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The Pipeline to Title IX

Dionne Koller

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THE PIPELINE TO TITLE IX

DIONNE KOLLER*

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INTRODUCTION

Sport participation for girls and women remains, to perhaps state the obvious, contested terrain. In the fifty years since Congress enacted Title IX, the struggle to achieve sex equality in sport has taken different forms, from the initial fight to permit girls and women to participate at all to navigating the backlash that Title IX as applied to sport has “gone too far.” Whatever its form, the struggle over gender equity in sport has been, at bottom, a struggle to re-calibrate the traditional systems of power circulating in sport.

Title IX dramatically¹ altered the trajectory of this struggle through a highly successful, but as yet not fully realized,² legal intervention that

* Professor of Law and Director, Center for Sport and the Law, University of Baltimore School of Law. I am grateful to Sarah Walrath for assistance with research.

1. Ellen Staurowsky et al., *50 Years of Title IX: We’re Not Done Yet*, WOMEN’S SPORTS FOUND. 6 (May 2022), https://www.womenssportsfoundation.org/wp-content/uploads/2022/05/13_Low-Res_Title-IX-50-Report.pdf (stating that “[f]or girls and women playing, competing, and working in sport, times have changed dramatically from the days when girl and women athletes were viewed as novelties.”). The report also notes that “[a] society that once justified limiting sporting opportunities for girls and women on the basis of now disproven notions of female inferiority and physical delicacy has witnessed a transformation of the U.S. sport system.” *Id.* at 29.

prohibits sex discrimination in education-based sport. This Article seeks to shed light on one aspect of the struggle, by arguing that to fully achieve equality for girls and women in sport, we must expand our lens to incorporate a more complete understanding of the systems of power³ that shape whether a girl becomes an athlete with the “interest” and “ability” to participate. In doing so, this article explains that youth sport is the pipeline to Title IX, and it operates as a largely privatized, professionalized system, conceptualized as a matter for the individual, not public policy. It is also an experience entwined with public health discourses that link participation in athletics with being a responsible citizen. In the U.S., youth sport is shaped by what many call our “neoliberal” political, historical moment, and in this way, it has a profound impact on Title IX’s continued ability to make meaningful change in education-based sport.

I. TITLE IX IN CONTEXT

Sport historians explain that our knowledge of sport should be viewed as “situational and contextualized.”⁴ To best understand how youth sport connects to the system of power in sport that Title IX seeks to address, it is therefore important as an initial matter to situate Title IX in both the landscape of sport and as it relates to our larger political and historical climate. To do this, our lens must ultimately be wider than sport itself.

Title IX’s impact is most commonly understood within the context of sport. The highlights of Title IX’s “success story” are well known, as scholars and advocates have long praised the law’s effect of “revolutionizing” sports by opening it up to girls and women to participate at the interscholastic and intercollegiate levels.⁵ The statistics are striking. Before Congress enacted

2. *Id.* at 6 (stating that “those gains have been made without a full commitment to Title IX’s mandate of equitable and fair treatment and more general principles of gender equity throughout the sport system.”); Erin E. Buzuvis, *Title IX: Separate but Equal for Girls and Women in Athletics*, in *THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES* 1, 1 (Deborah Brake et al. eds., 2021) (describing Title IX’s “dramatic, but unfinished and racially uneven, impact . . . on increasing athletic opportunities for women and girls.”).

3. See HUBERT L. DREYFUS & PAUL RABINOW, *MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS* 185 (Univ. of Chi. Press, 2d ed. 1983) (stating that for Foucault “[p]ower is not a commodity, a position, a prize, or a plot; it is the operation of the political technologies throughout the social body” and that the goal for one hoping to understand power in a given situation is “to identify how it operates.”).

4. Douglas Booth, *Constructing Knowledge: Histories of Modern Sport*, in *A COMPANION TO SPORT* 23, 35 (David L. Andrews & Ben Carrington eds., 2013).

