in sports on terms equal to men.

¹²⁵ *Id.* at 881.

¹²⁶ *Id.* at 881–82.

¹²⁷ NAT'L COAL. FOR WOMEN AND GIRLS IN EDUC., *supra* note 10, at 13. Former Senator Birch Bayh, who played a significant role in Title IX's enactment, stated that the reaction to the Commission's report was a "firestorm" and that the political process had been "harness[ed]" so that the proposed changes to Title IX which were backed by the Bush Administration were defeated. Birch Bayh, *Personal Insights and Experiences Regarding the Passage of Title IX*, 55 CLEV. ST. L. REV. 463, 470 (2007).

Thus, the increase in women and girls' participation in sports in the aftermath of Title IX illustrates that the expressive effect of the statute and regulations both eroded the stigma of women's participation in sports and discouraged discrimination in sports based on gender as institutions attempted to comply with the law and avoid sanctions, but also avoid the perception that they held outmoded views about women athletes. Title IX therefore has carried important moral weight that convinced people that the existing norms for sports participation which excluded women were wrong and deserved to be replaced.¹²⁸ These messages had the consequence of encouraging women to participate in sports. The expressive meaning of Title IX therefore seemingly achieved both effects — discouraging discrimination and encouraging interest — simultaneously. These consequences are still thought to be the logical result of Title IX's anti-discrimination mandate. However, this assumption is no longer warranted in the face of women's persistent, lagging participation rates, especially among certain populations. Therefore, the next part considers whether Title's IX's empowerment message can still have the dual effect of discouraging discrimination and encouraging women's participation in athletics. In doing so, it is important to consider whether the empowerment message resonates with diverse groups of girls and women. As will be explained below, a more complex message is being sent in the name of Title IX, and it is one that can have a significant impact on whether women and girls decide to participate in athletics. This signal is that the prevailing norms of the student-athlete experience — training to win and cultivate spectator appeal — are the natural goal of participation in sports, and that certain women and girls are more able to reach that goal than others.

2. Title IX's Second Message: The Exclusive Conception of Who Can Be an Athlete

Understanding Title IX's expressive content more fully is crucial to determining how its message of empowerment and entitlement to participate might resonate for some women but be diluted for others. To do this, we must first understand the model for athletics in which Title IX's opportunities are created. At the time Title IX was passed there were significant, troubling questions about education-based sports programs in the United States.¹²⁹ The prevailing model emphasized winning and commercialism

¹²⁸ See Sunstein, *supra* note 68, at 2031.

¹²⁹ Peter Adler & Patricia Adler, *From Idealism to Pragmatic Detachment: The Academic Performance of College Athletes*, 58 SOC. OF EDUC. 241 (Oct. 1985) (“[T]he

more than participation and academics. And, of course, the model openly excluded women. While Title IX caused individuals and institutions to update their views of women participating in sports, the law's equality framework did nothing to update the model that was constructed by men for the male student-athlete.¹³⁰ Time has shown that this model is one that is more readily accessed by upper-middle class white women who can assimilate into it more easily because they have the resources to meet its demands. As a result, Title IX developed a second, and far less examined message that must be taken into account when determining how best to achieve gender equity in sports.

a. The Model for Sport in Educational Institutions

Examining the model for sports that exists in our educational institutions is essential to understanding Title IX's expressive dimension because opportunities created for women in this model are created in the name of Title IX. This is because Title IX allows institutions to construct their sports programs as they see fit, adhering only to the principle of gender equality. Institutions therefore define which female athletes have sufficient "ability" to claim a participation opportunity and which women's sports will be offered in an effort to comply with Title IX. Moreover, education-based sports opportunities have important symbolic force, as these education-based athletics programs provide the most significant number of athletic participation opportunities in the United States.¹³¹ Scholar Deborah Brake has explained that Title IX implicitly incorporates the model of "elite competitive sports as the baseline measure of equality."¹³² This model is "dominant"¹³³ in our educational institutions today. It is also a model that

structure of universities with big-time athletic programs and the athletes' patterned experiences within these universities undermine their attainment of the professed goals of the educational system . . . [M]ost studies of college athletes have found a negative relationship between athletic participation and academic performance.").

¹³⁰ See e.g., Koller, *supra* note 15, at 439; Erin E. Buzuvis, *Sidelined: Title IX Retaliation Cases and Women's Leadership in College Sport*, 17 DUKE J. GENDER L. & POL'Y 1, 1 (2010).

¹³¹ See e.g., Olson, *supra* note 36, at 105 (stating that "colleges, universities and high schools" are the "loci of female athletes' most visible exclusion and inferiority"); Note, *supra* note 87, at 1265 (explaining the importance of the "symbolic role of intercollegiate sports").

¹³² Brake, *supra* note 58, at 541.

¹³³ *Id.* at 542.

was constructed by men, for the purpose of masculinizing males.¹³⁴ In my previous work, I explained that this model was left unchanged by Title IX, so that women seeking to participate in education-based sports programs must assimilate into the model for athletics that was built on the male norm.¹³⁵ Thus, because opportunities generated by Title IX's requirements operate within this framework, it is important to examine specifically the characteristics of that model and how it might speak to women in the name of Title IX.

The overarching characteristic of the model for athletics in our educational institutions today is its preference for high-level athletes.¹³⁶ Colleges are spending ever-increasing funds to recruit elite athletes, including female athletes, for their athletic programs.¹³⁷ Colleges and universities now emphasize winning more than ever, with athletic directors paid bonuses if they produce teams that win championships.¹³⁸ Spending on athletics has grown by double digits over the last decade, as schools see sports as a marketing tool, and with television contracts for even minor sports, athletic directors say they want viewers and alumni to see winning teams.¹³⁹ The emphasis on elite ability in educational institutions is also underscored by the fact that it can serve other national interests, with members of Congress and sports leaders expressing the sentiment that educational institutions have an important role to play in training Olympic athletes. For example, in a 1995 hearing on the Amateur Sports Act, the executive director of the United States Olympic Committee, Richard Schultz, explained that a priority for the USOC was partnering with the NCAA to preserve and enhance col-

¹³⁴ See Koller, *supra* note 15.

¹³⁵ *Id.*

¹³⁶ See e.g., CAHN, *supra* note 91, at 9–11; Pete Thamel, *Coaches Finding No Tolerance for Losing*, N.Y. TIMES, April 1, 2010, at B12 (“‘If you get fired for cheating, you can get hired right back again,’ he said. ‘If you get fired for losing, it’s like you’ve got leprosy.’”).

¹³⁷ Libby Sander, *Have Money, Will Travel: The Quest for Top Athletes*, CHRON. OF HIGHER EDUC., Aug. 1, 2008, available at <http://chronicle.com/article/Have-Money-Will-Travel-the/28750/>.

¹³⁸ Joe Drape & Katie Thomas, *As Colleges Compete, Major Money Flows to Minor Sports*, N.Y. TIMES, Sept. 2, 2010, <http://www.nytimes.com/2010/09/03/sports/03cup.html>.

¹³⁹ *Id.*

legiate programs in Olympic sports and protect the pipeline of Olympic athletes that come from college programs.¹⁴⁰

Of course, achieving elite ability can only come from intense training and skill development. As a result, a prospective athlete today is best positioned to claim one of the limited positions on a high school and, most importantly, college or university team if he or she starts participating in competitive sports at an early age,¹⁴¹ specializes in one sport during childhood 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’”¹⁴² to a sports team. This competitive environment means that, as a practical matter, “it 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,”¹⁴³ with training regimens that often could be considered extreme even for adults.¹⁴⁴ Indeed, the medical community has taken note, by urging parents and coaches to exercise restraint in pushing young athletes.¹⁴⁵ One of the negative aspects

¹⁴⁰ *Amateur Sports Act: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism of the S. Comm. on Commerce, Science, and Transp.*, 104th Cong. 41 (1995) (statement of Richard Schultz, Executive Director, U.S. Olympic Games).

