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The Obese and the Elite: Using Law to Reclaim School Sports

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Cover Page Footnote

Associate Professor of Law and Director, Center for Sport and the Law, University of Baltimore School of Law. I would like to thank Bryce Ziskind for outstanding assistance with research.

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THE OBESE AND THE ELITE: USING LAW TO RECLAIM SCHOOL SPORTS

DIONNE L. KOLLER*

Abstract

Sports in schools are a uniquely American phenomenon. Athletic programs flourish in high schools, colleges, and universities with traditionally very little interference by legislatures or courts. The most notable, if not limited, exception to this deference is Title IX of the Civil Rights Act of 1964 (Title IX), which prohibits educational institutions receiving federal financial assistance from discriminating on the basis of gender. As applied to athletic programs, Title IX is often cited as a public policy success. The law has led to the creation of meaningful sports participation opportunities for women and girls and shaped new norms for sports in general by sending a message that women and girls are entitled to participate on terms equal to men and boys. Statistics amply demonstrate that women's and girls' athletic participation rates since Congress passed the statute have increased dramatically. Despite these gains, however, many women and girls, especially those of color and from disadvantaged backgrounds, still do not participate in sports in numbers comparable to males. More broadly, data show that most children do not get nearly enough daily physical activity, and many consider childhood obesity a national crisis. These statistics occur against the backdrop of media attention and social science research persistently highlighting troubling issues with the elite, "win-at-all-costs" model for athletics that predominates in our schools and its effects on children's ability and willingness to participate in sports.

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Nevertheless, policy discourse around education-based sports programs focuses almost exclusively on gender discrimination and lack of robust Title IX enforcement. Using the theory of “problem definition,” this article explains the political focus on gender discrimination and Title IX as the primary point of legal intervention in education-based sports and asserts that such a focus is no longer justified. Instead, this article asserts that the time is ripe for a redefinition of the policy problem with education-based sports programs and suggests a pathway for legal reform in an effort to stimulate policy solutions that ultimately will benefit all students.

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Introduction

The physical health of our nation's children is characterized by two extremes. On the one hand, we are in the midst of a childhood obesity crisis.¹ Recent data show that only one in four children ages twelve to fifteen meet the government-recommended one hour per day of moderate physical activity,² and only one in three children are physically active on a daily basis.³ First Lady Michelle Obama's signature initiative is the *Let's Move!* campaign, which seeks to stimulate children's interest in physical activity and healthier lifestyles.⁴ Government concern over children's sedentary lifestyles is not new.⁵ On the other hand, however, social science and medical researchers frequently report on the crisis of overtraining and burnout in youth sports—children under pressure to win engaging in their sport with the intensity of an elite athlete.⁶

At the crossroads of these two extremes are our nation's K-12 schools, colleges, and universities, which are the primary providers of sports-participation opportunities in the United States. Much has been written about the troubling culture of youth sports programs, which generally favor

1. Faye Flam, *How Childhood Obesity Became a Crisis*, WASH. POST, Sept. 27, 2013, http://www.washingtonpost.com/postlive/how-childhood-obesity-became-a-crisis/2013/09/26/b2f87652-11e3-804b-d3a1a3a18f2c_story.html; *Learn the Facts*, LET'S MOVE, <http://www.letsmove.gov/learn-facts/epidemic-childhood-obesity> (last visited Oct. 21, 2014) ("Childhood obesity rates have tripled, and today, nearly one in three children in America are overweight or obese.").

2. Lindsey Tanner, *Despite Michelle Obama, Teens Just Aren't Moving*, WASH. POST, Jan. 14, 2014, http://www.washingtonpost.com/national/health-science/2014/01/13/ec36c18c-7953-11e3-af7f-13bf0e9965f6_story.html.

3. *Facts: Sports Activity and Children*, ASPEN INST., <http://www.aspenprojectplay.org/the-facts> (last visited Jan. 28, 2014).

4. *Learn the Facts*, *supra* note 1. Let's Move! is "a comprehensive initiative, launched by the First Lady, dedicated to solving the challenge of childhood obesity within a generation." *Id.*

5. *E.g.*, *Our History*, PRESIDENT'S COUNCIL ON FITNESS, SPORTS & NUTRITION, <http://www.fitness.gov/about-pcfsn/our-history/> (last visited Sept. 22, 2014). For instance, in 1953, an article was published in the *Journal of the American Association for Health, Physical Education and Recreation* expressing concern over the fitness level of U.S. children. This and other similar reports spurred President Dwight Eisenhower to create the President's Council on Youth Fitness. *Id.*

6. *Preventing Overuse Injuries*, HEALTHYCHILDREN.ORG, <http://www.healthychildren.org/English/health-issues/injuries-emergencies/sports-injuries/pages/preventing-overuse-injuries.aspx> (last visited Jan. 6, 2015).

winning over participation or fitness and demand elite-level commitments.⁷ Media reports detail the huge sums spent on athletics at the high school and college level at the expense of academics,⁸ and critics claim the commercialism driving most athletic programs victimizes student-athletes.⁹ Because of increased costs, sports at the middle-school level are disappearing, leaving children to participate in community programs primarily focused on developing talented athletes, or not playing at all.¹⁰ The result is that the United States has a sports culture aimed primarily at developing elite athletes and winning teams, and those without the talent, interest, or ability to meet these demands are left to “participate” in sports as fans.¹¹

Despite the wealth of evidence that taxpayer-supported school athletic programs are not meeting the need for widely accessible, age-appropriate sports programs that support overall health and fitness,¹² there is very little political discourse on the issue of using law to reform sports in schools. Instead, policy discussions primarily focus on enforcement of Title IX and achieving gender equity.¹³ This article seeks to deconstruct the values behind that policy choice so that we can contemplate a law and policy response that accounts for children’s needs and the problems with education-based sports today. Drawing on scholarly literature exploring the theory of “problem definition,” this article asserts that political advocacy in

7. Jonathan Mahler, *America’s Sick Youth Sports Culture*, BLOOMBERG VIEW (May 29, 2013), <http://www.bloombergview.com/articles/2013-05-09/america-s-sick-youth-sports-culture>; Dave Zirin, *The Cesspool: Why Youth Sports Suck*, EDGE OF SPORTS (May 9, 2013), <http://www.edgeofsports.com/2013-05-09-839/>.

8. Amanda Ripley, *The Case Against High-School Sports*, ATLANTIC, Oct. 2013, at 72, available at <http://www.theatlantic.com/magazine/archive/2013/10/the-case-against-high-school-sports/309447/> (stating that “the United States routinely spends more tax dollars per high school athlete than per high-school math student—unlike most countries worldwide”).

9. D. STANLEY EITZEN, *FAIR AND FOUL: BEYOND THE MYTHS AND PARADOXES OF SPORT* 151-69 (5th ed. 2012); Taylor Branch, *The Shame of College Sports*, ATLANTIC, Oct. 2011, available at <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

10. *Facts: Sports Activity and Children*, *supra* note 3.

11. *Id.*; see also Kenneth Cortsen, *The Role of Female Sports Fans in the Business of Sports*, KENNETH CORTSEN (July 2, 2013), <http://kennethcortsen.com/football-economy/the-role-of-female-sports-fans-in-the-business-of-sports/>; Kelly McBride, *Letter of Intent: With Its ‘W’ Initiative, ESPN Tries to Solve the Equation of Serving Women Sports Fans*, ESPN (Dec. 22, 2011), http://espn.go.com/espn/story/_/id/7379853/espn-times-solve-equation-women-sports-fans.

12. See *infra* notes 31-36 and accompanying text.

13. See, e.g., *infra* Part I.

favor of expanding opportunities for women and girls in sports centers on gender discrimination and insufficient Title IX enforcement as the problem—and greater Title IX enforcement as the solution—to the exclusion of alternative policy strategies that might address the fuller range of barriers to sports participation for not just women and girls, but all children and young adults.

Part I reviews the background data and current conception of the problem with education-based sports programs, which suggest that re-defining the prevailing problem with such programs and using law to achieve meaningful solutions is a timely and necessary policy goal. Part II outlines problem definition theory, and explains how Title IX and the struggle for gender equity became the persistent focus of political discourse and policy solutions for education-based sports. Part III analyzes the consequences of our Title IX-focused policy process, explaining that the focus on Title IX can keep other policy reforms for education-based sports off the political agenda, benefitting stakeholders who prefer the status quo. The focus on Title IX also can send a message that only those who meet the socially constructed definition of an “athlete” are entitled to participate in sports. Part IV suggests a re-definition of the problem, asserting that law should be used to reform the content of education-based sports programs. This part explains that a rethinking of the policy problem must challenge three underlying values that are accepted as essential features of education-based sports: that institutions must be given broad deference to construct and administer their sports programs; that the elite, “varsity” model for sports—with winning as the goal—is the only way to construct a school sports program; and that participating in education-based sports is a “privilege” for those who have the “interest” in and “ability” to play.

I. Childhood Obesity, Title IX and the State of Education-Based Sports Programs

Media and scholarly attention to the childhood obesity “crisis,” children’s lack of physical fitness, and the problems with education-based sports programs would suggest that reform of such programs is an issue ripe for policy action. Congress has a constitutional basis, through its spending power, for taking such action,¹⁴ as do state legislatures. Yet sweeping

14. U.S. CONST. art. 1, § 8, cl. 1; *Grove City Coll. v. Bell*, 465 U.S. 555, 575 (1984) (“Congress is free to attach reasonable and unambiguous conditions to federal financial assistance.”), *superseded by statute on other grounds*, *NCAA v. Smith*, 525 U.S. 429 (1999); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1980) (“[O]ur cases have long

reform of education-based sports programs—to promote the health and wellbeing of all students and ensure that athletics enhances the mission of schools—is generally not on federal or state policy agendas. Instead, as explained below, the issue of gender equity and enforcement of Title IX dominates the policy agenda surrounding education-based sports.

A. The Data on Sports in Schools

The heavy focus on gender discrimination and Title IX is not without good reason. The political narrative of Title IX has successfully been built around the symbolic power of the mantra “if you build it, [they] will come.”¹⁵ Like the magical appearance of the baseball players in the movie *Field of Dreams*, advocates stress that providing opportunities for women and girls to participate in education-based athletics programs on a basis equal to that afforded men and boys will encourage women and girls to develop the interest and ability to play.¹⁶ The *Field of Dreams* theory has worked to an impressive extent. In 1972, the year Title IX was passed, 295,000 girls competed in high-school sports compared to 3.67 million boys.¹⁷ In 2012-2013, over 3.2 million girls competed in high school sports compared to nearly 4.5 million boys.¹⁸ Before Title IX, less than 32,000

recognized that Congress may fix the terms on which it shall disburse federal money to the States.”).

15. *FIELD OF DREAMS* (Universal Pictures 1989).

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

17. NAT’L WOMEN’S L. CTR., *THE NEXT GENERATION OF TITLE IX: ATHLETICS* 1 (2012), available at http://nwlcr.org/sites/default/files/pdfs/nwlcathletics_titleixfactsheet.pdf [hereinafter *THE NEXT GENERATION OF TITLE IX*].

18. *2012-13 High School Athletics Participation Survey*, NAT’L FED’N OF STATE HIGH SCH. ASS’N, <http://nfhs.org/participationstatistics/participationstatistics.aspx> (follow “2012-13 High School Athletics Participation Survey Results” hyperlink) (last visited Jan. 7, 2015); see also *THE NEXT GENERATION OF TITLE IX*, *supra* note 17, at 1.

women participated in intercollegiate athletics.¹⁹ Now, there are more than 200,000 female intercollegiate athletes, representing 44% of the total number of intercollegiate student-athletes.²⁰ Despite more than forty years of growth, however, women and girls still do not participate in sports, or remain as participants, in numbers equivalent to men and boys. Women and girls' participation over the last decade largely has plateaued.²¹ Research shows that while significant numbers of girls participate in sports during the elementary and middle-school years, many stop participating in adolescence.²² Many more girls and women do not participate at all.²³ This is especially true for girls and women of color and those from disadvantaged socio-economic backgrounds.²⁴ For women and girls with disabilities, sports opportunities, while growing, are rare.²⁵ In policy

19. 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: MD. L.J. RACE RELIGION GENDER & CLASS 233, 242 (2003).

20. NCAA, NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 74 (2013), available at <http://www.ncaapublications.com/productdownloads/PR2014.pdf>.

21. BRAKE, GETTING IN THE GAME, *supra* note 16, at 229 (explaining that women's college athletic participation rates have "stayed relatively flat since 2003" and "gains at the high school level also appear to be diminishing"); B. Glenn George, *Forfeit: Opportunity, Choice and Discrimination Theory Under Title IX*, 22 YALE J.L. & FEMINISM 1, 1 (2010) ("[T]he work of eradicating discrimination in sports is far from over. Commentators lament that progress has slowed and even stagnated in recent years as the percentage of women engaged in intercollegiate sports has remained steady rather than increasing.").

22. Deborah L. Brake, *Wrestling with Gender: Constructing Masculinity by Refusing to Wrestle Women*, 13 NEV. L.J. 486, 491 (2013) ("Sport scholars have long known that girls' athletic participation declines in adolescence, and especially so for sports identified as 'masculine.'").

23. NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., TITLE IX AT 35: BEYOND THE HEADLINES 10 (2008) [hereinafter TITLE IX AT 35], available at <http://ncwge.org/PDF/TitleIXat35.pdf>; George, *supra* note 21, at 3.

24. ANGELINA KEWALRAMANI ET AL., 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."); see also Jacquelyn L. Bridgeman, *The End Game: Envisioning Equality for Women and Girls in Sports*, 2 WAKE FOREST J.L. & POL'Y 267, 273 (2012) ("[W]omen of color do not participate in intercollegiate athletics on nearly the same scale as white women."); George, *supra* note 21, at 41.

25. TITLE IX AT 35, *supra* note 23, at 11.

discussions, the cause for this relative gap in participation between males and females is often attributed to gender discrimination.²⁶

In the decades since Title IX was enacted, however, a fuller picture of youth sports in the United States has emerged that goes beyond gender-equity statistics. Research shows that children's participation in sports has resulted in what is described as a "bi-modal" curve.²⁷ On one end of the curve are children who fail to meet minimum daily physical activity requirements as set by numerous sport and health organizations.²⁸ Childhood obesity rates have more than doubled since the 1980s, and the United States now has one of the highest rates of childhood obesity in the world.²⁹ In contrast, on the other end of the curve are children who are overtraining and overspecializing in sports at far too young an age, with the result being an alarming rate of overuse and traumatic injuries.³⁰

These data occur against a backdrop of research and media attention documenting significant concerns over the model for athletics that dominates within our nation's schools.³¹ The overarching characteristic of

26. See *infra* Part II.B.

27. Laura J. Burton, *Rethinking a Commitment to Olympic Sports for Girls*, 79 J. PHYSICAL EDUC., RECREATION & DANCE, no. 9, 2008, at 5; see also Russell Ellis, *Sports Participation in Children: Where to Begin*, SIFAMILIES.ORG, <http://sifamilies.org/resources/helpful-articles-and-tips/230-sports-participation-in-children-where-to-begin> (last visited Jan. 9, 2015) ("On the one hand, our children are becoming more sedentary compared to children of past generations, which helps to explain a corresponding rise in the prevalence of childhood obesity. On the other hand, childhood participation in organized sports is at an all-time high and the participants, especially those training to become "elite" athletes, are getting younger and younger.").

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

29. See *Preventing Overuse Injuries*, *supra* note 6.

30. Am. Acad. of Pediatrics Comm. on Sports Med. & Fitness, *Intensive Training and Sports Specialization in Young Athletes*, 106 PEDIATRICS 154, 154-57 (2000); Am. Acad. of Pediatrics Comm. on Sports Med. & Fitness, *Medical Concerns in the Female Athlete*, 106 PEDIATRICS 610, 610-13 (2000); Am. Acad. of Pediatrics Comm. on Sports Med. & Fitness, *Strength Training by Children and Adolescents*, 107 PEDIATRICS 1470, 1470-72 (2001); see also *Preventing Overuse Injuries*, *supra* note 6.

31. See, e.g., 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, 429-439 (2010) [hereinafter Koller, *Not Just One of the Boys*] (discussing the "varsity" model for sports that predominates in our nation's schools).

this model is its preference for elite, or nearly elite, athletes.³² The media and scholars frequently have pointed out that the model for youth sports—especially at the high school and college level—emphasizes performance and winning over all else.³³ Indeed, researchers have noted that physical activity rates in children drop significantly starting at age nine, when children begin to “develop a self-concept of whether or not they are an athlete.”³⁴ By middle school, participation rates in sports such as baseball, soccer, and basketball drop as sports programs tend to “consolidate around the most talented, . . . committed . . . players.”³⁵ Researchers have found a lack of participation opportunities for the “moderately interested athlete” who simply wants to play for fun and fitness.³⁶ In short, these data suggest that the prevailing athletics culture, not solely gender discrimination, likely has a heavy influence on women and girls’ choices to participate, and indeed, has an impact on all children’s choices and ability to participate in sports.

