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ACHIEVING GENDER EQUITY UNDER TITLE IX FOR GIRLS FROM MINORITY, URBAN, RURAL, AND ECONOMICALLY DISADVANTAGED COMMUNITIES

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I. INTRODUCTION

According to intersectionality theory, discriminatory influences effect decisions regarding allocations of scarce resources, whether political, financial, or athletic.¹ I experienced an epiphany during a meeting of Faculty Athletic Representatives (FAR)² and intercollegiate athletic personnel where Title IX³ issues were discussed. During the discussion, I mentioned that I noticed certain proposed National Collegiate Athletic Association (NCAA) legislation contained a section captioned “Title IX impact.” The response assumed that by balancing spending priorities in men’s football, men’s basketball, and track and field with appropriate allocations in women’s volleyball, lacrosse, soccer, crew, and water polo,⁴ both gender equity and “minority gender equity” would be

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1. See LOUIS KUSHNICK, *RACE, CLASS & STRUGGLE: ESSAYS ON RACISM AND INEQUALITY IN BRITAIN, THE US AND WESTERN EUROPE* 46–47 (1998).

2. A FAR is defined by the FAR Association as,

a member of the faculty at an NCAA member institution. He or she has been designated by the institution to serve as a liaison between the institution and the athletics department, and also as a representative of the institution in conference and NCAA affairs. . . .

. . . [T]he role of the FAR is “. . . to ensure that the academic institution establishes and maintains the appropriate balance between academics and intercollegiate athletics.”

About FARs, FARA, <http://farawebsite.org/welcome-to-farawebsite-org/about-fara/about-fars/> (last visited Mar. 7, 2014) (quoting FARA, CONSTITUTION OF FACULTY ATHLETICS REPRESENTATIVES ASSOCIATION (2012), available at <http://farawebsite.org/welcome-to-farawebsite-org/about-fara/fara-constitution-bylaws/>).

3. See generally Patsy Takemoto Mink Equal Opportunity in Education Act, 20 U.S.C. §§ 1681–1688 (2012).

4. All of which have been considered emerging women’s sports by the NCAA. See generally Heather Dinich, *The NCAA Road Less Glorified: Athletes in Emerging Sports Play with Passion but Little Fanfare*, ESPN (July 20, 2009), <http://sports.espn.go.com/ncaa/news/story?id=4336120>. In

achieved. The response effectively disregarded minority women student-athletes. Minority women and other economically disadvantaged student-athletes are a subset of the larger population of women when resource allocations for women's sports are compared to total resource allocations for men's football, men's basketball, and track and field. However, after allocation disparities between men's sports and women's sports are identified, institutional athletic resources are, in addition to women's basketball, allocated to emerging women's sports, volleyball, lacrosse, soccer, crew, and water polo, to create new participation opportunities to remedy gender inequities. Allocations to emerging sports will ensure no, or very few, female minority student-athletes or female student-athletes from other readily identifiable subgroups will experience the participation benefits promised by Title IX, since few, or virtually no, minority female student-athletes or female student-athletes from economically disadvantaged communities or from rural or urban communities either participate in emerging women's sports at the interscholastic level⁵ or at

1991, the NCAA surveyed expenditures for male and female NCAA athletes. *NCAA Emerging Sports Timeline*, NCAA.ORG, <http://www.ncaa.org/sites/default/files/Emerging%2BSports%2BHistory.doc> (last visited May 1, 2014). The survey found that while enrollment in NCAA schools was split 50/50 between males and females, "male students constitute[d] about 70 percent of the participants in intercollegiate athletics" and "receive[d] about 70 percent of athletics scholarship funds, 77 percent of operating budgets and 83 percent of recruiting funds." *Id.* In response to this survey, the NCAA created the Gender Equity Task Force in 1992. *Id.* One of the first suggestions of the Task Force was to create a list of emerging women's sports. *Id.* In 1994, the NCAA adopted the Task Force's first list that included nine emerging sports. *Id.* "The NCAA created emerging sports for women as a way to generate more opportunities for women in collegiate sports in support of Title IX." Dinich, *supra*. Once identified as an emerging sport, "the NCAA allows . . . 10 years for the sport to grow to 40 teams over all three divisions [(I, II, and III)] before [the sport] is considered a championship sport" and removed from the list of emerging sports. *Id.*

The original nine emerging women's sports included archery, badminton, bowling, ice hockey, rowing, squash, synchronized swimming, team handball, and water polo. Graham Watson, *Emerging Sports Find Success, Struggles*, ESPN, <http://sports.espn.go.com/ncaa/news/story?id=4341135> (last updated July 21, 2009). Equestrian was added to the list in 1998, rugby in 2002, and sand volleyball in 2010. *Id.* Rowing, ice hockey, water polo, and bowling were all removed from the list between 1997 and 2003 because they each gained championship status. *Id.* Additionally, archery, badminton, synchronized swimming and team handball were each removed from the list in 2009 for lack of growth. *Id.* Currently, this leaves rugby, sand volleyball, squash, and equestrian on the list of emerging sports. *Id.*

5. See generally Deborah L. Brake & Verna L. Williams, *The Heart of the Game: Putting Race and Educational Equity at the Center of Title IX*, 7 VA. SPORTS & ENT. L.J. 199, 201 (2008) ("Most litigation, public policy, and legal scholarship have focused on athletics at the college level.") (citing Jocelyn Samuels, *Reviewing the Play: How Faulty Premises Affected the Work of the Commission on Opportunity in Athletics and Why Title IX Protections Are Still Needed to Ensure Equal Opportunity in Athletics*, 3 MARGINS 233, 255 (2003) (indicating that the absence of data collegiate athletic programs are required to keep "makes it difficult to monitor high schools' compliance with Title IX, where serious enforcement of the law is critical").

the collegiate level of sport.⁶

In her seminal article on intersectionality Professor Crenshaw quoted the title of Gloria T. Hull's book, *All the Women Are White, All the Blacks Are Men, but Some of Us Are Brave*⁷ as a beginning point in developing a Black feminist critique of antidiscrimination law and feminist legal theory.⁸ According to Professor Crenshaw, the book title indicated what she characterized as "a problematic consequence of the tendency to treat race and gender as mutually exclusive categories of experience and analysis."⁹ Professor Crenshaw's point regarding the marginalization of Black women became evident as I pondered a response to my inquiry regarding why the minority gender equity impact is not also considered with proposed legislation.

Although the response to my inquiry focused on the fact that minority equity on the men's side of sports may have been achieved, minority gender equity or gender equity for females from broader gender classes—including females from economically disadvantaged communities—is not achievable by simply balancing resource allocations for gender equity purposes to sports in which there is no or very little participation by minority female student-athletes or female student-athletes from economically disadvantaged, urban, and rural communities. Increasing resource allocations for female student-athletes in women's volleyball, lacrosse, soccer, crew, and water polo—without at the same time investing in emerging sports in middle schools and high schools in minority, urban, and rural communities throughout the country—would provide miniscule benefits to a significant population of potential collegiate women student-athletes.¹⁰ Only ten percent of all African-American female student-

6. See generally *Race and Gender Demographics Search*, NCAA.ORG, <http://web1.ncaa.org/rgd/Search/exec/saSearch> (search "2010–2011" for "Select an Academic Year" and search "Division I" for "Select a Division"; then follow "View Report" hyperlink) [hereinafter *Race and Gender Demographics Search Division I*].

7. See generally ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE (Gloria T. Hull et al. eds., 1982).

8. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139 (1989).

9. *Id.*

10. *Race and Gender Demographics Search Division I*, *supra* note 6. Between 2010–2011, the number of African-American women in each of these Division I sports, were: water polo (5); crew (157); lacrosse (53); soccer (451); and volleyball (562). *Id.* This makes a total of only 1,228—or a mere 10% of all African-American female Division I athletes, and only 1.6% of all female Division I athletes in the NCAA. See *id.* For all NCAA Divisions (I, II, and III), between 2010–2011, the number of African-American women in each of these Division I sports, were: water polo (9); crew (196); lacrosse (181); soccer (849); and volleyball (1,443). *Race and Gender Demographics Search*, NCAA.ORG, <http://web1.ncaa.org/rgd/Search/exec/saSearch> (search "2010–2011" for "Select an Academic Year" and search "All Divisions" for "Select a Division"; then follow "View Report"

athletes who participate in collegiate athletics at the NCAA Division I level participate in emerging sports.¹¹ Seventy-five percent of all African-American female collegiate student-athletes are participating in the two sports, which they have always traditionally had access to: basketball and track and field.¹² Overall, the statistics for Asian and Hispanic girls, girls from economically disadvantaged communities, rural communities, and urban communities demonstrate that, for them, Title IX's benefits are only a dream.¹³

In order to achieve gender equity for minority female students and female students from urban, rural, and economically disadvantaged communities at the collegiate level, "gender equity" must be achieved in middle and high school athletic programs in minority, urban rural, and economically disadvantaged communities.¹⁴ Participation opportunities in NCAA designated emerging sports must realistically be available to middle school and high schools girls in urban, rural, minority, and economically disadvantaged communities. Unfortunately for girls from these communities, participation opportunities are only available in traditional women's sports: basketball and track and field.¹⁵

Unless middle school and high school girls in urban, rural, and minority communities are given the opportunities to participate in the emerging women's sports, gender equity is being only facially achieved because Title IX requirements are implemented without specific regard to detrimental impacts on the aforementioned subgroups.¹⁶

This Article will consider the intersection of race, gender, economic status, and community characteristics with sports participation for girls in grades K–12 and will argue that there are two categories of intentional discrimination that are both actionable under Title IX. The first is direct discrimination by a perpetrator of the discrimination—the person that directly discriminates against victims.¹⁷ The second intentional discrimination category is indifferent discrimination by a third-party who knows or learns of the direct discrimination,

hyperlink) [hereinafter *Race and Gender Demographics Search All Divisions*]. This makes a total of only 2,678—or a mere 12.3% of all African-American female athletes, and only 1.4% of all female athletes across all three NCAA divisions. *See id.*

11. *Race and Gender Demographics Search Division I, supra* note 6.

12. *Id.*

13. *See generally id.*

14. *See Brake & Williams, supra* note 5, at 201 ("For purposes of increasing young women's access to athletics, a focus on sports opportunities in college is too late, particularly in the increasingly competitive environment for women's intercollegiate sports where there are very few opportunities for female college athletes to 'walk on' to sports.").

15. *See generally Race and Gender Demographics Search Division I, supra* note 6.

16. *See id.* (revealing that African-American female athletes in these sports make up only 10% of all African-American female athletes, and only 1.6% of all female athletes in Division I of the NCAA).

17. *See discussion infra* Parts IV(A)(1)–(3).

has the authority to take corrective action, but fails to take such action.¹⁸

The first category of discriminatory conduct is actionable as traditional intentional discrimination where liability is imposed on the perpetrator because the perpetrator's conduct is motivated by a discriminatory purpose.¹⁹ The second category is more nuanced. The discriminatory actor in this case is not the direct actor. In fact, the violator may have no motive to discriminate at all, or the discrimination experienced by the victim may be unintentional. The violator in this case learns of the discriminatory effect and turns a blind eye to the injury. More accurately, the violator is indifferent to the discriminatory effect of its policies or programs.²⁰ It is my contention that this second form of intentional discrimination, "deliberate indifference," is actionable intentional discrimination under Title IX.

A school district may be liable for this second form of intentional discrimination where, for example, its allocation of athletic resources provides little or no athletic participation opportunities for minority economically advantaged female students regardless of how well they have met the interests of other female subgroups.²¹ Such a school district may not be motivated by discriminatory animus, but what happens when its administrators learn that their actions have worked an unintended discriminatory effect on distinctly identifiable subgroups of female students protected under Title IX? However, rather than ameliorating the known discriminatory effects of its resource allocation decision making on protected subgroups under Title IX, school districts simply ignore the discriminatory effect of their decisions.

To be certain, the school district's original "remedial" allocation decision making will not, standing alone, breach the Supreme Court's traditional intentional discrimination standard. However, the intentional act *that will result* in liability is the deliberate indifference to the effects of that decision-making on protected subgroups. The doctrine holds that it is the decision not to ameliorate the unintended consequences of its original decision to allocate resources that is the wrongful act.²²

Part II of the Article will analyze intersectionality theory as the theoretical framework for examining gender equity, minority gender equity, and gender inequity occurring under Title IX for females from urban, rural, and economically disadvantaged communities. Part III of the Article will analyze sport participation statistics for female students in K-12 and will provide

18. See discussion *infra* Part IV(A)(4).

19. See *infra* Part IV(A)(4).

20. See discussion *infra* Part IV(A)(5).

21. See discussion *infra* Part IV(A)(5).

22. See discussion *infra* Part IV(A)(5).

statistical support for notice to interscholastic educators, athletic administrators, and school district authorities of gender inequity suffered by female students from minority, urban, rural, and economically disadvantaged communities. Although the gender inequities may not have been caused by actionable intentional discrimination according to the Supreme Court's traditional intentional discrimination doctrine under Title IX, actions or inaction by these institutions may subject them to liability for their deliberate indifference to the plight of female students affected by institutional policy decisions.

In Part IV, I will articulate the legal basis for establishing a claim for deliberate indifference intentional discrimination under Title IX. Part IV will first trace the development of the Supreme Court's intentional discrimination doctrine under the Equal Protection Clause of the U.S. Constitution, Title VI, and Title IX²³ and will argue that the actions or policies of interscholastic institutions reflect a second form of intentional discrimination because of these institutions' deliberate indifference to the impact of their actions or policies on minority girls and girls from urban, rural, and economically disadvantaged communities.

Part V will conclude that interscholastic educational institutions may be held liable for their failure to achieve gender equity under Title IX for girls from minority, urban, and rural communities, and girls from economically disadvantaged communities, where educational institutions knew of gender inequity within these subgroups of females and failed to take adequate measures to improve participation opportunities for girls from those communities.

II. INTERSECTIONALITY THEORY PROVIDES A THEORETICAL FRAMEWORK FOR ACHIEVING GENDER EQUITY FOR GIRLS FROM MINORITY, URBAN, AND DISADVANTAGED COMMUNITIES

Intersectionality theory represents a strategy for hastening legal recognition that identity status has legal consequences and that the forms of discrimination one is likely to face depend on one's identity status within a given social group.²⁴ Intersectionality theory rejects the assumption that all women—of varying ages, ethnicities, backgrounds, sexual orientation, and political and geographic locations—have identical experiences.²⁵

According to intersectionality theory, before a court can determine whether a plaintiff was the victim of actionable discrimination, it should first consider

23. See discussion *infra* Parts IV(A)(1)–(3).

24. Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 702 (2001). (“[D]ifferent status identity holders within any given social group are differently situated with respect to how much, and the form of, discrimination they are likely to face.”).

25. *Id.*

the identity status the plaintiff occupies.²⁶ Paying attention to the plaintiff's specific identity status allows the court to distinguish between the typical conceptualization of racial discrimination as an inter-group phenomenon, where discrimination is based on a whole racial or gender group,²⁷ and intra-group discrimination, where the discrimination is based on one's different identity status within a particular racial or gender group.²⁸

In her seminal article on intersectionality, Crenshaw's analysis focused on three cases²⁹ to illustrate "a common political and theoretical approach to discrimination which operates to marginalize Black women."³⁰ Her critique went beyond the courts, arguing that feminists and civil rights thinkers committed the same wrong by denying both the unique compoundedness of Black women's conditions and Black women's experiences—as both women and as Blacks (which often times means Black men)—place them at the intersection of the classes of women and Blacks.³¹ The compoundedness of Black women's condition allows for Black women, at times, to be absorbed into the collective experience of women or the collective experience of Blacks.³² At other times, Black women are considered so different from either group that their interests are marginalized by both groups.³³ According to Professor Crenshaw, this failure is due less to the "absence of political will to include Black women," and more to "an uncritical and disturbing acceptance of dominant ways of thinking about discrimination."³⁴

26. *Id.* ("For example, if the plaintiff bringing a discrimination suit is a heterosexual Asian American female attorney, courts should adjudicate her discrimination claim with that status identity in mind. More specifically, the fact that the employer in question treated Asian American men (or white or other women) well should not be taken as dispositive evidence that the employer did not either exhibit animus towards or harbor negative impressions of Asian American women.").

27. *Id.* at 703 ("Typically, courts conceptualize racial discrimination as an inter-group distinction, a distinction, for example, between whites and Asian Americans. Under this conceptualization, an Asian American plaintiff, will typically be required to demonstrate that she was treated differently (disparately) from a similarly situated non-Asian American (usually a white) employee.").

28. *Id.* ("[I]t is possible that [a] firm prefers Asian American men to Asian American women, discriminating against the latter but not the former. Framing the discrimination question solely in terms of the plaintiff's *Asian American* identity ignores the fact that the plaintiff's discrimination could be a function of [a] more specific status identity, her identity as an *Asian American female*.").

29. See Crenshaw, *supra* note 8, at 141–150 (*Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475 (9th Cir. 1983); *Payne v. Travenol Labs, Inc.*, 673 F.2d 798 (5th Cir. 1982); *DeGraffenreid v. General Motors Assembly Div.*, 413 F. Supp. 142 (E.D. Mo. 1976)).

30. *Id.* at 150.

31. *Id.* at 139 n.3, 150.

32. *Id.* at 150.

33. *Id.*

34. *Id.* In support of her argument Professor Crenshaw directs us to:

Consider first the definition of discrimination that seems to be operative in antidiscrimination law:

A similar critique may be hurled at gender equity analysis reflected in the law under Title IX and in the practices and policies within interscholastic institutions. First, by denying the compoundedness of minority student-athletes' situation and the situation of females from urban, disadvantaged, and rural communities, these female student-athletes are "absorbed into the collective experiences of either"³⁵ white female student-athletes or minority male student-athletes. In that case, minority female student-athletes are counted with white females students for purposes of determining whether proportionality exists under a Title IX analysis.³⁶ Yet, their differences from white female and minority male students place minority female student-athletes and female student-athletes from urban, disadvantaged, and rural communities at the margin because their differences are not adequately considered when devising Title IX solutions. Minority female student-athletes and female student-athletes from urban, disadvantaged, and rural communities are at the margin because emerging women's sports offer no real participation opportunities for student-athletes with these identity characteristics. The so-called emerging women's sports and former NCAA designated emerging women's sports can pragmatically be described as emerging sports for white female student-athletes or for female student-athletes from economically advantaged communities who may, for all practical purposes, reflect the same population of female student-athletes.³⁷

III. MINORITY GENDER EQUITY AND GENDER EQUITY FOR FEMALE STUDENT-ATHLETES FROM DISADVANTAGED COMMUNITIES CANNOT BE ACHIEVED AT THE COLLEGIATE LEVEL WITHOUT REFORMING POLICY DECISION MAKING IN INTERSCHOLASTIC ATHLETICS

Although Title IX has resulted in tremendous gains for women across a broad opportunity spectrum, ranging from employment, to educational and media exposure, to athletic participation opportunities, minority women and

Discrimination which is wrongful proceeds from the identification of a specific class or category; either a discriminator intentionally identifies this category, or a process is adopted which somehow disadvantages all members of this category. According to the dominant view, a discriminator treats all people within a race or sex category similarly. Any significant experiential or statistical variation within this group suggests either that the group is not being discriminated against or that conflicting interests exist which defeat any attempts to bring a common claim. Consequently, one generally cannot combine these categories. Race and sex, moreover, become significant only when they operate to explicitly *disadvantage* the victims; because the *privileging* of whiteness or maleness is implicit, it is generally not perceived at all.

Id. at 150–151 (citations omitted).

35. *Id.* at 150.