¹⁴¹ James White & Gerald Masterson, *Problems in Youth Sports*, FAMILY RESOURCE, available at www.familyresource.com/parenting/sports/problems-in-youth-sports (“Starting ages for youth in competitive sports have lowered dramatically in the past two decades . . . [and 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.”).

¹⁴² Brake & Williams, *supra* note 42, at 201.

¹⁴³ *Id.*

¹⁴⁴ COMM. ON SPORTS MED. AND FITNESS, AM. ACAD. OF PEDIATRICS, *Intensive Training and Sports Specialization in Young Athletes*, 106 PEDIATRICS 154, 154 (2000). See also Andrew Ferguson, *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>; 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 ORTHOPAEDIC AND SPORTS MED. CTR., http://www.guilfordortho.com/age_of_specialization.htm; Bob Condor, *Living Well: How Much is Too Much in Youth Sports*, SEATTLE POST – INTELLIGENCER, Sept. 26, 2004, available at http://www.seattlepi.com/health/192359_condor27.html.

¹⁴⁵ COMM. ON SPORTS MED. AND FITNESS & COMM. ON SCH. HEALTH, AM. ACAD. OF PEDIATRICS, *Organized Sports for Children and Preadolescents*, 107 PEDIATRICS 1459 (2001).

is early specialization and overtraining, with numerous reports of girls in sports like basketball and soccer training year-round and suffering the injuries that almost inevitably result.¹⁴⁶ 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 . . . [including] adults pressuring kids to win at early ages, along with single-sport specialization and year-round training.”¹⁴⁷ Sport specialization is defined as “athletes limiting their athletic participation to one sport which is practiced, trained for and competed in throughout the year.”¹⁴⁸ 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.”¹⁴⁹ 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.¹⁵⁰ It is also believed that specialization will make athletes more competitive for a college scholarship.¹⁵¹ Nevertheless, social scientists have noted that although “specialization enhances individual and team performance, it undermines the basic purpose of high school athletics.”¹⁵² Indeed, while it is generally accepted that sports participation is a beneficial activity, there are “numerous negative effects”

¹⁴⁶ Jack Kelly, *More Girls In Sports Means More Injuries*, PITTSBURGH POST-GAZETTE, May 28, 2008, available at <http://www.post-gazette.com/pg/08149/885201-114.stm> (“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, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/20/AR2009052003308.html> (noting that “pressures from parents, coaches and other athletes often cause players to over-indulge [in grueling practice and playing schedules] during such a critical developmental stage”).

¹⁴⁷ NCAA, ALLIANCE ISSUES ‘POOR GRADES’ ON NATIONAL YOUTH SPORTS REPORT CARD (2005), available at <http://fs.ncaa.org/Docs/PressArchive/2005/Announcements/Alliance%2BIssues%2BPoor%2BGrades%2Bon%2BNational%2BYouth%2BSports%2BReport%2BCard.html> (internal quotation marks omitted).

¹⁴⁸ Jay Watts, *Perspectives on Sport Specialization*, 73 J. PHYS. ED. RECREATION & DANCE 32 (2002).

¹⁴⁹ *Id.*

¹⁵⁰ David Susanj & Craig Stewart, *Specialization in Sport: How Early . . . How Necessary?*, COACHES INFO, http://www.coachesinfo.com/index.php?option=com_content&id=303&Itemid=170 (last visited Nov. 9, 2011).

¹⁵¹ Watts, *supra* note 148.

¹⁵² Susanj & Stewart, *supra* note 150.

from sport specialization,¹⁵³ including “burnout,” where an athlete simply quits participating in all sports.

Aside from the effects on the child-athlete, the model for sports that predominates in our educational institutions is also one that is costly for parents and caregivers. Countless blogs and news stories have detailed the enormous costs of youth sports participation, as most athletes who hope to claim a position on a high school or college team also participate in private or “club” sports in an effort to develop their talents to the highest level possible. Such costs can amount to thousands of dollars per year.¹⁵⁴

Of course, the result of fielding specially-trained, highly skilled athletes is that such athletes support the commercial interests of the institution. This is the case because better athletes — and athletes whose primary focus is sports — are more likely to win. Social scientists have long pointed out that winning has taken center-stage in the model for high school and college sports because winning sports programs provide spectator interest and commercial appeal.¹⁵⁵ As explained by one observer, “high 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.”¹⁵⁶ This has led to the well-known, now familiar issue of playing-to-win subverting academic pursuits in the lives of student-athletes.¹⁵⁷ 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

¹⁵³ Watts, *supra* note 148.

¹⁵⁴ Karen Datko, *The High Cost of Youth Sports*, MSN MONEY (May 10, 2011), <http://money.msn.com/saving-money-tips/post.aspx?post=673566d4-b94f-4f33-a1bf-39fb416498f4>; Laura T. Coffey, *Ten Ways to Get a Grip on Sports Costs for Kids*, MSN TODAY MONEY (July 30, 2010), <http://today.msnbc.msn.com/id/32063374/ns/today-money/t/ways-get-grip-sports-costs-kids/#.TqhqnEfff0>; Don Delco, *Youth Sports Become Big Time at Big Cost*, THIS WEEK NEWS (August 6, 2008), http://www.thisweeknews.com/content/stories/dublin/news/2008/08/06/0807duclubsp_sp.html.

¹⁵⁵ Joe Drape & Katie Thomas, *As Colleges Compete, Major Money Flows to Minor Sports*, N.Y. TIMES, September 2, 2010, <http://www.nytimes.com/2010/09/03/sports/03cup.html>. This feature of the male model for sports in educational institutions was recognized by women’s sports leaders who were concerned that women’s sports programs would take the same direction. CAHN, *supra* note 91, at 247 (noting that women’s sports leaders were concerned with the “crass commercialism, corruption and win-at-all-costs attitudes” of intercollegiate sports.).

¹⁵⁶ *Amateur Sports Act: Hearings*, *supra* note 48, at 187 (statement of Donna A. Lopiano, Executive Director, Women’s Sports Foundation).

¹⁵⁷ 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. Ian Begley & Mitch Abramson, *Girls Game Gone Wild: Increased Opportu-*

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.”¹⁵⁸

b. How the Model Can Become Title IX’s Message

To understand how Title IX’s equality and empowerment message could be diluted, it is important to understand how the model for sports prevailing in our educational institutions speaks in the name of Title IX, so that the model in effect becomes one of Title IX’s messages. It is important to appreciate how such powerful and clear signals to women and girls about their ability or entitlement to participate in sports can be overshadowed to the point where the law’s message is not just one of encouragement, but for some women and girls, a signal that sports are not for them. The reason lies in the fact that “expressive meanings are socially constructed,” and are “a result of the ways in which actions fit with (or fail to fit with) other meaningful norms and practices in the community.”¹⁵⁹ Context matters,¹⁶⁰ and Title IX itself contemplates that the context for the equality and empowerment message the law seeks to send will be shaped by administrators of education-based sports programs. Of course, to some extent, the message of equality and entitlement to participate has been diluted by the foot-dragging and cynical attempts at Title IX compliance that many institutions have engaged in since the statute was passed. This continuing, albeit more subtle, discrimination against women in sports cannot be discounted as a reason why some women do not participate in sports. However, this explanation does not account for the fact that Title IX’s expressive content includes a message of exclusion not based in gender discrimination, but in discrimination by institutions against those who cannot meet the prevailing norms of the student-athlete culture.