B. The Current Conception of the Problem

This picture of the state of children and sports is not reflected in political discourse surrounding education-based sports programs. Instead, advocacy centers on expanding opportunities for women and girls to participate and identifies persistent discrimination against female athletes and lackluster Title IX enforcement as the problem.³⁷ Interest groups that support

32. Deborah L. Brake, *Title IX as Pragmatic Feminism*, 55 CLEV. ST. L. REV. 513, 541 (2007) [hereinafter Brake, *Title IX as Pragmatic Feminism*] (discussing the “elite model of commercialized sport” in schools).

33. Ric Esposito, *The Dilemma of the Young Athlete: “Bigger, Stronger, Faster” May Mean “Beaten, Sick, and Fractured”*, SPORT DIG. (Mar. 29, 2011), <http://thesportdigest.com/2011/03/the-dilemma-of-the-young-athlete-%E2%80%9Cbigger-stronger-faster%E2%80%9D-may-mean%E2%80%9Cbeaten-sick-and-fractured%E2%80%9D/> (2011) (“Our young athletes are training harder than ever before and their bodies are paying the price. . . . One does not have to search too far in the media and scientific publications to see that the injury rate in youth sports is exploding to crisis proportion.”); *Preventing Overuse Injuries*, *supra* note 6.

34. *Facts: Sports Activity and Children*, *supra* note 3.

35. *Id.*

36. *Id.*

37. *Do You Know the Factors Influencing Girls’ Participation in Sports?*, WOMEN’S SPORTS FOUND. (June 7, 2012), <http://www.womenssportsfoundation.org/home/support-us/do-you-know-the-factors-influencing-girls-participation-in-sports> (“By age 14, girls are dropping out of sports at two times the rate of boys. . . . [K]ey factors [] contribute to this alarming statistic. . . . Girls have 1.3 million fewer opportunities to play high school sports than boys have.”); *Title IX Myths and Facts*, WOMEN’S SPORTS FOUND. (Mar. 18, 2013), <http://www.womenssportsfoundation.org/en/home/advocate/title-ix-and-issues/what-is-title-ix/title-ix-myths-and-facts> (“[G]iven equal

expanding opportunities for women and girls to participate in sports assert that the solution is greater Title IX enforcement.³⁸ To be sure, this definition of the problem accurately captures the current reality with respect to Title IX. It is widely accepted—and the data on participation reflect—that Title IX never has been adequately enforced.³⁹ For instance, advocates cite the fact that while slightly more than half of the students at National Collegiate Athletic Association (NCAA) member schools are women, they enjoy only 44% of the opportunities for athletic participation⁴⁰ and far less than half of the total amount of funds spent on athletics.⁴¹ Data show that during the years 2000-2009, progress toward gender equity in high-school sports slowed and the gender gap between opportunities for boys and girls grew larger.⁴² Given the inconsistent enforcement of the law and the accompanying “backlash,” as well as the persistent lack of equivalent opportunity at all levels, advocates understandably have been occupied with simply securing the benefits that the law seeks to provide.

As a result, for the last forty-plus years, gender discrimination and Title IX enforcement have dominated the political and legal discourse over the policy problem with education-based sports programs, and this construct still prevails.⁴³ This conception of the problem is also routinely reflected in

athletic opportunities, women will rush to fill them; the remaining discrepancies in sports participation rates are the result of continuing discrimination in access to those opportunities.”).

38. SHARP CTR. FOR WOMEN & GIRLS, *THE DECADE OF DECLINE: GENDER EQUITY IN HIGH SCHOOL SPORTS* 38 (2012) [hereinafter SHARP CTR., *DECADE OF DECLINE*], available at <http://www.womenssportsfoundation.org/home/research-and-reports/equity-issues/decade-of-decline> (follow “Download Now” hyperlink). For instance, a recent report by the SHARP Center for Women & Girls, in collaboration with the Women’s Sports Foundation and the National Women’s Law Center, detailed the persistent “gender gap” in sports participation among boys and girls. *Id.* The report’s top recommendation was for the Office of Civil Rights to “strengthen its enforcement of Title IX at the secondary school level.” *Id.*

39. Charles L. Kennedy, *A New Frontier for Women’s Sports (Beyond Title IX)*, 27 *GENDER ISSUES* 78, 80 (2010) (“The lack of enforcement of the laws and regulations, however, has been one of the major problems with the current Title IX regulations.”); Sarah L. Stafford, *Progress Toward Title IX Compliance: The Effect of Formal and Informal Enforcement Mechanisms*, 85 *SOC. SCI. Q.* 1469, 1485 (2004) (“The findings that current enforcement mechanisms, both formal and informal, have been relatively ineffective at increasing compliance may not be that surprising.”).

40. THE NEXT GENERATION OF TITLE IX, *supra* note 17, at 2.

41. NAT’L COAL. FOR WOMEN & GIRLS IN EDUC., *TITLE IX AND ATHLETICS: PROVEN BENEFITS, UNFOUNDED OBJECTIONS* 14-15 (2012) [hereinafter *TITLE IX AND ATHLETICS*], available at <http://ncwge.org/TitleIX40/Athletics.pdf>.

42. SHARP CTR., *DECADE OF DECLINE*, *supra* note 38, at 8.

43. ASS’N OF AM. UNIV. WOMEN, *TITLE IX: EQUITY IN SCHOOL ATHLETICS* 7 (2010), available at <http://www.aauw.org/files/2013/02/position-on-equity-in-school-athletics-111.pdf>

congressional hearings and Executive Branch initiatives on the subject of amateur sports participation. For instance, in 1992, Congress held hearings on intercollegiate sports. One focus of those hearings was Title IX's impact on women's participation in intercollegiate athletics programs.⁴⁴

Specifically, hearings centered on the fact that "schools still do not carry out either the letter or the spirit of title IX which calls for equal opportunity for men and women in athletics."⁴⁵ Similarly, at a 1995 hearing on the Amateur Sports Act that focused on Title IX's impact on men's Olympic sports, the Women's Sports Foundation made the point that Title IX enforcement was "critical."⁴⁶ In 2003, the top recommendation of the Secretary of Education's Commission on Opportunity in Athletics was that the Department should "reaffirm its strong commitment to equal opportunity and the elimination of discrimination."⁴⁷ The recommendation went on to state that "[t]he Commission recognizes that while women and girls have had many new opportunities, there is much more that must be done. Title IX will continue to be a critical component of our nation's quest for fairness."⁴⁸ In 2010, the Department of Education's Office for Civil Rights issued a Policy Clarification, and in doing so stated that "[a]lthough there has been indisputable progress since Title IX was enacted . . . sex discrimination unfortunately continues to exist in many education programs

(advocating for "strong enforcement" of Title IX, with an emphasis on continuing "to educate the public" on the benefits if the law is properly implemented); TITLE IX AND ATHLETICS, *supra* note 41, at 15 (stating that the Department of Education's Office of Civil Rights must "strengthen its efforts to enforce Title IX."); THE NEXT GENERATION OF TITLE IX, *supra* note 17, at 3 (noting policy action regarding education-based athletics programs remains "strengthen[ing] enforcement of Title IX").

44. *Intercollegiate Sports: Hearing on Title IX Impact on Women's Participation in Intercollegiate Athletics and Gender Equity Before the Subcomm. on Commerce, Consumer Protection, & Competitiveness of the H. Comm. on Energy & Commerce*, 102d Cong. (1992).

45. *Intercollegiate Sports (Part 2): Hearing on Title IX Impact on Women's Participation in Intercollegiate Athletics and Gender Equity Before the Subcomm. on Commerce, Consumer Protection, & Competitiveness of the H. Comm. On Energy & Commerce*, 102d Cong. 4 (1992) (statement of Rep. Cardiss Collins, Chairwoman, Subcomm. on Commerce, Consumer Protection, & Competitiveness).

46. *Amateur Sports Act: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. on Commerce, Science, and Transportation*, 104th Cong. 196 (1995) [hereinafter *Amateur Sports Act Hearing*] (statement of Donna Lopiano, Executive Director of the Women's Sports Fund).

47. SEC'Y OF EDUCATION'S COMM'N ON OPPORTUNITY IN ATHLETICS, "OPEN TO ALL:" TITLE IX AT THIRTY 33 (2003) [hereinafter "OPEN TO ALL": TITLE IX AT THIRTY], available at <https://www2.ed.gov/about/bdscomm/list/athletics/title9report.pdf>.

48. *Id.*

and activities.”⁴⁹ More recently, in commemorating the fortieth anniversary of Title IX, Congress resolved that “[t]he dramatic increase in female sports participation is undoubtedly an important factor in women’s success and advancement” and that “women have come a long way since the 1970s, but considerable work remains.”⁵⁰ It is apparent that across a range of platforms for policy discussion, the dominant narrative for thinking about women and girls’ participation in education-based sports is one of gender discrimination and insufficient enforcement of Title IX.

C. The Current Policy Solution

It is not just the gender discrimination definition of the problem that has dominated political discourse on education-based sports programs; it is also the Title IX solution. Since the statute itself does not mention athletics programs,⁵¹ the legal solution for the policy problem is found in Title IX’s implementing regulations, policy interpretations, and clarifications. These provide the framework for current conceptions of gender equity in sports and are a primary focus of policy conflict over the structure of education-based sports. Notably, the framework for Title IX compliance gives substantial deference to institutions to craft their athletics programs, as long as there is “equal athletic opportunity” for male and female students.⁵² The final regulations, which went into effect in 1975, provide that “[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient.”⁵³ Courts have held that Title IX and its implementing regulations do not require that institutions give

49. Memorandum from Russlynn Ali, Assistant Sec’y for Civil Rights to the U.S. Dep’t of Educ. Office for Civil Rights 1 (Apr. 20, 2010), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf>.

50. 158 CONG. REC. E1223 (daily ed. July 11, 2012) (statement of Rep. Danny K. Davis); *see also* 158 CONG. REC. E1094 (daily ed. June 20, 2012) (statement of Rep. Carolyn B. Maloney) (“It’s my great hope that we will use this momentous occasion to affirm the equal treatment of men and women and boys and girls and endeavor to work towards a time when women and girls can achieve true equality in athletics . . .”).

51. 20 U.S.C. § 1681(a) (2012). The statute states quite simply that: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” *Id.* § 1681(a).

52. *See* 34 C.F.R. § 106.41(c) (2013); 45 C.F.R. § 86.41(c) (2013).

53. 34 C.F.R. § 106.41(a).

preferential treatment to women.⁵⁴ Instead, Title IX requires entities that receive federal financial assistance to “provide equal athletic opportunity for . . . both sexes.”⁵⁵ To determine whether a school provides equal athletic opportunity, the regulations state that it must be determined, among other factors, “whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.”⁵⁶ Effective accommodation of male and female students’ interests and abilities through participation opportunities is measured by compliance with the “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

54. *Neal v. Bd. of Trustees of the Cal. State Univ.*, 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’”).

55. 34 C.F.R. § 106.41(c).

56. *Id.* § 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 and training facilities and services; (9) Provision of housing and dining facilities and services; (10) Publicity.

Id.

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.⁵⁷

The Department of Education's Office for Civil Rights is charged with enforcing Title IX,⁵⁸ and plaintiffs may bring individual claims for relief.⁵⁹ Every court to consider the issue has held that the regulations and Policy Interpretation are entitled to deference.⁶⁰ Moreover, every court to consider the issue has held that the regulations and Policy Interpretation are constitutional.⁶¹

From a normative perspective, Title IX's equal athletic opportunity solution is consistent with the accepted wisdom that institutions should have the freedom to structure their sports programs without government intrusion. The three-part test and accompanying interpretations and clarifications do not specify how an institution must comply, giving it the

57. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,418 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 88). 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>.

58. U.S. DEP'T OF ED. OFFICE FOR CIVIL RIGHTS, TITLE IX ENFORCEMENT HIGHLIGHTS 2 (2012), available at <http://www2.ed.gov/documents/press-releases/title-ix-enforcement.pdf> (explaining that OCR "investigates allegations of discrimination and obtains robust remedies"); U.S. DEP'T OF JUSTICE, TITLE IX LEGAL MANUAL 133 (2001), available at <http://www.justice.gov/crt/about/cor/coord/ixlegal.pdf> ("[T]he primary means of enforcing compliance with Title IX is through voluntary agreements with the recipients, and that fund suspension or termination is a means of last resort."); see also Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Towards Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL'Y 51, 60-61 (1996) (explaining the 1992 Supreme Court decision in *Franklin v. Gwinnett County Public Schools* enhanced Title IX enforcement by granting plaintiffs a right to sue for money damages for intentional violations of the statute).

59. See, e.g., *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60 *passim* (1992).

60. *McCormick ex rel. Geldwert v. Sch. Dist. Of Mamaroneck*, 370 F.3d 275, 290 (2d Cir. 2004); *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, 271 (7th Cir. 1994); *Cohen v. Brown Univ.*, 991 F.2d 888, 896-97 (1st Cir. 1993); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993); *Williams v. Sch. Dist. Of Bethlehem*, 998 F.2d 168, 171 (3d Cir. 1993); *Equity in Athletics, Inc. v. Dep't of Educ.*, 504 F. Supp. 2d 88, 102 (W.D. Va. 2007).

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

power to choose the way it will provide “equal athletic opportunity” for men and women.⁶² This, coupled with consistent endorsement by courts, lends enormous credibility to the Title IX solution.⁶³ Thus, after years of questions over the Bush Administration’s enforcement of Title IX, the Obama Administration reaffirmed the government’s commitment to the statute.⁶⁴ Indeed, Title IX itself enjoys such standing that even opponents have to work within its construct. Title IX critics often emphasize that they agree with the principles of equality and antidiscrimination that are found in the statute, but that Title IX’s regulatory implementation has gone too far.⁶⁵

Finally, the discrimination/Title IX enforcement construction of the policy problem and the accompanying Title IX solution also has dominated legal scholarship. Most articles dealing with the issue of women’s participation in sports focus on Title IX enforcement and on refuting claims by Title IX opponents that women are not as interested in athletics as men.⁶⁶ Across all of these various policy platforms, the gender-equity problem and Title IX enforcement solution have taken center stage in political discussions around education-based sports programs for more than forty years.

In short, while the work of achieving equality of opportunity for those women and girls who develop the ability to participate in education-based sports programs is far from done, it is unclear whether gender discrimination is still the primary force behind women and girls’ lagging interest in sports participation. In contrast, it is readily apparent that most students, both male and female, do not share in the benefits that education-based sports participation provides. The issue, then, is whether there is a conception of the policy problem that reflects the broader reality of

62. 34 C.F.R. § 106.41(c) (2013); 45 C.F.R. § 86.41(c) (2013).

63. See Kennedy, *supra* note 39, at 80 (“It is very obvious that Title IX would not have succeeded were it not for the court cases.”).

64. Press Release, The White House, Vice President Biden Announces Strengthening of Title IX (Apr. 20, 2010), available at <http://www.whitehouse.gov/the-press-office/vice-president-biden-announces-strengthening-title-ix> (stating that “making Title IX as strong as possible is a no-brainer”)

65. ALLISON KASIC & KIMBERLY SCHULD, TITLE IX AND ATHLETICS: A PRIMER 1 Independent Women’s Forum (2008) (“At issue is not the Title IX statute itself, which simply outlaws discrimination in educational institutions on the basis of gender.”) (on file with author).

66. Specifically, a review of seventy-five law review articles published since the enactment of Title IX found that 84% were concerned with enforcement of Title IX, and only 16% argued for other legal changes that would bring more women and girls into sports.

education-based sports programs. The next section argues that there is not, and explains how our focus on Title IX is the reason.

II. Defining the Problem: How Title IX Became the Focus of Reform for Education-Based Sports

As an initial matter, it is important to understand how gender equity in athletics and Title IX became and has remained the political focal point for reforming education-based sports programs. Title IX was enacted by Congress in 1972 to prohibit discrimination on the basis of gender in all education programs receiving federal financial assistance.⁶⁷ Title IX originally was intended to combat sex discrimination in education generally.⁶⁸ The purpose of the statute is to guarantee that all students have equitable opportunities to participate in an educational program.⁶⁹ As written, Title IX neither targets nor mentions athletics programs,⁷⁰ and the issue of discrimination against women in education-based athletics programs was only a brief part of the congressional debates on Title IX.⁷¹ As Edwards explains, the shift in Title IX's emphasis from education generally to education-based athletics programs was not simply the result of pressure or conflict among interest groups, but instead, the focus on athletics can best be explained as an "unintended consequence[]." ⁷² As an unintended consequence, however, implementing Title IX became the most consequential legal reform of education-based athletics programs over the last several decades. An important reason for this was the way that gender-equity advocates were able to define the problem as one the government could solve and thus keep it on the political agenda.