36. See discussion *infra* Part IV(A)(5).

37. See discussion *infra* Part IV(A)(5).

girls from disadvantaged communities continue to lag behind in realizing the deliverance Title IX promised. Before enactment of Title IX, minority women student-athletes participated primarily in basketball and track and field.³⁸ Forty years after enactment of that monumental piece of legislation, minority women's athletic participation opportunities remain limited predominantly to basketball and track and field.³⁹ Unless a conscious effort is made to ensure minority female student-athletes and female students from disadvantaged communities are not left behind in the aftermath of Title IX, athletic participation opportunities for these subgroups of female student-athletes will stagnate at current, unacceptable levels.⁴⁰

Emerging women's sports and formerly designated NCAA emerging women's sports are the sports vehicles through which gender equity is being achieved at the collegiate level of sports. However, unless participation opportunities in emerging sports are provided to minority girls and girls from urban, rural, and economically disadvantaged communities in middle and high schools, true gender equity in intercollegiate athletics cannot be achieved. Both intercollegiate and interscholastic institutions have an affirmative obligation under Title IX to remedy known cases of gender discrimination. Conscious indifference to unique gender equity issues experienced by minority girls and girls from urban, economically disadvantaged, and rural communities constitutes discrimination under Title IX. Further, policy choices made by interscholastic administrators which reduce, eliminate, or fail to offer, or that deprive minority females from identified communities of athletic participation opportunities, constitute intentional discrimination under Title IX.⁴¹

Sport participation opportunities statistics for both majority and minority girls in K-12 and girls from urban, rural, and economically disadvantaged communities demonstrate that, although gender equity under Title IX has provided clear sports participation opportunity gains for Caucasian female student-athletes, minority female student-athletes and other female student-athletes still lag far behind participation opportunities experienced by majority female students.⁴² Because female student-athletes from minority, urban, rural, and economically disadvantaged communities have limited access to emerging

38. Alfred Dennis Mathewson, *Black Women, Gender Equity and the Function at the Junction*, 6 MARQ. SPORTS L.J. 239, 257 (1996) ("Black women were locked into a system that did not offer them very many opportunities as women and when it did it had very few resources for them. Like Black men, they encounter stereotyping and stacking within the sports world which steers them into basketball and track." (citation omitted)).

39. *Id.*; *Race and Gender Demographics Search Division I*, *supra* note 6.

40. See discussion *infra* Part IV(A)(5).

41. See discussion *infra* Part IV(A)(5).

42. See discussion *infra* Part III(A).

sports, participation opportunities are limited to traditional women's sports and are practically nonexistent for these subgroups through emerging women's sports.

*A. Race, Ethnicity, Community Location, and Family Financial
Characteristics Adversely Impact Sports Participation Rates of Girls in
Grades 3–12*

Children's athletic ability and interest in physical activity takes shape and blossoms or dwindles in a social matrix that includes schools, churches, community organizations, after-school programs, government, and economic forces.⁴³ The idea that children's athletic ability and interest in physical activity takes shape in a social matrix seems reminiscent of the popular saying "it takes a village to raise a child."⁴⁴ Sport molds character, reveals flaws and, for those who are willing to admit what sports often reveals about one's character, sports can contribute to transforming girls into women and boys into men.⁴⁵ Any attempt, therefore, to achieve gender equity under Title IX without seeking to understand what factors influence sports participation opportunities for minority and majority girls, affirms a *status quo* where minority girls and other girls continue to lag behind in having meaningful access to the sports participation opportunities promised by Title IX.

Addressing the dilemma faced by adolescent and preadolescent female students from minority, urban, rural, and economically disadvantaged communities will require transformational changes in policy decision making engaged in by urban educators, education administrators, and interscholastic athletic administrators. The sports participation disparity between athletic participation rates of K–12 minority girls and girls from urban and suburban communities confirms why, unless there is a change in thinking, "authentic gender equity" under Title IX cannot be achieved.⁴⁶ As a whole, more children

43. See generally DON SABO & PHIL VELIZ, WOMEN'S SPORTS FOUND., GO OUT AND PLAY: YOUTH SPORTS IN AMERICA (2008), available at <http://www.womenssportsfoundation.org/en/home/research/articles-and-reports/mental-and-physical-health/go-out-and-play> [hereinafter GO OUT AND PLAY].

44. See, e.g., HILLARY RODHAM CLINTON, IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH US 12 (1996) (describing the old African proverb "it takes a village" and the reasoning for incorporating it into the title of her book).

45. The transformation that sports can facilitate in girls and boys may be accelerated or hindered depending on whether adults, coaches, and leaders of youth are themselves sufficiently mature to accept what their own successes or failures in sports should have taught them and the character development that should have resulted from such recognition; for one cannot teach that which one has not been open to learn or impart insight if one has not been willing to accept what the light has revealed about one's successes and failures.

46. See discussion *infra* Part III.

are involved in organized sports and participate on sports teams than ever in our history.⁴⁷ A national school-based survey of students and parents, conducted on behalf of the Women's Sports Foundation, revealed that race, gender, ethnicity, the community in which girls live and attend school, economic disparities, and family characteristics impact sports and sports participation rates for children from the 3rd through 12th grades.⁴⁸ Results of the study, summarized in the Women's Sports Foundation report, *Go Out and Play*,⁴⁹ demonstrate that far too many of our minority girls, girls from urban and rural communities, and girls from economically disadvantaged communities are missing out on the opportunities that sports can provide.

Go Out and Play was the result of a study that was conducted by Harris Interactive, Inc., on behalf of the Women's Sports Foundation and the Center for Research on Physical Activity, Sport & Health at D'Youville College, which collaborated in developing the study.⁵⁰ The study measured the participation rates of girls and boys in both exercise and organized team sports nationally.⁵¹ The study was intersectional in that its central focus was on how the intersection of race, gender, family income, and urbanicity⁵² are related to children's interest and participation in physical activity and athletics.⁵³

During the study, two nationwide surveys were conducted and both helped to form the basis upon which the conclusions of the report were drawn. The first of the two surveys was a school-based survey conducted on youth randomly selected from a pool of some 100,000 public and private schools in the United States.⁵⁴ The national sample size consisted of 2,185 3rd-through-12th-grade

47. GO OUT AND PLAY, *supra* note 43, at 8 (demonstrating that of the “estimated 7,342,910 children [who] participated in high schools sports during the 2006–2007 school year,” little is known about sports participation before high school).

48. *Id.* at 2–3.

49. *Id.* at 2–5.

50. *Id.* at ii.

51. *Id.* at 2.

52. Urbanicity was used as a variable in the study and defined as,

The urbanicity code (Q410) in the parent survey data file reflects the urbanicity of the plurality of households in that exchange (the first three digits of a seven-digit phone number, a level of greater detail than the area code alone). It is not based on a respondents' [sic] answers. Metropolitan Statistical Areas, as documented by the Office of Management and Budget, determine urbanicity. Locations in a central city of a MSA are coded as Urban. Location not in a central city of a MSA are coded as suburban. Locations not in an MSA are coded as rural. Urbanicity coding is iterative process. Census tracts are first coded by urbanicity based on the plurality of the population in the tract. Then tract-level codes are converted to exchange-level codes again based on the disposition of the plurality of the population of households.

Id. at 174, 178.

53. *Id.* at 2.

54. *Id.*

girls and boys.⁵⁵ Phone interviews were also conducted with 863 randomly selected parents of 3rd-through-12th-grade children.⁵⁶ Although all parents were asked their thoughts and feelings about their children's involvement and interest in physical activity and sport to deepen researchers understanding of the needs and experiences girls, boys, and the families of underserved populations, African-American and Hispanic parents were over-sampled.⁵⁷

1. Race Effects Participation Rates: Minority Girls Participate in Sports and Sporting Activities at Significantly Lower Rates than Majority Girls Participate

The idea that a person's specific identity status has social, legal, minority gender equity, and gender equity consequences is evident when one considers how race and gender intersect to limit sports opportunities for Asian, African-American, and Hispanic girls. Figure 1.1 below demonstrates the results of the study when race, gender, and ethnicity were examined. Caucasian girls represented 60% of the students who participated in organized sports, whereas the percentage of minority girls participated in sports was far lower.⁵⁸ Only 15% of the African-American girls who were surveyed participated in organized sports, while Hispanic girls represented a slightly higher percentage at 17%. The participation rate for Asian girls, however, was significantly lower than any other minority groups. Only 8% of Asian girls surveyed indicated they participated in organized sports.⁵⁹ The participation rate for Asian boys almost doubled that of Asian girls at 13%.⁶⁰ Asian girls represent a minority group for which Title IX efforts have not closed the minority gender equity gap.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 15.

59. *Id.* It is not clear whether there are cultural issues in play with respect to Asians.

60. Compare *infra* Figure 1.1 with *infra* Figure 1.2.

Figure 1.1: Distribution of All U.S. Girls Who Reported Participating in One or More Sports



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Figure 1.2: Distribution of All U.S. Boys Who Reported Participating in One or More Sports



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When female participation rates by race and the level of sports involvement—measured by whether girls were not involved, moderately involved,⁶³ or highly involved⁶⁴—is reviewed, a troubling trend is observed for Asian girls. The percent of Asian girls that did not participate in sports was higher than any other racial group at 47%. In addition, the percent of Asian girls who were moderately or highly involved in sports was lower than any other racial group. Of the girls surveyed, 44% of Asian girls indicated they were moderately involved in sports. On the other hand, 54% of Caucasian girls surveyed indicated they were moderately involved in sports, as compared to 50% of Hispanic girls and 47% of African-American girls.

The survey results for girls highly involved in sports, displayed in Figure 1.3 below, showed a preceptitious decline for all racial groups. The participation rate for Asian girls ranked the lowest of all other racial groups at 9%. The

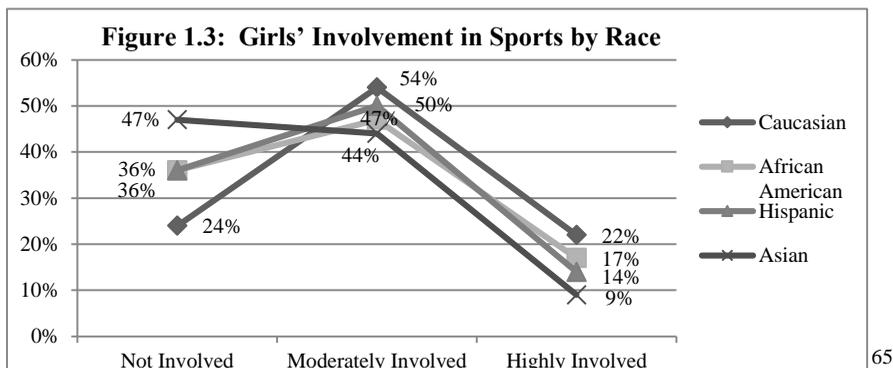
61. See GO OUT AND PLAY, *supra* note 43, at 15.

62. *Id.*

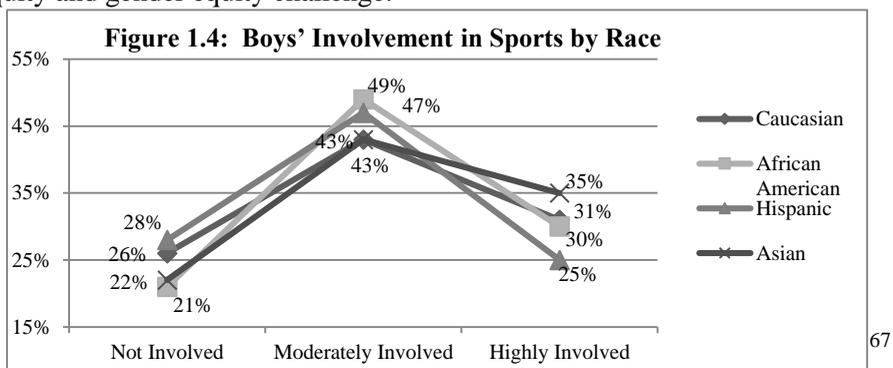
63. Students moderately involved in sports are defined as those who participated in one or two sports over the last twelve months. *Id.* at 11.

64. Students highly involved in sports are defined as those who participated in three or more sports over the last twelve months. *Id.*

participation rate for highly involved Caucasian girls was higher than all racial groups at 22%, followed by African-American girls at 17%, and Hispanic girls at 14%.



The phenomenon witnessed with respect to the participation rate for Asian girls was not repeated for Asian boys. Figure 1.4 below demonstrates that Asian boys had virtually the lowest nonparticipation rate at 22%, nearly identical to that of African-American boys at 21%. Unlike Asian girls, who represented the lowest participation rate of all racial groups for girls moderately involved in sports, Asian boys were tied at 43% with Caucasian boys, while African-American and Hispanic boys showed the two highest participation rates at 49% and 47%, respectively. Asian boys, however, represented the highest percent of boys who were highly involved in sports at 35%, higher than all other racial groups. Caucasian boys were highly involved in sports at a rate of 31%, followed by African-American boys at 30%, and Hispanic boys at 25%. Literally, the participation rate of Asian girls signals a troubling minority gender equity and gender equity challenge.⁶⁶



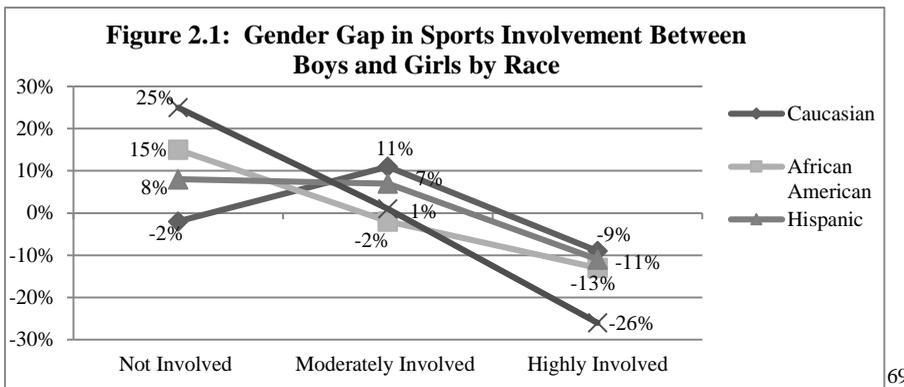
65. *Id.* at 16.

66. Compare *supra* Figure 1.3 with *supra* Figure 1.4.

67. GO OUT AND PLAY, *supra* note 43, at 16.

2. The Gender Equity Participation Gap that Persists Between Minority Girls and Boys Demands a Title IX Remedy

When the gender gap between boys and girls is compared across racial groups, the participation predicament of Asian girls and other minority girls is evident. Title IX imposes an affirmative obligation on interscholastic school districts, educators, and athletic administrators to address the significantly larger gender gap—which persists between minority girls and boys when compared to Caucasian girls and boys—where these institutions learn of the disparity.⁶⁸ Figure 2.1 below examines the gender gap by race for boys and girls not involved, moderately involved, and highly involved in participating in sports. When the participation gap between boys and girls is examined for students who reported they were not involved, moderately involved, or highly involved in sports, unmistakable trends are observable.



First, there was a significant persistent gender gap, more than any other racial group, in the nonparticipation rate of Asian girls and boys. The statistics demonstrated that Asian girls were 25% more likely than Asian boys to not participate in sporting activity. This percentage is higher than in any other racial group. African-American girls were 15% more likely than African boys to not participate in sports and sporting activity. Caucasian girls, however, are doing better with respect to the gap between nonparticipation rates than for boys and girls from other racial groups; Caucasian girls were 2% *less* likely than Caucasian boys to not participate in sports. Looking at it from the perspective of Caucasian boys, Caucasian boys were 2% more likely than Caucasian girls

68. See discussion *infra* Part IV(A)(5).

69. See generally GO OUT AND PLAY, *supra* note 43, at 16. The statistics from Figure 1.3, *supra*, and Figure 1.4, *supra*, were used to create this Figure 2.1, which shows the participation gender gap between Caucasian boys and girls and the participation gender gap between African-American, Hispanic, and Asian boys and girls.

to not participate in sports. The lowest nonparticipation rate for minority groups was that of Hispanic girls. Hispanic girls were only 8% more likely than Hispanic boys to not participate in sports.

The gender gap statistics for girls moderately involved in sports revealed that the gender gap between minority girls and boys widens when compared to the gender gap between Caucasian boys and girls. Caucasian girls were 11% more likely than Caucasian boys to be moderately involved in sport. The gender participation gap for Hispanics and Asians decreased, meaning that these girls were more likely to be moderately involved in sports than that of their male counterparts. Specifically, Hispanic girls were 7% more likely and Asian girls were 1% more likely than Hispanic and Asian boys to be moderately involved in sports. Except for African-American girls, the gender gap between girls and boys for all racial groups contracted and girls were *more* likely than boys in their racial group to be moderately involved in sports. The gender participation gap for African-American girls was the inverse of the other racial groups. African-American girls were 2% *less* likely than African-American boys to be moderately involved in sports.

Finally, when the statistics for girls and boys who were highly involved in sports were reviewed, the gender gap for all racial groups increased. Asian girls were 26% *less* likely than Asian boys, African-American girls were 13% *less* likely than African-American boys, Hispanic girls were 11% *less* likely than Hispanic boys, and Caucasian girls were 9% *less* likely than Caucasian boys to be highly involved in sports. Clearly, these figures demonstrate that although the participation gap increased for all racial groups, minority girls—particularly Asian girls—were more affected. The minority gender equity needs seem to be far greater for Asian girls. Asian girls were 25% *more* likely than Asian boys to not be involved in sports and 26% *less* likely than Asian boys to be highly involved in sports.⁷⁰

3. Family Income has a Significant Impact on Nonparticipating Gender Gap Between Girls and Boys in Grades 3–12

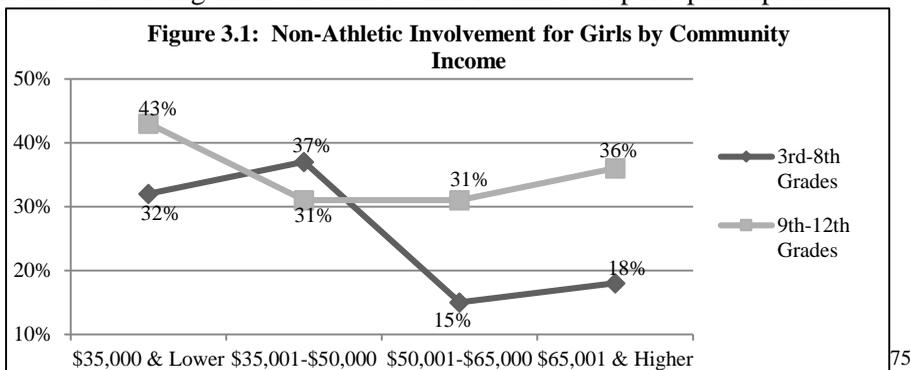
The compoundedness of minority girls' experiences—when they specifically identify as African-American and Hispanic girls and they experience family income disparities—as the research corroborated, work together to increase the sports nonparticipation rates for minority girls. As a result, a single axis approach to addressing gender equity under Title IX marginalizes African-American and Hispanic girls, who are disproportionately

70. Compare *supra* Figure 1.3 with *supra* Figure 1.4.

poor or live in urban communities.⁷¹

i. *The Correlation Between Family Income and Nonparticipation Rate for Girls in 3rd–8th Grade⁷² Demonstrates that Family Income Impacts Gender Equity Under Title IX*

We have learned from the study that not only do race and community characteristics—urban, rural, or suburban—impact sports participation rates across grades, but so does family income.⁷³ The survey results for girls not participating in sports during the 3rd-through-8th grades,⁷⁴ displayed in Figure 3.1 below, revealed that as family income increased, the nonparticipation rate for girls decreased from 32% for families with yearly income of \$35,000 and lower, to its lowest levels of 15% for families whose median income is between \$50,001 and \$65,000. A decrease in nonparticipation is a good sign, because it signals that, as family income increases, fewer girls in the 3rd through 8th grades were sitting on the sidelines when it comes to sports participation.



There were, however, slight increases in the nonparticipation rate for 3rd through 8th grade girls from two groups as family income increased. The first

71. Steven Perlberg, *American Median Incomes by Race Since 1967*, BUS. INSIDER (Sept. 17, 2013), <http://www.businessinsider.com/heres-median-income-in-the-us-by-race-2013-9>. According to the article, Asian households recorded the highest median household income, according to the Census Bureau, in 2012 of \$68,636. *Id.* The median family income was \$57,009 for non-Hispanic White households, \$33,321 for African-American (Black) households, \$39,005 for Hispanic households. *Id.*

72. The survey compared nonparticipation and participation rates to family income for two grading groups: (1) the 3rd through 8th grades; and (2) the 9th through 12th grades. GO OUT AND PLAY, *supra* note 43, at 17.

73. *Id.* at 16 (“The ‘community income level’ was measured by determining the median family income within the U.S. census tract that each of the participating schools in the student survey was located.”).

74. The survey compared nonparticipation and participation rates to family income for two grading groups: (1) the 3rd through 8th grades, and (2) the 9th through 12th grades. See *infra* Figure 3.1.