5. DEBORAH L. BRAKE, *GETTING IN THE GAME: TITLE IX AND THE WOMEN’S SPORTS REVOLUTION* 67 (N.Y. Univ. Press 2010).

Title IX, only about 30,000 women participated in college sports; today it is more than 200,000.⁶ At the high school level, nearly 300,000 girls participated in 1972, while as of 2018-19 there are almost 3.5 million.⁷ Women and girls' increased sports participation also has produced high-profile results. In the Summer and Winter Olympic Games, women make up at least half of all U.S. athletes, and they are frequently on the medal stand. The Women's National Basketball Association is thriving, a professional women's soccer league is growing, and female athletes are some of the most popular social media influencers and brand endorsers.

Title IX's impact is also noteworthy because it is far broader than its legal reach. The law is hailed for its effectiveness in shifting societal attitudes that once discouraged girls and women from engaging in sport.⁸ The normative force of Title IX is evident in issues such as the U.S. Women's National Soccer Team pay dispute⁹ and Sedona Prince's Tik Tok video highlighting disparities between the men's and women's NCAA basketball tournament accommodations.¹⁰ Although the law does not apply to these contexts, the expectation of gender equity does. Thus, while there is still much more to be done, there is no denying that, fifty years after Congress enacted Title IX, the environment for girls and women to participate in sport is dramatically improved.

We can further locate Title IX in the context of sport with reference to its point of legal intervention. While its cultural reach is vast, Title IX's legal coverage is significant, but more modest. The statute and regulations apply to education programs that receive federal financial assistance.¹¹ As a practical matter, then, Title IX's anti-discrimination mandate attaches to sport occurring at the interscholastic and intercollegiate levels. Sports programs that are embedded in schools have enormous significance in U.S. culture, and school sports programs serve a large number of athletes—about 8 million total in high

6. Staurowsky et al., *supra* note 1, at 8.

7. *Id.*

8. BRAKE, *supra* note 5, at 13; Buzuvis, *supra* note 2, at 5 (stating that “[p]erhaps more important than the power of Title IX to motivate compliance through enforcement, the law’s symbolic power has fueled the expansion of women’s sports by normalizing the expectation of equality in the realm of athletics.”).

9. Andrew Das, *U.S. Soccer and Women’s Players Agree to Settle Equal Pay Lawsuit*, N.Y. TIMES (May 18, 2022), <https://www.nytimes.com/2022/02/22/sports/soccer/us-womens-soccer-equal-pay.html>.

10. The post triggered a “Gender Equity Review” by the NCAA. See *NCAA External Gender Equity Review, Phase 1: Basketball Championship*, KAPLAN HECKER & FINK LLP (Aug. 2, 2021), <https://ncaa.genderequityreview.com/>.

11. The statute states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a) (2022).

school¹² and just under 500,000 in colleges and universities.¹³ However, while Title IX applies to its member institutions, it does not apply to the NCAA.¹⁴ Similarly, Title IX does not apply to the United States Olympic and Paralympic Committee¹⁵ or sport National Governing Bodies. Title IX also does not apply to private youth sports programs that operate outside the school setting.

Title IX's legal reach also is more modest than its cultural significance because it is focused solely on sex.¹⁶ As a result, Title IX cannot account for differences in sports participation among girls and women. Scholars and women's sport advocates have therefore explained that while Title IX is not responsible for, and cannot cure, participation disparities among girls and women, it is an issue that must be separately addressed to achieve meaningful equality in sport. For instance, the Women's Sports Foundation states that while Title IX can be credited with increasing opportunities for women of color to participate in sport, the law's "single axis" approach to equality and Black women's concentration in just a few sports "have distorted these statistics and obscure participation barriers that exist for these athletes."¹⁷

12. *2018-19 High School Athletics Participation Survey*, NFHS 54 (2018-19), https://www.nfhs.org/media/1020412/2018-19_participation_survey.pdf.

13. *NCAA Recruiting Facts Student-Athletes Need to Know in 2022*, PLAYTODAY, <https://playtoday.co/blog/ncaa-recruiting-facts/> (Dec. 19, 2022); Buzuvis, *supra* note 2, at 2 (stating that "[i]n the United States, unlike many countries, schools were and are a major source of athletic opportunities for children and young adults.").