This type of discrimination is fully contemplated by Title IX, because Title IX does not articulate a vision or define standards for education-based sports programs beyond gender equality. The statute and regulations instead give deference to educational institutions to define the content of their

nity on Court Brings Familiar Pitfalls Off of it, N.Y. DAILY NEWS, Nov. 26, 2008, available at lexisnexis.com.

¹⁵⁸ 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).

¹⁵⁹ Anderson & Pildes, *supra* note 70, at 1525.

¹⁶⁰ *Id.* at 1507.

athletic programs.¹⁶¹ For instance, perhaps most notably, institutions are permitted to determine whether to allow males and females to participate together on teams in “contact sports.”¹⁶² Moreover, as stated most recently in a 2010 OCR Dear Colleague letter, and repeatedly emphasized, “the three-part test is intended to allow institutions to maintain flexibility and control over their athletic programs”¹⁶³ The 1996 Policy Clarification makes a similar point, stating that “the three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with non-discriminatory opportunities to participate”¹⁶⁴ Additionally, prongs two and three of the three-part test state that institutions are responsible for effectively accommodating the athletic “interest” and “ability” found in the “underrepresented” gender. There is no standard by which interest and ability is judged, but it is instead given meaning by the institutions themselves, whose coaches and administrators have the final word on whether a potential athlete has the requisite interest and ability to be a member of a team. Thus, while they must use non-discriminatory methods of assessment to determine the interests and abilities of potential female student-athletes, institutions still may use “methods of their choosing.”¹⁶⁵ In addition, in determining whether a given sport “counts” for Title IX purposes, OCR defers to the NCAA and other organized sports regulatory bodies by using a rebuttable presumption that sports which are so recognized will be acceptable for Title IX purposes.¹⁶⁶ If an activity is not so recognized, OCR uses several factors to evaluate the activity, including whether the activity is “structured and administered in a manner consistent with established intercollegiate or inter-scholastic varsity sports in the institution’s athletic program.”¹⁶⁷

¹⁶¹ See *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Ed. v. Ohio High Sch. Athletic Ass’n*, 647 F.2d 651 (6th Cir. 1981); *Equity in Athletics, Inc. v. Dep’t of Educ.*, 504 F. Supp. 2d 88, 112 (W.D. Va. 2007) (explaining that schools should be permitted “to chart their own course in providing athletic opportunities without judicial interference or oversight”).

¹⁶² 34 C.F.R. § 106.41(b) (2010).

¹⁶³ Ali, *supra* note 35.

¹⁶⁴ Cantú, *supra* note 31.

¹⁶⁵ Ali, *supra* note 35. In addition, assessing ability includes “opinions of coaches, administrators and athletes at the institution regarding whether interested students . . . have the potential to sustain an intercollegiate team.” *Id.*

¹⁶⁶ Letter from Stephanie Monroe, Assistant Secretary for Civil Rights, to Colleague (Sept. 17, 2008) (on file with Department of Education).

¹⁶⁷ *Id.*

Because Title IX did not change the model for sports operating in educational institutions, and in fact its equality mandate guarantees women the same quality of participation opportunities as those provided for men, Title IX's expressive content includes not just the message of equality and empowerment, but also the signals sent by the types of opportunities created by institutions in an effort to comply with Title IX. Therefore, educational institutions and their athletics programs speak in the name of Title IX. It is apparent that the model for sports operating in most educational institutions expresses meanings about sports and who an athlete can be. This more nuanced message is reinforced by the rhetoric often used by courts and other government officials in discussing Title IX. This rhetoric, likely an effort to spur more women to participate in sports, often highlights women athletes' skill and athletic achievements and it is part of the message sent by Title IX.¹⁶⁸

1. The Rhetoric of Athletic Achievement in Title IX Cases

Title IX rhetoric did not always emphasize women's athletic skill and achievement. In the early cases involving claims of gender equity in sports,¹⁶⁹ courts often did not highlight the fact that the female athlete plaintiffs were highly skilled or elite-level, but instead stressed the athletes' desire simply to participate and play the game. For instance, when Allison Fortin sought to play Little League baseball, the court made no mention of any particular talent Allison may have had with respect to baseball. The case instead centered on her interest in the sport.¹⁷⁰ Similarly, in *Force v. Pierce City*, the plaintiff sought to try out for the boys' football team.¹⁷¹ Although the court noted that the plaintiff was interested in athletics¹⁷² and that it would not be unsafe for her to participate in the football program,¹⁷³ it was not emphasized that she had any particular athletic talent or elite ability. Other early cases similarly reflect the emphasis on the plaintiff's interest in sports, and not necessarily a unique ability to play at a high

¹⁶⁸ McAdams, *supra* note 71, at 341 (explaining that court decisions have an expressive effect).

¹⁶⁹ Such claims were made under Title IX as well as the Equal Protection Clause.

¹⁷⁰ *Fortin v. Darlington Little League, Inc.*, 514 F.2d 344, 350 (1st Cir. 1975).

¹⁷¹ *Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020, 1021 (W.D. Mo. 1983).

¹⁷² *Id.* at 1022 ("Nichole Force mentioned to her mother that she was greatly looking forward, that coming fall, to trying out for the seventh grade football team . . . Nichole had already been involved to a considerable extent in athletics . . .").

¹⁷³ *Id.* at 1028.

level.¹⁷⁴ Of course, the fact that these early plaintiffs generally were not highly skilled athletes was a sign of the times – women had difficulty achieving such status because they were generally denied any meaningful opportunity to participate in sports. However, Title IX's message of empowerment reflected in cases and commentary over the last forty years has been accompanied by what is perhaps an even more powerful signal about the type of athlete — one who is a highly skilled winner — that is most valued and therefore entitled to participate.¹⁷⁵ This signal is clearly seen in the Title IX cases which emphasize the plaintiff's athletic talent and the goal of athletic achievement.

For example, in an early Title IX case challenging the exclusion of two high school golfers from the school team because of their gender, the court stated that “here two gifted female children are asking for the same attention that is received by their brothers. When a possible future Patti Berg or Nancy Lopez reaches out to the courts for help, the court must examine its power and authority carefully to see if there is a way to help.”¹⁷⁶ Similarly, a court explained with respect to a girl seeking to play on the boys' basket-

¹⁷⁴ See *Morris v. Mich. State Bd. of Educ.*, 472 F.2d 1207 (6th Cir. 1973) (describing the plaintiffs as girls who had the “desire” to play high school tennis); *Brenden v. Indep. Sch. Dist.* 742, 477 F.2d 1292 (8th Cir. 1973); *Neb. Sch. Activities Ass'n*, 684 F. Supp. 626 (D. Neb. 1988); *Lantz v. Ambach*, 620 F. Supp. 663 (S.D.N.Y. 1985); *Haffer v. Temple Univ.* 524 F. Supp. 531 (E.D. Pa. 1981); *Jones v. Okla. Secondary Schs. Activities Ass'n*, 453 F. Supp. 150 (W.D. Okla. 1977); *Darrin v. Gould*, 540 P.2d 882 (Wash. 1975); *Israel v. W. Va. Secondary Schs. Activities Comm'n*, 388 S.E.2d 480 (W. Va. 1989). Even early cases involving boys seeking the right to play on girls' teams illustrate the fact that an athlete with exceptional skill was not the norm in education-based sports programs. See *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 170 (noting that plaintiff boy had athletic skills that were “average”).