75. GO OUT AND PLAY, *supra* note 43, at 17.

of these increases occurred in families earning between \$35,001 and \$50,000. In that income group, the nonparticipation rate increased to 37%, the highest nonparticipation rate of all income levels. The reason for this increase warrants further investigation.⁷⁶ After the nonparticipation rate had its most sizable drop from 37% for families earning \$35,001 to \$50,000 to 15% for families earning \$50,001 to \$65,000, nonparticipation increased slightly to 18% for families earning \$65,001 and higher. This increase was not nearly as significant as was noted with families earning between \$35,001 and \$50,000 annually.

Unlike the experience of girls, the nonparticipation rate for boys in the 3rd-through-8th grades, displayed in Figure 3.2 below, showed a steady decline as family income increased. The nonparticipation rate for boys in the 3rd-through-8th grades is 26% for boys from families with a median income of \$35,000 or lower, which is one percentage point lower than its highest level. The nonparticipation rate increased to its highest level for 3rd-through-8th grade boys to 27% for families with a median income of \$35,001 to \$50,000, and then dropped to 17% at the \$50,001 to \$65,000 median income range. The nonparticipation rate dropped again to 14% at the highest median income level.

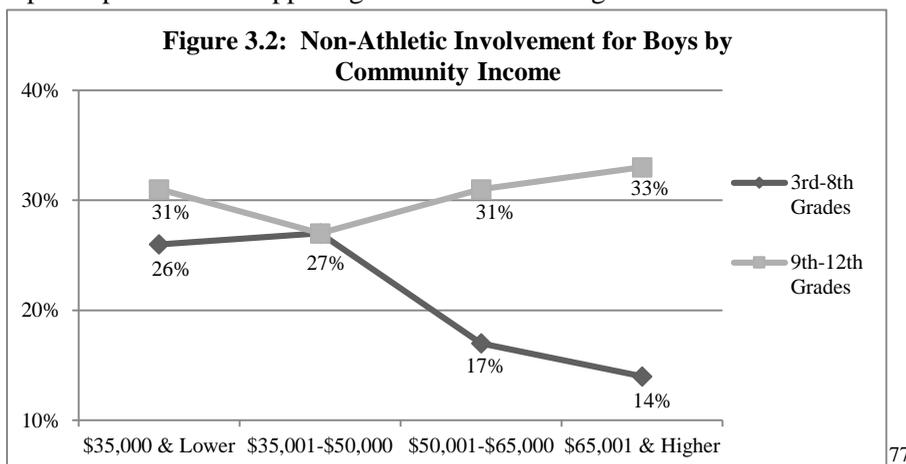
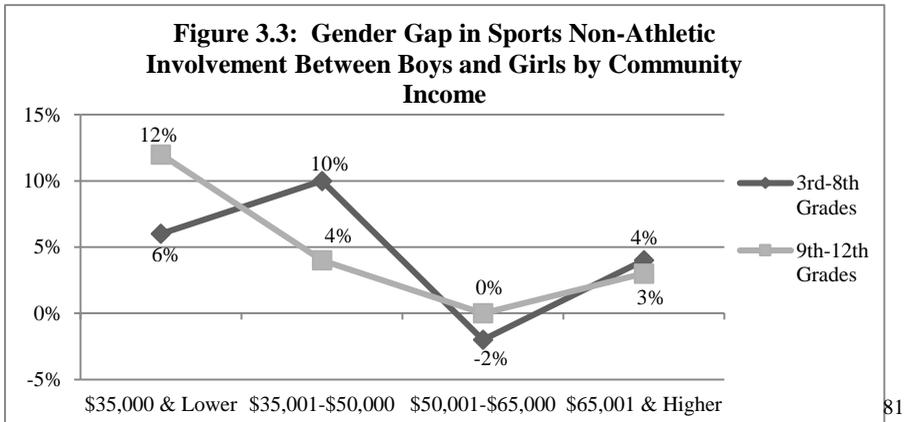


Figure 3.3 below demonstrates that as family income increased, girls in 3rd-through-8th grades with families having median incomes of \$50,001 to \$65,000 were no longer sitting on the sidelines at a greater rate than boys. The gender gap between girls and boys who are not participating in sports from families with income of \$35,000 or lower is 6%—indicating that 6% *more* girls than boys from families with incomes of \$35,000 or lower were not participating in sports. As family income increased into the \$35,001 to \$50,000 range, the

76. This is subject matter is left for a subsequent article.

77. *Id.*

nonparticipation gender gap also increased to 10%. At these income ranges, 10% *more* girls than boys were not participating in sports in the 3rd-through-8th grades.⁷⁸ However, for girls from families with median incomes of between \$50,001 and \$65,000, the nonparticipation rate began to decrease significantly relative to that of boys in 3rd-through-8th grades, so that 2% *less* girls than boys were sitting on the sidelines.⁷⁹ Although the nonparticipation rate dropped again for boys from families with a median of \$65,001 and higher, the nonparticipation rate for girls increased so that 4% *more* girls than boys are not participating in sports.⁸⁰



Clearly, since African-American and Hispanics are minorities groups who are overrepresented in the two lower median income groups—\$35,000 and lower and between \$35,001 and \$50,000⁸²—the high nonparticipation rate of 3rd-through-8th-grade girls in these income groups raises minority gender equity as well as “economic gender equity” concerns under Title IX. The nonparticipation rates for 3rd-through-8th-grade girls from families in these two

78. The nonparticipation rate for boys increased slightly from 26% to 27% for boys from families with incomes in the \$35,001 to \$50,000 range. However, the nonparticipation rate of girls increased from 32% to 37%, demonstrating a 10% increase in the nonparticipation rate of girls.

79. According to Figure 3.3, *infra*, 3rd–8th grade girls are 2% less likely than boys to not participate in sporting activities. Figure 3.1, *supra*, and Figure 3.2, *infra*, indicate that the nonparticipating rate for boys dropped to 17%, while the girls’ nonparticipation rate dropped to 15%, for families earning a median income between \$50,001 and \$65,000.

80. The data points in Figures 3.2, *infra*, demonstrate that the nonparticipation of boys dropped to 14% for family median income of \$65,001 and higher. However, Figure 3.1, *supra*, showed that the nonparticipation of girls increased to 18% for girls from families with median income of \$65,001 and higher. This nonparticipation rate indicates 4% more 3rd-through-8th-grade girls than boys are not participating in sports, even at this income range.

81. See GO OUT AND PLAY, *supra* note 43, at 17.

82. *Id.*; see also Perlberg, *supra* note 71.

income ranges also correspond to the high nonparticipation rate for girls that live in urban communities, as well as African-American and Hispanic girls. Family income and community characteristics may not adequately explain the nonparticipation rate of Asian girls, however. The study revealed that race, income disparity, and community characteristics work together to increase the sports nonparticipation rates for minority girls.⁸³ As a result, a single axis approach to addressing gender equity under Title IX marginalizes minority girls, who are disproportionately poor and live in urban communities, and also fails to remedy a growing minority gender equity problem in sports. The single axis approach also marginalized girls from urban, rural, and disadvantaged communities.⁸⁴

ii. During the 9th–12th Grades, as Family Income Increases, the Nonparticipation Rate for Girls Decreases

Survey results were not only very different for girls and boys in the 9th-through-12th grades, the results raise broader gender equity and minority gender equity concerns. The percentage of both girls and boys who are not participating in sports activity during the 9th-through-12th grades are considerably higher than during earlier grades, however.⁸⁵ The nonparticipation rate for 9th-through-12th-grade girls and boys were high across all income groups. For example, the nonparticipation rate for girls from families with family income of \$35,000 and lower income is 43%.⁸⁶ While the nonparticipation rate for boys is lower than that of girls, 31%, that figure is significantly higher than for 3rd-through-8th-grade boys.⁸⁷ At this median family income level, 12% *more* girls than boys surveyed indicate they did not participate in sports.

The nonparticipation rate for girls and boys dropped and remained relatively close to each other between families with median family incomes of \$35,001 to \$50,000.⁸⁸ The nonparticipation gender gap drops to 4%: only 4% *more* girls are not participating in sports during high school than boys. Although the nonparticipation rate of girls from families with a median income of \$50,001 to

83. *Id.* Since Asian household median incomes are the highest among minority groups, one would not expect the high nonparticipation gender gap of Asian girls and this is demonstrated in Figure 2.1, *supra. Id.*

84. *Id.*

85. Compare the nonparticipation rate statistics for girls in Figure 3.1, *supra* with Figure 3.2, *supra*.

86. The nonparticipation rate for 3rd-through-8th-grade girls from the same family income bracket is 32%.

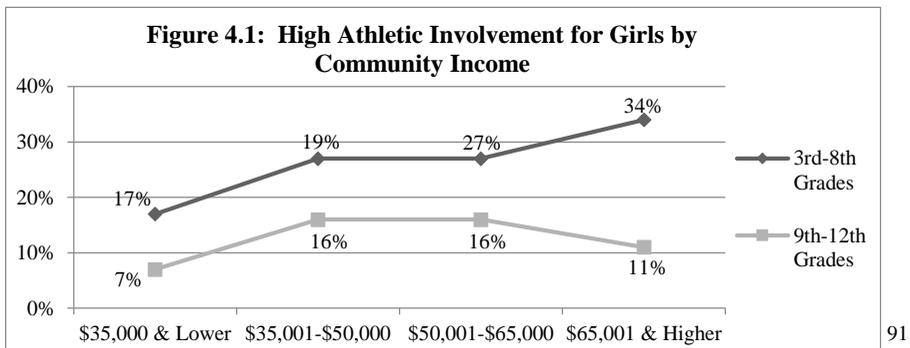
87. The nonparticipation rate for 3rd-through-8th-grade boys from the same family income bracket is 26%.

88. The nonparticipation rate for girls at this median family income bracket was 31%, while the nonparticipation rate for boys was 27%. *See supra* Figure 3.1, Figure 3.2.

\$65,000 is unchanged, the nonparticipation rate for boys increased to 31%, resulting in a nonparticipation gap of zero. The nonparticipation rate for both girls and boys from families with a median income of \$65,001 and higher increased,⁸⁹ so that only 3% *more* girls than boys are not participating in sports activities. Why such a drastic change in the nonparticipation rate during 9th-through-12th grades as compared to the nonparticipation rate witnessed in 3rd-through-8th grades is unclear.⁹⁰

4. Participation Rates for Highly Involved 3rd-through-8th-Grade Girls and Boys and Family Income

Figure 4.1 confirms that as family income increases, there is a corresponding increase in the participation rate of 3rd-through-8th-grade girls who were highly involved in sports. The participation rate of 3rd-through-8th-grade girls increased from 17% for girls from families with family income of \$35,000 or lower to 19% for girls from families with family income of \$35,001 to \$50,000. On the other hand, the participation rate for boys highly involved in sports increased from 27% to 33%. The participation rate increased again for both genders to 27%, for girls from families with family income in the \$50,001 to \$65,000 range, and to 45% for boys highly involved in sports activities. At the highest family income bracket, \$65,001 and over, the participation rate for 3rd-through-8th-grade girls increased to 34%; however, the participation rate for boys in the same grades and family income level dropped slightly to 44%.



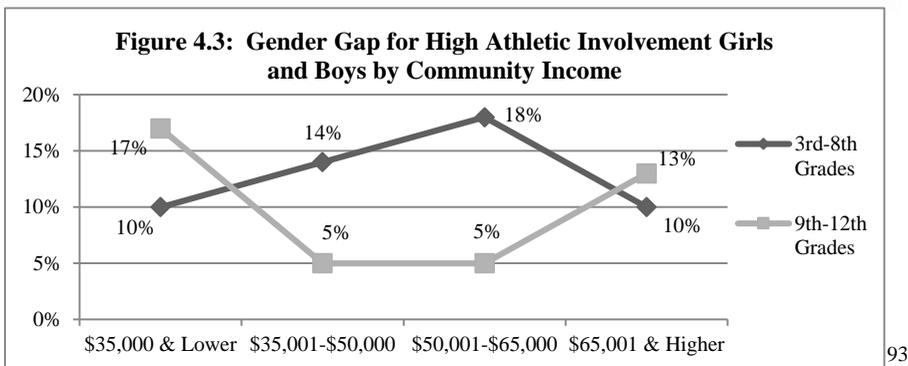
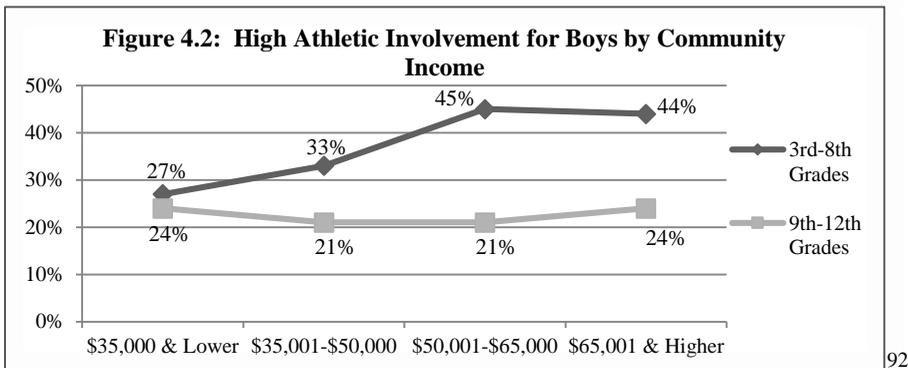
The gender gap between girls and boys at each family income level was even more pronounced. As Figure 4.3 demonstrates, there was a 10% gender participation gender gap between girls and boys from families with median

89. Compare *supra* Figure 3.1 (where the nonparticipation of girls is increase to 36%) with *supra* Figure 3.2 (where the nonparticipation rate for boys increase to 33%).

90. That question is left for a subsequent article.

91. See GO OUT AND PLAY, *supra* note 43, at 18.

family income of \$35,000 or lower: meaning that 10% *more* boys than girls were highly involved in sports in the 3rd through 8th grades at lower median family incomes. As family income increased to between \$35,001 and \$50,000, the gender participation gap also increased. According to the survey, as the median family income increased to between \$35,001 and \$50,000, 14% *more* boys than girls were highly involved in sports. As median family increased to between \$50,001 and \$65,000, the participation gender gap increased to 18%, indicating that 18% *more* boys than girls were highly involved in sports in that median family income range. Although the participation rate for boys in the 3rd-through-8th grades dropped by 1% for boys from families earning \$65,001 or higher, the participation gender gap was still at 10%; meaning that 10% *more* boys than girls were highly involved in sports in the 3rd-through-8th grades. According to the survey results, there are grave gender equity concerns for high school girls that have not been adequately addressed under Title IX.



92. *Id.*

93. *See id.*

5. Participation Rates for Highly Involved 9th-through-12th-Grade Girls and Boys and Family Income

The graph of the participation rates for 9th-through-12th-grade girls who were highly involved in sports by family income in Figure 4.1 was umbrella shaped. Whereas, the graph of the nonparticipation rates for girls in the 9th-through-12th grades in Figure 3.1 was shaped like an upside down umbrella, demonstrating an inverse relationship between the nonparticipation rates for girls in the 9th-through-12th grades and the participation rates of highly involved 9th-through-12th-grade girls from families with the same family income characteristics. As family median income increased for 9th-grade-through-12th-grade girls, the participation rate of girls highly involved in sports steadily increased, slightly more than doubling from 7% for girls from families with income of \$35,000 or lower to 16% for girls from families with income between \$35,001 and \$50,000. The participation rate remained the same at 16% for girls from families with income between \$50,001 and \$65,000. The participation rate of highly involved girls in the 9th-through-12th grades dropped back almost to that of the lowest income level at 11% hence the umbrella shaped graphic.

The upside down shaped umbrella graphic depicting the nonparticipation rate by family income tracked in Figure 3.1, demonstrates that the nonparticipation rate for 9th-through-12th-grade girls was highest at 43%, for girls from families with income of \$35,000 or lower. The nonparticipation rate dropped to 31% for girls from families with family income between \$35,001 and \$50,000 and remained the same for girls from families with family income between \$50,001 and \$65,000. Although the nonparticipation rate at the highest family income level (\$65,001 and higher) increased to 36%, it did not reach its highest rate. Instead the highest rate was seen for girls from families with the lowest family income at 43%.

Figure 4.1 and Figure 4.2 both confirm that significant changes in participation rates occur for both girls and boys during 9th through 12th grades. While the participation rate for girls highly involved in sports from families whose median income was \$35,000 or lower was only 7%, the participation rate increased and remained at 16% for girls from families with median incomes between \$35,001 to \$50,000 and \$50,001 to \$65,000. The participation rate dipped to 11% for girls from families earning \$65,001 or more. The participation rates for boys, however, were highest at both the lowest median income range, \$35,000 and lower, and highest when the median income was in the range of \$65,001 and higher. At both these income ranges, the participation rate for boys highly involved in sports was 24%, representing significant

participation gender gap between boys and girls at both family income ranges. As Figure 4.3 demonstrates, while at the lowest income range 17% *more* boys than girls were highly involved in sports, at the highest median income range 13% *more* boys than girls were highly involved in sports in the 9th through 12th grades. The participation gender gap remained the same at 5% for both the \$35,001 to \$50,000 and \$50,001 to \$65,000 median income categories—only 5% *more* boys than girls were highly involved in sports at this grade bucket. Even at the highest income brackets, more work still remains to be done to satisfy the directives of Title IX. Where interscholastic institutions, administrators, educators, and athletic programs are aware that the gender gap continues to persist for girls belonging to specific identity groups—including racial minority groups, and girls from urban, rural and economically disadvantaged communities—and fail to take steps to alleviate the discrimination faced by these identity groups, the institutions has acted deliberately indifferent to the discrimination faced by these identity groups. Deliberate indifference constitutes intentional discrimination under Title IX, and Title IX may be relied on to remedy this form of gender discrimination.⁹⁴

6. Variations in Minority Gender Gap in Athletic Participation Driven by Race and Community Income

The study revealed that family financial resources was one of several factors that effected both gender equity and also minority gender equity. Family financial resources,⁹⁵ race,⁹⁶ and community characteristics,⁹⁷ all of which separately effect gender equity, operate as additives⁹⁸ that profoundly influence gender equity. This section considers the relationship between race (children of color),⁹⁹ family income, and gender for children highly involved in sports. As shown in Figure 6.1 below, after studying race and family income, it became clear that the participation rate for Caucasian girls highly involved in sports progressively increased as family income increased. Caucasian girls from families with median family income of \$35,000 or lower that were highly involved in sports participated at a rate of 9%. The participation rate for these girls doubled to 18% for families earning between \$35,001 and \$50,000. There

94. See *infra* Part IV(A)(4).

95. See discussion *supra* Parts III(A)(3)–(5).

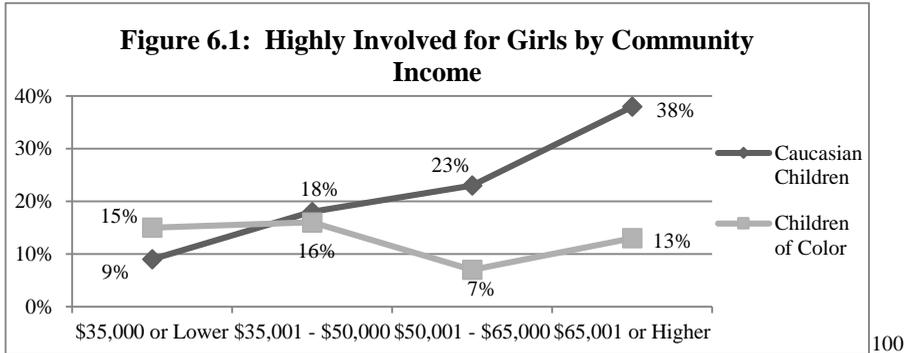
96. See discussion Part III(A)(6).

97. See discussion *infra* Parts III(A)(7)–(9).

98. See discussion Part III.

99. It is not clear why the study examined the participation rate of “children of color” and not the participation rate for the specific racial identity groups that were considered in the study: Caucasians, Hispanics, African-Americans, and Asians.

was a slight increase in the participation rate to 23% for Caucasian girls from families with median family incomes of between \$50,001 and \$65,000. However, the largest increase in participation rates occurred for Caucasian girls from families earning \$65,001 or higher—the participation rate improved to 38%.