14. *NCAA v. Smith*, 525 U.S. 459, 462 (1999).

15. While the USOPC's enabling statute requires it "to encourage and provide assistance to amateur athletic activities for women," 36 U.S.C. § 220503(12) (2022), Congress is considering a bill that would mandate equal treatment in U.S. Olympic sports. Equal Pay for Team USA Act of 2019, S. 2130, 116th Cong. (2019).

16. Staurowsky et al., *supra* note 1, at 11 (stating that "feminists and critical race theorists point out that as is the case with any "single axis" law, meaning any law that focuses on one category of bias in addressing discrimination, it does not take into account how sex discrimination intersects with other forms of bias"); Alfred Dennis Mathewson, *Remediating Discrimination Against African American Female Athletes at the Intersection of Title IX and Title VI*, 2 WAKE FOREST J.L. & POL'Y 295, 298 (2012) (stating that "Title IX, in remediating gender discrimination, does not mitigate the effect of racial discrimination against African American females, creating an imbalance in gains between African American and white female athletes."); Jacquelyn Bridgeman, *The End Game: Envisioning Equality for Women and Girls in Sports*, 2 WAKE FOREST J.L. & POL'Y 267, 274 (2012) (stating that "[w]hile it might be possible under such a framework for women of color to gain relief as women, or as people of color, the law does not adequately address the particular discrimination or subordination experienced when one is both.").

17. Staurowsky et al., *supra* note 1, at 22 (stating that "[s]ince the enactment of Title IX, Black, Indigenous, and People of Color (BIPOC) women athletes have experienced an increase in sport participation opportunities, yet the 'single axis' lens and racial clustering have distorted these statistics and obscured participation barriers that exist for these athletes."). Title IX does not take the approach, long advocated by Black feminists, that would address the multiple forms of oppression experienced by Black

In addition to locating Title IX through its cultural and legal impact, we can also map it in relation to the prevailing anti-discrimination theories of the time. Enacted in 1972, Title IX is similar to Title VI of the Civil Rights Act of 1964, which prohibits race discrimination in federally funded programs.¹⁸ Both statutes reflect the familiar liberal political approach to achieving equality by prohibiting discrimination, making access to federally funded programs race and gender blind. The formal equality, sex-blind approach works well in educational programs outside sport.¹⁹ However, Title IX advocates and policymakers were concerned that such an approach to sport would require open tryouts for teams without regard to sex, and therefore likely result in girls and women, because of physical differences, being largely shut out. As a result, Title IX's implementing regulations provide for separate men's and women's teams,²⁰ relying on a "separate-but-equal standard" to increase girls' and women's participation in sport.²¹

Thus, although Title IX's statute and regulations were crafted in a period marked by second-wave feminism,²² the law's approach to achieving gender equity in sport does not solely reflect liberal feminist theory. Scholars have called the feminist approach to sport "hard to define,"²³ and feminist legal scholars have explained that Title IX regulations use a method for compliance

women at the intersection of race, gender, and class. See COMBAHEE RIVER COLLECTIVE, COMBAHEE RIVER COLLECTIVE STATEMENT (1977); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

18. Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 252 (1964); Arne Duncan & Russlynn Ali, Sec'y, U.S. Dep't of Educ. & Assistant Sec'y, Off. for Civ. Rts., *Ensuring Equal Access to High-Quality Education*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. 1-2 (Jan. 2011), <https://www2.ed.gov/about/offices/list/ocr/docs/ensure03.pdf>.

19. Buzuvis, *supra* note 2, at 2.

20. *Id.* at 3.

21. *Id.* at 6.