¹⁷⁵ Brian Porto explains this aspect of Title IX's message well. In his book *A New Season*, he tells the story of Nicci Rinaldi, a gifted basketball player who accepted a scholarship to play basketball at Auburn University in Alabama. Rinaldi was one of the top women's basketball players in the country and she had been recruited to play for several accomplished women's basketball programs. Rinaldi began her college basketball career excited to play in the highly competitive and high profile Southeastern Conference. She was what many courts and Title IX advocates would call a Title IX success story. Unfortunately, she was immensely unhappy with the day-to-day life of being a college basketball player, describing her grueling practice schedule and isolation from the college experience as “hell.” Rinaldi subsequently transferred to Dartmouth College, which, as part of the Ivy League, forbids athletic scholarships. There, she played basketball for the love of the game and participated fully in college life. BRIAN PORTO, *A NEW SEASON: USING TITLE IX TO REFORM COLLEGE SPORTS* 1–2 (2003).

¹⁷⁶ *Othen v. Ann Arbor Sch. Bd.*, 507 F. Supp. 1376, 1379 (1981).

ball team that “Karen O’Connor is an extraordinarily gifted basketball player.”¹⁷⁷ Cases involving scheduling of high school sports also often highlight the talent of the female athletes, with plaintiffs 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 long-afforded to boys’ teams and one that is relevant to the most highly skilled athletes.¹⁷⁸ For instance, in a case involving disparate athletic facilities for girls’ softball players as compared to boys’ baseball players, the court recognized the harm that the unequal treatment had on the plaintiffs in that it would jeopardize their ability to play at the highest levels. The court stated that “[the plaintiffs] are seeking athletic scholarships, many of which, [p]laintiffs maintain, are not decided until after the softball season is over. Accordingly, it is critical that the two girls do their best during their final season.”¹⁷⁹ Another Title IX high school sports scheduling case illustrates how courts communicate that being a highly skilled athlete, instead of one who simply values participation, is the ideal. 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. 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.¹⁸⁰ Notably, the court highlighted the fact that the plaintiffs were part of the Olympic Development program for “girls with exceptional ability in soccer.”¹⁸¹ It was also noted that the girls participated on elite “club” soccer teams and that spring soccer, instead of fall soccer, made competing on both teams difficult. In addition, it was alleged that playing soccer in the spring disadvantaged the girls in terms of college recruiting, because many coaches recruit 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 been able to practice as much with their club team, they are injured from

¹⁷⁷ *O’Connor v. Bd. of Educ. of Sch. Dist. 23*, 545 F. Supp. 376 (N.D. Ill. 1982).

¹⁷⁸ *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 291–96 (2d Cir. 2004); *Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n*, 178 F. Supp. 2d 805, 848–50, 855–57 (W.D. Mich. 2001), *aff’d*, 459 F.3d 676 (6th Cir. 2005).

¹⁷⁹ *Daniels v. Sch. Bd. of Brevard Cty., Fla.*, 985 F. Supp. 1458, 1462 (M.D. Fl. 1997).

¹⁸⁰ *McCormick*, 370 F.3d at 299 n. 25.

¹⁸¹ *Id.* at 281.

“playing too much soccer” and, at that point in the year, “many are burned out.”¹⁸² 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 and praised the athletes, stating “many would include ‘single mindedness’ in a list of those traits possessed by great athletes. Few would choose the trait ‘well-rounded.’”¹⁸³

Similarly, in *Biediger v. Quinnipiac University*, the plaintiffs challenged the university’s decision to eliminate its varsity volleyball team. The court explained in great detail who the affected athletes were in terms of ability, starting with the recruitment process for intercollegiate volleyball, noting that “the recruiting process for Division I volleyball can begin as early as a player’s sophomore year in high school.”¹⁸⁴ To reach the level of being 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, the 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.”¹⁸⁵ 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.”¹⁸⁶ The court noted that, “[g]iven the number of hours spent practicing, playing and traveling with the team,” athletes’ relationship with the coach and each other was important.¹⁸⁷ 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 that 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 [who] have devoted a significant portion of their lives to training for the opportunity to 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.¹⁸⁸

¹⁸² *Id.* at 282.

¹⁸³ *Id.* at 296.

¹⁸⁴ *Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d. 277, 282 (D. Ct. 2009).

¹⁸⁵ *Id.* at 282.

¹⁸⁶ *Id.* (internal quotation marks omitted).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 292.

The emphasis on elite-level achievement as the natural goal of sports participation is also seen in the rhetoric of 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:

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 IX¹⁸⁹

Another court 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 [T]he 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. . . .”¹⁹⁰

Other cases similarly highlight the plaintiff-athlete’s skill at her sport.¹⁹¹ Accordingly, while courts uniformly have upheld Title IX’s mandates, they often have done so by using rhetoric reinforcing the norm that athletic skill and accomplishment is what is most valued about sports participation. In this respect, courts have sent the message that Title IX opportunities are for highly-skilled, elite athletes focused on winning. In the words of the Second Circuit, “a primary purpose of competitive athletics is to strive to be the best.”¹⁹²

¹⁸⁹ *Cohen v. Brown Univ.*, 101 F.3d 155, 188 (1st Cir. 1996) (emphasis added).

¹⁹⁰ *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 773 (9th Cir. 1999).

¹⁹¹ *Brust v. Regents of Univ. of Cal.*, No. 2:07-cv-1488 FCD/EFB 2007 WL 4365521, at *1 (E.D. Cal. Dec. 12, 2007) (explaining that the plaintiffs are all “highly skilled athletes” who had been involved in their sports since childhood); *Beasley v. Ala. State Univ.*, 966 F. Supp. 1117, 1120 (M.D. Al. 1997) (highlighting plaintiff as a “skilled” volleyball player); *Roberts v. Colo. State Univ.*, 814 F.Supp. 1507, 1517 (D. Col. 1993) (noting plaintiffs’ “dedication” to softball and significant “talent”).

¹⁹² *McCormick v. Sch. Dist. of Mamaroneck* 370 F.3d 275, 295 (2d Cir. 2004).

2. The Rhetoric of Athletic Achievement and Title IX by Government Officials

The rhetoric used by government officials in support of Title IX also has reinforced the seemingly natural norm of elite athletic achievement as the goal of sports participation in the many reports and speeches given about Title IX's value and success. For example, in its report titled "Title IX: 25 Years of Progress – June 1997," the Office of Civil Rights highlighted women's basketball as an example of Title IX's success. OCR's report noted:

In 1972, 132,299 young girls played high school basketball. In 1994-95 the number had increased to 412,576, an increase of over 300 percent. In the last two years, women's basketball has come of age with the gold-medal victory of the American women's basketball team at the 1996 Olympics, the increased media attention to the NCAA women's basketball tournament, and the development of two professional women's basketball leagues.¹⁹³

Similarly, the report highlighted women's success in soccer, stating:

In one sport that is more and more a favorite for young girls — soccer — the results have led to a World Cup Championship. In 1996, the U.S. National soccer team captured the first-ever women's Olympic medal in this sport before a crowd of 76,481, and in doing so, established its position as the world's premier women's soccer program.¹⁹⁴

Title IX's statement about the type of athletes that are valued — those who are highly skilled and can cultivate spectator appeal (and by extension, institutional prestige) — is also communicated through statements about Title IX's connection to the United States' Olympic aspirations. One of the hoped-for effects of Title IX, at least to many members of Congress, was that it would help increase our pipeline of female Olympians. 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

¹⁹³ U.S. DEP'T OF EDUC.: TITLE IX: 25 YEARS OF PROGRESS – JUNE 1997, *available at* <http://www2.ed.gov/pubs/TitleIX/part5.html>.

¹⁹⁴ *Id.*

to continue to encourage women throughout America to develop into Olympic athletes”¹⁹⁵

Finally, and perhaps most pointedly, Title IX’s dual message clearly can be seen every year, when presidents welcome NCAA champions to the White House. For example, in 2010, after its second consecutive national championship win, the University of Connecticut Women’s basketball team visited the White House for its photo opportunity with President Obama. The President praised the team, as he had done with the 2010 Men’s champion, stating that

This team has had an unbelievable run . . . seven of the last sixteen NCAA titles; [s]ix undefeated regular seasons; [f]our undefeated championship seasons 39-0 is pretty good.