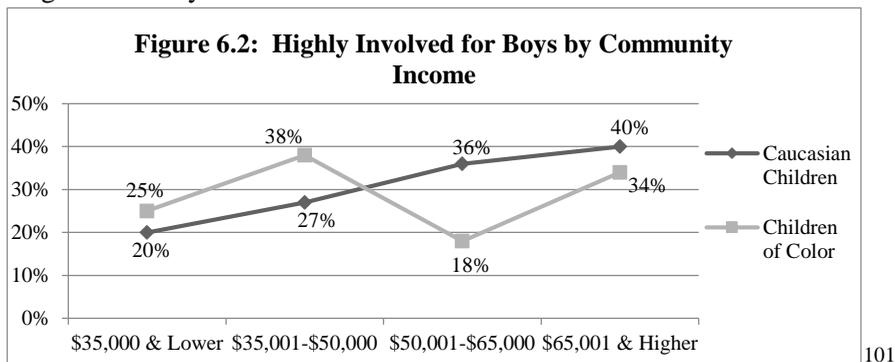


The experience of girls of color was significantly different from that of Caucasian girls. The participation rate of girls of color highly involved in sports, from families earning \$35,000 or lower, was significantly higher than that of Caucasian girls at 15%. Girls of color, with a median family income between \$35,001 and \$50,000 who were highly involved in sports, participate in sport at a rate of 16%, two percentage points *lower* than Caucasian girls. The participation rate of girls of color dropped to 7% for girls of color from families with a median family income of between \$50,001 and \$65,000, while the participation rate of Caucasian girls increased from 18% to 23%. Although the participation rate of girls of color from families in the highest family income range, \$65,001 and higher, surged back up to 13%, the participation rate of Caucasian girls also increased significantly to 38%—25% higher than girls of color.

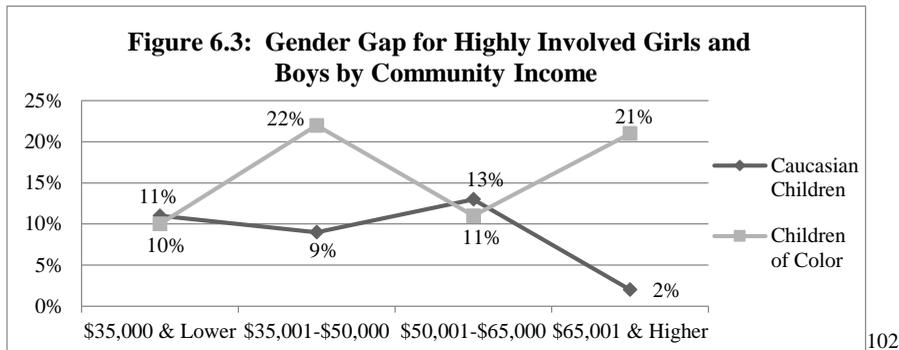
The participation rate for Caucasian boys when compared to boys of color portrayed a different picture than that for Caucasian girls, in Figure 6.2 below. The participation rate of Caucasian boys was only significantly greater than boys of color for families with a median income of between \$50,001 and \$65,000. In that income range, the participation rate for Caucasian boys highly involved in sports was 36%, double that of boys of color, which was 18%. At the lowest family income range, \$35,000 or lower, the participation rate for boys of color was 5% higher than Caucasian boys. At the \$35,001 to \$50,000 family income range, the participation rate for boys of color was 11% higher than Caucasian boys. Finally, at the highest family income range, \$65,001 or higher,

100. See GO OUT AND PLAY, *supra* note 43, at 19.

the participation rate increased to 40% for Caucasian boys, but that rate is only 6% higher than boys of color.



The participation gender gap, displayed in Figure 6.3 below, persisted at all median income categories, although at the highest median household income level, where Caucasian girls participated in sports 2% *less* than Caucasian boys, the participation gap narrowed. Girls of color from families with family income of \$65,001 or more were 21% *less* likely to participate in sports at a high level than boys of color. As one considers the other family income levels, the story is much different. Caucasian boys were 10% *more* likely than Caucasian girls to be highly involved in sports where family income was \$35,000 or below. As the median family income increased to between \$35,001 and \$50,000, the gender gap decreased to 9%, so that Caucasian girls were 9% *less* likely than Caucasian boys to be highly involved in sports. When family income was between \$50,001 and \$65,000, 13% *more* Caucasian boys than girls were highly involved in sports. However, as mentioned above, the gender gap narrowed again at median family income of \$65,001 or more. At the highest median income range, Caucasian girls were 2% *less* likely than Caucasian boys to be highly involved in sports. It appears that for Caucasian girls, Title IX is working for at least girls who—although still 2% lower than Caucasian boys—come from families with median family incomes of \$65,001 and greater, because the participation gap for Caucasian girls was at its lowest level by 2% less than the participation rate of Caucasian boys.



The gender participation gap for girls and boys of color from families earning \$35,000 or less did not show significant variance from the gender participation gap between Caucasian boys and girls. At that family income level, there was a participation gender gap of 10% for children of color: 10% *more* boys of color are highly involved in sports at this median family income group than girls. Girls of color whose families' median family income was between \$35,001 and \$50,000 and were highly involved in sports, participate in sport at a rate of 16%—2% *lower* than Caucasian girls. However, as Figure 6.3 illustrates, although the gender participation gap between Caucasian girls and boys was only 9%, the gender participation gap between boys and girls of color more than doubled that of Caucasian girls and boys: 22% *more* boys of color than girls of color were highly involved in sports, where their median family income was between \$35,001 and \$50,000.

The gender participation gap of boys and girls of color was only 11% for children from families with a median family income between \$50,001 and \$65,000. That is, at the \$50,001 to \$65,000 median family income range, 11% *more* boys of color were highly involved in sports than girls of color. The participation gender gap between Caucasian boys and girls was slightly higher at 13%; 13% *more* Caucasian boys were highly involved in sports than Caucasian girls.

There was a significant disparity between the participation rate of girls of color and Caucasian girls whose median family income was \$65,001 or higher. Figure 6.1 shows that although the participation rate for girls of color almost doubled to 13% at family income of \$65,001 or higher, the participation rate for Caucasian girls grew to 38% at this income level. Although gender parity was achieved (or at least close to) for Caucasian girls in the highest income range, this was not the case for girls of color. There is almost no gender gap for Caucasian girls at the highest income bracket. Caucasian girls highly involved

in sports participated at a rate that was only 2% *lower* than Caucasian boys. Girls of color, on the other hand, participated at a rate that was 21% *lower* than boys of color.

The fact that, as family income increased, the sports participation rate of girls of color decreased, was unexpected. It is not clear why the gender gap virtually disappeared for Caucasian girls as family income reached its highest level in the survey and not for girls of color.¹⁰³

7. The Community Where 3rd-through-12th-Grade Girls Live Influences Their Nonparticipating Rate in Sporting Activities

Studying the rate at which girls and boys are not participating in sports—the nonparticipation rate—gives us a glimpse of their interests in sports and physical activities. If the nonparticipation rate is noted to be greater for one group—minority and urban girls as compared to suburban girls or rural girls—the higher nonparticipation rate means that more members of that group are not participating in sporting activities and should prompt us to consider factors contributing to the rate differential. If there is any hope of achieving minority gender equity under Title IX, strategic efforts must be made to reduce the number of minority girls, girls from urban communities, and girls from economically disadvantaged communities who were not participating in sports, by developing strategies for increasing participating opportunities in emerging and formerly designated NCAA emerging women's sports.

It is reasonable to conclude from the *Go Out and Play* study that urban communities consist predominantly of minority groups.¹⁰⁴ The percentages of girls from urban communities that were not participating in sports were at their highest points at two grade levels: the first was in the 3rd grade through 5th grade, and again in the 9th-through-12th grades. The study revealed, as displayed in Figure 7.1 below, that 41% of urban girls in both the 3rd-through-5th grades and the 9th-through-12th grades were not involved in sports activities. The nonparticipation rate of urban girls at these two grade levels was higher than both girls and boys from suburban¹⁰⁵ and rural¹⁰⁶ communities.

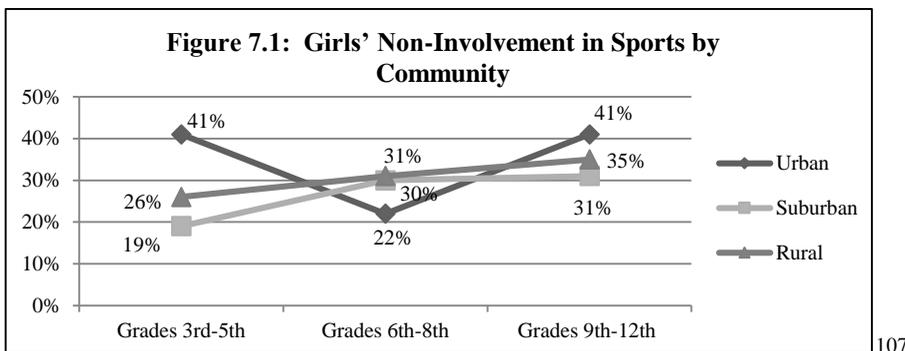
103. The answer to this question is worth further investigation.

104. See generally *GO OUT AND PLAY*, *supra* note 43.

105. Only 19% of suburban girls in the 3rd-through-5th grades and 31% in the 9th-through-12th were not involved in sports; whereas, the percent of suburban boys not involved in sports was 11% in the 3rd-through-5th grades and 29% for the 9th-through-12th grades. Compare *infra* Figure 7.1 with *infra* Figure 7.2.

106. Only 26% of girls from rural communities do not participate in sports at the 3rd-through-8th grades, while that figure increases to 35% in the 9th-through-12th grades; however, although the figure for boys from rural communities who do not participate in sports in the 3rd-through-5th grades is higher than boys from both urban and suburban communities at 31%, and that figure increases by only 3% for

Girls from suburban communities show their lowest percent of non-involvement in sports during the 3rd through 5th grades at 19%. The percentages of girls from suburban and rural communities that were not involved in sports in the 9th-through-12th grades, although lower than urban girls, were relatively close to each other: 31% for suburban girls and 35% for rural girls. Rural girls did not fare much better than urban girls. Other than minority girls, rural girls represented girls with the next highest rate of nonparticipation during the 3rd-through-5th grades at 26%.



In these formative ages, where sport participation is critical, urban girls in the 3rd-through-5th grades had a nonparticipation rate that was much higher rate than girls and boys from urban, suburban, and rural communities. The earlier an athlete begins participating in sport, the more proficient that athlete becomes in sports as they mature.¹⁰⁸ The increase in the nonparticipation rate for urban girls noted in the 3rd-through-5th grades was repeated again in the 9th-through-12th grades—the grades during which potential collegiate female student-athletes were recruited to participate in traditional, emerging, and formerly designated NCAA emerging women’s sports at the collegiate level.¹⁰⁹

Interestingly enough, however, unlike suburban girls and girls from rural communities, where the nonparticipation rate gradually increased from the 3rd-through-12th grades, the nonparticipating rate of urban girls dropped to 22%—

rural boys in the 9th-through-12th grades to 34%. *Id.*

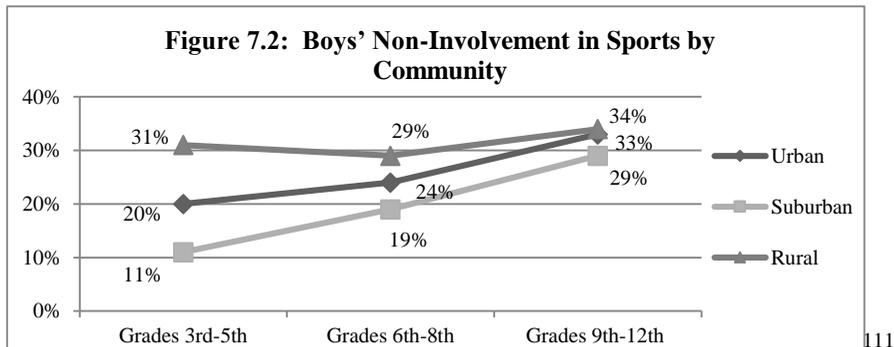
107. See generally GO OUT AND PLAY, *supra* note 43, at 13.

108. *Heart of the Game*, *supra* note 5, at 201. The authors’ stated the following: For purposes of increasing young women’s access to athletics, a focus on sports opportunities in college is too late, particularly in the increasingly competitive environment for women’s intercollegiate sports where there are very few opportunities for female college athletes to “walk on” to sports. It takes years and years of competitive play to have the necessary skill to take advantage of the sports opportunities Title IX has created at the college level.

Id. (citations omitted).

109. See generally *id.*

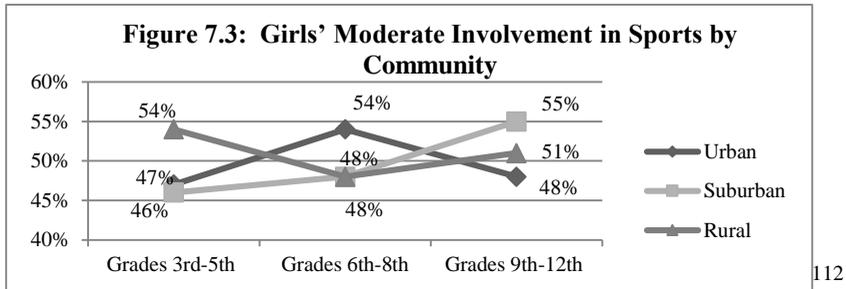
its lowest level—just before urban girls enter high school—6th-through-8th grades. The nonparticipation rate of urban girls in the 6th-through-8th grades fell below the nonparticipation rates of both suburban and rural girls. The nonparticipation rates of suburban and rural girls in the 6th-through-8th grades was 30% and 31%, respectively.¹¹⁰ The nonparticipation rate for urban girls in the 6th-through-8th grades was also lower than the nonparticipation rate for urban boys at 24% and rural boys at 29%.



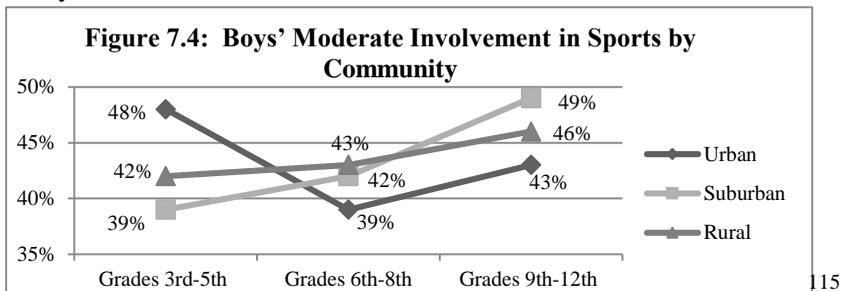
The data demonstrates that girls from urban and minority communities are interested in playing sports. As the nonparticipation rate for minority and urban girls at the middle school level decreased, there was a corresponding increase, over girls from other communities, in the sports participation rate of urban girls moderately involved in athletics. Figure 7.3 below shows that while 54% of urban girls surveyed were moderately involved in sports—6% higher than suburban and rural girls that were moderately involved in sporting activities—both suburban and rural girls participate at a 48% rate. As demonstrated below in Figure 9.1, when the participation rate of urban girls that were highly involved in sports during middle school—6th-through-8th grade—is compared to girls from both suburban and rural communities, a similar trend is seen. The participation rate of urban middle school girls that were highly involved in sports was 24%, while the participation rate for suburban and rural girls was at 22% and 21%, respectively. Figure 9.1 below also demonstrates that during high school the participation rates of urban, suburban, and rural girls highly involved in sports clustered between 12% and 15%: rural girls at 15%, suburban girls at 14%, and urban girls at 12%.

110. Of the suburban girls surveyed, 30% are not involved in sports, while 31% of rural girls are not involved in sports.

111. See *GO OUT AND PLAY*, *supra* note 43, at 14.



The problem, however, for urban girls and minority girls is that participation opportunities in emerging sports are virtually unavailable in their communities.¹¹³ Therefore, while Title IX is achieving gender equity by increasing participation opportunities in emerging and formerly designated NCAA emerging sports, minority girls and girls from urban, rural, and economically disadvantaged communities are not receiving the benefits promised by Title IX because those participation opportunities are not reasonably available in those communities.¹¹⁴



112. See GO OUT AND PLAY, *supra* note 43, at 13.

113. See A. Jerome Dees, *Do the Right Thing: A Search for an Equitable Application of Title IX in Historically Black Colleges and University Athletics*, 33 CAP. U. L. REV. 219, 266 (2004) (“These emerging sports have been dubbed country club sports by a number of critics. Minority leaders blame college administrators for what they call a poor selection of sports in their attempt to try to comply with Title IX. The former NCAA chairman of the Minority Opportunity Committee stated that the selected sports are ‘traditionally very white, middle class sports . . . exclusive to people of color.’ The athletic opportunities created by these sports have resulted in few additional opportunities for black women, the core constituents of HBCUs. The ol’ girls network now in place has white women at the controls of women’s athletics and black women on the outside of the process; for white women power and opportunity is concentrated in their hands while black women are clustered into track and basketball.” (footnote omitted) (citations omitted)); Brian L. Porto, *Completing the Revolution: Title IX as Catalyst for an Alternate Model of College Sports*, 8 SETON HALL. J. SPORT L. 351, 382 (1998) (“African-American women do not benefit as much as white women do from the establishment of women’s college teams in ‘emerging’ sports because those sports, such as soccer, lacrosse, and softball, are popular in white suburban and rural communities, but are not popular in urban communities, where many African-American women live.” (footnote omitted)).

114. *Id.*

115. See GO OUT AND PLAY, *supra* note 43, at 14.

8. Participation Rate of Girls in Grades 3–12 Moderately Involved in Sports Is Influenced by Community Location, Economic Disparities, Race, Ethnicity, and Family Characteristics

Much of the focus for closing the gender gap in collegiate sports has been at the collegiate level, and rightly so. However, closing the gender gap for minority girls, girls from urban and rural communities will require cultivating fertile ground much earlier in the lives of girls, and boys, for that matter, than at the collegiate level. Figure 7.3 and Figure 7.4 above examined statistics for girls and boys moderately involved in sports. Unlike urban girls, Figure 7.3 confirmed a steady increase in the percent of suburban girls moderately engaged in sports beginning in the 3rd-through-5th grades and continuing through high school (9th-through-12th grades). In the 3rd-through-5th grades, 46% of suburban girls surveyed were moderately involved in sports. That number increased to 55% by the 9th-through-12th grades.¹¹⁶ The highest percent of girls surveyed who indicated moderate participation in sports was for rural girls in the 3rd-through-5th grades at 54%.¹¹⁷ The percent of rural girls moderately participating in sports dropped to 48% in the 6th-through-8th grades, before increasing again to 51% in their high school years.

The trends in participation rates for urban girls who were moderate sports participants indicate that these girls may offer a potential population for narrowing the minority gender equity gap between urban girls and the gender gap between girls from both suburban and rural communities. The percentage of urban girls surveyed who were moderately engaged in sports was 47% in the 3rd-through-5th grades, and was slightly higher than the participation rate for suburban girls who were at 46%. The participation rate for urban girls moderately involved in sports peaked in middle school at 54% and dropped slightly to 48% in the high school grades. The participation rate of urban girls moderately involved in sports during the 9th-through-12th grades was lower than both girls living in rural and suburban communities.

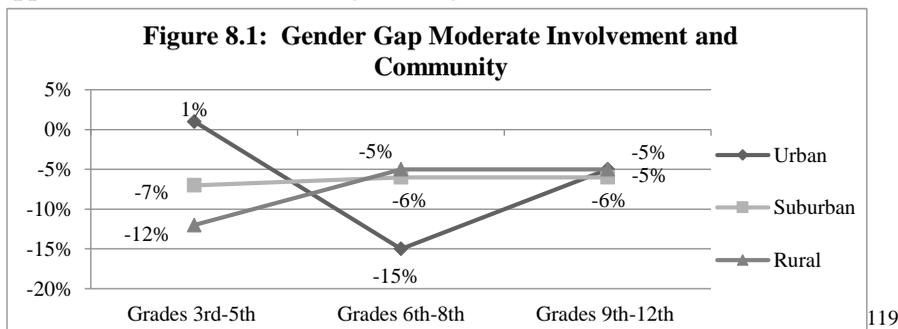
The participation rate for urban boys in the 3rd-through-5th grade who were moderately involved in sports was 48%—higher than the participation rate of rural boys in the same grades at 42% and that of suburban boys at 39%. The participation rate for urban boys in the 6th-through-8th grades moderately involved in sports dropped to 39%, which was below the participation rates for rural boys at 43% and suburban boys at 42%. As Figure 7.4 demonstrates, much

116. A similar phenomenon was seen with suburban boys moderately involved in sports, where there is a steady increase in participation from 39% in grades three through five to 49% for 9th through 12th grade boys. *See supra* Figure 7.4.