22. Rosalyn Baxandall & Linda Gordon, *Second-Wave Feminism*, in A COMPANION TO WOMEN'S HISTORY 414, 414 (Nancy A. Hewitt ed., 2002) (stating, "[t]he 'second-wave' US women's movement emerged in the late 1960s . . ."); Stephanie M. Frisinger, Comment, *The Commodification of Feminism: Consequences and Insight for the Millennial Generation of Young Women*, 55 CREIGHTON L. REV. 193, 198 (stating "[t]he second wave of feminism began in the 1960s and 1970s."); Aya Gruber, *Neofeminism*, 50 HOUS. L. REV. 1325, 1331 (stating that, "[s]econd-wave feminism is not a singular overarching theory of justice. Rather, the term describes a body of differing theoretical work within a temporal time frame, namely the 1960s up until the 1990s.").

23. Jennifer Hargreaves, *Querying Sport Feminism: Personal or Political?*, in SPORT AND MODERN SOCIAL THEORISTS 187, 187 (Richard Giulianotti ed., 2004). Hargreaves goes on to state that "there has been no coherent, cohesive, authentic sport feminism, but many different manifestations . . . which . . . have common characteristics with the many faces of mainstream feminism." *Id.*

that takes a “hybrid approach,”²⁴ reflecting “various strands of feminist legal theory.”²⁵ As Deborah Brake notes, however, although the statute and regulations rely on “liberal feminism, antisubordination, and cultural feminisms,” it has not been influenced by more modern advances in critical and feminist theory, such as Black feminism and queer theory.²⁶ Moreover, while Title IX incorporates different theories for achieving sex equality in sport, the law itself was not a priority project for the feminist movement or feminist legal scholars. Professor Brake explains that the feminist movement “neglected”²⁷ sport in favor of focusing on other aspects of equality, so that, by and large, “feminist legal scholarship has ignored or marginalized sport.”²⁸

Although perhaps neglected as a feminist project, and in some ways reflecting several different feminist theories, Title IX was conceived in the 1970s, when “second-wave feminism”²⁹ and classic liberal values, as opposed to more radical ideologies, prevailed in political thought.³⁰ Liberal feminism’s primary concern was with “equality of access and opportunity, different socialization practices, gender stereotyping, and discrimination,”³¹ and in recounting the history of feminist legal theory, Tracy Thomas states that during this time, “formal legal equality feminism dominated.”³² This approach

24. Doriane Lambelet Coleman et al., *Re-Affirming the Value of the Sports Exception to Title IX’s General Non-Discrimination Rule*, 27 DUKE J. GENDER L. & POL’Y 69, 69 (2020).

25. BRAKE, *supra* note 5, at 8; Buzuvis, *supra* note 2, at 1 (stating that “[b]ecause the requirements it imposes on scholastic and collegiate athletics do not reflect a single unified theory of gender equality, it has been aptly dubbed a law of ‘many feminisms.’”).

26. BRAKE, *supra* note 5, at 11.

27. *Id.* at 2.

28. *Id.* Professor Brake further states that “And, for all of its impact on women’s equality—in sports and in society—it is a law that has been too often neglected in feminist scholarship examining the role of law in shaping understandings of gender and producing cultural change[,]” and that

Title IX is a “feminist” law in the sense that it is animated by a desire to enable women to live more full and meaningful lives, without the stifling constraints of gender roles and discrimination. And yet, for the most part, feminist legal scholarship has not given Title IX its due.

Id.

29. Hargreaves, *supra* note 23, at 188.

30. See Buzuvis, *supra* note 2, at 2 (stating that “Civil rights laws in other contexts, including Title IX’s application to other areas, such as admissions, use a formal equality principle in which similarly situated individuals must be treated the same without regard to their sex.”).

31. Sheila Scraton & Anne Flintoff, *Gender, Feminist Theory, and Sport*, in A COMPANION TO SPORT *supra* note 4, at 96-97.