These women beat their own NCAA record to become the first women’s basketball team in history to win 78 games in a row over the past two years, which is just a staggering achievement.¹⁹⁶

This photo opportunity illustrates the complex nature of Title IX’s message to women. On the one hand, the President’s ceremony signaled that women’s athletic accomplishments were just as important as men’s, because the women’s NCAA champion had been invited to the White House just as the men’s champion had. Moreover, the president rightly praised the enormous athletic accomplishment and skill of the team members. On the other hand, the presidential photo opportunity (and the great ceremony surrounding the president’s yearly completion of his “March Madness” men’s and women’s tournament brackets) signals that what is most valued about education-based athletics is being a highly skilled athlete who is also a winner.

All of this rhetoric by courts, Congress, and government officials is seemingly in service of Title IX’s message of empowerment. Those highlighting extraordinary female athletic achievement are presumably doing so with the intent that such rhetoric will communicate that women athletes are as valued as male athletes, and that profiling high-performing female athletes will inspire greater numbers of women and girls to participate in sports. While that is certainly one aspect of the message sent by Title IX, the rhetoric of athletic achievement that has become associated with the law

¹⁹⁵ *Amateur Sports Act: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism of the S. Comm. on Commerce, Science, and Transp.*, 104th Cong. 12 (1995) (statement of Norma Cantú, Assistant Secretary, Office for Civil Rights, Department of Education).

¹⁹⁶ Rich Elliott, *President Obama Speaks*, CONN. POST BLOGS (May 17, 2010), available at <http://blog.ctnews.com/elliott/2010/05/17/president-obama-speaks>.

has also helped shape the collective understanding¹⁹⁷ that sports participation is for those who have both the talent and the means to develop into the kind of elite athlete that generates institutional prestige and commercial appeal. In contrast, athletes who participate in sports but resist the demands of the student-athlete culture are not nearly as celebrated in the Title IX rhetoric or the day-to-day reality of Title IX's equality mandate. Thus, Title IX's deference to educational institutions to define a worthy student-athlete combined with courts' interpretations and the government's Title IX rhetoric reflect and reinforce what now seems to be the natural, largely invisible understandings that make Title IX's message more complex than it is assumed. The next part will explore the ways that Title IX's second message can shape women's choices to participate, or not, in sports.

c. How Title IX's Expressive Content Shapes Norms for Sports Participation

Just as Title IX's message of equality, empowerment and entitlement to participate in sports has motivated women to participate in sports, so too can Title IX's signals about the type of women that can be athletes shape norms for sports participation. Thus, the message of athletic achievement and the exclusive conception of who can be an athlete is internalized differently by different groups of women. The first group of women to whom Title IX speaks are those with the socio-economic means to realistically participate in the prevailing model for education-based sports. These girls and women enjoy the financial resources, access to facilities, coaching, and parental support necessary to achieve the skill level required of most educational institutions. For these women and girls, Title IX's message can be at once empowering and overwhelming, as this group has the means to participate in the prevailing model for sport, but its demands often lead to burnout and abandonment of sport altogether. The second group of girls and women to whom the model speaks are those who do not have such resources. For many of these women, the message sent is that the barriers to participation are insurmountable. For this group of women and girls, sports participation is not about being on equal footing with male athletes. For many, it is an irrelevant indulgence because these girls and women are not on equal footing with their more privileged female counterparts. In this way, Title IX's exclusive conception of gender equity in sports can at once empower some women to participate while discouraging others.

¹⁹⁷ Sunstein, *supra* note 68, at 2050–51 (explaining that the law shapes norms through, among other things, “clarifying and supporting statements by politicians”).

Scholars have examined the ways in which the law shapes behavior. As Richard Pildes has explained, government action does not simply reflect our collective understandings. It “also shapes and reconstitutes them. Governmental actions can express — and sustain — a reaffirmation or a rejection of these norms.”¹⁹⁸ Importantly, expressive meanings have power when they “fit with” other community norms and practices.¹⁹⁹ There are several explanations for how the expressive content of the law shapes norms and affects behavior.²⁰⁰ Expressive law scholars have explained that law affects behavior, not just because of the sanctions imposed by the law, but also “by affecting social norms and, consequently, by changing an individual’s preferences for undertaking particular acts.”²⁰¹ Law causes individuals to update their understandings of behavior that will gain community approval or disapproval.²⁰² Because individuals are sensitive to what others think and act to minimize damage to their reputations, the understandings signaled by the law will cause individuals to act in accordance, separate from any sanction or requirement of the law itself.²⁰³

The inclination to conform to social norms is particularly strong in the area of athletics, because sport is a powerful social institution.²⁰⁴ Moreover, Title IX’s ability to shape norms and affect individual attitudes towards sports participation is significant because the sheer popularity of the law and its place in our culture make it a substantial symbol that resonates far beyond its legal sanctions. Such expressive power can convey important attitudes about women’s sports participation that cause women and girls to internalize²⁰⁵ not just the message of empowerment, but also the message that the only athletes who are entitled to athletic opportunity and garner community approval are those who have the socio-economic means and willingness to cultivate and sustain the high level of athletic achievement that is

¹⁹⁸ Pildes, *supra* note 70, at 725, 755.

¹⁹⁹ Anderson & Pildes, *supra* note 70, at 1525 (“The expressive meaning of a norm does not inhere in that norm in isolation, but is a product of interpreting the norm in the full context in which it is adopted and implemented.”).

²⁰⁰ Geisinger, *supra* note 70, at 35.

²⁰¹ *Id.*

²⁰² McAdams, *supra* note 70, at 339.

²⁰³ *Id.* at 339–40.

²⁰⁴ See Note, *supra* note 87, at 1267 (explaining that the “underlying power of sport as a social institution” and that “as a socializing agent, sport requires “conformity to certain normative values and behaviors”) (quoting E. GERBER ET AL., *THE AMERICAN WOMAN IN SPORT* 406 (1974)).

²⁰⁵ See McAdams, *supra* note 70, at 343–45 (explaining how approval-seeking motivates individual behavior).

prized by educational institutions and fans.²⁰⁶ Thus, Title IX's equality, empowerment and entitlement message has been diluted by Title IX's second message in two ways. First, the type of opportunities created in the name of Title IX sends a message that sports participation is only for those who have the ability and willingness to become highly skilled athletes. Second, Title IX's empowerment message is diluted because for some communities, such as women of color and lower socio-economic status, the message sent by the law does not fit within the context of their lives. This results in a kind of dissonance,²⁰⁷ where many women today interpret the message of what it takes to be an athlete as a message that athletics is not for them.

The internalization of these messages has measurable consequences. For those women who have access to sports opportunities, social science data show that many who try to meet the demands of our education-based sports culture experience "burnout" and abandon sports rather than try to forge an athletic identity that differs from the win-at-all-costs norm.²⁰⁸ Many more women do not participate at all.²⁰⁹ Perhaps most troubling, however, is the message sent by Title IX that is interpreted as one of exclusion of women who do not enjoy the resources to access the opportunities that Title IX provides. Thus, social science data shows that the message of empowerment and its stimulus to participate is communicated most powerfully to upper-middle class white women and girls.²¹⁰ This is through the selection of

²⁰⁶ Olson, *supra* note 36, at 108 (noting that society "accepts superwomen" athletes with elite talent but not women who want to "play purely for fun" or simply participate for the sake of participation).