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

68. Amanda Ross Edwards, *Why Sport? The Development of Sport as a Policy Issue in Title IX of the Education Amendments of 1972*, 22 J. POL'Y HIST. 300, 300 (2010).

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

70. *See* 20 U.S.C. § 1681(a) (2012).

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

72. Edwards, *supra* note 68, at 302.

A. Problem Definition Theory

Legal realists and critical legal theorists long ago established the false distinction between politics and law.⁷³ Public policy scholars offer useful explanations for how the political content of law takes shape through exploration of the theory of “problem definition.” Problem definition is concerned with “what we choose to identify as public issues” and the resulting characterization of such issues in the political process.⁷⁴ Problem definition is important, and it is examined by policy scholars for two reasons. First, scholars have used problem definition to explain how social problems rise or fall on the government’s agenda.⁷⁵ Second, scholars have used problem definition to explain the legal solutions that result from the legislative process.⁷⁶ Problem definition theory has helped explain legislative and regulatory initiatives in areas ranging from air transportation and anti-drug policy to agriculture and taxes.⁷⁷ An example of problem-definition analysis is the issue of sexual harassment. Scholars used a problem definition approach to explain how sexual harassment in the workplace “catapulted” itself onto the national agenda, and how feminist legal theorists’ concepts of sexual harassment helped shape the political discussion and legal solutions.⁷⁸ Specifically, sexual harassment ascended

73. COSTAS DOUZINAS ET AL., *Introduction* to POLITICS, POSTMODERNITY AND CRITICAL LEGAL STUDIES at 1, 9 (Costas Douzinas et al. eds., 1994) (stating “the rule of law was a hollow facade behind which the sociologist could easily uncover the . . . political mechanisms . . . of domination” and “the law itself was the legislative product of the dominant class”); David Kairys, *Introduction* to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 3 (David Kairys ed., 3d ed. 1998) (discussing the “social and political content of law”); Elizabeth Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, *supra*, at 23, 35 (“Realism had effectively undermined the fundamental premises of liberal legalism, particularly the crucial distinction between legislation (subjective exercise of will) and adjudication (objective exercise of reason). . . . [T]he whole liberal world view of (private) rights and (public) sovereignty mediated by the rule of law was only a mirage, a pretty fantasy that masked the reality of economic and political power.”).

74. David A. Rochefort & Roger W. Cobb, *Preface* to THE POLITICS OF PROBLEM DEFINITION: SHAPING THE POLICY AGENDA vii (David A. Rochefort & Roger W. Cobb eds., 1994).

75. *Id.*

76. *Id.*

77. *See generally id.*

78. Ellen Frankel Paul, *Sexual Harassment: A Defining Moment and Its Repercussions*, in THE POLITICS OF PROBLEM DEFINITION: SHAPING THE POLICY AGENDA, *supra* note 74, at 67, 68-70.

on the national agenda due to the “tsunami” effect.⁷⁹ The combination of the Anita Hill/Clarence Thomas hearings and her explosive charges of harassment, along with other similar scandals, captured the public’s attention. In addition, Professor MacKinnon and other activists advanced a definition of sexual harassment that encompassed a wide range of conduct.⁸⁰ This had the effect of making the problem seem widely prevalent⁸¹ and shaping the legal solutions.⁸²

Policy scholars argue that before law is enacted, social conditions must be defined as public “problems” that reach the government’s policy agenda.⁸³ A public problem is defined as a “condition that produces needs or dissatisfaction among people and for which relief is sought through governmental action.”⁸⁴ Policy scholars have explained that social conditions do not, without more, become policy problems. Instead, Professors Baumgartner and Jones contend that “[a]rguments must be made and accepted that a given problem can be solved by government action” before a social condition can ripen into a policy problem.⁸⁵ Thus, “[c]onditions become defined as problems when we come to believe that we should do something about them.”⁸⁶ The actual process of a condition being defined as a problem is a result of interpretation.⁸⁷ This “translation” happens as a result of the values that shape one’s perceptions and whether, consistent with those values, government action should be used to address the issue.⁸⁸ Professor Stone defined political problem definition as the “strategic representation of situations” by which interest groups,

79. *Id.* at 94.

80. *Id.* at 68-70.

81. *Id.* at 86-92.

82. *Id.* at 93.

83. B. Dan Wood & Alesha Doan, *The Politics of Problem of Problem Definition: Applying and Testing Threshold Models*, 47 AM. J. POL. SCI. 640 (2003); see also John M. Strate et al., *Physician-Assisted Suicide and the Politics of Problem Definition*, 10 MORTALITY 23, 25 (2005) (“How problems are defined ultimately determines the policy decisions reached by government and the content of public policy.”).

84. Wood & Doan, *supra* note 83, at 640, 640 n.1 (citing JAMES E. ANDERSON, PUBLIC POLICYMAKING 88 (2000)).

85. FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* 27 (2d ed. 2009) (explaining that “before a problem is likely to attract the attention of government officials, there must be an image, or an understanding, that links the problem with a possible governmental solution”).

86. JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 109 (1995).

87. *Id.* At 109-11.

88. *Id.* at 110-11.

government actors, and other stakeholders “deliberately and consciously fashion portrayals so as to promote their favored course of action.”⁸⁹

Problem definition involves significant political strategy, as “[c]onditions come to be defined as problems through the strategic portrayal of causal stories”⁹⁰ and the use of comparisons to highlight inequalities.⁹¹ Categorization also plays a role in shaping the perception that a particular condition is a problem⁹² that should move from the private realm to become a public issue that requires the government to take action.⁹³ Thus, in the United States there is a “core belief” in individual liberty, freedom from government intervention, and trust in the free market.⁹⁴ Conditions are more readily transformed into problems the government should solve when they “violate important values”⁹⁵ or are otherwise portrayed as implicating an area in which exceptions to the rule of minimal government are accepted, such as with the issue of national defense.⁹⁶

While problem definition heavily affects legislative outcomes, legal institutions also play an important role in influencing how problems get defined.⁹⁷ Indeed, scholars have explained how the Constitution and issues of federalism shape the debates over which social conditions become “problems” for government to solve, because “every problem at some time is defined as a constitutional question,” and current understandings of constitutionality “always impose themselves on the definition of any problem.”⁹⁸ Moreover, because the Constitution gives the states authority over areas such as education, defining problems in these areas on a national

89. DEBORAH STONE, *POLICY PARADOX* 133 (2d ed., 1997) [hereinafter STONE, *POLICY PARADOX*].

90. Deborah Stone, *Causal Stories and the Formation of Policy Agendas*, 104 *POL. SCI. Q.* 281, 299 (1989) [hereinafter Stone, *Causal Stories*].

91. KINGDON, *supra* note 86, at 198.

92. *Id.* at 111 (“[M]uch of the struggle over problem definition centers on the categories that will be used and the ways they will be used. You may not be able to judge a problem by its category, but its category structures people’s perceptions of the problem in many important respects.”).

93. BAUMGARTNER & JONES, *supra* note 85, at 27 (“[P]rivate problems need to be linked to public causes in order to demand governmental attention.”).

94. Christopher J. Bosso, *The Contextual Bases of Problem Definition*, in *THE POLITICS OF PROBLEM DEFINITION: SHAPING THE POLICY AGENDA*, *supra* note 74, at 182, 184-86.

95. KINGDON, *supra* note 86, at 198.

96. Bosso, *supra* note 94, at 182, 185.

97. *Id.* at 193 (“By virtue of constitutionally-mandated function, fundamental design, and legal jurisdiction, formal institutions *must* influence the way problems get defined.”).

98. *Id.* at 194.

scale can be difficult. The problems are often defined differently in different states.⁹⁹

Scholars have agreed that problem definition has enormous significance in the policy process.¹⁰⁰ Problem definition is said to be “critical” in political conflict¹⁰¹ and it is also important for agenda setting—moving an issue to the forefront of the political agenda or keeping it off.¹⁰² Most significantly, problem definition matters because it powerfully shapes not just the political process, but also legislative outcomes¹⁰³ and the content of public policy.¹⁰⁴ As a result, it is crucial to understand how and why policy problems come to be defined so that we can have a greater awareness of the underlying values and interests that are advanced by one definition over another.¹⁰⁵ Problem definition, then, is not just important in the political process, it is important to understanding the resulting legal solution.¹⁰⁶

Given the significance of problem definition, to fully understand how Title IX has remained the central focus of education-based athletics reform—and why it has had such staying power—it is important to first deconstruct the definition of the problem that Title IX seeks to address.

99. *Id.* at 195-96.

100. BAUMGARTNER & JONES, *supra* note 85, at 53.

101. John Portz, *Plant Closings, Community Definitions, and the Local Response*, in THE POLITICS OF PROBLEM DEFINITION: SHAPING THE POLICY AGENDA, *supra* note 74, at 32, 45; E. E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 68 (Dryden Press 1975) (“[T]he definition of the alternatives is the supreme instrument of power.”).

102. David A. Rochefort & Roger W. Cobb, *Problem Definition: An Emergency Perspective*, in THE POLITICS OF PROBLEM DEFINITION: SHAPING THE POLICY AGENDA, *supra* note 74, at 1, 4; *see also* KINGDON, *supra* note 86, at 198.

103. BAUMGARTNER & JONES, *supra* note 85, at 65.

104. Strate et al., *supra* note 83, at 25 (“How problems are defined ultimately determines the policy decisions reached by government and the content of public policy.”).

105. STONE, POLICY PARADOX, *supra* note 89, at 135 (“[W]ith multiple perspectives . . . one can achieve an understanding of problems that is more comprehensive and more self-conscious and explicit about the values and interests any definition promotes.”).

106. Janet A. Weiss, *The Powers of Problem Definition: The Case of Government Paperwork*, 22 POL'Y SCI. 97, 97-98 (1989) (“A problem definition at the outset of the policy process has implications for later stages: which kinds of evidence bear on the problem, which solutions are considered effective and feasible . . . how policies are implemented, and by which criteria policies are assessed. . . . [P]roblem definition is more than the overture to the real action; it is often at the heart of the action itself.”).

B. Defining the Problem as Discrimination: Athletics as a Legitimate Area in Which to Impose Equality

In the 1970s, when Title IX and its regulations were promulgated, the notion that women failed to participate in athletics at rates similar to men was not widely viewed as a function of gender discrimination, but was a seemingly “natural” social condition.¹⁰⁷ Title IX advocates successfully put gender equity in athletics on the political agenda by linking athletics to values of fairness and equality and articulating a powerfully simple causal narrative demonstrating that differences between men and women in athletics were not “natural” but socially constructed.

1. Athletics, Equality, and Fairness

Prior to Title IX, the message to females, reinforced by public policy, was that athletic participation was for boys and men only and that sports participation by women was not normal.¹⁰⁸ An early case involving a girl seeking to join a Little League baseball team illustrates this well. In 1974, the league denied Allison Fortin the opportunity to join a team because of her gender, and she brought suit, alleging violations of her Fourteenth Amendment rights to Equal Protection.¹⁰⁹ In denying her claim, the district court ruled that the exclusion of girls was perfectly rational because there was significant risk that they might be hurt.¹¹⁰ The district court credited the testimony of an orthopedic surgeon who opined “it was the normal activity of a young lady to keep off baseball fields and play with dolls.”¹¹¹

107. See *infra* notes 108-110 and accompanying text.

108. M. Marie Hart, *On Being Female in Sport*, in *OUT OF THE BLEACHERS: WRITINGS ON WOMEN AND SPORT* 24 (Stephanie L. Twin ed., 1979); Eileen McDonagh & Laura Pappano, *PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS* 247 (1979); Erin E. Buzuvis, *Survey Says . . . a Critical Analysis of the New Title IX Policy and a Proposal for Reform*, 91 IOWA L. REV. 821, 825, 848-57 (2006).

109. *Fortin v. Darlington Little League, Inc.*, 514 F.2d 344, 345-46 (1st Cir. 1975).

110. *Id.* at 346.

111. *Id.* at 350; see also *Cape v. Tenn. Secondary Sch. Athletic Ass’n*, 563 F.2d 793, 795 (6th Cir. 1977) (holding the state did not intentionally discriminate on the basis of gender in adopting rules requiring different structure to girls’ basketball, where state sought to protect the female players “who are weaker and incapable of playing the full-court game from harming themselves”; “[t]o 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”), *abrogated on other grounds*, *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 190 F.3d 705, 706 (6th Cir. 1999).

The state strongly reinforced the view that it was not normal or safe for women to participate in sports by providing little or no participation opportunities for girls and women through government-funded educational institutions.¹¹² Not surprisingly, girls and women generally showed limited interest in sports, “often to the extent that they [did] not even consider the possibility of participation.”¹¹³ This social condition, reinforced by law and widely held norms, came to be defined as gender discrimination.

Title IX advocates were successful in defining this as a problem ripe for government action by making education-based athletics programs a legitimate point of struggle for equality. Because the policy problem Title IX originally was meant to address was discrimination against women in education generally,¹¹⁴ the focus of the legislation was on the substantial barriers women faced in gaining admission to colleges and universities in undergraduate and graduate programs.¹¹⁵ Congressional hearings centered on this framing of the issue.¹¹⁶

By linking the gender gap in education-based sports programs to themes of equality and fairness, advocates helped transform the condition of unequal participation in education-based sports programs into a legitimate policy problem.¹¹⁷ These values formed the foundation of Title IX’s general anti-discrimination mandate¹¹⁸ as well as that of similar initiatives to eliminate federally subsidized discrimination.¹¹⁹ The value judgments

112. See Amanda Ross Edwards, *Why Sport? The Development of Sport as a Policy Issue in Title IX of the Education Amendments of 1972*, 22 J. POL’Y HIST. 300, 304-07 (2010).

113. Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254, 1265 (1979).

114. 120 CONG. REC. 39,992 (1974) (statement of Senator Birch Bayh); see also Wendy Olson, *Beyond Title IX: Toward an Agenda for Women and Sports in the 1990’s*, 3 YALE J.L. & FEMINISM 105, 119 (1991).

115. EQUAL PLAY: TITLE IX AND SOCIAL CHANGE 49-50 (Nancy Hogshead-Maker & Andrew Zimbalist eds., 2007).

116. *Id.*

117. BAUMGARTNER & JONES, *supra* note 85, at 8 (noting that “equality” and “fairness” are “two widely shared goals in America”); Daniel Yankelovich, *How Changes in the Economy Are Reshaping American Values*, in VALUES AND PUBLIC POLICY 16, 23 (Henry J. Aaron et al. eds., 1994) (stating that “America’s most important traditional values” are “equality of opportunity,” “fairness,” and “achievement”).

118. See 20 U.S.C. § 1681(a) (2012).

119. For example, the same values were invoked in passing the Civil Rights Act of 1964 (Title VI) which prohibited race discrimination in federally-funded programs, The Rehabilitation Act of 1973, which prohibited discrimination by federally-funded programs against otherwise qualified disabled individuals, and the Age Discrimination Act of 1975,

underlying those initiatives, however, were not yet widely shared with respect to athletic participation. Thus, Title IX advocates have struggled with convincing policy makers, policy implementers, and the public to accept that there is a “problem” with educational institutions not allocating equivalent sports participation opportunities to women and girls as they do to men and boys.¹²⁰ To make this argument, advocates have categorized the problem as an equality issue and worked to ensure that this categorization resonates with policymakers and government officials charged with implementing the law’s mandate.¹²¹

Gender-equity supporters successfully categorized the problem in athletics as an equality issue by drawing on notions of equality applied in other areas. A common conception of equality, and perhaps the one with the most political and intuitive appeal, is the notion of “formal” equality, which is based on the principle that like cases “should be treated alike,”¹²² and, therefore, “unlike cases should be treated differently.”¹²³ A formal equality definition of the problem requires comparisons be made between those for whom equal treatment is sought.¹²⁴ Thus, arguments appealing to this version of equality require emphasizing the similarities between men and women—that is, that men and women are “similarly situated.”¹²⁵ This form of equality is described as the “right to equal treatment,”¹²⁶ and was strongly advanced by feminists in the early 1970s, when Title IX was passed.¹²⁷ Advocates persuasively used comparisons between men and women and girls and boys and categorized the issue as one of equality, not

which prohibited discrimination by federally-funded programs against individuals on the basis of age. *See* 130 CONG. REC. 9,271 (1984).