32. Tracy A. Thomas, *The Long History of Feminist Legal Theory*, in THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES, *supra* note 2, at 1, 16.

was a very successful part of the rights revolution.³³ Title IX's sport feminism is therefore historically embedded in the period where feminists were focused on taking an anti-discrimination approach to address women's oppression and subordination.³⁴ Moreover, while the regulations specifying methods of Title IX compliance take different approaches to achieving equality, "[t]he underlying assumption of all liberal sports feminism is that sport is fundamentally sound and represents a positive experience to which girls and women need access"³⁵ and that discrimination serves as a barrier to girls and women accessing sport on terms equal to boys and men.³⁶ This is undoubtedly the approach taken by Title IX, which ultimately does not seek to change the model for sport beyond the notion that girls and women must be given equal access.³⁷

While very much of its time, feminist sports scholars recognize that the liberal feminist approach is still relevant today in that

early feminist critiques of malestream sport are valuable for their rejection of biological explanations for women's subordination in sport, and for establishing that gender is socially constructed. They are important, also, for documenting the real distributive inequalities between men's and women's sport Many of the questions raised by early liberal feminists remain pertinent to contemporary sport practice.³⁸

Yet this decades-old conception of the problem of gender equity in sport has, as with feminist theory generally, been met with some criticism. Scholars have stated that while liberal feminism has created opportunities for women, other

33. *Id.* (stating that "[f]ormal legal equality proved to be a successful strategy for feminists. From securing the vote to the U.S. Supreme Court's equal protection jurisprudence beginning in the 1970s, equality provided a useful analytical vehicle for protecting women's rights.").

34. Hargreaves, *supra* note 23, at 187.

35. Scraton & Flintoff, *supra* note 31, at 97; see Dionne L. Koller, *Not Just One of the Boys: A Post-Feminist Critique of Title IX's Vision for Gender Equity in Sports*, 43 CONN. L. REV. 401 (2010).

36. Scraton & Flintoff, *supra* note 31, at 97.

37. See Hargreaves, *supra* note 23, at 188 (stating that "sport feminism . . . was linked to the specific quest for equality of opportunities between men and women. This approach . . . is based on liberal-democratic ideologies and is linked to equal rights policy-making . . ."). Hargreaves further notes that this approach is different from "radical sport feminism" which focuses on the "limitations" of the non-discrimination, equality of opportunity approach. *Id.*; see also Koller, *supra* note 35.

38. Scraton & Flintoff, *supra* note 31, at 97.

sport feminists have criticized that approach as obscuring deeper systems of oppression.³⁹ Moreover, some have pointed out that white women's experience in sport is often taken as the dominant narrative—a type of “essentialism”⁴⁰ that has been critiqued in the larger feminist discourse—so that much of the advocacy and scholarship on Black women and sport is recounting statistics, with Black women “simply ‘added on’ to an understanding of gender oppression.”⁴¹ Black feminists also have used post-colonial and Black feminist approaches to advance a more nuanced analysis of the systems of power and oppression in sport.⁴² Other feminist scholars explain that with a greater understanding of systems of power and oppression since the 1970s, we are now in an era of “middle ground theorizing,”⁴³ where the work of “‘third wave’ . . . feminism” combines elements of second wave feminist critiques of existing institutions and mechanisms of power with the contributions of poststructuralism, queer theory, and intersectionality.⁴⁴ These approaches recognize that while many of the traditional critiques of gender equity in sport are still very relevant today,⁴⁵ the theoretical tools and wider array of voices that have emerged in the fifty years since Congress enacted Title IX raise important issues about race, sex, gender, and sport,⁴⁶ as well as reinvigorate questions about the “relationship between gender and class”⁴⁷ that are important to understanding sport and future directions for Title IX.

39. *Id.*

40. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990) (describing that in feminist legal theory “white, straight, and socioeconomically privileged people . . . claim to speak for all of us.”).

41. Scraton & Flintoff, *supra* note 31, at 101.

42. Letisha Brown, *Post-Colonial Feminism, Black Feminism and Sport*, in THE PALGRAVE HANDBOOK OF FEMINISM AND SPORT, LEISURE AND PHYSICAL EDUCATION 479 (2017); CHANDRA TALPADE MOHANTY, FEMINISM WITHOUT BORDERS 107 (Louise Mansfield et al. eds, 2003) (asserting that the “juncture of feminist and anti-racist/Third World/postcolonial studies is of great significance, materially as well as methodologically.”).