117. The participation rate for rural boys in the same grade range was in between the participation rate for urban boys at 48% and that of suburban boys at 39%.

like urban girls, the participation rate for urban boys in the 9th-through-12th grades who were moderately involved in sports at 43% was lower than any other group.¹¹⁸ The participation rate for suburban boys in the 9th-through-12th grades at 49% was the highest of all communities studied, including boys from rural communities at 46%.

The gender gap statistics depicted in Figure 8.1 demonstrate that, except for urban boys and girls in the 3rd-through-5th grades, at all other grade levels, girls that were moderately involved in sports were participating, regardless of the community in which they live, at a greater rate than boys—there was no gender gap at these grade levels. The gender gap for girls from rural communities declined from its highest levels at 12% in the 3rd-through-5th grade; girls from rural communities participated at a moderate level at 12% *more* than boys from the same community. In the 6th-through-8th grades, rural girls were only 5% more likely than boys to be moderately involved in sports. The gender gap for girls from suburban communities who were moderately involved in sports dropped to zero in the 9th-through-12th grades.



The gender gap between 3rd-through-5th-grade boys and girls from urban communities who reported that they were moderately involved in sports was only 1%—only 1% *more* boys than girls from urban communities moderately participated in sports. The participation rate for girls from urban communities decreased to -15%, meaning that 15% *more* urban girls than urban boys were moderately involved in sports in the 6th-through-8th grades. A similar trend in the gender gap was demonstrated for girls and boys from suburban and rural communities in the 6th-through-8th grades; 5% more rural girls and 6% more suburban girls were moderately involved in sports than boys from those respective communities. The sports participation rate of girls from urban, suburban, and rural communities that were moderately involved in sports, both prior to and in the 9th-through-12th grades, suggests fertile ground for achieving

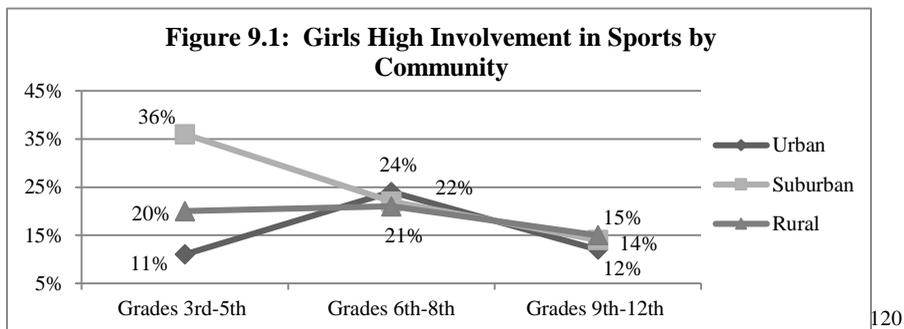
118. Compare *supra* Figure 7.3 with *supra* Figure 7.4.

119. See GO OUT AND PLAY, *supra* note 43, at 13–14.

gender equity across a broader identity spectrum, and should forecast better participation opportunities and gender equity gains for all girls highly involved in sports during the 9th-through-12th grades.

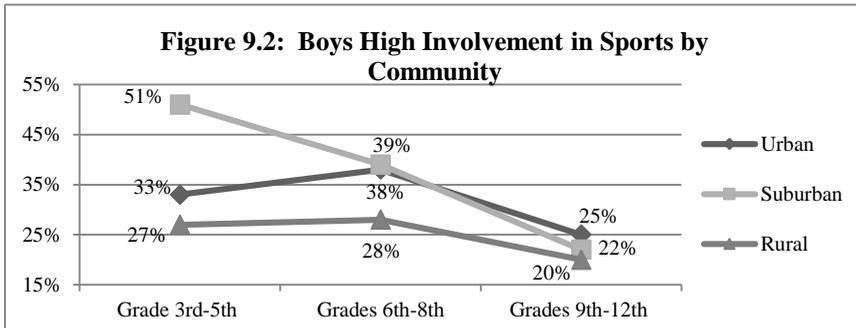
9. What Happens to Sports Participation Opportunity Gains for Girls Highly Involved in Sports by 12th Grade

Figure 9.1 demonstrates that urban girls in the 3rd-through-5th grades surveyed who indicated they were highly involved in sports had the lowest participation rate of girls from all communities at 11%. However, much as was the case with urban girls who were moderately engaged in sports; in the 6th-through-8th grades, the participation rate for urban girls doubled to 24% and was higher than girls from all other communities. In the 3rd-through-5th grades, girls from suburban communities who were highly involved in sports had the highest participation rate of girls from all communities at 36%. There was, however, a precipitous drop in the participation rate of suburban girls highly involved in sports, from 36% in the 3rd-through-5th grades to 22% for girls from suburban communities in 6th-through-8th grade. The participation rate of rural girls surveyed who were highly involved in sports had a participation rate of 20% in the 3rd-through-5th grades; however, the participation rate only increased by 1% to 21% in the 6th-through-8th grades. By the 9th-through-12th grades, however, rural girls who were highly involved in sports participated at a higher level of participation at 15% than both suburban girls at 14%, and urban girls at 12%.

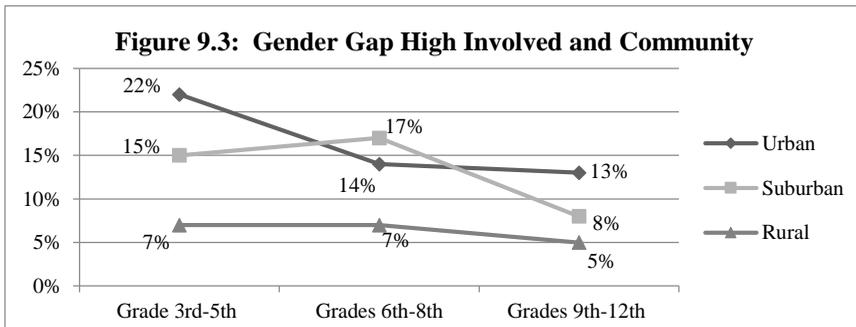


A gender gap existed when the participation rates of boys highly involved in sports were compared to girls at all grades levels, as displayed in Figure 9.3 below. The participation rate for suburban boys in the 3rd-through-5th grades at 51% was 15% *higher* than suburban girls in the same grades. The difference between the participation rates of urban boys at 33% and urban girls highly

involved in sports displayed a greater gender gap of 22%—22% *more* urban boys than urban girls in 3rd-through-5th grades were participating in sports at the highest level. However, there was only a 7% difference between the participation rates of rural boys at 27% and rural girls at 20% in the 3rd-through-5th grades. Seven percent *more* rural boys than rural girls were participating in sports at the highest level in the 3rd-through-5th grades.



121



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The gender gap between girls and boys highly involved in sports was still apparent in the 6th-through-8th grades for girls from all communities. It is apparent that at these grades, suburban and urban girls were losing the participation game to suburban and urban boys. The participation rate for suburban boys was 17% *higher* than the participation rate of suburban girls in 6th-through-8th grades. However, the gender gap for urban boys and girls was at 14%. The participation rate of highly involved rural boys was 7% *higher* than the participation rate of rural girls.

It is clear that in high school, urban girls are falling behind all groups as far as the participation gender gap is concerned. The gender gap narrowed between suburban boys and girls in the 9th-through-12th grades. The participation rate for suburban boys was 8% *higher* than the participation rate for suburban girls.

121. See *id.* at 14.

122. See *id.* at 13–14.

The gender gap narrowed even more when the participation rates of rural boys were compared to those of rural girls. The participation rate for rural boys was only 5% *higher* than rural girls. The gender gap was at its highest rate, however, between urban boys and girls, with urban boys participating at a rate 13% *greater* than urban girls. Clearly, more work needs to be done to bridge the gender gap between girls and boys from all communities, particularly the gender gap between girls and boys from urban communities.

IV. HARVESTING TITLE IX TO ENHANCE PARTICIPATION OPPORTUNITIES FOR GIRLS FROM MINORITY, ECONOMICALLY DISADVANTAGED, URBAN, AND SUBURBAN COMMUNITIES

Caucasian female student-athletes are flourishing because of participation opportunities available through emerging sports, while African-American, Hispanic, Asian, and other minority female student-athletes are consistently denied the access to participation opportunity benefits Title IX was enacted to confer. Girls from minority, urban, rural, and economically disadvantaged communities have such limited access to emerging sports that their participation opportunities are virtually limited to traditional women's sports and are essentially nonexistent with respect to emerging women's sports.¹²³ Educational institutions that receive federal funds, which recognize these inequities and turn a blind eye to them, may be liable under Title IX.¹²⁴

Title IX affirmatively obligates federal funds recipients to eliminate not only traditional intentional discrimination, but also known instances of "deliberate indifference" to inequities occurring within those institutions. The Supreme Court has developed an expanded intentional discrimination doctrine,¹²⁵ as seen in the Supreme Court's "deliberate indifference" jurisprudence that will provide a Title IX remedy for victims who lack access to sports participation opportunities in emerging women's sports known to be created by institutional policy choices that perpetuate gender inequities experienced by minority girls, girls from urban, economically disadvantaged, and rural communities.¹²⁶ Regardless, however, of their status as members of a racial minority group or members of other identity groups, "deliberate

123. See *Race and Gender Demographics Search Division I*, *supra* note 6. See also Lauren Smith, *Black Female Participation Languishes Outside Basketball and Track*, CHRON. HIGHER EDUC. (June 29, 2007), <http://chronicle.com/article/Black-Female-Participation/21449>; Timothy Davis, *Race and Sports in America: An Historical Overview*, 7 VA. SPORTS & ENT. L.J. 291, 309 (2008).

124. See *infra* Part IV(A)(4).

125. See generally Derek W. Black, *The Mysteriously Reappearing Cause of Action: The Court's Expanded Concept of Intentional Gender and Race Discrimination in Federally Funded Programs*, 67 MD. L. REV. 358, 379 (2008).

126. See discussion *infra* Parts IV(A)(1)–(4).

indifference” of high school and middle school athletic decision makers, school districts, and state education administrators to whether their policy choices sustain gender inequities or undermine Congressional objectives Title IX was enacted to promote, constitutes actionable intentional discrimination.¹²⁷

A. Traditional Intentional Discrimination Analysis Under Title IX Does Not Reach Conduct that Constitutes Disparate Impact Discrimination

Unlike Equal Protection Clause jurisprudence, Title VI and Title IX impose an affirmative obligation on programs receiving federal funds to remedy discrimination once officials become aware of the consequences of their programs or policies.¹²⁸ In this section of the Article, I will examine the differences and similarities between application of intentional discrimination and “deliberate indifference” standards for assessing liability under Title IX and will argue, private cause of action aside, the obligation to provide equal access to sports participation opportunities exists for educational institutions that receive federal funds. Therefore, programs whose administration or policies deny equal access to sports participation opportunities are vulnerable to losing federal funding if they do not act to correct the problem. They should also be vulnerable to private action once responsible program officials are aware of the effects of their programs or policy decisions and remain “deliberately indifferent” to the programs’ effects.¹²⁹

To begin my analysis, I will analyze the Supreme Court’s intentional discrimination and disparate impact jurisprudence under the Equal Protection Clause, Title VI, and Title IX and will apply the Court’s “deliberate indifference” analysis, developed under the Supreme Court’s sexual harassment cases, to gender equity claims and claims of denial of access to sports participation opportunities under Title IX. Application of the Court’s “deliberate indifference” doctrine to gender equity claims and claims of denial of access to sports programs under Title IX will enable advocates of gender equity to achieve gender equity under Title IX for minority girls, girls from urban, rural, and economically disadvantaged communities.

1. Intentional Discrimination and Race Under the Equal Protection Clause

The standard applied in determining whether actions taken constitute discrimination in violation of the Equal Protection Clause of the Constitution

127. See discussion *infra* Parts IV(A)(1)–(4).

128. See Black, *supra* note 125, at 402–03; see also discussion *infra* Part IV(A)(1)–(3).

129. See *infra* notes Parts IV(A)(1)–(4).

was articulated by the Supreme Court in *Washington v. Davis*.¹³⁰ The case involved two African-American (then called Negroes) police officers who filed suit against the Commissioners of the United States Civil Service Commission, the Commissioner of the District of Columbia, and the Chief of the District's Metropolitan Police Department asserting that promotion policies of the police department were racially discriminatory because of the policies' disparate impact on African-American applicants.¹³¹ In reaching its decision that, absent purposeful discrimination, disparate impact is not sufficient to establish intentional discrimination under the Equal Protection Clause of the Fifth Amendment, the Supreme Court chronicled its historical approach to intentional discrimination.¹³²

Starting with the Supreme Court's 1880 decision in *Strauder v. West Virginia*, the *Washington* Court reasoned that, although *Strauder* "established that the exclusion of all Negroes from grand and petit juries in criminal" cases would constitute a violation of the Equal Protection Clause, the fact that a particular jury is not statistically representative of the community—without more—is not sufficient to establish "invidious discrimination."¹³³ The purposeful intent to exclude members of a particular race from jurors, although the *sine quo non* of establishing intentional discrimination, may be proven by showing a systemic exclusion of eligible members of the particular race from jury pools or by unequal application of the law to members of that race.¹³⁴

The *Washington* Court continued its examination of the historical standard employed in determining intentional discrimination. The Court examined how the standard had been applied in the context of legislative redistricting, where the Court had previously upheld a New York apportionment statute against a claim that redistricting lines were "racially gerrymandered."¹³⁵ The statute was upheld even though, as a result of the redistricting, the districts that were

130. 426 U.S. 229 (1976). Although the case involved the Equal Protection under the Fifth Amendment to the Constitution, the Supreme Court indicated that the standard applied in Equal Protection cases under the Fourteenth Amendment is not different than would be applied under the Equal Protection Clause of the Fifth Amendment. *Id.* at 239.

131. *Id.* at 232.

132. *Id.* at 239.

133. *Id.* (citing *Strauder v. West Virginia*, 100 U.S. 303 (1880)).

134. The *Washington* Court stated, "A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurors of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination." *Id.* at 239 (quoting *Akins v. Texas*, 325 U.S. 398, 403–404 (1945)).

135. *Id.* at 240 (citing *Wright v. Rockefeller*, 376 U.S. 52, 58 (1964)).

challenged were rendered either predominantly white or minority districts.¹³⁶ The Court upheld the statute because the challenger failed to demonstrate that the legislature, when the statute was enacted, was motivated by race or that the legislature intentionally drew the districts along racial lines.¹³⁷

The *Washington* Court next considered the school desegregation cases, in which the Supreme Court adhered to the equal protection principle that discrimination must be traced to a “racially discriminatory purpose.”¹³⁸ The Equal Protection Clause is not violated, the Court commented, simply because there are predominantly black and white schools in a community.¹³⁹ According to the Court, there must be intentional state action to segregate or a state purpose to segregate.¹⁴⁰

In support of its claim that intentional discrimination under the Equal Protection Clause meant more than disparate impact discrimination, the *Washington* Court recounted why its recent decision rejected a disparate impact discrimination claim, where the basis for the claim was an alleged racially discriminatory effect of certain provisions of the Social Security Act.¹⁴¹ Holding that discrimination occurred simply because certain provisions of the Social Security Act have a statistically discriminatory effect on a racial group would, according to the *Washington* Court, render any differential treatment a violation of the Equal Protection Clause regardless of the absence of racial motivation and regardless of the legitimate rationale for such treatment.¹⁴²

This does not mean, however, that disparate impact discrimination can never be the basis for finding intentional discrimination or that disparate impact is irrelevant in determining intentional discrimination.¹⁴³ The Court in

136. *Id.*

137. *Id.* (“[T]he plaintiffs had not shown that the statute ‘was the product of a state contrivance to segregate on the basis of race or place of origin.’” (quoting *Wright*, 376 U.S. at 58)).

138. *Id.*

139. *Id.*

140. *Id.* (“The essential element of *de jure* segregation is ‘a current condition of segregation resulting from intentional state action.’ . . . ‘The differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate.” (quoting *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 205, 208 (1973)).

141. *Id.* at 240–41 (citing *Jefferson v. Hackney*, 406 U.S. 535, 548 (1972)).

142. *Id.* (reiterating that “[t]he Court has also recently rejected allegations of racial discrimination based solely on the statistically disproportionate racial impact of various provisions of the Social Security Act because ‘[t]he acceptance of appellants’ constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be.’” (alteration in original) (quoting *Jefferson*, 406 U.S. at 548 (1972)).

143. *Id.* at 242 (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the

Washington signaled that *Yick Wo v. Hopkins*¹⁴⁴ was an important illustration of this point. The defendants in *Yick Wo* were incarcerated for violating a San Francisco City ordinance which made it unlawful to conduct a laundry business within the city and county without consent of the board of supervisors.¹⁴⁵ Laundries that were constructed of brick or stone were exempt from the statute.¹⁴⁶ The defendants alleged that of the 320 laundries within the city and county of San Francisco, 240 were owned by persons of Chinese decent, and 310 of the total were constructed of wood.¹⁴⁷ Over 200 applicants of Chinese decent that had conducted their business for over twenty years who applied to the board of supervisors for a license were denied.¹⁴⁸ Only one applicant that was not of Chinese decent was denied a license by the board of supervisors.¹⁴⁹ The *Washington* Court determined that the ruling in *Yick Wo* was one example of a context in which the disparate impact of a statute on persons of Chinese decent was evidence that the board of supervisors committed intentional discrimination in its application of a neutral statute.¹⁵⁰

The Supreme Court's rulings addressing racial discrimination in a series of jury selection cases provided a second example of disparate impact discrimination, based on racial statistical disparities, was proof of intentional discrimination in violation of the Equal Protection Clause.¹⁵¹ The *Washington* Court observed that the systematic exclusion of African-Americans from juries demonstrated intentional discrimination resulting from asymmetrical application of the law.¹⁵² A plaintiff could make out a prima facie case for intentional discrimination by showing, in addition to the absence of African-Americans on a particular jury, proof that the jury commissioners were never informed of the number of African-Americans in a community that were eligible to serve on the jury or that the jury selection process that was not racially neutral.¹⁵³

The Supreme Court applied its ruling in *Washington*, a Fifth Amendment

weightiest of considerations." (citation omitted)).

144. *Id.* at 241 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

145. *Yick Wo*, 118 U.S. at 357.

146. *Id.* at 358.

147. *Id.* at 358-59.

148. *Id.* at 359.

149. *Id.*

150. *Washington v. Davis*, 426 U.S. 229, 241 (1976) ("A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race." (citing *Yick Wo*, 118 U.S. at 373-74)).

151. *Id.* at 241.

152. *Id.*

153. *Id.*

case, to the Equal Protection Clause of the Fourteenth Amendment in *Arlington Heights v. Metropolitan Housing Development Corp.*¹⁵⁴ In affirming its decision in *Washington*, the *Arlington Heights* Court observed that the unconstitutionality of an official zoning board will not be judged solely on whether its action resulted in disproportionate impact on a racial group.¹⁵⁵ Although not irrelevant, the Court noted, racially disproportionate impact “is not the sole touchstone of an invidious racial discrimination.”¹⁵⁶ The Court found that the parties failed to carry the burden, proving that the Village of Arlington Heights was motivated by a discriminatory purpose in its decision to deny rezoning and, therefore, ended the Court’s constitutional inquiry.¹⁵⁷

2. Intentional Discrimination and Gender Under the Equal Protection Clause

In *Personnel v. Feeney*, the Supreme Court examined whether the intentional discrimination standard applicable to race cases under the Equal Protection Clause of the United States would be similarly applied to sex discrimination claims.¹⁵⁸ The plaintiff—Helen Feeney—was not a veteran.¹⁵⁹ During her twelve-year tenure as a state employee for the state of Massachusetts, Helen Feeney had scored well on competitive civil service examinations.¹⁶⁰ However, because of Massachusetts’s veterans’ preference statute, male veterans who scored lower than her were always ranked higher than her for civil service positions.¹⁶¹ As a result, the preference granted males an immense advantage over females.¹⁶² The plaintiff challenged the veterans’

154. 429 U.S. 252 (1977).

155. *Id.* at 264–65.