120. EQUAL PLAY: TITLE IX AND SOCIAL CHANGE, *supra* note 115, at 1-6.

121. *Id.*

122. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 546, 577 (1982); *see also* Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1142 (1986) (“The ideal of equality—that similarly situated individuals should be treated alike—is basic to our political and legal system.”); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1293-94 (1987) (“The hornbook definition of equal protection is ‘that those who are similarly situated be similarly treated.’”) (citations omitted).

123. Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 818 (1989).

124. *Id.* at 818; Westen, *supra* note 122, at 537-38 (“[E]quality is comparative, deriving its source and its limits from the treatment of others.”).

125. Cain, *supra* note 123, at 819.

126. *Id.* at 820.

127. *Id.* at 819-20.

special treatment, thereby invoking values such as “fairness” and “justice” to justify government intervention to eradicate discrimination.¹²⁸

This approach was persuasive to policymakers. Initially, Congress rejected efforts by the NCAA to limit the application of Title IX by excluding intercollegiate sports, and Congress subsequently rejected the NCAA’s proposal to exclude from the statute’s coverage “revenue generating” sports.¹²⁹ With the Civil Rights Restoration Act of 1987,¹³⁰ Congress also overturned the Supreme Court’s decision in *Grove City College v. Bell*, which would have limited Title IX’s impact only to those departments within an educational institution that directly received federal financial assistance.¹³¹ In hearings on that issue, notions of equality and fairness featured prominently. Picking up on themes advanced by Title IX advocates, Senator Stevens explained that

women’s sports, and women athletes did not rank in the world of college athletics and beyond. Similarly, young girls in junior high and high school were, for the most part, relegated to a limited number of sports activities, while money and time was lavished on boys’ Not only did the boys have more choice, but the resources expended on their teams provided a learning and growing experience unavailable to the girls. . . . If we are committed to equality, and to providing equal opportunity, and if we enact laws to codify these principles, we must stand by our purpose in making these laws. . . . [and] reaffirm our commitment to fairness.¹³²

These images of “fairness” and “justice” have a natural appeal in arguments for equality in athletics because of common understandings of athletics as an arena for competition, an environment presupposing individuals start from equal positions. Metaphors such as “leveling the playing field” are frequently invoked. For instance, in a hearing on Title IX’s effect on the Amateur Sports Act, Assistant Secretary for Civil Rights Norma Cantú

128. EQUAL PLAY: TITLE IX AND SOCIAL CHANGE, *supra* note 115, at 6.

129. *Id.* at 57-64.

130. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (codified as amended at 20 U.S.C. §§ 1681, 1687, 1688 (1988); 42 U.S.C. § 2000d-4a (1988)).

131. *Grove City Coll. v. Bell*, 465 U.S. 1211, 1221 (1984), *superseded by statute*, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28, *as recognized in* *NCAA v. Smith*, 525 U.S. 459, 465-69 (1999).

132. 130 CONG. REC. 9,272 (1984). Notably, Senator Stevens’ remarks cited the Women’s Sports Foundation and influential advocates Billie Jean King and Donna DeVerona. *Id.*

invoked images of the level playing field in stating “[T]here is no place for discrimination in sports. Discrimination goes against the very grain of what competition is all about.”¹³³

Accordingly, to argue persuasively for an antidiscrimination definition of the policy problem, advocates have had to assert that boys and girls and men and women are “alike” in respects relevant to allocating education-based sports opportunities.¹³⁴ A necessary condition, then, for viewing women and girls’ lack of participation in education-based athletic programs as a problem is a belief that women and girls are as interested in participating in sports as boys and men. Opponents of Title IX have built their arguments, both in the political and legal arenas, around the assertion that differing rates of participation between males and females is the result of naturally different levels of interest in athletic participation between genders.¹³⁵ Therefore, the argument goes, Title IX’s implementing regulations amount to a “quota” system which requires institutions to provide opportunities to women and girls who are not as “interested” in participating as boys and men.¹³⁶

2. A Powerful Causal Narrative

In response, Title IX advocates have been successful at explaining this apparent “interest” gap through a powerful causation narrative—that “interest” in athletics participation is socially constructed, most prominently by those who structure athletics programs and allocate participation opportunities, so that lack of such opportunities creates a lower level of interest among women and girls.¹³⁷

Scholars have explained the importance of “causal stories” to the understanding of problem definition in the policy process.¹³⁸ A problem is said to be defined “when we have described its causes.”¹³⁹ Describing the

133. *Amateur Sports Act Hearing*, *supra* note 46, at 16 (statement of Norma V. Cantú, Assistant Sec’y, Dep’t of Educ., Office of Civil Rights).

134. Koller, *Not Just One of the Boys*, *supra* note 31, at 425-26.

135. See *Cohen v. Brown Univ.*, 991 F.2d 888, 900 (1st Cir. 1993); EQUAL PLAY: TITLE IX AND SOCIAL CHANGE, *supra* note 115, at 219.

136. KASIC & SCHULD, *supra* note 65, at 1. For instance, the Independent Women’s Forum characterizes Title IX as “a crusade to impose quotas and gender preferences in schools” which “demand[s] that women participate in athletics at the same rate as men.” *Id.*

137. *Cohen v. Brown Univ.*, 101 F.3d 155, 162-64 (1st Cir. 1996); Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 51-59 (2001) [hereinafter Brake, *The Struggle for Sex Equality*].

138. STONE, POLICY PARADOX, *supra* note 89, at 188-89.

139. *Id.* at 188.

cause of a problem is important to establishing that the problem can be solved by government action because the social condition described is the result of human control.¹⁴⁰ More than that, causal narratives “either challenge or protect an existing social order . . . assign responsibility . . . so that someone will have to . . . [remediate, and] legitimize . . . particular actors as fixers.”¹⁴¹ Thus, the struggle to define the cause of a social condition represents a broader fight over “basic structures of social organization.”¹⁴²

Title IX advocates have succeeded in taking women’s historically lower interest in participating in athletics out of the realm of nature and assigning a clear, human cause. By demonstrating a link between opportunities to participate, which are created and provided by the human beings who administer sports programs, and interest in participation, Title IX advocates took the state of inequality in athletics and demonstrated how it was unfair. Through this characterization, our educational institutions could be assigned responsibility for the harm, and, therefore, could be charged with remediating it. The “if you build it, they will come” narrative, then, does more than invoke the image of a beloved movie. It tells the story of the cause of women and girls’ purportedly low level of interest in sports, and provides a simple solution that government action can solve.

The causation narrative advanced by Title IX advocates provides the theoretical backbone for Title IX’s substantive equality provisions.¹⁴³ Title IX supporters argued that differences between men and women’s interest in athletics were the result of discriminatory social relationships and institutional practices that “construct” such differences.¹⁴⁴ Because,

140. *Id.* at 204.

141. *Id.*

142. *Id.* at 204-05.

143. Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL’Y 1, 5 (1994) (“Some substantive equality advocates favor equal treatment in some situations and special accommodation in others, insisting, for example, on equal access for women to men’s athletic teams, private clubs, and colleges, but on separate teams, clubs, and colleges for women to meet their special needs.”); David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 263 (2005) (“Title IX, on the other hand, looks beyond formal equality and reaches into the realm of substantive equality.”).

144. Brake, *The Struggle for Sex Equality*, *supra* note 137, 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.”).

historically, only men and boys had the opportunity to develop the interest and ability to participate in sports, women and girls were conditioned not to seek athletic opportunities because society severely limited opportunities for them to do so.¹⁴⁵ As a result, advocates have persuasively made the case that women's expressed "interest" in athletics cannot be weighed equally with men's because such "interest" might instead be the result of social factors that discourage women's athletic participation, rather than the result of real choices.¹⁴⁶ Instead, advocates argue 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.¹⁴⁷ Title IX incorporates this substantive, or "structural," approach to equality primarily through the so-called "three-part test" for compliance, which has been the main focus of the political conflict over gender equity in sports.¹⁴⁸ Through the three-part test, schools are required to create opportunities for girls and women to participate in sports to stimulate their interest in participating.¹⁴⁹ This harnesses the power of the "if you build it, they will come" imagery by assuming that Title IX will not simply guarantee equality, but will also shape norms for sports participation that will inspire women and girls to participate.¹⁵⁰

Opponents have balked at this more expansive definition of the equality issue. Courts, however, have readily embraced the premise that creating opportunities stimulates interest in participation,¹⁵¹ and opinions often cite the overwhelming statistics indicating that simply creating opportunities for

145. Buzuvis, *supra* note 108, at 825.

146. Brake, *The Struggle for Sex Equality*, *supra* note 137, 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.").

147. 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); Horwitz, *supra* note 67, at 314-15.

148. Brake, *The Struggle for Sex Equality*, *supra* note 144, at 49-50, 60-61.

149. Brake, *Title IX as Pragmatic Feminism*, *supra* note 32, at 537; Deborah 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, 213-14 (2008).

150. BRAKE, GETTING IN THE GAME, *supra* note 16, at 94.

151. Buzuvis, *supra* note 108, 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").

women to participate in sports has led to increased interest.¹⁵² For instance, in the landmark case of *Cohen v. Brown University*, the court found that

[t]o 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.¹⁵³

The court in *Cohen* 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.¹⁵⁴ Other courts have endorsed this view.¹⁵⁵ Thus, courts, scholars, and Title IX advocates have emphasized that Title IX combats gender discrimination by guaranteeing women equitable opportunities to participate in athletics, which subsequently generates interest.¹⁵⁶

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

153. 101 F.3d 155, 178–79 (1st Cir. 1996).

154. *Id.* at 179.

155. See Dionne L. Koller, *How the Expressive Power of Title IX Dilutes Its Promise*, 3 HARV. J. SPORTS & ENT. L. 103, 118 n.66 (2012) [hereinafter Koller, *How the Expressive Power of Title IX Dilutes Its Promise*] (citing *Penderson v. La. State Univ.*, 213 F.3d 858, 878 (5th Cir. 2000); *Neal v. Bd. Of Trs. Of Cal. State Univ.*, 198 F.3d 763, 767, 769 (9th Cir. 1999); *Roberts v. Colo. Stat Univ.*, 814 F. Supp. 1507, 1514 (D. Colo. 1993); *Amateur Sports Act Hearing*, *supra* note 46, at 201 (statement of Peggy Bradley Doppes, National Association of Collegiate Women Athletic Administrators)); see also Koller, *Not Just One of the Boys*, *supra* note 31, at 424 n.127.

156. BRAKE, GETTING IN THE GAME, *supra* note 16, at 94 ("Our experience with Title IX in recent decades serves as empirical evidence that the court's instincts in *Cohen v. Brown Univ.* were right on the mark: if you build it, they will come."); *What Is Title IX*, WOMEN'S SPORTS FOUND., <http://www.womenssportsfoundation.org/home/advocate/title-ix-and-issues/what-is-title-ix> (last visited Apr. 15, 2015) ("Since 1972, female participation in high school sports has increased by more than 900%. Yes, girls want to play, too.").

Politically, this view has been successful despite considerable opposition (termed a “backlash”¹⁵⁷ by Title IX advocates) for two reasons. First, the overwhelming support of courts in upholding the constitutionality of this approach gave the definition of the problem substantial credibility and authority.¹⁵⁸ Indeed, scholars have explained the way that courts, as social institutions, powerfully legitimize causal stories that define social problems.¹⁵⁹ Second, data accumulated over the life of Title IX have reinforced this construction of the issue, amply illustrating that as opportunities for women and girls have increased, so has interest.¹⁶⁰ The causal narrative that ties women and girls’ lower participation in athletics to discrimination by identifiable actors is clear and simple, and avoids a more complex explanation that would attempt to account for other factors shaping participation rates, such as the sports model that educational institutions employ.¹⁶¹

C. Defining the Problem with a Legal Solution: Athletics as a Legitimate Area for Government Intervention

A second challenge for Title IX advocates in defining unequal athletic participation rates between males and females as a policy problem that government should address has been making athletics and specifically the gender composition of athletic programs a legitimate area for government

157. See Koller, *Not Just One of the Boys*, *supra* note 31, at 404 n.11 (citing Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ., 366 F.3d 930, 933 (D.C. Cir. 2004); *Hearing on Title IX of the Educ. Amendments of 1972 Before the Subcomm. on Postsecondary Educ. Training and Life-Long Learning of the H. Comm. on Econ. and Educ. Opportunities*, 104th Cong. 146 (1995) (statement of T.J. Kerr, President, National Wrestling Coaches Association); Buzuvis, *supra* note 108, at 860).

158. Portz, *supra* note 101, at 46.

159. Stone, *Causal Stories*, *supra* note 90, at 294 (“The political success of causal theories is constrained by two powerful social institutions for determining cause and legitimating claims about harms: law and science [L]aw carries great formal authority . . .”).

160. EQUAL PLAY: TITLE IX AND SOCIAL CHANGE, *supra* note 115, at 5; KINGDON, *supra* note 86, at 100-01 (discussing the role of “feedback” in defining policy problems); Koller, *How the Expressive Power of Title IX Dilutes Its Promise*, *supra* note 155. The feedback on the success of Title IX in creating interest has reinforced the belief among policymakers and courts that greater Title IX enforcement is the solution to lagging female participation rates.

161. See STONE, POLICY PARADOX, *supra* note 84, at 196-97 (“Complex causal explanations are not very useful in politics precisely because they do not offer a single locus of control, a plausible candidate to take responsibility [I]n politics, people search for immediate and simple causes.”).

intervention.¹⁶² That is, those who support gender equality in athletics have had to demonstrate that sport is not simply an individual, private pursuit or privilege about which government should not be concerned. This is a particular challenge in the United States because sports participation is generally thought of as a private matter, and courts and Congress typically defer to sports administrators and educational institutions to define the content of their programs and regulate themselves with a minimum of government intrusion.¹⁶³ To overcome this, advocates have linked women's athletics participation to important social outcomes that government traditionally supports and that are believed to enhance the common good—American athletic achievement and overall health and wellness.¹⁶⁴ Moreover, advocates have not challenged the traditional deference shown to educational institutions in structuring their programs.¹⁶⁵ Title IX supporters simply seek to incorporate women into the model for sports that men have long enjoyed.¹⁶⁶

One of the ways Title IX supporters have successfully argued for government intervention to achieve gender equity in sports is by linking Title IX with images of American athletic achievement. Such a strategy invokes the power of sportive nationalism and has had important symbolic political force. Sport can be used to enhance a nation's prestige and demonstrate supremacy in the international community¹⁶⁷ as well as to enhance nationalism domestically.¹⁶⁸ This "use of elite athletes by governments to demonstrate national fitness and vitality for the purpose of enhancing national prestige" is referred to as "sportive nationalism."¹⁶⁹ In

162. See KINGDON, *supra* note 86, at 109-10 ("Conditions become defined as problems when we believe we should do something about them.")

163. See PRESIDENT'S COMM'N ON OLYMPIC SPORTS, THE FINAL REPORT OF THE PRESIDENT'S COMMISSION ON OLYMPIC SPORTS 11-13 (1977); MATTHEW MITTEN ET AL., SPORTS LAW AND REGULATION 27 (2d ed. 2009).

164. Koller, *How the Expressive Power of Title IX Dilutes Its Promise*, *supra* note 155, at 103.

165. *Id.*

166. See, e.g., Koller, *Not Just One of the Boys*, *supra* note 31, *passim*.

167. RICHARD ESPY, THE POLITICS OF THE OLYMPIC GAMES 7-8 (1979); James A.R. Nafziger, *Legal Aspects of a United States Foreign Sports Policy*, 8 VAND. J. TRANSNAT'L L. 837, 839-40 (1975).

168. See Alan Bairner, *Sportive Nationalism and Nationalist Politics: A Comparative Analysis of Scotland, the Republic of Ireland, and Sweden*, 20 J. SPORT & SOC. ISSUES 314, 314-15 (1996).

169. John Hoberman, *Sportive Nationalism and Doping*, in PROCEEDINGS FROM THE WORKSHOP, RESEARCH ON DOPING IN SPORT 7 (2001); see also John Hoberman, *How Drug*

the United States, athletic achievement is unquestionably an important tool to promote nationalism.¹⁷⁰

Interest groups and supportive government officials have also persuasively made the case that the government should act to eliminate gender discrimination in athletics to support American athletic achievement on the international stage.¹⁷¹ Thus, the image¹⁷² of American athletic achievement is frequently invoked in support of Title IX. For instance, in its report titled “Title IX: 25 Years of Progress – June 1997,” the Office of Civil Rights (OCR) 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.¹⁷³

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,

Testing Fails: The Politics of Doping Control, in *DOPING IN ELITE SPORT: THE POLITICS OF DRUGS IN THE OLYMPIC MOVEMENT* 241, 260 (Wayne Wilson & Edward Derse eds., 2001).