43. Scraton & Flintoff, *supra* note 31, at 104; *see* TALPADE MOHANTY, *supra* note 42, at 106 (stating that “[s]ince the 1970s, there have been key paradigm shifts in Western Feminist theory. These shifts can be traced to political, historical, methodological, and philosophical developments in our understanding of questions of power, struggle, and social transformation.”).

44. Scraton & Flintoff, *supra* note 31, at 105.

45. *Id.*

46. *See* Hargreaves, *supra* note 23, at 194 (stating that “third wave feminist[]” politics around sport “may replace the identity politics of the 1970s, 1980s and 1990s, to explore how institutional knowledges and social practices repress difference.”); *see* Erin Buzuvis et al., *Sport is for Everyone: A Legal Roadmap for Transgender Participation in Sport*, 31 J.L. ASPECTS SPORT 212 (2021).

47. Scraton & Flintoff, *supra* note 31, at 105.

Yet however we pinpoint Title IX vis-à-vis feminist theory, we must also locate the law in its larger historical context. To do this, we should “take a break”⁴⁸ from traditional feminist conceptions of Title IX and consider the bigger picture. Nancy Fraser’s work provides important insight to this end. Fraser argues that feminist projects may be undermined by the way they converge with larger societal forces of neoliberalism, which she asserts resulted in gender equality achieving success on a cultural level without fully changing “institutions.”⁴⁹ This view certainly applies to sport, as the presence of more girls and women participating has in one sense been “revolutionary,” but in another has done little to transform the institution of sport. Indeed, compared with the “sex bureaucracy”⁵⁰ that exists on college campuses to implement Title IX outside of sport, the institutional attention to Title IX as applied to sport is decidedly small and, statistics on persistent inequities in high school and college sport show, often ineffective.⁵¹ Moreover, the model for sport remains that which was established by and for men and boys. In this sense, achieving gender equity in sport faces hurdles similar to the effort to desegregate schools. Derrick Bell argued that school desegregation efforts largely were unsuccessful⁵² because, while there may have been general support for the notion of equality for Black citizens as a normative matter, “on a positivistic level—how the world *is*—it is clear that racial equality is not deemed legitimate by large segments of the American people.”⁵³ Similarly, in sport, there seems to be nearly universal support for Title IX and adherence to the belief that girls and women have a right to participate. It is just the matter

48. JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 6-7 (Princeton Univ. Press, 2008) (stating that “I don’t want to see theory that way. I want to see it as the effort to form hypotheses about what is happening in the world and about the various social goods and bads that are being distributed among people. Instead of working to defend, protect, and maximize theory as an account of the world and program for the world, I am trying to see it as theory fragments lying about that we can use quite instrumentally, pragmatically, and disloyally to deal with problems we perceive and want to do something about.”).

49. NANCY FRASER, *FORTUNES OF FEMINISM: FROM STATE-MANAGED CAPITALISM TO NEOLIBERAL CRISIS* 210 (2013); see also Grant Jarvie, *Sport, New Social Divisions and Social Inequality*, in *INCLUSION AND EXCLUSION THROUGH YOUTH SPORT* 63 (Symeon Dagkas, Kathleen Armour eds., 2012) (stating that “feminist ideals of gender inequality now sit squarely in the social mainstream but have yet to be fully realized in practice.”).

50. Jacob Gersen & Jeannie Suk Gersen, *Governing Sex Through Bureaucracy*, in *GOVERNANCE FEMINISM: NOTES FROM THE FIELD* 159, 160 (Janet Halley et al. eds., 2019).

51. Staurowsky et al., *supra* note 1, at 9.

52. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *HARV. L. REV.* 518, 519 (1980).

53. *Id.* at 523 (emphasis in original).

of taking the steps necessary to fully implement those values and aspirations that remains a significant sticking point.