156. *Id.* at 264–65 (The Court made it clear that the intentional discrimination standard it established in *Washington* applied to the Fourteenth Amendment, by stating, “Our decision last Term in *Washington v. Davis* made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. ‘Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.’ Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.” (quoting *Washington*, 426 U.S. at 242 (citation omitted))).

157. *Id.* at 270–71 (“Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village’s decision. This conclusion ends the constitutional inquiry. The court of Appeals’ further finding that the Village’s decision carried a discriminatory ‘ultimate effect’ is without independent constitutional significance.” (footnote omitted)).

158. 442 U.S. 256, 267 (1979) (“The present case is apparently the first to challenge the Massachusetts veterans’ preference on the simple ground that it discriminates on the basis of sex.”).

159. *Id.* at 256.

160. *Id.*

161. *Id.*

162. *See id.* at 257–58. The preference applied to the state of Massachusetts’s classified civil service position, which represented 60% of the state’s public jobs. *Id.* at 261–62. “Although the veterans’ preference thus does not guarantee that a veteran will be appointed, it is obvious that the

preference statute on the ground that the preference, which required state governmental employers to consider veterans who served during a war ahead of nonveterans, violated her rights under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.¹⁶³

In reaching its decision that the Massachusetts statute passed Equal Protection scrutiny, the Court acknowledged that the Fourteenth Amendment did not strip states of all power of classification.¹⁶⁴ All laws classify, the Court acknowledged, so long as rationally based, the fact that legislative classifications unevenly impact certain groups, normally raises no constitutional concerns.¹⁶⁵ In evaluating the constitutionality of such a state classification, the concern is the validity of the classification and not the legislature's wisdom in enacting the law, so long as there is no reason to infer hostility on the part of the legislature.¹⁶⁶

Before addressing the standard it would apply in determining whether the Massachusetts statute discriminated on the basis of gender, the Court reviewed the constitutional standard applied in determining race discrimination claims under the Equal Protection Clause.¹⁶⁷ Racial classifications, the Court

preference gives to veterans who achieve passing scores a well-nigh absolute advantage." *Id.* at 264. Further, historically Massachusetts sought to insure that women veterans were covered by the statutory preference for veterans:

Notwithstanding the apparent attempts by Massachusetts to include as many military women as possible within the scope of the preference, the statute today benefits an overwhelmingly male class. This is attributable in some measure to the variety of federal statutes, regulations, and policies that have restricted the number of women who could enlist in the United States Armed Forces, and largely to the simple fact that women have never been subjected to a military draft.

Id. at 269–70 (footnote omitted).

163. *See id.* at 259. Plaintiff's case was consolidated with a case filed by Carol A. Anthony, an attorney, whose efforts to secure a position as a Civil Service Counsel I were similarly frustrated. *Id.* at 259 n.3. Over the objections of the defendants—state officials—the Attorney General of Massachusetts appealed to the Supreme Court who certified for decision of the Supreme Judicial Court of Massachusetts whether the Attorney General may appeal the matter over the objections of state officials-defendants. *Id.* The Supreme Judicial Court of Massachusetts ruled in favor of the Attorney General. *Id.* The Supreme Court vacated the judgment of the District Court and remanded the case for reconsideration in light of its decision in *Washington v. Davis*: that without purposeful discrimination, the Equal Protection Clause of Fifth Amendment is not violated simply because the statute had a disparate impact on racial groups. *Id.* at 281. On remand the District Court ruled the statute violated the Equal Protection Clause of the Fourteenth amendment, because the disparate effect of the statute was too inevitable to be unintended. *Id.* at 260–61.

164. *Id.* at 271.

165. *Id.* at 272 ("The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.").

166. *Id.* ("When some other independent right is not at stake, and when there is no 'reason to infer antipathy,' it is presumed that 'even improvident decisions will eventually be rectified by the democratic process . . .'" (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (citations omitted))).

167. *See id.* at 271–72.

recapped, are presumptively invalid and would be upheld only upon an “extraordinary justification.”¹⁶⁸ The same is true for a neutral statute that is an apparent pretext for racial discrimination.¹⁶⁹ The Court made clear, however, that even a neutral statute that has a disproportionate impact on minority groups will not be struck down unless the impact is traceable to a racially discriminatory purpose.¹⁷⁰ Classifications based on gender, according to the Court, are afforded similar treatment under Equal Protection analysis.¹⁷¹

The question the Court considered in applying its Equal Protection precedent was whether the system of classification instituted by the Massachusetts statute was based, plainly or surreptitiously, on gender.¹⁷² The Court accepted plaintiff’s concession in the case that the statute was neutral on its face.¹⁷³ The Court also agreed with the District Court’s determination that the statute served a legitimate purpose and that the preference was not established for the purpose of discriminating against women.¹⁷⁴ The Court signaled, as it did in its race cases to which its Equal Protection analysis applied, that gender impact alone could establish discriminatory purpose, if there was not a plausible neutral ground for the classification system established by the statute.¹⁷⁵

However, comprehension of the inevitable impact of the veterans’ preference statute on women is not intentional discrimination for constitutional

168. *Id.* at 272.

169. *Id.*

170. *Id.*

171. *Id.* at 273 (“[P]recedents dictate that any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment.”).

172. *Id.* at 274.

173. *Id.*

174. *Id.* at 274–75 (“The [plaintiff] has thus acknowledged and the District Court has thus found that the distinction between veterans and nonveterans drawn by [the statute] is not a pretext for gender discrimination. The [plaintiff]’s concession and the District Court’s finding are clearly correct.”).

175. *Id.* at 275. The Court stated,

Apart from the facts that the definition of “veterans” in the statute has always been neutral as to gender and that Massachusetts has consistently defined veteran status in a way that has been inclusive of women who have served in the military, this is not a law that can plausibly be explained only as a gender-based classification.

....

Just as there are cases in which impact alone can unmask an invidious classification, there are others, in which—notwithstanding impact—the legitimate noninvidious purposes of a law cannot be missed. This is one. The distinction made by [the statute] is, as it seems to be, quite simply between veterans and nonveterans, not between men and women.

Id. (citation omitted).

purposes.¹⁷⁶ The statute violates the Equal Protection Clause if it was enacted to serve a discriminatory purpose, but does not violate the Constitution because of its disproportionate impact on women.¹⁷⁷ The statute's disparate impact may raise an inference that discrimination may be in play, but an inference that discrimination may exist is not proof of intentional discrimination.¹⁷⁸

3. Intentional Discrimination Under Title IX and Title VI

Without a private right of action under Title IX and Title VI, enforcement of and impositions of penalties for discrimination in violation of the respective statutes would be limited to withholding of or denial of federal funds.¹⁷⁹

i. Private Right of Action Title IX

Courts¹⁸⁰ and commentators¹⁸¹ have recognized that Title VI and Title IX are coextensive. Analysis of Title VI and Title IX, therefore, will proceed simultaneously. The Supreme Court in *Cannon v. University of Chicago*, in determining whether a private right of action existed to recover damages or seek injunctive relief under Title IX, analyzed why decisions under Title VI were relied on to determine the question of whether a private right of action existed under Title IX.¹⁸² The plaintiff, Geraldine Cannon, alleged in her complaint that, although she was qualified to attend both the University of Chicago and Northwestern Medical schools—based on her grade point average and her

176. *Id.* at 279. The Court reasoned,

“Discriminatory purpose,” however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part “because of,” not merely “in spite of,” its adverse effects upon an identifiable group. Yet nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service.

Id. (footnote omitted) (citation omitted).

177. *Id.*

178. *Id.* at 279 n.25 (“But in this inquiry—made as it is under the Constitution—an inference is a working tool, not a synonym for proof. When, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof.”).

179. *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 638–39 (1999). *See generally Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274 (1998).

180. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 177–78 (2005); *see also Grove City Coll. v. Bell*, 465 U.S. 555, 566 (1984); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 514 (1982); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694–99 (1979).

181. Black, *supra* note 125, at 365.

182. *See generally Cannon*, 441 U.S. at 677.

medical school examination scores—she was denied admission because of her gender.¹⁸³ Both medical schools admitted candidates that were less qualified than her.¹⁸⁴ Ms. Cannon claimed that because both institutions had policies against admitting applicants over the age of thirty—unless they had advanced degrees—these institutions discriminated against women.¹⁸⁵ Since women have higher incidences of interrupted higher education, the policies had a disproportionate and discriminatory impact on women.¹⁸⁶

The Supreme Court granted certiorari to review the Seventh Circuit's decision that Ms. Cannon had no private right of action against the defendants.¹⁸⁷ The Court determined that—for the sake of argument, the defendants admitted certain facts in their motion to dismiss—only two facts were relevant to its resolution of the Seventh Circuit's ruling.¹⁸⁸ First, Ms. Cannon was excluded from admission to the respective medical schools because of her sex.¹⁸⁹ Second, each institution received federal funds.¹⁹⁰ The admitted facts, according to the Supreme Court, established “a violation of § 901 (a) of Title IX of the Education Amendments to the 1972.”¹⁹¹ The real question was whether Ms. Cannon could have brought an action to recover damages for the violations.

In concluding that the Seventh Circuit's decision was wrong, the Supreme

183. *Id.* at 680–81 n.2.

184. *Id.*

185. *Id.* at 681 n.2 (Cannon contended that “[t]hese policies . . . prevented [her] from being asked to an interview at the medical schools, so that she was denied even the opportunity to convince the schools that her personal qualifications warranted her admission in place of persons whose objective qualifications were better than hers.”).

186. *Id.* (Cannon claimed that both “the age and advanced-degree criteria operate to exclude women from consideration even though the criteria are not valid predictors of success in medical schools or in medical practice. As such, the existence of the criteria either makes out or evidences a violation of the medical school's duty under Title IX to avoid discrimination on the basis of sex.” (citation omitted)).

187. *Id.* at 685–86. According to the Supreme Court, “[t]he Court of Appeals agreed that the statute did not contain an implied private remedy. Noting that § 902 of Title IX establishes a procedure for the termination of federal financial support for institutions violating § 901, the Court of Appeals concluded that Congress intended that remedy to be the exclusive means of enforcement.” *Id.* at 683–84.

188. *Id.* at 680.

189. *Id.*

190. *Id.*

191. *Id.* Shortly after the Seventh Circuit's decision, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976. *Id.* at 685. The amendment authorized attorneys' fee awards to the winning party in a Title IX enforcement action. *Id.* The Court of Appeals granted a petition to rehear the case in light of the passage of the Civil Right Attorney's Fees Awards Act of 1976. *Id.* at 685–86. On rehearing, the court ruled that the Act did not intend to create a new right of action, where one did not exist. *Id.*

Court carefully reviewed the four factors laid down in *Cort v. Ash* that, if satisfied, would indicate Congressional intent to create an implied private right of action.¹⁹² The first factor, whether the plaintiff was a member of the class Congress intended to benefit by enactment of Title IX, was answered in the affirmative by the Supreme Court.¹⁹³ The second, the legislative history of Title IX, required the *Cannon* Court to look beyond the legislative history of Title IX and also consider the relationship of Title IX to Title VI and to other Congressional actions.¹⁹⁴

The Court concluded that where a federal right is created, it may not be necessary to demonstrate an intention to create a private right of action.¹⁹⁵ Under those circumstances, however, an explicit purpose to deny a private right of action would be controlling.¹⁹⁶ Title IX's history clearly demonstrated, however, that Congress *did* intend to create a private right of action.

The Court chronicled the relationship between Title VI and Title IX to demonstrate that decisions under Title VI were relevant to its determination of whether Congress intended an implied private right of action under Title IX.¹⁹⁷ The Court first indicated that Title IX was patterned after Title VI.¹⁹⁸ The legislative history of Title IX demonstrates that, except for substitution of the word "sex" for the words "race, color, or natural origin" in Title VI, the benefited class in both statutes was described using the identical language.¹⁹⁹

192. *Id.* at 688 (citing *Cort v. Ash*, 422 U.S. 66 (1975)). Those factors include

[(1)] [I]s the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' that is, does the statute create a federal right in favor of the plaintiff? [(2)] [I]s there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? [(3)] [I]s it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? [(4)] [I]s the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 688–89 n.9 (citations omitted) (quoting *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916)).

193. *Id.* at 693–94 ("Unquestionably, therefore, the first of the four factors identified in *Cort* favors the implication of a private cause of action. Title IX explicitly confers a benefit on persons discriminated against on the basis of sex, and petitioner is clearly a member of that class for whose special benefit the statute was enacted.").

194. *Id.* at 694 ("We must recognize, however, that the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question.").

195. *Id.*

196. *Id.* ("[I]n situations such as the present one 'in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling.'" (quoting *Cort*, 422 U.S. at 82)).

197. *Id.* at 695–709.

198. *Id.* at 694 ("Title IX was patterned after Title VI of the Civil Rights Act of 1964.").

199. *Id.* at 694–95.

The origin of Title IX also demonstrates its link with Title VI. Although Title IX began as a house bill that would have added the word “sex” to the list of discriminatory conduct prohibited by Title VI, the house bill, which ultimately became Title IX, was taken out of Title VI—because Title IX’s focus was slightly more limited than that of Title VI.²⁰⁰ The administrative method for terminating federal funding for an institution engaged in discrimination prohibited under both Title IX and Title VI mirrored each other, and neither statute expressly provided for a private right of action for the benefited class.²⁰¹

When Title IX was enacted in 1972, according to the *Cannon* Court, Title VI had already been interpreted by the Fifth Circuit Court of Appeals to provide private right of action, an opinion that had been repeatedly cited with approval.²⁰² Noting that a dozen federal courts had reached the same conclusion that Title VI provided for a private right of action, the Court ruled that it was justified in presuming that Congress intended a private right of action under Title IX.²⁰³ In reaching this conclusion, the Court reasoned that both private citizens and Congressional representatives are presumed to know the state of the law.²⁰⁴ Further, repeated references by Congressional representatives to Title VI validated their intent that Title IX would be interpreted to provide for a private right of action.²⁰⁵ Finally, the Court determined that it was not necessary to rely on the presumption, because the language and history of the collection of statutes that Title IX was a part of, demonstrated that Congress understood that the private right of action that existed with respect to Title VI would also be found in its companion statute, Title IX.²⁰⁶

Having concluded that the second factor established by the *Cort* decision was satisfied, that there was historical support for a private right of action under Title IX, the *Cannon* Court turned its attention to the third factor established by *Cort*: a prohibition against implying a private right of action, which “would

200. *Id.* at 695 n.16 (“Although [the house bill] never made it through the House, its sex discrimination provision was lifted from it, modified along the lines suggested in the 1970 hearings, and included in the House Resolution that was amended and adopted by the House as its version of what became [Title IX].”).

201. *Id.* at 696 (“The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.”).

202. *Id.* at 696.

203. *Id.*

204. *Id.* at 696–97.

205. *Id.* at 696–98 (“It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX.”).

206. *Id.* at 699.

frustrate the underlying purpose of the legislative scheme.”²⁰⁷ Title IX, like the statute it was modeled after, Title VI, was aimed at achieving two objectives: (1) preventing the use of federal funds to support discriminatory practices; and (2) affording protection to individual citizens against those discriminatory practices.²⁰⁸ The mechanism for achieving the first goal is found in the power to terminate the federal funding of institutions that discriminate on the bases of race (Title VI) or sex (Title IX).²⁰⁹ However, terminating federal funding, although austere, may not efficiently serve the needs of individuals who have been discriminated against.²¹⁰ Affording protection to individual citizens against institutional discriminatory practices may be more effectively achieved by providing a private right of action to the party discriminated against.²¹¹

The final factor under *Cort* is satisfied because implying a federal remedy in the form of a private right of action would be appropriate, since the subject matter is not one of state concern.²¹² Since the Civil War, the federal government and federal courts have been a powerful source of protection against discrimination, and it is the distribution of federal funds that provides justification for the statutory prohibition in the first place.²¹³ Although *Cannon* resolved whether a private right of action existed under Title IX, the decision did not address the standard to be applied in determining whether discrimination has been proven.

ii. *Private Right of Action Title VI*

As discussed above, when Title IX was enacted in 1972, the Court of Appeals for the Fifth Circuit, in *Bossier Parish School Board v. Lemon*, had already interpreted Title VI to provide private right of action.²¹⁴ The *Bossier Parish School Board* opinion had been repeatedly cited with approval. Prior to

207. *Id.* at 703.

208. *Id.* at 704.

209. *Id.*

210. *Id.* at 705 (“[I]t makes little sense to impose on an individual, whose only interest is in obtaining a benefit for herself, or on HEW, the burden of demonstrating that an institution’s practices are so pervasively discriminatory that a complete cutoff of federal funding is appropriate.”).

211. *Id.* at 705–06 (“The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute.”).

212. *Id.* at 708.

213. *Id.* at 708–09 (“Moreover, it is the expenditure of federal funds that provides the justification for this particular statutory prohibition. There can be no question but that this aspect of the *Cort* analysis supports the implication of a private federal remedy.”).

214. See generally *Bossier Parish Sch. Bd. v. Lemon*, 370 F.2d 847 (5th Cir. 1967), *cert. denied*, 388 U.S. 911 (1967); *Cannon*, 441 U.S. at 696 n.20.

the enactment of Title IX, lower courts had already determined that a private right of action existed under Title VI.²¹⁵ The Supreme Court in *Alexander v. Sandoval* confirmed that a private right of action existed under Title VI.²¹⁶

The question before the Supreme Court in *Alexander v. Sandoval* was whether a private individual has a right to enforce agency regulations prohibiting disparate impact discrimination under Title VI.²¹⁷ By accepting financial assistance from the United States Department of Justice and the Department of Transportation, the Alabama Department of Transportation subjected itself to Title VI's restrictions, which prohibited the Alabama Department of Transportation from excluding anyone from its programs or activities on account of their race, color, or national origin.²¹⁸ Before reaching its decision that no private right of action exists to enforce agency regulations prohibiting disparate impact discrimination under Section 602 of Title VI,²¹⁹ the *Sandoval* Court acknowledged that it was beyond dispute that a private individual may bring an action to recover damages and to seek injunctive relief under Section 601 of Title VI.²²⁰

The *Sandoval* Court noted that the reasoning of the Supreme Court in *Cannon v. University of Chicago* (fully discussed above) was instructive.²²¹ In *Cannon*, the Court acknowledged that Title VI and Title IX were equivalent enactments and that Congress had intended Title IX, like Title VI, to provide a private cause of action.²²² The *Sandoval* Court concluded that *Cannon* “embraced the existence of a private right to enforce Title VI as well.”²²³ What was more significant, the *Sandoval* Court observed, was Congressional ratification of the holding in *Cannon* when Congress enacted Section 1003 of

215. *See id.*

216. 532 U.S. 275, 280 (2001).

217. *Id.* at 278.

218. *Id.*

219. *Id.* at 288 (“Section 602 authorizes federal agencies ‘to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability.’” (alteration in original) (quoting 42 U.S.C. § 2000d-1 (2012))).

220. *Id.* at 280–81 (“For purposes of the present case, however, it is clear from our decisions, from Congress’s amendments of Title VI, and from the parties’ concessions that three aspects of Title VI must be taken as given. First, private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages.” (footnote omitted)).

221. *Id.*

222. *Id.* at 280 (“The reasoning of [the *Cannon*] decision embraced the existence of a private right to enforce Title VI as well. ‘Title IX,’ the Court noted, ‘was patterned after Title VI of the Civil Rights Act of 1964.’ And, ‘[i]n 1972 when Title IX was enacted, the [parallel] language in Title VI had already been construed as creating a private remedy.’ That meant, the Court reasoned, that Congress had intended Title IX, like Title VI, to provide a private cause of action.” (alteration in original) (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694, 696 (1979))).

223. *Id.*

the Rehabilitation Act Amendments of 1986.²²⁴ That provision specifically eliminated the states' sovereign immunity defense against action brought to enforce Title VI in federal court and provided for equitable and legal remedies for a private individual in such actions.²²⁵ Therefore, the Court reaffirmed that a private individual has a right to sue to enforce rights provided under Title VI.²²⁶

The second aspect of Title VI that *Sandoval* recognized must be accepted as a given is that Section 601 of Title VI prohibits only intentional discrimination.²²⁷ Finally, the *Sandoval* Court recognized that regulations promulgated under Section 602 of Title VI²²⁸ may validly ban disparate impact discrimination, although the banned activities may be perfectly acceptable under Section 601.²²⁹ The activities banned under regulations authorized by Section 602—because the action has a disparate impact on protected racial

224. *Id.* (“Congress has since ratified *Cannon*’s holding. Section 1003 of the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U.S.C. § 2000d–7, expressly abrogated States’ sovereign immunity against suits brought in federal court to enforce Title VI and provided that in a suit against a State ‘remedies (including remedies both at law and in equity) are available . . . to the same extent as such remedies are available . . . in the suit against any public or private entity other than a State.’” (quoting 42 U.S.C. § 2000d–7(a)(2)).