170. MARTIN BARRY VINOKUR, *MORE THAN A GAME: SPORTS AND POLITICS* 108 (1988); see also *ESPY*, *supra* note 167, at 4.

171. Amateur Sports Act Hearing, *supra* note 46, at 12 (statement of Norma V. Cantú, Assistant Sec’y, Office of Civil Rights, Dep’t of Educ.) (“Senator Hatch has perhaps best captured the essence of the meaning and promise of Title IX, when, in 1984, on the Senate Floor, he observed that there were few, if any, Senators who did not want Title IX implemented so as to continue to encourage women throughout America to develop into Olympic athletes . . . Indeed, Title IX and Olympic sports enjoy a symbiotic relationship. As participation opportunities for women and girls . . . increase as a result of Title IX, more women are successfully able to compete internationally in Olympic sports.”).

172. BAUMGARTNER & JONES, *supra* note 85, at 28 (explaining that “images, or popular and elite understandings of public policies, are an integral part of the political battle”).

173. U.S. DEP’T OF EDUC., *TITLE IX: 25 YEARS OF PROGRESS* pt. 5 (1997), available at <http://www2.ed.gov/pubs/TitleIX/part5.html>.

and in doing so, established its position as the world's premier women's soccer program.¹⁷⁴

Policymakers have also been impressed by the argument that government intervention in sports through Title IX will help increase our pipeline of female Olympians. As stated by Norma Cantú, former Assistant Secretary for Civil Rights for the Department of Education:

Senator Hatch has perhaps best captured the essence of the meaning and promise of Title IX. In 1984, on the Senate floor, he observed that there were few, if any, Senators who did not want "Title IX implemented so as to continue to encourage women throughout America to develop into Olympic athletes"¹⁷⁵

Thus, using sportive nationalism to appeal for government intervention is an important part of the argument in support of Title IX.

Advocates also make the case for government intervention by asserting that sports participation provides individuals with significant and well-documented lifetime benefits.¹⁷⁶ For instance, Title IX supporters highlight the fact that sports participation helps children learn important lessons such as discipline, teamwork, time management, and leadership that "further long-term personal growth, independence and well being."¹⁷⁷ Advocates also point to studies demonstrating that students who participate in high-school sports perform better academically and have an increased probability of attending college.¹⁷⁸ Moreover, Title IX supporters make clear that athletic participation creates numerous benefits for women and girls,

174. *Id.*

175. *Amateur Sports Act Hearing*, *supra* note 46, at 12 (statement of Norma V. Cantú, Assistant Sec'y, Office of Civil Rights, Dep't of Educ.).

176. *Facts: Sports Activity and Children*, *supra* note 3 (noting "[a]dolescents who play sports are eight times as likely to be active at age 24 as adolescents who do not play sports" and that "[h]igh school athletes are more likely than non-athletes to attend college"); *see also* Deborah Brake, *Revisiting Title IX's Feminist Legacy: Moving Beyond the Three-Part Test*, 12 AM. U. J. GENDER SOC. POL'Y & L. 453, 458 (2004) [hereinafter Brake, *Revisiting Title IX's Feminist Legacy*] ("Studies have shown that girls who compete in sports not only receive a physical benefit, but also benefit academically and socially. Girls who play sports have higher self-esteem, less risk of depression, a lower likelihood of engaging in high-risk behaviors").

177. Brake & Williams, *supra* note 149, at 235.

178. Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 112-13 (2008).

including better physical and mental health, higher self-esteem, lower rates of depression, smoking, drug use, and pregnancy, and more positive body image, as well as greater educational success and stronger inter-personal skills.¹⁷⁹ Advocates often highlight research suggesting physical activity reduces female risk of cardiovascular disease, and physically active women are less likely to develop diseases, such as breast cancer.¹⁸⁰ Advocates also stress that the benefits of sports participation in younger years are carried throughout life.¹⁸¹ Finally, and most recently, Title IX advocates point to the alarming number of children, and especially girls, who are overweight and suffering the lifelong physical and emotional effects of obesity.¹⁸² This expansion of the issue beyond equality to other positive health and social outcomes has helped ensure that gender equity in sports remains an important public policy problem that justifies government action.

III. The Consequences of Title IX-Focused Political Discourse

Scholars have written much about the law's relationship to social norms.¹⁸³ Although some say cultural norms are "sticky" and not easily changed, many frequently credit Title IX with dramatically changing social norms related to women and girls' participation in sports.¹⁸⁴ Debate over the law's consequences continues, most prominently through specious

179. *Amateur Sports Act Hearing*, *supra* note 46, at 12 (1995) (statement of Norma Cantú, Assistant Sec'y, Office for Civil Rights, Dep't of Educ.) ("[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 "females 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"); *Facts: Sports Activity and Children*, *supra* note 3.

180. WOMEN'S SPORTS FOUND., *HER LIFE DEPENDS ON IT: SPORT, PHYSICAL ACTIVITY AND THE HEALTH AND WELL-BEING OF AMERICAN GIRLS 8-9* (2004) [hereinafter *HER LIFE DEPENDS ON IT*], available at <http://www.womenssportsfoundation.org/home/research/articles-and-reports/mental-and-physical-health/her-life-depends-on-it>.

181. *Amateur Sports Act Hearing*, *supra* note 46, at 183-99 (statement of Donna A. Lopiano, Executive Director, Women's Sports Foundation).

182. *HER LIFE DEPENDS ON IT*, *supra* note 182, at 3-5.

183. See, e.g., Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025-29 (1996).

184. Brake, *Title IX as Pragmatic Feminism*, *supra* note 32, at 513.

claims that Title IX has gone too far at the expense of male athletes.¹⁸⁵ However, the general outcome of Title IX—opening up sports to women and girls—is uniformly supported.¹⁸⁶ Aside from this accounting of Title IX’s impact, however, there has been little examination of Title IX’s less obvious consequences, particularly in terms of how the law reinforces unstated values and power structures within education-based sports.

Legal scholars have explained that law’s consequences are measured by prevailing social norms.¹⁸⁷ Because the structure of interscholastic and intercollegiate sports programs are built on unstated values and assumptions about the way sports should be, many of the consequences flowing from the focus on gender equity as the principle point of reform for education-based sports remain obscure. As explained below, the focus on gender equity has masked other barriers to participation for women and girls, and has significantly limited the development of additional policy solutions that could have a more wide-reaching impact than Title IX’s equality-based solution. The discrimination/Title IX enforcement construction of the problem with education-based sports has also had the unintended consequence of benefitting those who would oppose additional policy solutions that would go beyond an equality mandate and regulate the content of athletics programs.¹⁸⁸ The discrimination/Title IX enforcement construction of the problem also can send a message to some individuals that they are not entitled to be athletes.¹⁸⁹

A. The Focus on Title IX Prevents a Redefinition of the Problem with Education-Based Sports Programs

Policy scholars have noted that, like social norms, some definitions of policy problems “will remain long-term fixtures of the policy landscape”¹⁹⁰ as “[o]ld categories and old means of classifying subjects into those categories tend to persist.”¹⁹¹ One of the reasons for the persistence of the discrimination/Title IX enforcement definition of the problem is that it is

185. “OPEN TO ALL”: TITLE IX AT THIRTY, *supra* note 47, at 7-10.

186. *See id.*

187. Sunstein, *supra* note 183, at 2048 (“Any particular characterization or accounting of consequences will rest not on some depiction of the brute facts; instead it will be mediated by a set of . . . norms determining how to describe or conceive of consequences.”).

188. EITZEN, *supra* note 9, at 244-47; JOHN R. GERDY, AIR BALL: AMERICAN EDUCATION’S FAILED EXPERIMENT WITH ELITE ATHLETICS 45, 66-67 (2006).

189. *See generally* Lawrence Blum, *Moral Asymmetry: A Problem for the Protected Categories*, 16 LEWIS & CLARK L. REV. 647 (2012).

190. Rochefort & Cobb, *supra* note 102, at 4.

191. KINGDON, *supra* note 86, at 112.

comprehensive.¹⁹² It comes with a clear solution—that greater Title IX enforcement will both enable and encourage women and girls to play. This solution has the appeal of being a straightforward, widely accepted answer¹⁹³ that draws on values used across a range of contexts, both with respect to gender as well as race, disability, age, and other so-called “protected” legal categories. Moreover, Title IX has become a powerful cultural symbol. Title IX is said to be the “first federal law to have achieved true pop status,”¹⁹⁴ and the words “Title IX” have become synonymous with female athletic achievement and opportunity.¹⁹⁵ Cultural images therefore strongly reinforce the belief that the law is an effective solution. Perhaps most significantly, there is still ample evidence of unequal allocation of resources between males and females in interscholastic and intercollegiate sports programs.¹⁹⁶ It is therefore clear that the problem definition and its accompanying solution centering on greater Title IX enforcement is not unwarranted, and Title IX advocates have done well in keeping alive the notion that there is a problem that government can and should solve.

Given all of this, it might not be readily apparent why such a definition of the problem would need updating. That is, if gender discrimination in education-based sports programs still is a problem, and the solution still has not been fully implemented, why should the policy discourse not end there, with a focus on Title IX enforcement?

The answer is that the primary problem with education-based sports programs now goes far beyond gender discrimination. First, although the government historically has not fully enforced Title IX so that women and girls enjoy the complete range of participation opportunities that the law guarantees them,¹⁹⁷ Title IX has been enormously successful at changing

192. See Portz, *supra* note 101, at 46.

193. See Rochefort & Cobb, *supra* note 102, at 25 (stating that “an essential concern in problem definition is solution *availability*”) (emphasis in original); see also STONE, POLICY PARADOX, *supra* note 89, at 196-97 (“[I]n politics, people search for immediate and simple causes” whereas “social scientists tend to see complex causes of social problems.”).

194. LEVIT & VERCHICK, *supra* note 16, at 107; see also BRAKE, GETTING IN THE GAME, *supra* note 16, at 1, 13 (“[A]ppeals 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.”).

195. See TITLE IX AT 35, *supra* note 23, at 7.

196. *Id.* at 10.

197. See *supra* Part I.B.

cultural norms around sports participation for women and girls.¹⁹⁸ As gender-equity advocates have recognized, despite the fact that women and girls still do not fully enjoy their fair share of athletics opportunities and resources, there is an “illusion of equality” where many believe that “girls have finally ‘made it’ in sport and that gender equality is either a reality or nearly so.”¹⁹⁹ For instance, Olympic gold medalist Shawn Johnson stated that she only learned of Title IX’s significance when she became an Olympian, because the notion of women participating in sports “is so normal.”²⁰⁰ While this might be troubling from the perspective of generating continued political support for aggressive Title IX enforcement, it illustrates that norms around women’s sports participation have changed, so that girls’ choices to participate, or not, likely depend on other factors besides perceived opportunities to participate.

In addition, the lack of participation opportunities is likely not so substantial or widespread as it once was that it deters women from taking up sports altogether due to lack of opportunity.²⁰¹ Thus, lack of opportunity, as well as the stigma and gender stereotyping that once served as a clear barrier to developing female interest in sports participation, is not nearly as powerful.

Instead, other substantial barriers to sports participation have emerged, most notably those related to the model for sports that educational institutions most commonly employ. Professor Brake has explained that Title IX implicitly incorporates the model of “elite competitive sports as the baseline measure of equality,”²⁰² and this model is “dominant”²⁰³ in our educational institutions today. With winning and spectator appeal the goals, education-based sports programs are costlier than necessary, and the preference for talented athletes means that participation opportunities are limited. Data show that millions of children, both male and female, who try to meet the demands of our education-based sports model experience “burnout” and abandon sports or simply do not participate at all.²⁰⁴ Because sports programs concentrate on the most talented and committed players,

198. *See supra* Part I.A.

199. SHARP CTR., *DECADE OF DECLINE*, *supra* note 38, at 35.

200. Jake Simpson, *How Title IX Sneakily Revolutionized Women’s Sports*, ATLANTIC (June 21, 2012), <http://www.theatlantic.com/entertainment/archive/2012/06/how-title-ix-sneakily-revolutionized-womens-sports/258708>.

201. Koller, *How the Expressive Power of Title IX Dilutes Its Promise*, *supra* note 155, at 103.

202. Brake, *Title IX as Pragmatic Feminism*, *supra* note 32, at 541.

203. *Id.* at 541-42.

204. George, *supra* note 21, at 440-41.

children begin to drop out of sports around the middle-school years or never take them up once they develop an understanding, based on prevailing norms of sport, of whether or not they are an “athlete.”²⁰⁵ All of this occurs in the midst of a childhood obesity “crisis.”²⁰⁶

The conception of the policy problem as one of gender discrimination, incorporating an equality solution, has no effect on such issues. This is because Title IX, even if fully enforced, only guarantees that women and girls with the “interest” and “ability” to play have equivalent access to the model for sports provided to boys and men.²⁰⁷ It does not mandate that the model itself be changed in any way. The definition of the problem as gender discrimination, therefore, is far too narrow, and the Title IX solution far too limited, to address the issues facing education-based sports programs today.

B. The Current Definition of the Problem Benefits Those Who Oppose Further Regulation of Education-Based Sports

A second reason to question the current conception of the problem with education-based sports is that the discrimination/Title IX enforcement conception keeps other policy alternatives off the agenda. The definition of the policy problem focusing on gender discrimination and Title IX enforcement in fact can benefit the very stakeholders who generally oppose restructuring their athletic programs to grant broader participation opportunities to girls and women (and indeed all students).²⁰⁸ This is because athletics programs, especially those at the college and university level, have a great deal more to lose if other proposals rose on the political agenda.²⁰⁹

205. See *Facts: Sports Activity and Children*, *supra* note 10.

206. Flam, *supra* note 1.

207. 34 C.F.R. § 106.41(c) (2013).

208. This is because the NCAA and its member institutions generally favor the status quo and resist government regulation. See KINGDON, *supra* note 86, at 110 (explaining the “great political stakes” involved in problem definition).

209. For instance, the NCAA and its member institutions opposed gender equity in athletics, and sought to exempt revenue-producing sports because gender equity would redirect resources from men’s sports. EQUAL PLAY: TITLE IX AND SOCIAL CHANGE, *supra* note 115, at 60-63. More recently, the NCAA has argued against proposals to pay college players. See John Jeanson, *NCAA Stance on Paying Athletes ‘An Absurdity’*, NEWSDAY (Oct. 7, 2013, 12:03 PM), <http://www.newsday.com/sports/columnists/john-jeanson/ncaa-stance-on-paying-athletes-an-absurdity-1.6211864>.

Opponents can challenge a policy even after it has been enacted. Opponents can challenge a policy through the bureaucracy that would implement the law, and can also make a challenge through legal action. Title IX has been challenged by the NCAA and its member institutions using both methods.²¹⁰ First, the NCAA lobbied to exclude intercollegiate athletics from Title IX's coverage, or at a minimum to secure an exemption for "revenue producing sports."²¹¹ These efforts did not succeed, but the NCAA was successful, through the Javits Amendment, in ensuring that Title IX would not be applied to require equal spending on men and women's athletics.²¹² The NCAA also legally challenged Title IX's implementing regulations.²¹³

The NCAA ultimately took control over women's intercollegiate athletic programs, and ever since it seemingly has stopped challenging Title IX.²¹⁴ However, while it may be that the NCAA has fully adopted the position that gender equality in athletics is important, it is also likely that it recognizes the political value of adopting the Title IX compliance definition of the policy problem because the focus on that can serve to keep other proposals for reform off the agenda.

Interest groups are important in agenda setting because they act to promote new agenda items and block initiatives that threaten benefits such groups are currently enjoying.²¹⁵ Thus, a key part of agenda setting is the fight by interest groups to keep issues off the policy agenda.²¹⁶ Moreover, advancing certain definitions of policy problems over others has the effect of "challeng[ing] or protect[ing] an existing social order."²¹⁷

The NCAA and its member institutions have sought to protect the existing structure of college athletics and keep proposals for wider reform off the political agenda, by moving from a position of aggressively challenging Title IX to readily agreeing that equitable allocation of sports

210. M. MARGARET CONWAY ET AL., *WOMEN AND PUBLIC POLICY: A REVOLUTION IN PROGRESS* 26 (3d ed. 2004).

211. *EQUAL PLAY: TITLE IX AND SOCIAL CHANGE*, *supra* note 115, at 60-63.

212. *Id.* at 102.