Moving from the “ought”⁵⁴ of Title IX to the fully realized “is” has been the work of the last fifty years, and it is far from over. As we explore Title IX’s future, however, we would do well to consider Fraser’s point that through “the cunning of history,” second-wave-era feminist changes, while helping to transform our culture, also worked to “legitimate” our transition to late-stage, neoliberal capitalism,⁵⁵ as the pursuit of gender equality was inadvertently “harnessed to the engine of capitalist accumulation.”⁵⁶ As a result, Fraser argues that efforts to secure sex equality, to truly be effective, must be “historically self-aware.”⁵⁷

Title IX advocates, of course, always have been aware in the sense of being attuned to the numerous attempts to undermine the law. Thus, some have described the necessary vigilance by stating that

[w]here there has been a clear and steady upward trajectory for women and girls in academics . . . in athletics the momentum has always been mixed, and it has been a constant battle to gain and to retain ground. Among other things, the “fate” of women’s sports “has always been tied to the larger political climate.” Because of this, and because of the recency in historical time of the broader commitment to sex equality, it is important for those who are devoted to the idea to remain attuned to shifts in that climate.⁵⁸

54. *Id.* (emphasis in original).

55. FRASER, *supra* note 49, at 211. The term “neoliberalism” has been called “contested and unstable.” Samantha King, *Nike U: Full Program Athletics Contracts and the Corporate University*, in *SPORT AND NEOLIBERALISM: POLITICS, CONSUMPTION AND CULTURE* 75, 76 (David L. Andrews & Michael L. Silk eds., 2012). However, critical theorists commonly identify neoliberalism as “a new political consensus” that emphasizes privatization and “free markets” and “the virtues of individualism” by reframing “social problems” as issues for the individual, as well as an emphasis on “competitiveness,” “economic self-sufficiency” and decreased social programs combined with increased criminalization. Michael L. Silk & David L. Andrews, *Sport and the Neoliberal Conjuncture*, in *SPORT AND NEOLIBERALISM: POLITICS, CONSUMPTION & CULTURE* 1, 7 (David L. Andrews & Michael L. Silk eds., 2012).

56. FRASER, *supra* note 49, at 221.

57. *Id.* at 224. For instance, scholars such as Grant Jarvie suggest, based on Fraser’s work, that “[i]f the feminist critique of sport were to integrate in more balanced way issues of redistribution, recognition and the idea of justice, then perhaps it would be possible to reconnect a feminist critique of sport and social inclusion under capitalism.” Jarvie, *supra* note 49, at 65.

58. Coleman et al., *supra* note 24, at 72. Coleman and her co-authors call for attention to shifting political climates in the context of the movement to include transgender persons in sport, stating that

Heeding Fraser's caution, however, remaining aware of the political climate must include attention to the larger societal forces that, while seemingly not aimed at thwarting the progress of girls and women in sport, can have that impact. Therefore, just as feminist projects have had unintended consequences in areas such as domestic violence and the anti-rape movement,⁵⁹ so too might the incorporation of feminist goals into the institution of sport through Title IX have costs and prompt blind spots that prevent a full appreciation of future directions for reform.⁶⁰

To fully locate Title IX, then, we must account not just for the politics of sport, but the politics of the society in which Title IX operates. Looked at through this wider lens, it is apparent that Title IX's first fifty years have taken place against a backdrop of political transition emphasizing neoliberal ideology—a transition that has had a significant impact on sport. Critical theorists have explored this change, and explained that as a key part of culture, sport is “sutured into and through” the overall neoliberal societal environment.⁶¹ As such, critical sports scholars have sought to explain

[t]he most recent political challenge has come from the identity movement and affiliated advocacy groups whose goal has been to secure much needed protections for people who are transgender. To that end, movement advocates have pushed for policy reforms that would grow the circumstances in which law is sex-blind. Where sex remains a basis for classification, they have worked to ensure that people who are transgender are included in spaces and programming consistent with their gender identity.

Id. at 73. Coleman and her co-authors take the position that

in sport, where sex and the sex-linked physical traits associated with the male and female body are outcome determinative, the effects of the proposed reforms would be revolutionary: they would require either the dismantling of Title IX's existing sex-segregated architecture and thus of the female category, or the unconditional inclusion of males who identify as females in girls and women's sport. While the latter is less obviously existential than the former, both would signal that policymakers were abandoning the original commitment to sex equality in this setting.

Id.