²⁰⁷ Sunstein, *supra* note 68, at 2035–36 ("[P]eople often try to bring norms into accord with existing information. When there is conflict between the two, people may experience dissonance. The result of the dissonance may produce new norms or new understandings of existing information.").

²⁰⁸ Koller, *supra* note 15, at 440–41.

²⁰⁹ *Id.*; George, *supra* note 10, at 15–16.

²¹⁰ For instance, NCAA data for 2009–2010 shows that the overall percentage of female college athletes who are black is 11.6% and Hispanic is 4%. The overwhelming majority is white. ERIN ZGNOC, NCAA, STUDENT-ATHLETE ETHNICITY: 1999–2000 - 2009–2010 NCAA STUDENT-ATHLETE ETHNICITY REPORT 55 (2010), available at <http://www.ncaapublications.com/p-4214-student-athlete-ethnicity-2009-10-ncaa-student-athlete-ethnicity-report.aspx>. See BRAKE, *supra* note 59, at 113; Timothy Davis, *Race and Sports in America: An Historical Overview*, 7 VA. SPORTS & ENT. L.J. 291, 308–09 (2008); A. Jerome Dees, *Access or Interest: Why Brown has Benefited African-American Women More than Title IX*, 76 U. MO. KAN. CITY L. REV. 625, 636–638 (2008); Alfred Dennis Mathewson, *Black Women, Gender Equity and the Function at the Junction*, 6 MARQ. SPORTS L. REV. 239, 241–43 (1996); Olson, *supra* note 36, at 127–28 ("[T]he African-American woman has been largely absent

sports offered by educational institutions and the women who play them.²¹¹ For example, nearly all of the sports offered by educational institutions at the high school and collegiate level for girls and women are those played by white women with the socio-economic means to cultivate their talent. These sports are: lacrosse, soccer, softball, volleyball, field hockey, tennis and golf.²¹² Black and Hispanic females are largely concentrated in basketball (32.8% black, 2.5% Hispanic) and indoor track and field (21.5% black and 3.3% Hispanic).²¹³ Moreover, most so-called “emerging sports,” or those that the NCAA is trying to develop to championship status, typically have few participants of color or from disadvantaged backgrounds, such as equestrian (0.7% of participants are black and 1.9% are Hispanic) and the formerly “emerging” and now championship sports of rowing (2.8% black and 4.2% Hispanic) and ice hockey (0.4% black and 0.8% Hispanic).²¹⁴ In contrast, most women of color are clustered into the sport of bowling (40.8 % black and 2.4 % Hispanic).²¹⁵

While it is certainly possible that women of color are not “interested” in sports like lacrosse or soccer and instead choose to focus — when they do

from sport in two ways. First, African-American women are an overwhelmingly small proportion of those participating in collegiate sports. Second, when they do participate, African-American women are usually typecast into only a handful of sports.”). See also WOMEN AND SPORTS IN THE UNITED STATES 202 (Jean O’Reilly and Susan K. Cahn, eds.) (2007) (explaining cultural barriers to sports participation for Hispanic women and girls); Andrew Ferguson et al., *Inside the Crazy Culture of Kids Sports*, TIME, July 12, 1999, at 52 (showing the necessary time, equipment and cost necessary for children to participate in various sports).

²¹¹ BRAKE, *supra* note 59, at 113 (stating that part of the reason for the disparity in participation by women of color “is that much of the growth in women’s sports in recent years has been in sports that are disproportionately played by white women”).

²¹² See ZGNOC, *supra* note 210, at 55. For instance, the most recent NCAA data show that for women’s soccer, 3.8% of the participants are black, while 5% are Hispanic. *Id.* For lacrosse, 2.4% are black and 1.8% are Hispanic. *Id.*

²¹³ *Id.*

²¹⁴ *Id.*; see also BRAKE, *supra* note 9, at 114 (“[T]he women’s sports with the most growth in recent years are the so-called country club or suburban sports, which are played primarily by girls from suburban, largely white communities and are less available in urban areas and poorly funded high schools. High-growth sports like rowing, softball, swimming, and lacrosse frequently require large investments of time and money outside school and are inaccessible to many students.”).

²¹⁵ See ZGNOC, *supra* note 210, at 55. See also BRAKE, *supra* note 59, at 114 (explaining that women of color make up the majority of participants in bowling but that relatively few participation opportunities in bowling have been added in the last decade).

participate — on sports such as basketball or track and field, the structural theory of equality upon which Title IX's regulations are premised reminds us that preferences can be socially constructed, so that women are conditioned not to seek athletic opportunities or develop an interest in participation where opportunities seem out of reach. This is the case for many opportunities offered through Title IX, because the model preferences athletes who are highly trained and skilled, something that generally only comes from years of private coaching and competitive opportunities that require substantial parental involvement, enormous financial resources, and access to training and facilities.²¹⁶ The best explanation, then, for the fact that most sports offered by our high schools and universities are played by white women is that the model for sports offered in the name of equality and Title IX sends a message to some women that discourages rather than develops their interest in participation. This is particularly true because the critique that Title IX leaves out women and girls who would participate in sports for recreational reasons and women and girls of color is not new.²¹⁷ At some point, and for some women, Title IX's persistent shortcomings have become one of its messages.

Accordingly, one of the "approval patterns" signaled by Title IX is that white women with the willingness, talent and means to become highly skilled athletes are most valued in American education-based sports programs.²¹⁸ This message carries particular force because of the legitimacy and moral weight that Title IX enjoys in popular opinion.²¹⁹ Moreover, the unique effects of peer pressure on children and teens means that they likely will not risk trying to change the prevailing norms for sports participation²²⁰ but will instead simply reject participation completely. This effect of discouraging participation is uniquely problematic in the case of women and girls because there is no stigma for women and girls who fail to participate in sports. There is, however, a stigma associated with being an athlete who

²¹⁶ BRAKE, *supra* note 59, at 114 ("[M]any of the new women's sports added in recent years are sports girls grow up playing in private club and youth sport programs rather than in public schools.").

²¹⁷ Olson, *supra* note 36, at 116, 118, 127–130.

²¹⁸ McAdams, *supra* note 71, at 364–66 (stating that legislation reflects public opinion and approval).

²¹⁹ *See id.* at 374 (explaining that legislation carries particular force when the public believes that the government operates "legitimately").

²²⁰ *See* Sunstein, *supra* note 68, at 2033–34 (explaining how social norms affect risk-taking behavior, especially among young people).

is not talented or “in it to win it.”²²¹ As one gender equity advocate explained, our prevailing sport culture has “unintentionally created [the following] outcomes[:] . . . sports programs with little diversity with regard to numbers and types of sports — thereby decreasing the likelihood that children will be exposed to a sport which matches up to their skills, abilities and interests” and we have created “a generation of non-participants who feels that sports participation is only for the most skilled and physically talented.”²²² Indeed, perhaps the most telling reflection of how Title IX’s mixed message has shaped women’s preferences and behaviors with respect to sports is research that repeatedly confirms women’s growing interest in sports as *fans*. Statistics show that women’s interest in sports in general, that is, in being a sports fan, is now roughly equal to men’s.²²³ Thus, while women’s participation in sports has leveled off, their interest in being a sports spectator or fan has continued to grow.²²⁴ This suggests that opportunities for elite athletes at higher levels such as the college ranks do not encourage women to participate in sports as much as it engages them in being a part of the culture that values elite athletic achievement and strengthens the belief that sports participation is for the talented, privileged few and not all.