213. *NCAA v. Califano*, 444 F. Supp. 425, 428 (D. Kan. 1978), *rev'd*, 622 F.2d 1382 (10th Cir. 1980).

214. *EQUAL PLAY: TITLE IX AND SOCIAL CHANGE*, *supra* note 115, at 107 (explaining that in driving the Association of Intercollegiate Athletics for Women out of the business of regulating women's college sports, the NCAA "agreed that it would cease all efforts to try to thwart the goal of gender equity in athletic departments").

215. KINGDON, *supra* note 86, at 49-51; SCHATTSCHNEIDER, *supra* note 101, at 68.

216. Rochefort & Cobb, *supra* note 102, at 8.

217. STONE, *POLICY PARADOX*, *supra* note 89, at 204.

participation opportunities and increasing resources for women's athletics is an important policy problem. A 1992 congressional hearing on Title IX illustrates this well. At that time, members of Congress were concerned with the fact that twenty years after Title IX was passed, "schools still do not carry out either the letter or the spirit of title IX" ²¹⁸ At least one member of Congress attempted to redefine the issue, tying the lack of gender equity in college and university sports to larger issues with the "capitalistic" nature of such athletics programs. ²¹⁹ Responding to the data showing that Title IX had not been complied with, Rep. Tom McMillen stated that

I introduced last summer the Collegiate Athletic Reform Act, because, among other things, the bill would distribute [college sports] revenue differently, not based on winning . . . , but it would be based on academic parameters, it would be based on commitment to gender equity, it would be based on values I believe that are part of college and university values

. . . .

. . . [C]ollege sports is heading down a disastrous road

. . . .

. . . We are here to take these sports entertainment complexes which are unique in America [A]nd we are trying to put back educational values in those complexes. ²²⁰

The NCAA, as well as college presidents, all kept the focus squarely on Title IX, stating that the issues were "important" and that "much more needs to be done." ²²¹ One year later, the same congressional committee held

218. *Intercollegiate Sports (Part 2) Hearing*, *supra* note 45, at 1 (statement of Rep. Cardiss Collins, Chairwoman, Subcomm. on Commerce, Consumer Protection, and Competitiveness).

219. *Id.*

220. *Id.* at 4 (statement of Rep. Tom McMillen, Subcomm. on Commerce, Consumer Protection, and Competitiveness).

221. *Id.* at 25 (statement of Merrily Dean Baker, assistant executive director of administration, NCAA); *see also id.* at 23 (statement of Phyllis Howlett, Assistant Comm'r, Big Ten Conference, and Chairman, NCAA Comm. on Women's Athletics) (explaining the NCAA's position that gender equity was a "moral imperative" and that "we have a long way to go in achieving overall compliance with the law"); *id.* at 58 (statement of Richard D. Schultz, Executive Director, NCAA) (commenting that the issue of gender equity in college athletics was "important" and the association would work to keep it "on the front burner").

hearings on Title IX which opened with the statement that “[n]early everyone agrees that enforcement of Title IX has been virtually nonexistent.”²²² At that time, the President of Wake Forest University testified on behalf of the President’s Commission on the NCAA and stated that the issue of gender equity was a “leading matter” and that they were “making steady progress toward the achievement of equity.”²²³ Other witnesses on behalf of college and university sports’ interests highlighted the commitment to the goal of gender equity and the “significant progress” institutions had made in achieving compliance.²²⁴

Similarly, in 2003, the Secretary of Education’s Commission on Opportunity in Athletics considered the “major issue” of institutions cutting men’s athletic teams.²²⁵ The Commission, composed primarily of members representing college athletic interests, kept the focus on Title IX and the way in which its implementation might impact men’s teams, despite the fact that “one of the major factors” the Commission identified for the loss of men’s teams was “excessive expenditures” by colleges and universities to support men’s football and basketball.²²⁶

Finally, the NCAA and its member institutions often cite Title IX as a reason why further regulation of intercollegiate athletics would be bad policy. For instance, a recent proposal²²⁷ to compensate players in revenue-producing sports and set guidelines for the management of concussions have been opposed by the NCAA and member institutions on the grounds that, among other things, such initiatives would conflict with or undermine efforts to comply with Title IX.²²⁸

222. *Intercollegiate Sports: Hearing Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the H. Comm. on Energy and Commerce*, 103d Cong. 1 (1993) [hereinafter *Intercollegiate Sports Hearing*] (statement of Rep. Cardiss Collins, Chairwoman, Subcomm. on Commerce, Consumer Protection, and Competitiveness).

223. *Id.* at 6-7 (statement of Thomas K. Hearn, Jr., President, Wake Forest Univ.).

224. *Intercollegiate Sports Hearing*, *supra* note 222, at 13 (statement of Phyllis Howlett, Co-Chair, NCAA Task Force on Gender Equity).

225. “OPEN TO ALL”: TITLE IX AT THIRTY, *supra* note 47, at 19.

226. *See id.* at 34-35, 53-57 (recommending the Department of Education explore an antitrust exemption for college athletics to allow “educational institutions and national athletic governance organizations” to attempt to control “excessive expenditures” in intercollegiate sports).

227. *See, e.g.*, National Collegiate Athletics Accountability Act, H.R. 2903, 113th Cong. § 3 (2013) (providing that “Title IX . . . shall not apply with respect to any activity carried out . . . to comply with” the proposed amendment).

228. Rachel Cohen & Ralph D. Russo, *Paying College Athletes: Not If, But How*, HUFFINGTON POST (Jan. 7, 2013, 9:34 AM EST), http://www.huffingtonpost.com/2013/01/07/paying-college-athletes_n_2424429.html (“Colleges worried about how the stipends would

The NCAA's public acceptance of the Title-IX-compliance conception of the problem, and its steadfast claims to be working toward equal athletic opportunity, can therefore be seen as more than just an important step in eradicating discrimination against female student-athletes. It can also be seen as a way to keep other reform proposals off the agenda.²²⁹ This is important, because much has been written about the power structures built around college sports. Professors Robert McCormick and Amy Christian McCormick state, "A broad array of participants in college sports harvests a wealth of riches."²³⁰ The NCAA's agreement with the Title IX solution very likely enhanced the staying power of "gender equity" as an issue that could be solved, and deterred consideration of proposals such as that put forward by Rep. McMillen and other policymakers which would have redefined the issue as a symptom of the larger excesses of education-based sports—a problem definition that could lead to a legal solution dramatically

affect Title IX compliance and whether they'd be able to afford them."); Marc Edelman, *The Case for Paying College Athletes*, U.S. NEWS (Jan. 6, 2014, 8:00 AM EST), <http://www.usnews.com/opinion/articles/2014/01/06/ncaa-college-athletes-should-be-paid> ("[T]he NCAA defends its no-pay rules on several dubious grounds NCAA claims that compensating student-athletes would create a Title IX problem."); Chuck Ross, *Blame Title IX for NCAA's Financial Woes*, REAL CLEAR SPORTS (Apr. 8, 2013), http://www.realclearsports.com/articles/2013/04/08/blame_title_ix_for_ncaas_woes_97838.html ("Title IX was cited by the NCAA as a roadblock to monetary stipends for student-athletes."); Mechelle Voepel, *Title IX a Pay-For-Play Roadblock*, ESPN (July 15, 2011), http://espn.go.com/college-sports/story/_/id/6769337/title-ix-seen-substantial-roadblock-pay-play-college-athletics ("Gambardella[, Representative of Quinnipiac University,] thinks that there is likely no viable end-around Title IX to allow schools to pay only those athletes who are in profitable sports, which generally are football and men's basketball. In fact, the idea of excluding revenue-producing sports from Title IX compliance goes back all the way to soon after the legislation was signed in June 1972. Those attempts, such as 1974's Tower Amendment, have failed. . . . Ultimately, though, she [(Gambardella)] believes the Title IX case law is so significant that 'pay-for-play' is not a workable concept.").

229. Other reform proposals have been aimed at the NCAA. See H.R. 2903 (proposed to "amend section 487(a) of the Higher Education Act of 1965 to provide increased accountability of nonprofit athletic associations, and for other purposes").

230. Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 75-76 (2006) ("Colleges and universities, of course, enjoy enormous revenues and other important indirect benefits from their athletics programs. Corporations that sponsor and underwrite the athletic contests gain unparalleled exposure for their products and services. . . . Coaches are paid lavishly for recruiting and training winning teams. Media corporations like CBS and ESPN generate huge advertising revenues by airing college athletic events. Even high school coaches have found illicit ways to profit from the enterprise of college sports.").

altering existing power structures in intercollegiate and interscholastic sports.

C. The Definition of the Problem Can Send a Message That Sports Are for the Privileged Few

Finally, it is important to consider the implications of the discrimination/Title IX enforcement problem definition in light of the message it sends to those children and young adults who do not benefit from a “greater Title IX enforcement” solution. To these individuals, the focus on Title IX and lack of other proposals for legal reform can send a message that they are not included in what it means to be an “athlete.”

Policy made through default or neglect can be just as important as policy made by intentional political effort, as “policy silences are . . . as significant as policy that results from deliberate action.”²³¹ Moreover, legal scholars have explained that “[t]here can be no doubt that law, like action in general, has an expressive function” and that its expressive dimension goes beyond its coercive effects.²³² Thus, law is said to create meanings and shared understandings between the government and public²³³ and it communicates important value judgments.²³⁴ Rules are essentially “political in nature” in that they “include and exclude, unite and divide. . . . by placing people in different categories [R]ules sort people and activities into privileged and nonprivileged statuses.”²³⁵ Conversely, feminist legal scholars have explained how the absence of law conveys an important message to society, as well, by devaluing those who are left out.²³⁶ Law therefore has served to “reflect[] and create[] oppressive social systems” through its “‘expressive

231. CONWAY ET AL., *supra* note 210, at 13.

232. Sunstein, *supra* note 183, at 2051 (“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 M. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1531-33 (2000); Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 37 (2002) (“[M]any are now considering how law may affect behavior in ways beyond the traditional costs associated with direct sanctions.”); 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.”).

233. Anderson & Pildes, *supra* note 232, at 1571.

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

235. STONE, *POLICY PARADOX*, *supra* note 89, at 285-86.

236. Nadine Taub & Elizabeth M. Schneider, *Women’s Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, *supra* note 73, at 328.

function' [by sending] messages . . . about the kind of people we are and the institutions that we value."²³⁷

Information about the kind of individuals that are valued by education-based sports programs is communicated forcefully by policy silences that allow certain conditions to persist. For example, the dearth of athletic opportunities for women and girls from disadvantaged socio-economic backgrounds,²³⁸ and specifically, the fact that opportunities secured through Title IX most often go to upper-middle-class white women²³⁹ has remained a persistent "condition" that has not ripened into a policy problem.²⁴⁰ It is not clear that current advocates for Title IX will advance the cause or even that they should. For example, the Women's Sports Foundation position paper on "Race and Sport" states that "Title IX can be a vehicle to advance opportunities for women of color in sports" by greater enforcement and ultimately greater overall opportunity for women and girls.²⁴¹ Yet the paper also acknowledges "Title IX cannot address the issue of why more people of color are not accessing the entire range of sports opportunities offered in schools and colleges."²⁴² The recommendation is that "a broader range of issues" beyond gender discrimination must be addressed to increase athletic opportunities for students of color.²⁴³ However, without any interest group taking ownership of this issue and making the case that it is a problem that government can address, the condition will persist, and the message likely sent to this population of girls and women is that our schools' definition of an athlete may not include them.

237. Andrew A. Taslitz, *What Feminism Has to Offer Evidence Law*, 28 SW. U. L. REV. 171, 179-80 (1999).

238. See Timothy Davis, *Race and Sports in America: An Historical Overview*, 7 VA. SPORTS & ENT. L.J. 291, 309 (2008); A. Jerome Dees, *Access or Interest: Why Brown Has Benefitted African-American Women More than Title IX*, 76 UMKC L. REV. 625, 638 (2008).

239. See BRIAN L. PORTO, A NEW SEASON: USING TITLE IX TO REFORM COLLEGE SPORTS 143-51 (2003) (explaining Title IX history); EQUAL PLAY: TITLE IX AND SOCIAL CHANGE, *supra* note 115, at 4-6 (explaining history of advocacy for Title IX).

240. KINGDON, *supra* note 86, at 109 ("Conditions become defined as problems when we believe we should do something about them.").

241. WOMEN'S SPORTS FOUND., THE FOUNDATION POSITION: RACE AND SPORT 4 (n.d.), available at http://www.womenssportsfoundation.org/home/advocate/title-ix-and-issues/title-ix-positions/race_and_sport (click on "Download Now" hyperlink).

242. *Id.*

243. *Id.*

Moreover, data on childhood obesity, the problems with the youth sports culture, “burnout,” and the dominant model for athletics in schools all draw substantial media attention but never have transformed into a policy problem with a clear solution. As a result, the condition persists, and the policy silence reinforces the value judgment that such programs are rightly for those who are “athletes,” as that term is socially constructed, and not for the millions of others who are left behind by this standard.

IV. Redefining the Problem with Education-Based Athletics

The cultural institution that is sports is particularly susceptible to calcified thinking—that rules are absolute, conditions cannot be changed, and tradition is paramount.²⁴⁴ Moreover, public policy scholars have explained the way a “stable equilibrium” develops so that a condition does not get defined as a problem for government to solve when “most individuals are perceived as accepting” it.²⁴⁵ Though the struggle over Title IX might suggest otherwise, the focus on gender equity in sports is an important tradition in United States culture and politics.²⁴⁶ With an emphasis on equality and the continuing fight to assimilate women and girls into existing athletic programs, Title IX advocacy reinforces the perception that most everyone “accepts” the way things are, giving little attention to the model for athletics educational institutions have constructed.²⁴⁷

However, by understanding the reasons why Title IX has dominated our political and legal thinking about education-based sports programs, we are able to put the policy focus on gender equity in its proper context. In doing so, it is apparent that even with its success and worthy policy goals, at bottom, the focus on gender equity and Title IX—and lack of meaningful attention to reforming education-based sports programs—is a political choice.

Such a choice certainly has justification. Title IX deserves much credit for changing social norms around women and girls’ participation in sports.

244. See Ripley, *supra* note 8 (arguing that sports are so “entrenched” in schools that making changes to sports programs that could benefit the educational mission of schools is usually not considered by administrators); *cf.* PGA Tour, Inc. v. Martin, 532 U.S. 661, 699-701 (2001) (Scalia, J., dissenting).

245. Wood & Doan, *supra* note 83, at 641.

246. See BRIAN L. PORTO, A NEW SEASON: USING TITLE IX TO REFORM COLLEGE SPORTS, 143-151 (2003) (explaining Title IX history); Equal Play: Title IX and Social Change, *supra* note 115, at 4-6 (explaining history of advocacy for Title IX).

247. *Id.*

Moreover, the work to end discrimination in education-based sports programs is not over, and efforts to increase women and girls' participation in sports must continue. However, the lesson from Title IX's application to sports—that legal changes to education-based sports programs can, in dramatic fashion, change norms around sports participation—should now be applied beyond the gender discrimination context. Title IX's causal narrative that “if you build it, they will come,” no longer fully captures the reasons why many women and girls do not participate, or remain as participants, in sports. Moreover, data show the definition of the policy problem and the solution of greater Title IX enforcement no longer address the primary issues with education-based sports programs. Conditions have emerged in the forty-plus years since Title IX was enacted which make it clear that aside from gender discrimination, our education-based sports programs incorporate values which serve as substantial barriers to fuller participation by greater numbers of both boys and girls, men and women.²⁴⁸

Yet expanded participation in sports programs is needed now more than ever. It is time for the policy process to account for the physical needs of our children, the model for athletics that has been built by our educational institutions, and exactly who is, and is not able to play. In short, redefining the problem with education-based sports programs is necessary not simply to achieve greater gender equity, but to achieve the greater good.

Such a redefinition is timely because legal developments have contributed to a national dialogue on the culture of sports that has the potential to stir policy change.²⁴⁹ The process of translating conditions into “problems” that the government should address depends on both individual and collective perceptions.²⁵⁰ In general, “[c]itizens abide by prevailing arrangements without much thought.”²⁵¹ Serious conditions may be perceived as normal by the community, and individuals who find a condition untenable privately may not mobilize to change it because they

248. See TOM FARREY, *GAME ON: HOW THE PRESSURE TO WIN AT ALL COSTS ENDANGERS YOUTH SPORTS* 70-74, 76 (2009) (explaining that the structure of school-based sports leaves many children on the sidelines because the problem with school-based sports is that they are the “pathway to pro sports”).