225. *Id.* (“We recognized in *Franklin v. Gwinnett County Public Schools*, that [the amendment] ‘cannot be read except as a validation of *Cannon*’s holding.’” (citation omitted) (quoting *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 72 (1992))).

226. *Id.* (“It is thus beyond dispute that private individuals may sue to enforce § 601.”).

227. *Id.* The Court traced its intentional discrimination jurisprudence beginning with *Regents of Univ. of Cal. v. Bakke*, where the Supreme Court was asked to review “a decision of the California Supreme Court that had enjoined the University of California Medical School from ‘according any consideration to race in its admissions process.’” *Id.* (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 272 (1978)). The *Sandoval* Court noted that “[e]ssential to the Court’s holding reversing that aspect of the California court’s decision was the determination that § 601 ‘proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.’” *Id.* at 280–81 (alteration in original) (quoting *Bakke*, 438 U.S. at 287). The *Sandoval* Court then considered the Supreme Court’s decision in *Guardians Assn. v. Civil Service Commission of the City of New York*, where “the Court made clear that under *Bakke* only intentional discrimination was forbidden by § 601.” *Id.* at 281 (citing *Guardians Ass’n v. Civil Serv. Comm’n of N.Y.*, 463 U.S. 582, 610–11 (1983) (Powell, J., concurring)). Finally, the *Sandoval* Court, stated that *Alexander v. Choate* “is true today: ‘Title VI itself directly reach[es] only instances of intentional discrimination.’” *Id.* (alteration in original) (quoting *Alexander v. Choate*, 469 U.S. 287, 293 (1985)).

228. Section 602 of Title VI provides that:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section [601] of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

42 U.S.C. § 2000d–1 (2012).

229. See *Sandoval*, 532 U.S. at 281.

groups—are only enforceable by the federal funding agencies, and not by private individuals.²³⁰ The *Sandoval* Court, however, did not address whether the failure of a federal funds recipient to remedy disparate impact discrimination known to such federal funds recipient constitutes “deliberate indifference” that would qualify as intentional discrimination in violation of Section 601 of Title VI. *Sandoval* also did not address what conduct amounted to intentional discrimination or even how a plaintiff may prove intentional discrimination.²³¹ Guidance to answering these questions may be garnered from the Supreme Courts sexual harassment Title IX cases.

4. “Deliberate Indifference” Standard for Sexual Harassment Claims Under Title IX

To turn a blind eye to conduct or policies of an institution that receives federal funds and is known to deny participation opportunities Title IX was enacted to ensure constitutes intentional discrimination and entitles victims to a private cause of action against such institutions.²³² This approach to evaluating intentional discrimination, a standard that is more flexible than the Supreme Court’s traditional intentional discrimination analysis under both Title VI and Title IX, emerges upon a closer examination of the Supreme Court’s sexual harassment cases, beginning with the *Gebser* line of cases.²³³ Title IX not only imposes an obligation to prevent discrimination motivated by intent to disadvantage or to benefit a particular racial or gender group, it also prohibits discrimination that results from conduct or policies that demonstrate disregard for the effect of institutional policies or individual conduct on groups protected by Title IX, where the disregarder knows of the effects of its conduct or policies, has the authority to remedy the discriminatory effects, and chooses not to, or fails to make any reasonable effort to remedy.²³⁴

230. *See id.* at 292–93.

231. Black, *supra* note 125, at 372.

232. *Id.* at 380.

233. *Id.* at 380–81.

234. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998). The Court indicated that the response of a federal funds recipient determines whether it will be liable for damages under Title IX (“We think, moreover, that the response must amount to deliberate indifference to discrimination. The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation.”). *Id.*

i. Gebser v. Lago Vista Independent School District

Gebser v. Lago Vista Independent School District involved a sexual harassment claim filed against the Lago Vista Independent School District and the sexual harasser.²³⁵ The sexual harassment initially began as inappropriate and aggressive sexual comments made by Frank Waldrop, a high school teacher, to students in his classes.²³⁶ It escalated to Waldrop inappropriately touching and fondling one student, Alida Star Gebser, during her freshman year in high school.²³⁷ Waldrop began having sexual intercourse with Ms. Gebser during the spring of her freshman year and into January of her sophomore year, when Waldrop was arrested after he was discovered having sexual intercourse with Ms. Gebser.²³⁸ Although parents of two other students complained to the school principal of Waldrop's sexual comments,²³⁹ a complaint was never lodged regarding Waldrop's behavior toward, and sexual involvement with, Ms. Gebser.²⁴⁰ Waldrop's employment was terminated and his teaching license revoked after his arrest.²⁴¹

Ms. Gebser and her mother filed suit in state court alleging, among other things, that the school district was liable under Title IX for Waldrop's conduct.²⁴² The Federal District Court's summary judgment in favor of the school district²⁴³ was affirmed on appeal to the Court of Appeals for the Fifth

235. *Id.* at 277–79.

236. *Id.* at 277.

237. *Id.* at 277–78.

238. *Id.* at 278.

239. *Id.* (“The principal arranged a meeting, at which, according to the principal, Waldrop indicated that he did not believe he had made offensive remarks but apologized to the parents and said it would not happen again. The principal also advised Waldrop to be careful about his classroom comments and told the school guidance counselor about the meeting, but he did not report the parents’ complaint to Lago Vista’s superintendent, who was the district’s Title IX coordinator.”).

240. *Id.*

241. *Id.*

242. *Id.* at 279 (The case was initially filled in state court and later removed to the United States District Court for the Western District of Texas. The District Court granted Lago Vista summary judgment on all claims. The case against Waldrop was remanded to state court. Gebser appealed the summary judgment rejecting her Title IX claim.).

243. *Id.* (The District Court “reasoned that the statute ‘was enacted to counter *policies* of discrimination . . . in federally funded education programs,’ and that ‘[o]nly if school administrators have some type of notice of the gender discrimination and fail to respond in good faith can the discrimination be interpreted as a *policy* of the school district.’ Here, the court determined, the parents’ complaint to the principal concerning Waldrop’s comments in class was the only one Lago Vista had received about Waldrop, and that evidence was inadequate to raise a genuine issue on whether the school district had actual or constructive notice that Waldrop was involved in a sexual relationship with a student.” (alteration in original) (citation omitted)).

Circuit.²⁴⁴ The Fifth Circuit determined that the school district could not be held liable under Title IX for sexual harassment of a student by one of its teachers unless: first, the school district's employee that was invested with supervisory control over the teacher actually knew of the sexual harassment; second, the employee with supervisory control must have the power or authority to end the abuse; and finally, the employee must have failed to end the sexual harassment.²⁴⁵

The Supreme Court reached its ruling in *Gebser*—that a damage remedy under Title IX is unavailable unless an official of the federal funds recipient that has authority to both deal with the alleged discrimination and to implement remedial procedures has actual knowledge that its programs are discriminatory and also neglects to reasonably respond²⁴⁶—by demonstrating that its ruling was mandated by Congressional intent and by limitations placed on damages awards where judicially implied private right of action is fashioned by the courts.²⁴⁷ The plaintiff in *Gebser* advanced two possible standards for imposing liability on the Lago Vista Independent School District for the teacher's sexual harassment. The first, *respondeat superior*, where liability would be imposed because the teacher's authority as an employee of the school district facilitated the sexual harassment of the student.²⁴⁸ Secondly, liability should be imposed because the school district had constructive notice, in that is, the school "district knew or 'should have known' about harassment but failed to uncover and

244. *Id.* at 279–80. ("The court first declined to impose strict liability on school districts for a teacher's sexual harassment of a student, reiterating its conclusion in *Leija* that strict liability is inconsistent with 'the Title IX contract.' The court then determined that Lago Vista could not be liable on the basis of constructive notice, finding that there was insufficient evidence to suggest that a school official should have known about Waldrop's relationship with Gebser. Finally, the court refused to invoke the common law principle that holds an employer vicariously liable when an employee is 'aided in accomplishing [a] tort by the existence of the agency relation,' explaining that application of that principle would result in school district liability in essentially every case of teacher-student harassment." (alteration in original) (citations omitted)).

245. *Id.* at 280.

246. *Id.* at 290 ("[W]e hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.").

247. *Id.*

248. *Id.* at 281–82. The plaintiff, who was joined by the United States as *amicus curiae*, would impose Title IX liability on the school district because the teacher's authority as an employee of the federal funds recipient aided the teacher's ability to carry out his sexual harassment of the student regardless of whether school district "had any knowledge of the harassment and irrespective of their response upon becoming aware." *Id.* at 281. This position, according to the Supreme Court is "an expression of *respondeat superior* liability, *i.e.*, vicarious or imputed liability, under which recovery in damages against a school district would generally follow whenever a teacher's authority over a student facilitates the harassment." *Id.* at 282 (citations omitted).

eliminate it.”²⁴⁹

In rejecting application of the *respondeat superior* theory to sexual harassment of a student by a school teacher, the Supreme Court noted that the plaintiff mistakenly relied on a statement in *Franklin v. Gwinnett County Public Schools*²⁵⁰ to argue that vicarious liability theory, which is generally applied in employment discrimination cases under Title VII, may be similarly applied to Title IX claims where the victim of sexual harassment is a student who is not in an employment relationship with the federal funds recipient.²⁵¹ The Supreme Court noted that its decision to impose liability in *Franklin* did not turn on constructive notice or imputed liability.²⁵² Rather, there was ample evidence that the school district in *Franklin* knew of the sexual harassment but did nothing about it.²⁵³ The Court’s justification for deciding that agency principles should direct its inquiry concerning imposition of liability under Title VII rested on the proposition that Title VII prohibits employment discrimination and defines the term employer to include any agent.²⁵⁴ Title IX, on the other hand, does not contain an analogous statement, nor does the statute “expressly call for application of agency principles.”²⁵⁵

Title IX prohibits application of vicarious liability since, unlike Title VII where Congress specifically provided for a private right of action,²⁵⁶ the private

249. *Id.*

250. 503 U.S. 60, 75 (1992) (“Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and ‘when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor “discriminate[s]” on the basis of sex.’ We believe the same rule should apply when a teacher sexually harasses and abuses a student.” (alteration in original) (citation omitted) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64, (1986)).

251. *Gebser*, 524 U.S. at 283 (According to the Court, “[w]hether educational institutions can be said to violate Title IX based solely on principles of *respondeat superior* or constructive notice was not resolved by *Franklin*’s citation of *Meritor*. That reference to *Meritor* was made with regard to the general proposition that sexual harassment can constitute discrimination on the basis of sex under Title IX, an issue not in dispute here.” (citation omitted)).

252. *Id.*

253. *Id.* (“In fact, the school district’s liability in *Franklin* did not necessarily turn on principles of imputed liability or constructive notice, as there was evidence that school officials knew about the harassment but took no action to stop it.”).

254. *Id.* at 283.

255. *Id.* The Court noted,

Moreover, *Meritor*’s rationale for concluding that agency principles guide the liability inquiry under Title VII rests on an aspect of that statute not found in Title IX: Title VII, in which the prohibition against employment discrimination runs against ‘an employer’ explicitly defines ‘employer’ to include ‘any agent.’ Title IX contains no comparable reference to an educational institution’s ‘agents,’ and so does not expressly call for application of agency principles.

Id. (citations omitted).

256. *Id.* (“Unlike Title IX, Title VII contains an express cause of action and specifically provides for relief in the form of monetary damages. Congress therefore has directly addressed the subject of

right of action under Title IX is judicially implied.²⁵⁷ In fashioning the scope of the private right of action under Title IX and the scope of the corresponding damage remedy, the *Gebser* Court concluded that the purpose of Title IX would be frustrated if damage recovery against the school district is allowed to proceed on the basis of *respondent superior* or constructive notice theory.²⁵⁸ A requirement that actual notice be received as a condition to recovery would not frustrate Title IX's two fold purposes of preventing federal funds from being used to sustain sexual discrimination and affording citizens effectual safeguards against discriminatory practices.²⁵⁹

Conditioning the imposition of liability on actual notice of discrimination and on federal recipient's failure to take corrective action is consistent with the contractual relationship between the government and the federal funds recipient under Title IX²⁶⁰ and distinguishes recipients' obligations under Title IX from those under Title VII,²⁶¹ where the prohibition is *not* conditional.²⁶² Administrative enforcement of Title IX is also conditioned on actual knowledge of discrimination in and by institutions receiving federal education funds.²⁶³

damages relief under Title VII and has set out the particular situations in which damages are available as well as the maximum amounts recoverable." (citations omitted)).

257. *Id.* at 283–84 (“With respect to Title IX, however, the private right of action is judicially implied, and there is thus no legislative expression of the scope of available remedies, including when it is appropriate to award monetary damages.” (citations omitted)).

258. *Id.* at 285 (“[W]e conclude it would ‘frustrate the purposes’ of Title IX to permit a damages recovery against a school district for a teacher’s sexual harassment of a student based on principles of *respondent superior* or constructive notice, *i.e.*, without actual notice to a school district official. Because Congress did not expressly create a private right of action under Title IX, the statutory text does not shed light on Congress’ intent with respect to the scope of available remedies.”).

259. *Id.* at 286 (“Congress enacted Title IX in 1972 with two principal objectives in mind: ‘[T]o avoid the use of federal resources to support discriminatory practices’ and ‘to provide individual citizens effective protection against those practices.’” (alteration in original) (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979))).

260. *Id.* at 286 (Noting the similarity between Title VI and Title IX, the *Gebser* Court noted that “[t]he two statutes operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.”).

261. *Id.* (“That contractual framework distinguishes Title IX from Title VII, which is framed in terms not of a condition but of an outright prohibition. Title VII applies to all employers without regard to federal funding and aims broadly to ‘eradicat[e] discrimination throughout the economy.’” (alteration in original) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 254 (1994))).

262. *Id.* at 287.

263. *Id.* at 288. The Court reasoned that

Title IX’s express means of enforcement—by administrative agencies—operates on an assumption of actual notice to officials of the funding recipient. . . . Significantly, however, an agency may not initiate enforcement proceedings until it ‘has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.’ The administrative regulations implement that obligation, requiring resolution of compliance issues ‘by

According to the Court, the principal purpose of the notice requirement is to provide recipients opportunity to voluntarily comply before enforcement action is taken, and to avoid education funds from being diverted from educationally useful purposes, “where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures.”²⁶⁴ It would, therefore, be unsound for judicially implied private right of action to permit liability and a damages award without requiring notice to, and opportunity to, remedy discrimination where the statute’s enforcement structure requires such notice.²⁶⁵

*ii. Davis v. Monroe County Board of Education*²⁶⁶

Aurelia Davis filed an action against the Monroe County Board of Education, claiming that her daughter, LaShonda—a fifth grade student—had experienced prolonged sexual harassment at the hands of a student in her class.²⁶⁷ The harassment began in December of 1992²⁶⁸ and continued beyond April of 1993.²⁶⁹ The sexually harassing behavior escalated.²⁷⁰ LaShonda was

informal means whenever possible,’ and prohibiting commencement of enforcement proceedings until the agency has determined that voluntary compliance is unobtainable and “the recipient . . . has been notified of its failure to comply and of the action to be taken to effect compliance.”

Id. (citations omitted).

264. *Id.* at 289.

265. *Id.* at 289–90.

266. 526 U.S. 629 (1999).

267. *Id.* at 632.

268. *Id.* at 633–34. In December of 1992, LaShonda’s classmate, G.F., tried to touch her breasts and genital area and also made sexually offensive remarks to her. *Id.* at 633. Similar incidents occurred around January 4 and January 20, 1993. *Id.* Each incident was reported to LaShonda’s mother, Aurelia, and her teacher, Diane Fort. *Id.* at 633–34. Although Aurelia was assured that the school principal was informed, G.F. was not disciplined by the school for his conduct. *Id.* at 634.

269. *Id.* According to the record, during a physical education class in February of 1993, G.F., after allegedly placing a door stop in his pants, engaged in sexually suggestive behavior toward LaShonda. *Id.* A week after reporting this incident to her physical education teacher, another incident occurred while in the classroom of another teacher, Joyce Pippin. *Id.* These incidents were reported, but with no result. *Id.*

270. *Id.* The Court reported,

Petitioner alleges that G.F. once more directed sexually harassing conduct toward LaShonda in physical education class in early March, and that LaShonda reported the incident to both Maples and Pippin. In mid-April 1993, G.F. allegedly rubbed his body against LaShonda in the school hallway in what LaShonda considered a sexually suggestive manner, and LaShonda again reported the matter to Fort.

The string of incidents finally ended in mid-May, when G.F. was charged with, and pleaded guilty to, sexual battery for his misconduct. The complaint alleges that LaShonda had suffered during the months of harassment, however; specifically, her previously high grades allegedly dropped as she became unable to concentrate on her studies, and, in April 1993, her father discovered that she had written a suicide note. The complaint further alleges that, at one point, LaShonda told petitioner that she “didn’t know how much

not the only victim of the sexual harassment.²⁷¹ Not only was very little done to prevent or punish the offending student, but LaShonda was also not allowed to move her seat in the class; she was sitting next to the offending student for more than three months after the harassment began.²⁷²

Certiorari was granted by the Supreme Court to determine whether an institution that receives federal educational funds will be held liable, under any set of circumstances, for *student-on-student* sexual harassment.²⁷³ According to the Court, it was asked to do more than determine the conduct prescribed by Title IX.²⁷⁴ The critical question was whether the school district could be held liable for *its failure* to respond to sexual harassment being perpetrated by one student against other students.²⁷⁵ Citing its decision in *Cannon*, the Court confirmed that it had previously determined that an implied private right of action is available under Title IX,²⁷⁶ and that money damages are recoverable for its violation.²⁷⁷ The Court observed that it has regarded Title IX as a law having been enacted under authority granted to Congress by the Spending Clause of the Constitution.²⁷⁸ Therefore, private damages are only available for violations of this implied private right of action when recipients of federal educational funds have notice that they *could* be liable for the behavior in question.²⁷⁹

longer she could keep [G.F.] off her.”

Id. (alteration in original) (citations omitted).

271. *Id.* at 635 (“Nor was LaShonda G. F.’s only victim; it is alleged that other girls in the class fell prey to G.F.’s conduct. At one point, in fact, a group composed of LaShonda and other female students tried to speak with Principal Querry about G. F.’s behavior. According to the complaint, however, a teacher denied the students’ request with the statement, ‘If [Querry] wants you, he’ll call you.’” (alteration in original) (citations omitted)).

272. *Id.* (“Nor, according to the complaint, was any effort made to separate G. F. and LaShonda. On the contrary, notwithstanding LaShonda’s frequent complaints, only after more than three months of reported harassment was she even permitted to change her classroom seat so that she was no longer seated next to G. F.” (citations omitted)).

273. *Id.* at 639.

274. *Id.*

275. *Id.* (“Here, however, we are asked to do more than define the scope of the behavior that Title IX proscribes. We must determine whether a district’s failure to respond to student-on-student harassment in its schools can support a private suit for money damages.”).

276. *Id.*

277. *Id.*

278. *Id.* at 640; *see also* U.S. CONST. art. I, § 8, cl. 1.

279. *Davis*, 526 U.S. at 640. According to the Supreme Court,

When Congress acts pursuant to its spending power, it generates legislation “much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.” In interpreting language in spending legislation, we thus “insis[t] that Congress speak with a clear voice,” recognizing that “[t]here can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected

The Supreme Court rejected the school district's argument that the liability sought to be imposed on the district was for conduct of a third party and not for its own behavior.²⁸⁰ In rejecting the district's argument, the Court determined the conduct for which the district would be held liable was its decision to *remain idle*—turning a blind eye—in the face of *student on student* sexual harassment in its program.²⁸¹ The Court made a distinction between the notice limitations imposed on the federal funds recipient as to the *scope* of potential activities that may be prohibited by Title IX²⁸² and whether the recipient had notice that the prohibited conduct is being carried under its programs.²⁸³

When an institution accepts federal educational funds, the contract entered into with the government is an agreement to abide by congressionally imposed conditions established when Congress acted under the Spending Clause of the Constitution.²⁸⁴ Congress may act pursuant to its authority under the Spending

of it.”