The expressive power of Title IX has therefore taken on a new significance, beyond sending the message that female athletic participation is valued on terms equal to men. By incorporating the norms of the prevailing model for education-based sport, Title IX sends signals that can discourage women’s interest in sports participation in that the law incorporates a model of athletics that is not appealing to or attainable by many women. Although nowhere in the statute and regulations, Title IX is thereby convey-

²²¹ Of course, the fact that a component of Title IX’s message to women within our educational institutions emphasizes winning and highly-skilled athletes might not be a matter of great concern if the model served equally to dampen the interest of potential male athletes. To some extent, it likely does. However, in my previous work, I explained how the model can uniquely injure women’s desire to participate in sports, because the model was constructed by and for the male athlete. *See generally* Koller, *supra* note 15.

²²² *Amateur Sports Act: Hearings supra* note 48, at 189-190 (statement of Donna A. Lopiano, Executive Director, Women’s Sports Foundation).

²²³ ANDREI MARKOVITS, SPORTS CULTURE AMONG UNDERGRADUATES: A STUDY OF STUDENT-ATHLETES AND STUDENTS AT THE UNIVERSITY OF MICHIGAN, <http://www.andreimarkovits.com/docs/SportsCultureAmongUndergraduates.pdf>. ; Rich Luker, *Women are Sports Fans Too*, BRANDWEEK, December 2, 1996, at 20 (“Women are the driving force in the growth in interest in sports in the ‘90s. In 1994, 79% of all women were fans. That number increased to 85% of women in 1996.”).

²²⁴ MARKOVITS, *supra* note 223; Luker, *supra* note 223, at 20.

ing the value judgment that the competitive, commercial and elite model of sports is better than sports for the sake of participation, health and fitness or simply social reasons. Through the mix of sports and level of play largely accessible only by white, upper-middle class women, Title IX has conveyed an exclusive conception of who can be an athlete and implicitly signaled the judgment that equality for some women is the equivalent of equality for all. Just as the picture of the typical 1970s athlete as a male deterred women from playing sports, so too does the stereotypical image of today's female athlete. These messages contribute to the "interest paradox,"²²⁵ steering many young women away from sports instead of encouraging them to participate. Accordingly, Title IX's message of empowerment has been diluted by the more subtle, but palpable messages about who is entitled to participate in education-based sports programs and what the cost of that participation will be.

IV. POTENTIAL SOLUTIONS

The socio-economic snapshot of education-based sports and the types of women that benefit most, and least, from Title IX discussed in the previous section is not a new revelation.²²⁶ However, using an expressive theory of the law provides a fresh way of understanding these outcomes and can therefore enrich our thinking about potential solutions. As a starting point, then, we must acknowledge that for some women and girls, Title IX's message is part of the problem and not the solution. Accordingly, the first step in achieving a solution for the conflicting messages sent about athletics participation to women and girls in the name of Title IX is to recognize that Title IX cannot and should not be the sole policy for developing women's interest in sports. Despite Title IX's many important successes, it is not a cure-all and we must not assume that it can provide the type of comprehensive policy solution needed to effectively bring a diverse group of women and girls into sports and allow them to reap the benefits. Indeed, it is not realistic or fair to expect that Title IX can continue shaping norms for sports participation in a way that meets the needs of a diverse population of women. As an anti-discrimination statute, the rights it provides are crucial to opening the door for women to the world of sports. But while essential, Title IX is limited. The statute and regulations mandate equality and do

²²⁵ See Koller, *supra* note 15, at 439–47.

²²⁶ See Olson, *supra* note 36, at 116–19, 127–30 (highlighting the fact that women who simply seek recreation or participation for its own sake as well as women of color are left out of Title IX's success story).

not articulate any particular content for education-based sports programs. Accordingly, while Title IX does not allow schools to assume that women are not as interested in sports as men, it does allow schools to assume that the only athletes worth providing with equality are those who have the socio-economic means and desire to assimilate into the model for sports that predominates in education-based athletics programs. As a result, an equality framework is not enough to develop interest in sports participation among many groups of women and girls because it has had no power to check the evolution of sport to the point where the conditions of participation for many women operate as an insurmountable barrier. Those conditions, which favor highly skilled athletes and tend to select for those with the resources to meet them, send a powerful message in the name of Title IX, and the message must be changed. Women and girls who would benefit from sports participation (and, obesity rates show, need it more than ever) deserve more.

However, in seeking to change the negative messages sent to many women in the name of Title IX, we need not eliminate or change Title IX. First, it is clear that for many women, Title IX and its enforcement sends an inspiring message that does develop interest in sports participation. Title IX's message and its substantive guarantees align in a way that resonates for such women, and for this reason it should not be abandoned or weakened. And, even if the law has not had as significant an impact on sports participation for some women, its equality message expresses a common understanding of the value of women's sports participation that should not be changed.²²⁷ Additionally, there is an important consequentialist justification for Title IX. However imperfect the law is, an argument can be made that it is more beneficial overall to provide athletic opportunity to some women because doing so makes all women better off. This is the case because having some women achieve the highest levels of sport erodes the stigma of women's sports participation and breaks down socially-constructed stereotypes that serve as barriers to participation for all women.

Moreover, unlike in the Equal Protection context, where laws can be deemed unconstitutional where they express divisive, hostile or contemptuous messages toward citizens,²²⁸ the conclusion that Title IX's empowerment message resonates with only some, but not all, women and girls does not mean that Title IX should be eliminated. This is because the failure of

²²⁷ See Sunstein, *supra* note 68, at 2027–28 (explaining that laws can be understood by the public as expressing societal principles and commitments).

²²⁸ Anderson & Pildes, *supra* note 70, at 1533 (explaining the ways in which Equal Protection doctrine incorporates expressive concerns).

Title IX's message to inspire and empower some women and girls, and especially of color or lower socio-economic status, arguably is not stigmatizing them, because there currently is little stigma associated with women and girls who do not participate in sports. However, an expressive account of Title IX does reveal that it is perpetuating a kind of expressive harm to such women by sending messages of exclusion that, with the formidable socio-economic barriers such women face, serve to deter their participation in sports. While some scholars suggest that these outcomes are not to be attributed to Title IX,²²⁹ it is clear that Title IX's expressive power has, in the case of girls and women of color and lower socio-economic status, crossed the line from simply neglecting these women's needs to shaping norms for sports participation that do not include them. Moreover, such long-standing outcomes in the name of Title IX serve to express an attitude that fails to show equal concern and respect for those left out of Title IX's success.²³⁰ Thus, while the solution is not to eliminate Title IX and its anti-discrimination mandate, we must focus on legal changes that send a consistently empowering message to all girls and women about who an athlete can be.

In doing this, we should create a sport policy that eliminates the dissonance between the message of equality and empowerment for female athletes and the inequalities that prevent many girls and women from participating.²³¹ We must focus on formulating a policy for education-based sports programs that shows equal concern and respect²³² for all women who are left

²²⁹ See BRAKE, *supra* note 59, at 115 ("It would be a mistake to blame Title IX for suppressing sports opportunities for women of color. Title IX did not introduce racism or racial disparities in access to sports, nor did it worsen these problems. Rather, the law neglects racial inequality in sports in its quest to equalize women's opportunities.").

²³⁰ Alan Strudler, *The Expressive Dimension of Governmental Action: Philosophical and Legal Perspectives*, 60 MD. L. REV. 492, 495–96 (2001).

²³¹ It might be that when Title IX was enacted and its implementing regulations put into place, which sought to change the social meaning behind who an athlete (based on gender) could be, it was determined that the costs would be too great to also attempt to change the prevailing model for education-based sports and the even more entrenched views that sports participation was for winning, not just participation. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 998 (1995) ("[S]ocial meanings act to induce actions in accordance with social norms, and *thereby* impose costs on efforts to transform social norms. They present, then, a particularly harsh collective action problem, for not only is there little incentive for an individual to contribute to a new collective good, but there is a punishment — the cost of deviance — for any individual who wishes to contribute to a new collective good[.]")