249. See, e.g., *Keller v. Electronic Arts, Inc.*, No. C 09-1967 CW, 2010 WL530108 (N.D. Cal. Feb. 8, 2010); *O'Bannon v. NCAA*, Nos. C 09-1967 CW, C 09-3329 CW, C 09-4882 CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010); *Decision and Direction of Election passim*, *Nw. Univ.*, No. 13-RC-121359 (N.L.R.B. Mar. 26, 2014), available at <http://www.nlr.gov/case/13-rc-121359?page=4>.

250. Wood & Doan, *supra* note 83, at 641.

251. *Id.*

wish to conform to the community view.²⁵² Thus, “[n]orms and expectations develop” that tie individual behavior to the perceived beliefs of the individual’s community.²⁵³ At some point, however, scholars have pinpointed a “threshold” at which individuals will bring their private beliefs public, and the result is a change in the prevailing “social interpretations” which can lead to mobilization for problem definition or redefinition.²⁵⁴

We may be approaching a “change” threshold for education-based sports due to legal developments²⁵⁵ that have highlighted features of American sports culture that many find unacceptable. For instance, while playing with pain was once an unquestioned badge of honor in sports (if not an outright requirement for participation), state legislation mandating that children be removed from games if suspected of having suffered a concussion,²⁵⁶ and litigation over this issue at the intercollegiate and professional sports levels, have generated a national dialogue on sports reform, particularly for children.²⁵⁷ The legal response to sports doping, litigation over the use of college athletes’ names and likenesses, and a movement to allow college athletes to unionize have forced a rethinking of the win-at-all costs, commercialized model for sports. These legal proceedings have revealed the significant downsides to our prevailing model for sport. When such costs become large enough, individuals will cross the “threshold of non-

252. *Id.*

253. *Id.* Doan and Wood explain that “[e]ven those individuals predisposed toward nonacceptance [of the condition] will accept the condition due to the social costs of opposing the majority.” *Id.* at 651; *see also* Sunstein, *supra* note 183, at 2031-32 (alteration in original) (“[A] person’s behavior often depends on expectations about behavior by other people. Behavior and choice are a product . . . of the perceived *judgments* of other people, and those judgments . . . constitute . . . social norms.”).

254. Wood & Doan, *supra* note 83, at 642.

255. Sunstein, *supra* note 183, at 2026 (explaining that law “may influence social norms and push them in the right direction”).

256. All fifty states now have laws which require children suspected of having suffered a concussion be removed from play, and several bills have been proposed in Congress to set minimum standards for concussion management as well. *See, e.g.*, WASH. REV. CODE ANN. § 28A.600.190 (2012); Protecting Student Athletes from Concussions Act of 2013, S. 1546, 113th Cong. (2013); Concussion Treatment and Care Tools Act of 2013, S. 1516, 113th Cong. (2013).

257. *See* Dan Diamond, *President Obama Puts NCAA on Notice: Protect Your Student-Athletes*, FORBES (Jan. 27, 2013), <http://www.forbes.com/sites/dandiamond/2013/01/27/president-obama-puts-ncaa-on-notice-protect-your-student-athletes/>; David Hudson, *President Obama Hosts Healthy Kids and Safe Sports Concussion Summit*, THE WHITE HOUSE BLOG (May 29, 2014, 6:15 PM EDT), <https://www.whitehouse.gov/blog/2014/05/29/president-obama-hosts-healthy-kids-and-safe-sports-concussion-summit>.

acceptance” of the current state of affairs and defining or redefining the policy problem can begin.²⁵⁸

To start the conversation, this article proposes a redefinition of the policy problem that focuses on challenging three powerful underlying values “accepted” as an unchangeable reality of education-based sports. First, a redefinition of the problem with education-based sports must challenge the notion that the content of sports programs should be left to institutions and administrators, with minimal legal regulation. Second, a redefinition of the problem must challenge the model for athletics that is operating in our schools, and specifically the notion that the primary purpose of such programs is winning and entertainment. Finally, a redefinition of the problem must account for the needs of all students and not just those who qualify as “athletes.”

A. Rethink the Legal Deference to Education-Based Sports Programs

To begin the process of redefining the problem with education-based sports programs, we must challenge the notion that public law has little role to play in regulating such programs. The United States, unlike other nations, has not developed a coherent philosophy for where or how sport fits in to the public sector. On one hand, the United States does not have a ministry for sport or other similar government institution that organizes or regulates amateur sports. The United States Olympic Committee and United States Anti-Doping Agency are private corporations, deliberately structured as such to emphasize the difference between the United States and communist sports regimes²⁵⁹ and avoid triggering constitutional due-process protections for athletes.²⁶⁰ Most law aimed at sports facilitates professional, not amateur, competition.²⁶¹ On the other hand, a substantial number of sports opportunities for children and young adults are provided through educational institutions that receive public funding.²⁶² Reflecting this uneasy relationship with sports, courts, Congress, and legislatures adopt

258. Wood & Doan, *supra* note 83, at 641.

259. Dionne L. Koller, *From Medals to Morality: Sportive Nationalism and the Problem of Doping in Sports*, 19 MARQ. SPORTS L. REV. 91, 100 (2008).

260. Dionne L. Koller, *Does the Constitution Apply to the Actions of the United States Anti-Doping Agency?*, 50 ST. LOUIS L.J. 91, 109-11 (2005).

261. See, e.g., STEPHEN R. LOWE, *THE KID ON THE SANDLOT: CONGRESS AND PROFESSIONAL SPORTS 1910-92* (1995); David K. Wiggins, *A Worthwhile Effort? History of Organized Youth Sport in the United States*, 2 KINESIOLOGY REV. 65, 66-67, 72-73 (2013) (describing the privatized nature of youth sports).

262. Ripley, *supra* note 8 (“Sports are embedded in American schools in a way they are not almost anywhere else.”).

the view that sports programs deserve considerable deference. For this reason, legal intervention in education-based sports programs occurs at the margins, leaving undisturbed the sports model operating in schools, colleges, and universities.

One reason for this deference is the fact that sports in schools are legally viewed as part of the educational process.²⁶³ Accordingly, state legislatures, as well as the federal government and courts, leave sports regulation to voluntary associations of primarily private (at least nominally) associations,²⁶⁴ giving great freedom to these institutions to structure their programs.²⁶⁵ Athletics programs enjoy freedom from regulation not just from outside the institution, but often from inside as well.²⁶⁶

263. *Albach v. Odle*, 531 F.2d 983, 985 (10th Cir. 1976) (“The educational process is a broad and comprehensive concept It is not limited to classroom attendance but includes innumerable separate components, such as participation in athletic activity”); W. Burlette Carter, *Student-Athlete Welfare in a Restructured NCAA*, 2 VA. J. SPORTS & L. 1, 69-80 (2000) (discussing reasons why courts traditionally have deferred to the NCAA).

264. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 309 (2001) (Thomas, J., dissenting) (citations omitted) (“The TSSAA has not performed a function that has been ‘traditionally exclusively reserved to the State.’ . . . The organization of interscholastic sports is neither a traditional nor an exclusive public function of the States.”). In describing the role of the state in regulating high school athletics, the Court stated that “the State Board of Education merely acquiesced in the TSSAA’s actions and did not assume the role of regulating interscholastic athletics.” *Id.*; *see Crane v. Indiana High School Athletic Ass’n*, 975 F.2d 1315, 1319-20 (7th Cir. 1992) (“The IHSAA is a voluntary association. Under Indiana law, as in most states, there is a longstanding, general principle of judicial noninterference in the internal affairs of voluntary associations.”); MITTEN ET AL., *supra* note 163, at 25 (stating that while local schools have great autonomy in structuring their sports programs most regulation is by state associations of which schools are members); Diane Heckman, *Fourteenth Amendment Procedural Due Process Governing Interscholastic Athletics*, 5 VA. SPORTS & ENT. L.J. 1, 10 (2005) (“On the interscholastic level, the National Federation of State High School Associations (NFSHSA) is the national umbrella group for all state high school athletic associations. Each state routinely has a high school interscholastic association.”).

265. *Id.* at 27 (discussing courts’ deference to schools and athletic associations to regulate interscholastic and intercollegiate sports).

266. BRIAN L. PORTO, *A NEW SEASON: USING TITLE IX TO REFORM COLLEGE SPORTS* 181 (2003) (discussing “athletic department autonomy” from the rest of the university); SHARP CTR., *DECADE OF DECLINE*, *supra* note 38, at 17 (“School leaders make decisions about the number of athletic teams to offer during the year.”); *see also* “OPEN TO ALL”: TITLE IX AT THIRTY, *supra* note 47, at 5, 25 (recommending that “[t]he Department of Education should encourage educational institutions and national athletic governance organizations to address” the problem with excessive expenditures in college sports and finding that “Title IX does not limit an institution’s flexibility in deciding how budgets will be allocated among sports or teams. This flexibility should not be subjected to government interference”).

This deference has some justification. It may be wise to leave the choice of sports, scheduling of games, rules of play, academic eligibility, and other similar issues to the discretion of institutions and voluntary associations. Yet the public sector's role in providing sports participation opportunities in educational institutions is coupled with a view that the public, through legislative action, has little role in shaping the types of opportunities provided or the number of children and young adults who will be served. The current legal view is that participation in such programs is a "privilege" and not a right.²⁶⁷ This explanation of sports in schools might make sense under current constitutional law doctrine, but it reinforces the belief that sports participation is for the few and not for all. It also minimizes the potential role of public law and policy in reforming school-based sports to address the broader social problems of childhood obesity and the lack of accessible sports participation opportunities (and the accompanying benefits) to literally millions of children and young adults.²⁶⁸

Yet there is a role for law to play, particularly at the federal level. Congress has recognized the importance of youth sports and fitness²⁶⁹ and presidents dating back to Dwight Eisenhower, who created the President's Council on Physical Fitness, have acknowledged the key role the

267. See *Sisson v. Va. High Sch. League, Inc.*, No. 7:10CV00530, 2010 WL 5173264, at *3 (W.D. Va. Dec. 14, 2010) (finding the "privilege" of participating in interscholastic athletics is not protected by the due process clause); *Equity in Athletics, Inc. v. Dept. of Educ.*, 504 F. Supp. 2d 88, 110, 110 n.10 (W.D. Va. 2007) (citing cases holding that the "privilege of participating in interscholastic athletics" is not protected by the Fourteenth Amendment).

268. While statistics show that about half of all high school students participate in sports, millions more do not. John Gillis, *High School Sports Participation Increases Again*, NAT'L FED'N OF STATE HIGH SCH. ASS'NS (July 17, 2014) (noting that "54.8% of students enrolled in high schools participate in athletics"). Moreover, only a few hundred thousand students participate in intercollegiate sports. *Current Student Athletes*, NCAA, <http://www.ncaa.org/student-athletes/current> (last visited May 1, 2015) (stating that more than 460,000 NCAA student-athletes participate in intercollegiate athletics).

269. See, e.g., A Resolution Expressing the Support of the Senate for the Establishment of an Urban Youth Sport Initiative in Partnership with the United States Olympic Committee, S. Res. 100, 111th Cong. (2009) (expressing support for physical fitness which increases character development as well as academic success); H.R. Res. 6, 111th Cong. (2009) (recognizing the importance of youth league coaches in the life and development of children); Expressing the Sense of the House of Representatives that a National Youth Sports Week Should Be Established, H.R. Res. 442, 110th Cong. (2007) (promoting awareness of the importance of youth sports in health and character development of children).

government plays in promoting youth sports and fitness.²⁷⁰ Moreover, while education is a matter traditionally entrusted to the states,²⁷¹ Congress, as with Title VI, Title IX, and numerous other significant policy initiatives, has invoked its spending power to regulate education on a national scale.²⁷²

Outside of Title IX and the antidiscrimination context, however, the rationale for Congress regulating this area of education-based athletics programs is not as readily apparent as it is for regulating academics. There certainly is a substantial amount of law applied to education-based sports programs. Besides Title IX, such programs are subject to, among other areas, constitutional law,²⁷³ antitrust law,²⁷⁴ contract law,²⁷⁵ disability law,²⁷⁶ and tort law.²⁷⁷ However, there is little if any law aimed at the

270. See Exec. Order No. 10673, 21 Fed. Reg. 5341 (July 16, 1956) (“[R]ecent studies, both private and public, have revealed disturbing deficiencies in the fitness of American youth; . . . it is imperative that the fitness of our youth be improved and promoted to the greatest possible extent; and . . . such fitness is the responsibility of the government at all levels, as well as the responsibility of the family, the school, the community, and other groups and organizations; and . . . it is necessary that the activities of the Federal Government in this area be coordinated and administered so as to assure their maximum effectiveness and to provide guidance and stimulation . . .”).

271. *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (“[E]ducation is perhaps the most important function of state and local governments’ . . .”); *Gong Lum v. Rice*, 275 U.S. 78, 85 (1927) (“The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear.”); *Cumming v. Cnty. Bd. of Ed.*, 175 U.S. 528, 545 (1899) (“[T]he education of the people in schools maintained by state taxation is a matter belonging to the respective States . . .”); Robert A. Garda, Jr. & David S. Doty, *The Legal Impact of Emerging Governance Models on Public Education and Its Office Holders*, 45 URB. LAW. 21, 50, 50-51 (2013) (“Control of our public school system is a State matter delegated and lodged in the State legislature by the Constitution.”).

272. See, e.g., 20 U.S.C. §§ 6301-6302 (2012); 42 U.S.C. §§ 1751-1753 (2012).

273. E.g., *Tenn. Secondary Sch. Athletic Ass’n v. Brentwood Acad.*, 551 U.S. 291, 295-99 (2007) (applying the First Amendment to regulation by interscholastic athletic association); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 *passim* (1995) (applying Fourth Amendment to school’s drug testing of students participating in interscholastic athletics); *O’Connor v. Bd. of Educ.*, 449 U.S. 1301 *passim* (1980) (applying the Equal Protection Clause to gender classification in interscholastic basketball program).

274. See, e.g., *NCAA v. Bd. Of Regents of Univ. of Okla.*, 468 U.S. 85 *passim* (1984).

275. See, e.g., *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992); *Hendricks v. Clemson Univ.*, 529 S.E.2d 293 (2000), *rev’d*, 578 S.E.2d 711 (2003); *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379 (1972).

276. See 29 U.S.C. § 794(b)(2)(A) (Supp. II 2014).

277. See, e.g., *Henney v. Shelby City Sch. Dist.*, No. 2005 CA 0064, 2006 WL 747475, at *passim* (Ohio Ct. App. Mar. 23, 2006); *Zides v. Quinnipiac Univ.*, No. CV020470131S, 2006 WL 463182, *passim* (Conn. Super. Ct. Feb. 7, 2006); *Baker v. Briarcliff Sch. Dist.*, 613 N.Y.S.2d 660 *passim* (App. Div. 1994).

content of education-based sports programs. Indeed, though Title IX is credited with revolutionizing such programs, it did so by reinforcing the view that deference to educational institutions is the preferred approach. Through the Three-Part test, schools are left with flexibility to determine their path of compliance. Moreover, because Title IX is based on principles of equality, the law allows institutions complete freedom to structure their programs as long as they do so within the regulatory definition of equal athletic opportunity.²⁷⁸

As a result, the notion that law should be used to reform school sports programs to better address the need to increase children and young adult's fitness is rarely considered. For instance, in the *Report of the Secretary of Education's Commission on Opportunity in Athletics*, the commission recommended "much should be done to encourage interest in athletics. The Commission recommends that the Department of Education explore innovative programs to support and nurture a strong interest in athletics and physical fitness."²⁷⁹ Yet the report evidenced a clear preference for educational institutions to be left alone to structure athletic programs as they see fit, without government interference, and focused instead on "encouraging" athletic interest through private sector partnerships and "encouraging" educational institutions to reform themselves.²⁸⁰ In addition, when Congress has considered reform proposals aimed at college athletics, the concern has been to strengthen rights for institutions and athletes vis-à-vis the NCAA, rather than change the model for athletics itself.²⁸¹ Indeed,

278. See *Cohen v. Brown Univ.*, 991 F.2d 888, 906-07 (1993) (upholding injunction requiring Brown to reinstate two women's teams while litigation was pending, and rejecting the argument that such an injunction would "intrude[] on Brown's discretion"). The court noted that the argument had some force, in that "[w]e are a society that cherishes academic freedom and recognizes that universities deserve great leeway in their operations" and that "we must remain sensitive to the fact that suits of this genre implicate the discretion of universities to pursue their missions free from governmental interference." *Id.*

279. "OPEN TO ALL": TITLE IX AT THIRTY, *supra* note 47, at 35.