Id. (alterations in original) (citations omitted).

280. *Id.* at 640–41 (The Court agreed that Title IX imposes liability for the conduct of the federal funds recipient that “[E]xclud[e] [persons] from participation in, . . . den[y] [persons] the benefits of, or . . . subject[t] [persons] to discrimination under’ its ‘program[s] or activit[ies]’ in order to be liable under Title IX. The Government’s enforcement power may only be exercised against the funding recipient, and we have not extended damages liability under Title IX to parties outside the *scope* of this power.” (alteration in original) (citations omitted) (emphasis added)).

281. *Id.* at 641–42.

282. *Id.* (“We recognized that the *scope* of liability in private damages actions under Title IX is circumscribed by *Pennhurst’s* requirement that funding recipients have notice of *their potential liability*. Invoking *Pennhurst*, *Guardians Ass’n*, and *Franklin*, in *Gebser* we once again required ‘that the “receiving entity of federal funds [have] notice *that it will be liable for a monetary award*”’ before subjecting it to damages liability.” (citation omitted) (emphasis added)).

283. The Court noted that the limitation recognized by *Pennhurst* and its progeny, although protecting the federal funds recipient from vicarious liability for actions of its employees or agents on a negligence theory, the limitation does not insulate the federal funds recipient from liability for its own intentional discrimination in violation of Title IX. The Court reasoned that,

In particular, we concluded that *Pennhurst* does not bar a private damages action under Title IX where the funding recipient engages in intentional conduct that violates the clear terms of the statute.

Accordingly, we rejected the use of agency principles to impute liability to the district for the misconduct of its teachers. Likewise, we declined the invitation to impose liability under what amounted to a negligence standard—holding the district liable for its failure to react to teacher-student harassment of which it knew or *should have* known. Rather, we concluded that the district could be liable for damages only where the *district itself intentionally* acted in clear violation of Title IX by remaining *deliberately indifferent* to acts of teacher-student harassment of which it had actual knowledge. Contrary to the dissent’s suggestion, the misconduct of the teacher in *Gebser* was not “treated as the grant recipient’s actions.” Liability arose, rather, from “an official decision by the recipient not to remedy the violation.”

Id. at 642 (citations omitted) (emphasis added) (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)).

284. The Spending Clause, Article I, Section 8 of the U.S. Constitution provides: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises

Clause only when recipients of federal funds voluntarily and knowingly accept the conditions and terms of the assumed contract with the government.²⁸⁵ Further, as the Court acknowledged in *Davis*, there can be no knowing acceptance unless federal funds recipients are aware of the conditions imposed by Congress or are able to determine what is expected of them.²⁸⁶ In the case of Title IX, recipients of federal educational funds must have notice from the statute that Congress prohibits certain behavior. Notice of the scope of conduct Title IX was enacted to proscribe may be found in the express terms of the statute, its statutory structure, and the nature of the enforcement powers granted federal agencies to insure compliance.²⁸⁷

The Supreme Court rejected the school district's argument in *Davis* that student-on-student sexual harassment is *not* a form of discrimination that falls within the scope of Title IX, because discrimination of third parties is not discrimination committed by the school district.²⁸⁸ In doing so, the Supreme Court ruled that the school district was on notice that it could be obligated to prevent discrimination perpetrated by third parties, in this case a student.²⁸⁹ Notice to the district was provided by the statute and the enforcement agencies that the district has an affirmative obligation to prevent sexual discrimination by third parties over which it has authority and control.²⁹⁰

Having determined that the school district was on notice that it could be potentially liable for *student-on-student* sexual harassment, the Supreme Court identified a second form of notice federal funds recipients must have before they may be held liable, which notice relates to the elements of the judicially implied right of action under Title IX. To be liable for damages, the federal funds recipient must have knowledge that beneficiaries of its educational programs are being discriminated against under circumstances where the district has authority to act and fails to act by remaining deliberately indifferent to the plight

shall be uniform throughout the United States." U.S. CONST. art. I, § 8.

285. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'").

286. *Davis*, 526 U.S. at 640.

287. *Id.* at 638–39, 644.

288. *Id.* at 642.

289. *Id.* at 643–44. According to the Court,

[T]he regulatory scheme surrounding Title IX has long provided funding recipients with notice that they may be liable for their failure to respond to the discriminatory acts of certain nonagents. The Department of Education requires recipients to monitor third parties for discrimination in specified circumstances and to refrain from particular forms of interaction with outside entities that are known to discriminate.

Id.

290. *See id.* at 645, 647–48.

the class of persons Title IX was enacted to benefit. The intentional discrimination for which the federal funds recipient will be held liable for is their deliberate indifference to discrimination against a class of beneficiaries of Title IX.²⁹¹ Deliberate indifference to discriminatory conduct by third parties that prevents students enrolled in the district programs from gaining equal access to educational services is a form of intentional discrimination that falls within Title IX's scope.²⁹²

5. Deliberate Indifference to the Lack of Equal Access to Sports Opportunities for Protected Groups Constitutes Actionable Discrimination Under Title IX

The argument made in this section is that the failure to effectively accommodate the interest of or to provide sports participation opportunities for African-American girls, girls from other minority groups, or girls from urban, rural, and economically disadvantaged communities—although traceable to race, cultural, or economic factors—constitutes intentional discrimination in violation of Title IX. Deliberate indifference to the lack of effective accommodation and participation opportunities available to these girls, regardless of its origin, is a form of intentional discrimination under Title IX.

Educational institutions that receive federal educational funds intentionally discriminate in violation of Title IX when these institutions are deliberately indifferent to gender inequity experienced by girls that are members of these identity groups.²⁹³ The fact that racial discrimination, which may have been caused by another entity—and for which that entity may be liable—does not

291. *Id.* at 642 (“Rather, we concluded that the district could be liable for damages only where the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student harassment of which it had *actual knowledge*.” (emphasis added)).

292. *Id.* at 650. According to the Court,

The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender. We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.

Id.

293. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998); *see also* Black, *supra* note 125, at 371 (“The *Gebser* line of cases demonstrates that a defendant also violates Title VI and Title IX when it takes intentional action/inaction that causes, contributes to, or *perpetuates* the discrimination or *disadvantages* that occur within its programs.” (emphasis added)). The Second Circuit Court of Appeals applied the “deliberate indifference” doctrine under Title VI in *Zeno v. Pine Planes Central School District*, 702 F.3d 655, 671 (2nd Cir. 2012) to “conclude that there was sufficient evidence in the record to support the jury’s finding that the District’s responses to student harassment of Anthony “amount[ed] to deliberate indifference to discrimination.”

absolve the recipient of federal educational funds of its obligation to address the resultant gender inequity caused thereby.²⁹⁴

i. Educational Institutions Failure to Provide Interscholastic Participation Opportunities for Girls, Regardless of Race or Economic Status, Is Within the Scope of Discriminatory Practices Title IX Was Intended to Reach

The Supreme Court has already determined that an implied private right of action is available under Title XI, and that money damages are recoverable for its violation.²⁹⁵ Private damages are only available for violations of Title IX when recipients of federal educational funds have notice that the offending conduct falls within the scope of statute.²⁹⁶ Title IX is applicable to educational institutions, which includes secondary schools.²⁹⁷ The regulations implementing Title IX specifically provide that a “recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.”²⁹⁸ Clearly educational institutions that receive federal educational funds are aware of the conditions Title IX attaches to those funds (i.e. that recipients of those funds must afford equal access to members of both sexes to athletic opportunities, including African-Americans and girls from other minority groups, girls from urban communities, and girls from economically disadvantaged communities.²⁹⁹

ii. Private Cause of Action Requires Notice to Offending Institutions that Beneficiaries of Title IX the Lack of Equal Access to Athletic Opportunities

Once it is clear that recipients of federal educational funds have notice that they could fall within the ambit of Title IX and potentially exposed for their failure to provide equal access to athletic participation opportunities for girls,

294. Black, *supra* note 125, at 371 (“Such a violation occurs, even when the defendant did not initially desire or act to create discrimination or disadvantage, if the discrimination and disadvantage continue to occur because the defendant knowingly refuses or fails to intervene.”).

295. *Davis*, 526 U.S. at 640.

296. *See Gebser*, 524 U.S. at 283–84.

297. *See* 20 U.S.C. § 1681(c) (“For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department. . .”).

298. 34 C.F.R. § 106.41(c) (2012).

299. *See Gebser*, 524 U.S. at 286.

regardless of their race, ethnic background, or community of origin, Title IX further requires notice that girls within programs are not actually being afforded equal access to athletic participation opportunities.

According to the Supreme Court in *Gebser*, the principal purpose of actual notice is to provide recipients an opportunity to voluntarily comply before enforcement action is taken. Notice also avoids educational funds from being diverted from educationally useful purposes, as “where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures.”³⁰⁰ The Court concluded that it would therefore be unsound for a judicially implied private right of action to permit liability and damages award without requiring notice to and opportunity to remedy discrimination, where the statute’s enforcement structure requires such notice.³⁰¹

The Department of Education’s Office for Civil Rights (OCR) has said that an institution violates Title IX if it fails to meet any of the three elements of the “three prong test.”³⁰² The “three prong test” was derived by the OCR in its 1979 Policy Interpretation and provided three benchmarks for demonstrating effective accommodation claims under Title IX.³⁰³ Under the “three prong test,” a federal funds recipient had to establish either that: 1) the educational institution is providing athletic participation opportunities to members of each sex in numbers that are substantially proportionate to their respective enrollment at that institution; 2) the institution has demonstrated a history of accommodating the athletic interests of the underrepresented sex; or 3) that the athletic interests and abilities of the underrepresented sex has been effectively accommodated.³⁰⁴

300. *Gebser*, 524 U.S. at 289. See discussion *supra* Parts IV(A)(4)(i) (indicating that imposing liability under a respondent superior theory would allow education funds to be diverted from educationally useful purposes).

301. *Gebser*, 524 U.S. at 290.

302. See Andrew J. Weissler, *Unasked Questions: Applying Title IX’s Effective Accommodation Mandate to Interscholastic Athletics*, 19 *SPORTS LAW J.* 71, 80–81 (2012).

303. *Id.* In 1975, the United States Department of Health, Education, and Welfare (HEW) listed ten (10) nonexclusive factors courts should consider in determining whether an educational institution is in compliance with Title IX, the first of which was “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.” *Id.* at 79. Claims filed under this first factor were later referred to as “effective accommodation” claims. *Id.* The other nine factors were referred to as “equal treatment” claims. *Id.* The “three prong test” came out of Department of Education’s Office for Civil Rights (OCR), 1979 Policy Interpretation, 44 Fed. Reg. at 71,413 (Dec. 11, 1979), and provided three benchmarks for demonstrating effective accommodation claims. *Id.* at 80–81.

304. 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, 62 (1996) (“Under the first prong, the court examines whether athletic participation opportunities are provided to each sex in numbers substantially proportionate to their enrollment. If a school cannot meet this prong, the court

Title IX and its implementing regulations apply to interscholastic athletics. Scholars, however, have taken three different views in applying the “three prong test” to determine whether educational institutions have effectively accommodated the interest of both sexes in the context of interscholastic athletics.³⁰⁵

One approach is to apply the tests to interscholastic athletics exactly as the courts have applied in the intercollegiate context.³⁰⁶ Other commentators take the position that the “three prong test,” considering the impact of its application to intercollegiate athletics, is appropriate and should not be applied to interscholastic athletics.³⁰⁷ Finally, some scholars, while recognizing that interscholastic athletics is a legitimate gender discrimination subject, remedying discriminatory impacts in interscholastic institutions pose such unique problems strict application of the three prong test is simply unworkable. These scholars are nevertheless willing to propose alternative solutions even if they are inconsistent with the statutory framework of Title IX.³⁰⁸

This Article does not advocate adoption of these approaches, nor does it advance a fourth alternative. It does not attempt to reconcile them either. Instead, the author takes the position that regardless of the agency’s articulated

then determines whether the school can demonstrate a history and continuing practice of program expansion for the underrepresented sex. If a school fails the second prong, the court finally asks whether the athletic interests and abilities of the underrepresented sex have been fully and effectively accommodated by the school. If the plaintiffs can show that the school also fails on this third prong, then the court must find the school out of compliance with Title IX. In applying this three-prong test, courts have arrived at the same conclusion: that the schools that have been challenged to date have failed to provide adequate opportunity to their female athletes and thereby are violating federal law.”).

305. Weissler, *supra* note 304, at 73–74 (noting that although “the guidance developed for intercollegiate athletics is meant to apply to interscholastic athletics only ‘when appropriate,’ and no further guidance has been provided for when such appropriateness exists,” the “when appropriate” language has been ignored by courts when applying the Policy Interpretations to interscholastic athletics). Not only have courts ignored the differences between the maturity and skill level of intercollegiate athletes and interscholastic athletes in applying the three prong test, so have scholars. *Id.* at 74.

306. *Id.* at 74 (citing Ray Yasser & Samuel J. Schiller, *Gender Equity in Athletics: The New Battleground of Interscholastic Sports*, 15 CARDOZO ARTS & ENT. L.J. 371 (1997); Lynne Tatum, Comment, *Girls in Sports: Love of the Game Must Begin at an Early Age to Achieve Equality*, 12 SETON HALL J. SPORT L. 281 (2002)).

307. *Id.* (citing Allison Kasic, *Title IX Enforcement Could Devastate High School Sports*, U.S. NEWS & WORLD REP. (Feb. 16, 2011), <http://www.usnews.com/opinion/articles/2011/02/16/title-ix-enforcement-could-devastate-high-school-sports>; Letter from Joshua P. Thompson, Attorney, Pac. Legal Found., To Whom It May Concern, Office for Civil Rights, Chi. Office, U.S. Dep’t of Educ. (Feb. 8, 2011), available at <http://www.pacificlegal.org/document.doc?id=514>).

308. *Id.* (citing Patrick N. Findlay, *The Case for Requiring a Proportionality Test to Assess Compliance with Title IX in High School Athletics*, 23 N. ILL. U. L. REV. 29, 36-40 (2002); Carolyn Davis, Note, *Leave It on the Field: Too Expansive an Approach to Evaluating Title IX Compliance in Biediger v. Quinnipiac University?*, 76 BROOK. L. REV. 265, 272-73 (2010)).

rationale for application of Title IX's proscriptions and remedies applicable to intercollegiate athletics, turning a blind eye to gender based inequities experienced by girls at the interscholastic level who are members of certain identify groups—namely African-Americans, Hispanic and Asian girls, and girls from urban, rural, and economically disadvantaged communities—constitutes intentional discrimination under the Supreme Court's deliberate indifference jurisprudence under Title IX.

In the author's view, any federal funds recipient, at any level of athletics, should be held liable if it can be established that such institutions are deliberately indifferent to discrimination against a protected class of Title IX beneficiaries, after notice of its existence, and they act to perpetuate such discrimination.³⁰⁹ Using this more elemental approach, the next question is exactly what forms of institutional conduct should constitute the kind of deliberate indifference so as to trigger Title IX liability for interscholastic institutions?

iii. Notice that Girls Are Not Being Afforded Equal Access to Athletic Participation Opportunities Must Be Given to Someone With Authority to Prevent the Discrimination

The Supreme Court ruled in *Gebser* that a damage remedy under Title IX is unavailable unless an official of the federal funds recipient that has authority to both deal with the alleged discrimination and to implement remedial procedures has actual knowledge that its programs are discriminatory and also neglects to reasonably respond.³¹⁰ The Supreme Court in *Gebser* recognized that the school principal was such a person. The plaintiff in *Gebser* correctly identified the school principal as the person that has authority to address the alleged discrimination and to implement remedial procedures, however, the plaintiff failed on providing such notice. Rather than notifying the principal that the student was being sexually harassed by the teacher, parents complained that the teacher made sexually inappropriate remarks during class.³¹¹

309. Black, *supra* note 125, at 379 (“The *Gebser* line of cases demonstrates that the statutory bar of discrimination in federally funded programs—which the Court has interpreted to mean “intentional” discrimination—also prohibits volitional actions that effectively perpetuate discrimination, undermine congressional intent, or subject individuals to inequality.”).

310. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

311. *Id.* at 291. According to the *Gebser* Court,

The only official alleged to have had information about Waldrop's misconduct is the high school principal. That information, however, consisted of a complaint from parents of other students charging only that Waldrop had made inappropriate comments during class, which was plainly insufficient to alert the principal to the possibility that Waldrop was involved in a sexual relationship with a student.

Id.

Moreover, there are a number of other parties within educational institutions that receive federal funds that would satisfy the requirement that notice must be given to an official of the federal funds recipient that has authority to both deal with the alleged discrimination and to implement remedial procedures. At the interscholastic level, "official notice" may be provided to school administrators, School District Boards of Directors, Superintendents, Athletic Director, teachers, or even other coaches. Such notice can be implied from the statistical evidence that is readily available through a variety of governmental agencies. The statistics in this Article clearly demonstrate a lack of access to sports opportunities for African-American girls and girls from other minority groups, girls from urban and girls from economically disadvantaged communities currently exists in institutions offering interscholastic athletics. Determining whether these statistics are also true with respect to particular federal educational funds recipients offering interscholastic athletics is the first step. Providing official notice to institutional administrators that the Title IX rights of African-American girls and girls from other minority groups, girls from urban communities, and girls from economically disadvantaged communities are being violated is the next step. With the notice and opportunity to cure issue resolved, access to statutory remedies can readily be pursued to bring these identity groups within the orbit of statutory protections Title IX was created to promote.

V. CONCLUSION

Interscholastic educational institutions may be held liable for their failure to achieve gender equity for minority female students and gender equity for females from urban, rural, and economically disadvantaged communities. Gender equity, with respect to access to participation opportunities in emerging women's sports, must be achieved in middle and high school athletic programs, if gender equity is to be achieved at the collegiate level for girls from these identity groups. Participation opportunities in NCAA designated emerging sports (volleyball, lacrosse, soccer, crew, water polo, and equestrian) must realistically be available to middle school and high schools girls in urban, rural, minority, and economically disadvantaged communities. Unfortunately for girls from these communities, participation opportunities are only available in traditional women's sports: basketball and track and field. Unless middle school and high schools girls in urban, rural, and minority communities are given the opportunities to participate in the emerging women's sports, the fact is that gender equity is being (facially) achieved only because Title IX requirements are implemented without specific regard to detrimental impacts failure to remedy lack of participation opportunities for those subgroups.

Under Title IX there are two categories of intentional discrimination that are both actionable under Title IX. The first is direct discrimination by a perpetrator of the discrimination; the person that directly discriminates against victims. The second intentional discrimination category is not the perpetrator or the party causing the discrimination, but the party who knows or learns of the discrimination, has the authority to take corrective action, but fails to take such action.

The first category of discriminatory conduct is actionable as traditional intentional discrimination where the perpetrator liability is imposed because the perpetrator's conduct is motivated by a discriminatory purpose. The second category is more nuanced. The discriminatory actor in this case is not the direct actor. In fact, the violator may have no motive to discriminate at all, or the discrimination experienced by the victim may have been unintentional. The violator in this case learns of the discriminatory effect and turns a blind eye to injury. More accurately, the violator is indifferent to the discriminatory effects of the conduct of the intentional discriminator or the discriminatory effects of its policies or programs. It is my contention that this second form of intentional discrimination, "deliberate indifference," is actionable intentional discrimination under Title IX.

A school district may be liable for this second form of intentional discrimination where, for example, its athletic resource allocation decisions provide athletic participation opportunities for majority and economically advantaged female students without regard to the interests of other female subgroups. Such a school district may not be motivated by discriminatory animus, but what happens when its administrators learn that their actions have worked an unintended discriminatory effect on distinctly identifiable subgroups of female students protected under Title IX? However, when a school district, rather than ameliorating the known discriminatory effects of its resource allocation decision-making on protected subgroups under Title IX, simply ignores the discriminatory effect of its decisions, it has violated the law.

To be certain, the school district's original "remedial" allocation decision-making will not, standing alone, breach the Supreme Court's traditional intentional discrimination standard. However, the intentional act *which will result* in liability is the "deliberate indifference" to the effects of that decision-making on protected subgroups. The doctrine holds that it is the decision not to ameliorate the unintended consequences of its original decision to allocate resources that is the wrongful act.