²³² See generally Anderson & Pildes, *supra* note 70; Strudler, *supra* note 230.

out of sports participation and suffer the consequences. That is, sending a message that women and girls have the right to participate in sports must be aligned with norms that value participation for the sake of participation, and move away from a group-based²³³ remedy that allows some women to stand in the shoes for all.

In this respect, a new policy could pick up where Title IX has left off, by influencing social norms about the meaning and goals of sports participation²³⁴ through programs that encourage participation for the many instead of opportunities for the relatively elite few. Of course, by simply addressing the issue of sports programs in schools in a way that it never has before, Congress can send an important signal that sports participation for all children is important. Congress can enhance this message by developing an education-based sports policy that does several things. First, and most importantly, a new education-based sports policy should move beyond an equality framework and instead focus on removing barriers to sports participation besides discrimination on the basis of gender. It is no longer enough to hope for a “trickle down” effect to generate interest in sports participation. While it is true that creating opportunities for women to participate at the college and university level can spur participation among young girls by showing that women and girls can be athletes, this is no longer enough. Significant socio-economic barriers to sports participation mean that many of today’s elite women athletes do not represent the circumstances and needs of many potential female athletes. Indeed, the possibility of an opportunity in college tomorrow means little to a middle school girl who does not have the means or access to quality sports programs today. Increased public funding for community-based sports programs and expansion of sports programs into grade schools and middle schools should therefore be a priority. Title IX’s emphasis on opportunities at the college level comes too late for the women and girls who have not had the means to develop as athletes in their childhood. Moreover, opportunities at the college level will always be too few as compared with those in grade, middle and high schools, which can potentially touch every individual, not just those with the ability to go to college.

In addition, institutions receiving federal financial assistance should be incentivized to create sports programs that appeal primarily to participants and not simply fans. A new sport policy should reward institutions for find-

²³³ See generally Note, *supra* note 87 (opining that the social policy behind Title IX demands further efforts to increase overall participation in sports).

²³⁴ See Sunstein, *supra* note 68, at 2026 (“[A]n appropriately framed law may influence social norms and push them in the right direction.”).

ing ways to create a wide range of sports programs that value commitment, discipline, social connection and participation over solely spectator appeal and training for college scholarships, conference championships or the professional ranks. Moreover, creative uses of sports programs which enhance the educational mission of the school and do not rely on substantial parental commitments and resources should be favored over programs that require their athletes to have year-round, private training to be at the level to make the school team.

To support this, spending on athletic programs at the high school and college level should be regulated. Such restrictions could include limiting disproportionate expenditures on certain sports (i.e., football and basketball), or limiting expenditures on recruiting, for instance. Limits could also be placed on revenue generation through education-based sports programs or requiring equal funding for men's and women's sports programs. Whatever the specifics, Congress could craft legislation which emphasizes the academic and health benefits of sports participation and minimizes the need for schools to attempt to capitalize on the commercial appeal and revenue aspects of athletics that drive the current culture.

In addition, Congress should authorize the Department of Education to establish pilot programs to experiment with gender integration in education-based sports programs. Gender segregation, especially at the grade school, middle school and even high school levels of sport is not in most cases necessary to protect the health and safety of athletes. In contrast, gender integration can have significant benefits in furthering the cause of gender equity in sports. Although many will object that gender integrated sports teams might further turn women away from sports, it is difficult to measure what the impact would be because girls are segregated from boys at the very earliest ages of sports participation. Thus, if girls at a young age developed their skills alongside boys, fears that girls would be kept off teams based on talent or driven from sports because boys shut them out might be unfounded. In addition, if programs emphasized development of skills and values other than achieving the very highest levels of athletic performance as measured exclusively by the male norm, boys and girls would have a better chance of playing together safely and equitably. Gender integration in education-based sports programs also would free up resources to offer more sports teams and opportunities for greater numbers of students to participate.

Additionally, Congress should address the need for sports participation opportunities for physically challenged students. The exclusive conception of who can be an athlete is perhaps seen most clearly in our neglect of physi-

cally challenged individuals, particularly women.²³⁵ The Paralympic program as well as programs through the United States military demonstrate that there are a number of meaningful ways that individuals with disabilities can participate in sports and reap the substantial emotional and physical benefits. Moreover, a small percentage of high schools are developing opportunities for disabled students to participate in sports, but those opportunities are primarily for boys.²³⁶ As it did for women in general with Title IX, the law has an important role to play in shaping norms for sport participation for individuals with disabilities.

Finally, Congress should set reasonable limits on colleges' and universities' ability to run sports programs that train future professional athletes and Olympians. This group of athletes needs no additional external motivation for participating and remaining committed to sports. Moreover, organizations such as professional sports leagues and the United States Olympic Committee can better address issues which might affect participation rates and talent development. Thus, if we need more Olympic volleyball players or want athletes to be better prepared for the National Football League, it is these organizations that should address the issue. College and university sports should be left to develop programs best suited to educating students. All of these reforms would be a significant step in the right direction, both through the actual programs that would be created and affected by them, and also because it would mean putting the government's imprimatur on participation-focused sports programs in schools. This would go a long way toward sending the message that sports participation is for all and not the chosen few.

V. CONCLUSION

Decades after Title IX was passed, women and girls still do not participate in sports at rates equal to their male counterparts. Data show that this is particularly true for women and girls of color and disadvantaged socioeconomic backgrounds. The current theory for the persistent lag in participation rates centers on the continuing presence of discrimination against female athletes and a culture that devalues the female athlete's sport experience. The remedy is often said to be greater Title IX enforcement. Yet in

²³⁵ See WOMEN AND SPORTS IN THE UNITED STATES, *supra* note 210, at 172–73 (discussing the needs of physically challenged women as an “overlooked issue of diversity in women’s sport”).

²³⁶ NAT’L FED’N HIGH SCH. ASS’NS, 2009–10 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY 51, *available at* <http://www.nfhs.org/content.aspx?id=3282>.

arguing for more of what Title IX has to offer, we may be missing an opportunity to critically examine the model for sports operating in our educational institutions, and specifically how that model is endorsed by Title IX. To that end, this Article examined Title IX's expressive dimension to better understand how it communicates with potential female athletes and how this might affect their interest in participating in athletics.

It is apparent that Title IX's message that women and girls are entitled to participate in sports on terms equal to men and boys is an essential and enduring one. However, through its anti-discrimination framework, which gives substantial deference to educational institutions to structure their athletic programs, Title IX expresses more than just a message of equality and empowerment. Instead, it signals to potential female athletes that the athletes who are most valued and legitimate are those who meet the demands of the prevailing student-athlete culture which values winning and spectator appeal and often requires elite-level talent. These demands serve to filter out many potential female athletes who do not have the resources or access to programs which will support their development as athletes. As a result, the expressive content of Title IX amounts to a mixed message, both telling women and girls that they should take up sports, but signaling that if they do, the cost will be high and the potential rewards in terms of participation opportunities limited. Perhaps most troubling, it signals to some women and girls that they have little chance to become athletes at all. In this way, Title IX's expressive dimension unintentionally can serve to turn girls and women away from sports, keeping them as far from realizing the benefits of gender equity as they were before the statute was passed.

A new sport policy can act to change the social construct of education-based sports so that a message is sent to potential female athletes that more clearly aligns with Title IX's message of equality, empowerment, and entitlement to participate. Such a policy should not rely on an anti-discrimination framework, but should instead define the content of education-based sports programs to include values that will attract the greatest numbers of women and girls as well as men and boys. Thus, we should not amend or eliminate Title IX, but supporters of gender equity in sports should work to augment it, by ensuring that our federally-funded educational institutions create programs that produce greater numbers of female athletes instead of simply female athletic fans.