280. *Id.*

281. See Marc Edelman, *Disarming the Trojan Horse of the UAAA and SPARTA: How America Should Reform Its Sports Agent Laws to Conform with True Agency Principles*, 4 HARV. J. SPORTS ENT. L. 145 (2013); *Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes: Hearing Before the H. Comm. on Education and the Workforce*, 113th Cong. (2014), available at <http://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=374849>; *Promoting the Well-Being and Academic Success of College Athletes: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 113th Cong (2014), available at http://www.commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=48f489fd-720f-44d7-8a68-53efaecf8139&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=b06c39af-e033-4cba-9221-de668ca1978a&MonthDisplay=7&YearDisplay=2014.

the notion that the government should stay out of sports regulation is so widely accepted that calls for reform often include the suggestion that intercollegiate athletics be further insulated from legal regulation through an antitrust exemption.²⁸²

Thus, once we rethink the wide deference given to institutions to structure their sports programs, it is possible to make the case that there is a problem with education-based sports that the government can and should solve. Childhood obesity and children's sedentary lifestyles are not simply unfortunate social conditions²⁸³ or issues that are too complex for government to tackle meaningfully.²⁸⁴ The government, through taxpayer-supported educational institutions, administers our nation's most comprehensive sports program, as the majority of sports opportunities for children and young adults in the United States are provided through educational institutions.²⁸⁵ The data on childhood obesity,²⁸⁶ youth fitness,²⁸⁷ and lack of access coupled with the demonstrated benefits of

282. "OPEN TO ALL": TITLE IX AT THIRTY, *supra* note 47, at 5 ("The Department of Education should encourage educational institutions and national athletic governance organizations to address the issue of reducing excessive expenditures in intercollegiate athletics. Possible areas to explore might include an antitrust exemption for college athletics."); BRIAN L. PORTO, THE SUPREME COURT AND THE NCAA: THE CASE FOR LESS COMMERCIALISM AND MORE DUE PROCESS IN COLLEGE SPORTS 16-18 (2012) (noting legislation that would grant the NCAA a limited antitrust exemption for regulations that promote educational ends); Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 370 (2007) ("One possible legislative solution would be for Congress to create an antitrust exemption for the NCAA."); *see also*, NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 122 (1984) (White, J., dissenting) (arguing that the antitrust laws should have limited application to the NCAA because "[t]he NCAA . . . 'exist[s] primarily to enhance the contribution made by amateur athletic competition to the process of higher education as distinguished from realizing maximum return on its entertainment commodity'").

283. *See* BAUMGARTNER & JONES, *supra* note 85, at 27.

284. *See* STONE, POLICY PARADOX, *supra* note 89, at 196-97 (explaining that conditions with "complex causal explanations" are not useful in the political policy process because they do not offer a single source for control of the problem and a "plausible" actor to be assigned responsibility for the solution).

285. Ripley, *supra* note 8 ("Sports are embedded in American schools in a way they are not almost anywhere else. Yet this difference hardly ever comes up in domestic debates about America's international mediocrity in education.").

286. For instance, one study found that "among 17 developed nations, the U.S. had the highest rates of childhood obesity among those ages 5-19." *Facts: Sports Activity and Children*, *supra* note 9.

287. *See supra* Part I.A.

sports participation²⁸⁸ provide ample justification to reconsider the laissez-faire attitude towards regulation of education-based sports.

This is especially the case because data powerfully demonstrate that there are significant geographic and socio-economic differences in access to sports both in the community and in schools.²⁸⁹ Leaving access to sports participation opportunities to the private sector means that only socio-economically advantaged children are able to access such opportunities, and children with physical and intellectual disabilities often have no participation opportunities at all.²⁹⁰ Finally, research shows that the effects of childhood obesity and lack of fitness are a national, not local, problem.²⁹¹ All of this illustrates that a redefinition of the problem with education-based sports must challenge the traditional level of deference given to educational institutions to craft their sports programs, as such programs present important policy issues that the federal government is well positioned to solve.

B. Law Should Be Used to Outline a Better Model for Education-Based Sports

Once we re-consider the unquestioned deference given to educational institutions to craft their sports programs, we can begin to re-imagine the model for sports that predominates in our schools. To do this, attention must be given to the barriers to sports participation that such a model perpetuates and the alternate means and goals for constructing school-based sports. Thus, the redefinition of the problem with education-based sports should seek to re-shape the current model by using the law to promote values that are consistent with an educational mission and harness the benefits of sports participation for all students.

288. See *supra* notes 176-181 and accompanying text.

289. *Facts: Sports Activity and Children*, *supra* note 9 (explaining that there is a “relative lack of access for minority children” and that access to sports is “shaped by geography and gender” in that participation rates in “low socio-economic schools” are much lower than in “high socio-economic schools”). The report also explains that disparities exist among states, in that those in the Northeast and Midwest generally provide more sports participation opportunities and those in the South and West offer less. *Id.*

290. *Id.*

291. *Id.* (stating that “medical costs related to obesity are estimated at \$147 billion a year,” and that “[m]ore than a quarter of all Americans between the ages of 17 to 24 are too fat to serve in the military”).

To begin, it is worth remembering that sports are socially constructed. As Justice Scalia explained in *PGA Tour, Inc. v. Martin*, there is nothing “essential” about any sport.²⁹² Likewise, there is nothing essential, in terms of selection of sports or levels of competition, about the ways in which an interscholastic or intercollegiate sports program should be structured. Indeed, even the term “student-athlete” was created by the NCAA—some scholars say to prevent athletes from being classified as employees.²⁹³ Therefore, to effectively redefine the problem with education-based sports, it is important to examine the underlying, generally unstated belief that the elite, “varsity” model for sports, which is dominant in our educational institutions, is the only means for delivering the benefits of sports participation to children and young adults.²⁹⁴ While such a model might be necessary for generating fan interest and commercial appeal, nothing suggests that it is necessary to transfer the benefits, such as better academic performance, increased health and wellbeing, and positive social behaviors, which researchers have demonstrated sports participation provides.²⁹⁵ In fact, such a model, given its propensity to exclude, overwork, and in many cases exploit,²⁹⁶ might not even be the preferable means of providing the benefits of sports participation.

Additionally, the current model for sports in schools is costly. Because the model emphasizes winning, commercial appeal, and requires intensive, sometimes professional-level demands, program costs can be a substantial drain on institutional resources, and not all students can participate.²⁹⁷

292. 532 U.S. 661, 699-705 (Scalia, J., dissenting).

293. McCormick & McCormick, *supra* note 230, at 74.

294. See McCormick *ex rel.* Geldwert v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 294-95 (2d Cir. 2004) (stating that “[a] primary purpose of competitive athletics is to strive to be the best” and that “the chance to be champions” is “fundamental to the experience of sports”); Cohen v. Brown Univ., 991 F.2d 888, 891 (1st Cir. 1993) (referring to the “magic of intercollegiate sports”).

295. George, *supra* note 21, at 36-39; Brake, *Title IX as Pragmatic Feminism*, *supra* note 32, at 541.

296. McCormick & McCormick, *supra* note 230, at 74.

297. See KNIGHT COMM’N ON INTERCOLLEGIATE ATHLETICS, RESTORING THE BALANCE: DOLLARS, VALUES, AND THE FUTURE OF COLLEGE SPORTS 3 (2010) [hereinafter KNIGHT COMM’N, RESTORING THE BALANCE], available at <http://www.knightcommission.org/restoringthebalance> (follow “Download PDF on this report” hyperlink) (“The growing emphasis on winning games and increasing television market share feeds the spending escalation because of the unfounded yet persistent belief that devoting more dollars to sports programs leads to greater athletic success and thus to greater revenues.”); Ripley, *supra* note 8 (explaining that “in many schools, sports are so entrenched that no one—not even the

Moreover, increasing amounts are diverted from an institution's academic programs to athletics.²⁹⁸ Perhaps most concerning is the data which show that many middle schools and high schools are dropping sports programs altogether, especially in communities with fewer economic resources.²⁹⁹ Like the concerns previously mentioned, the rate of "atrophy" of interscholastic sports programs is another problematic feature of the model that should be addressed.³⁰⁰ This suggests that the current model for sports in schools increasingly is not making sense to school leaders, either economically, academically, or both.

The definition of the problem and accompanying solution must therefore be formulated to re-imagine the very purpose of sports in schools, from being a "privilege" for athletes and entertainment for fans to an inclusive program that promotes all students' individual wellness and academic success. To do this, policymakers and advocates should not shy away from proposing solutions that regulate more than the gender content of sports programs. Instead, regulation could focus on requiring schools to have a sports program that provides meaningful fitness opportunities for all students as part of the educational curriculum, including students with disabilities. Moreover, to continue promoting the goals of gender equity, a policy solution could require schools to have co-ed teams, and only sponsor teams where males and females can play together safely. The law could require equal spending on men's and women's sports (a gender-equity solution rejected as part of Title IX) or limit overall spending to encourage schools to select cost-efficient sports options and minimize travel for competition. Government action could be used to incentivize schools to develop new sports, with new rules, to provide age-appropriate, broad-

people in charge—realizes their actual cost" and that many high schools spend substantially more per student for sports than for academics)

298. KNIGHT COMM'N, RESTORING THE BALANCE, *supra* note 297, at 6 ("At most institutions, [athletic] expenditures require a redistribution of institutional resources. . . . [A]lmost all programs must rely on allocations from general university funds, fees imposed on the entire student body, and state appropriations . . .").

299. SHARP CTR., DECADE OF DECLINE, *supra* note 38, at 26-27 ("The highest drop in sports programs across the 2000s occurred in schools in which whites have the lowest rates of enrollment. . . . [M]any of the schools that eliminate interscholastic sports programs have fewer economic resources and, concomitantly, student bodies that come from working-class or poorer communities where families and children are already disproportionately disadvantaged.").

300. *Id.* at 27 (asking whether "policymakers, public health planners and educators" are considering how the loss of interscholastic sports is affecting "academic achievement, dropout rates, delinquency rates or suspensions").

based participation opportunities that schools can afford and that fit within the school's educational mission. In short, a re-definition of the problem and proposed solutions should not simply work at the margins to contain the excesses and other negative attributes of the current model, but should instead seek to build a model that emphasizes what researchers know to be the positive outcomes from sports participation.

C. A Policy Solution Should Include All Students

Finally, a definition of the problem with education-based sports and the accompanying solution must challenge the notion that sports in schools are only for those with the ability to play, as measured by coaches and administrators. As explained above, while Title IX advocates successfully made the case that athletics is a legitimate area in which to impose gender equality, the law itself reinforced the notion that discrimination on the basis of ability is an inherent feature of sports.³⁰¹ While it is certainly essential to discriminate on the basis of talent in allocating professional and elite sports opportunities, it is neither necessary nor desirable to do so in the educational context. Models for sport which exclude students based on talent do not run afoul of Title IX (or any other law), but reinforce the norms that lead children and young adults either to adopt an athletic identity, or, too often, a sedentary lifestyle.³⁰² Thus, a re-thinking of the policy problem with education-based sports programs should reject the seemingly natural discrimination that excludes those who are not sufficiently "able" athletes and devise solutions that embrace all students. In doing so, interest groups and policymakers should heed the lessons from Title IX that "interest depends on opportunity structures."³⁰³

A redefinition of the problem with education-based sports must also challenge the notion that discriminating based on talent and ability is necessary because cost prevents expanding opportunities for all students. Currently, education-based sports programs spend large sums to support the relative few who are "athletes," and those students enjoy the many benefits that sports participation provides (and, recent efforts by athletes to unionize and seek compensation for concussions point out,³⁰⁴ may endure significant

301. Title IX does this through its regulations, which only require institutions to provide equal athletic opportunity to those who have the "interest" and "ability" to participate. 34 C.F.R. § 106.41(c) (2013); 45 C.F.R. § 86.41(c) (2013).

302. See *supra* Part I.A.

303. Brake, *Revisiting Title IX's Feminist Legacy*, *supra* note 176, at 458.

304. Decision and Direction of Election *passim*, Nw. Univ., No. 13-RC-121359 (N.L.R.B. Mar. 26, 2014), available at <http://www.nlr.gov/case/13-rc-121359?page=4>

personal costs as well). Such spending is driven by the model for sports incorporated into our educational programs, and virtually guarantees that the few, and not the many, will have access to sports participation opportunities.³⁰⁵

While school sports programs can increase “social capital,” which can benefit the entire school community,³⁰⁶ it does not make up for lack of physical fitness and individual health.³⁰⁷ Schools, colleges, and universities will object to any notion of providing or requiring sports opportunities for all students because of cost. However, most such costs are a part of the model for athletics prevailing in educational institutions today; they are not an inherent feature of sports.³⁰⁸ An educational institution intent on designing a sports program for all students, instead of a sports program that will have the best chance of winning or the widest commercial appeal should readily be able to construct sports opportunities in which every student participates and reaps the benefits.

The problem must therefore be defined as one affecting the health and wellbeing of all children and young adults, and should not be about allocation of athletic opportunities for those who can be defined as “athletes” with the “interest” in and “ability” to play. By classifying students as “athletes” who are worthy of participating in sports, educational institutions do not see all students as individuals with physical fitness needs, and such institutions exercise a power that benefits some and leaves most on the sidelines. Indeed, the term “student-athlete” highlights this distinction, by carving out a population of students who enjoy the benefits of sports participation. A re-definition of the policy problem would render such a distinction unnecessary, as all students could enjoy an athletic component to their educations, with sports participation opportunities for all students viewed as a necessity and not a privilege.

(follow “Decision and Direction of Election” hyperlink); *In re NCAA Student-Athlete Concussion Injury Litig.*, 988 F. Supp. 2d 1373 (N.D. Ill. 2013).

305. See “OPEN TO ALL”: TITLE IX AT THIRTY, *supra* note 47, at 28 (“[T]he nature of college athletics makes it possible for only a relatively small number of high school athletes to be able to participate in varsity sports at the college level.”)

306. Daniel H. Bowen & Collin Hitt, *High-School Sports Aren’t Killing Academics*, ATLANTIC (Oct. 2, 2013, 7:46 AM ET), <http://www.theatlantic.com/education/archive/2013/10/high-school-sports-aren’t-killing-academics/280155/>.

307. See *supra* Part I.A.

308. See generally KNIGHT COMM’N, RESTORING THE BALANCE, *supra* note 297. To paraphrase a point made often by Anita DeFrantz, “sports are not expensive”—we make them that way. Tom Farrey, *Too High a Price to Play*, ESPN (June 7, 2012), <http://m.espn.go.com/wireless/story?storyId=7986414&wjb=&pg=3&lang=ES>.

In sum, to meaningfully redefine the policy problem with education-based sports, we must challenge the underlying, seemingly accepted values that serve to protect the existing structure of such programs and propose solutions requiring the nation's taxpayer-supported educational institutions to construct athletic programs for all students that can best promote overall health, fitness and the educational mission. Although undoubtedly any policy solutions would have to account for differences between high school and intercollegiate athletics, a re-definition of the problem should look to Congress to define the content of appropriate education-based sports programs, both in terms of what such programs must include and what they cannot include, and tie federal funding to meeting the benchmarks.

V. Conclusion

There is a certain stability that has resulted from the political conflict over Title IX.³⁰⁹ By focusing on that as the policy problem, institutions and advocates can work within the framework of the “devil they know,” and not waste resources trying to define the contours of a new policy or working to defeat it. Conversely, advocates for gender equity in sports can draw on the positive symbols and images that forty-plus years of Title IX have cultivated, and can therefore keep the issue of gender equity alive without diluting their resources trying to argue for additional policy solutions.

What this article suggests, however, is that there is a cost to such stability. For decades, the policy problem with education-based sports programs has been defined through the lens of gender discrimination. The solution guaranteeing equality in such programs—Title IX—has developed into part of the policy problem through decades-long battles over implementation and enforcement across all three branches of government. This article does not challenge the notion that women and girls still do not get their fair share of athletics resources. However, by focusing solely on Title IX and its enforcement, we may be missing an important opportunity to advocate for government intervention that would re-fashion education-based sports programs in a way that goes beyond gender equity, and that may have an even greater impact on developing the interest of not only women and girls, but all students, who might someday participate in sports.

309. BAUMGARTNER & JONES, *supra* note 85, at 24.

In this way, keeping the light shining on Title IX as the area of policy contention can have the unintended consequence of benefitting those stakeholders who would resist further, and potentially more dramatic, changes to the model for athletics that prevails in our educational institutions. Moreover, the continuing focus on Title IX may send a message to the millions of sedentary children and young adults that they do not fit the model of who can be an “athlete.” Given this, an aggressive re-definition of the policy problem facing education-based sports programs that goes beyond gender discrimination is an essential first step to re-imagining the nature and purpose of sports in schools.