59. See MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 115 (Alfred Blumstein & David Farrington eds., 2006) (explaining that “[t]he contemporary women's movement in the United States helped facilitate the carceral state. Demands by the U.S. women's movement in the 1970s and 1980s to address the issues of rape and domestic violence had . . . far-reaching . . . consequences . . .”).

60. See HALLEY, *supra* note 48, at 9 (stating that “we can't make decisions about what to do with legal power in its many forms responsibly without taking into account as many interests, constituencies, and uncertainties as we can acknowledge.”).

61. Silk & Andrews, *supra* note 55, at 1. Silk and Andrews further state that “locating . . . sport as an element of the cultural terrain within a wider cultural politics” we can “understand it as a site through which various discourses are mobilized in regard to the organization and discipline of daily life in the service of particular political agendas.” *Id.* at 5.

“neoliberal sport” by revealing that current sport systems are “anchored in power relations that serve particular ends and thereby perpetuate structural inequalities.”⁶²

Of course, it certainly could be that Title IX’s “hybrid” approach to equality makes it more resilient⁶³ in the face of these larger political forces, but not likely. At bottom, Title IX is a non-discrimination intervention that brought girls and women into the existing model for sport.⁶⁴ Its gender equity mandate does not—beyond opening up opportunities for girls and women to play and on terms equivalent to those provided to men—change it. Additionally, whatever Title IX’s approach to sex equality, there is no denying that education-based sport has, over the last fifty years, developed into a much more commercialized, competitive enterprise. Sport at all levels, including sport for girls and women, certainly has been “harnessed to the engine of capitalism.” We should therefore look at Title IX within the context of this broader historical moment, and ask what societal forces, beyond just the traditional power relationships circulating in sport, might undermine the goal of Title IX.⁶⁵ In this sense, though the cultural shift in support of girls’ and women’s participation in sport has “coincided with the mass marketing of women’s empowerment through sport,”⁶⁶ it may also be that neoliberalism does not provide fertile ground for the type of sport feminism that is needed to fully achieve sex equality in sport. As explained below, the dominant political ideology operating in society today may in fact undermine the goals of gender equity in sport through its influence on the prevailing model for youth sport.

II. SECURING THE PROMISE OF TITLE IX: DEVELOPING “INTEREST” AND “ABILITY”

To understand how political forces outside of sport can intersect with and potentially undermine the movement for gender equity in sport, we must first

62. *Id.* at 15; see also David Inglis, *Theodor Adorno on Sport: The Jeu D’Esprit of Despair*, in *SPORT AND MODERN SOCIAL THEORISTS*, *supra* note 23, at 81, 90 (stating that “sports today are thoroughly permeated by domination, and . . . they operate in the interests of the capitalist economy . . .”).

63. See BRAKE, *supra* note 5, at 8 (stating that “[w]hile some aspects of the law have been more forceful and effective than others, Title IX’s distinctive approach has enabled it to succeed in a way that other discrimination laws have not.”).

64. See Koller, *supra* note 35.

65. See JAY COAKLEY, *SPORT IN SOCIETY: ISSUES & CONTROVERSIES* 42 (7th ed. 2001) (stating that “[a]ccording to critical theories, the relationship between sports and society is never set once and for all time: sports change as historical conditions and political and economic forces change.”).

66. Hargreaves, *supra* note 23, at 195. Hargreaves goes on to state that “the quest is to nurture sustainable forms of sport feminism which can tackle the needs of *our times*.” *Id.* at 202.

consider the terms of Title IX's non-discrimination promise. The particulars of Title IX's enactment and requirements have been well covered in cases and scholarly literature, and I will not repeat them all here.⁶⁷ It is enough to explain that the heart of Title IX's promise is the threshold requirement that to enjoy its protection, girls and women must have an "interest" in sport and the requisite "ability" to participate.

A. *The Interest and Ability Requirement*

To determine whether a school provides sufficient sports participation opportunities, courts and the Department of Education's Office of Civil Rights (OCR) use the so-called "Three-Part Test."⁶⁸ The test is considered an important part of the law's effectiveness because it is aimed at fostering girls' and women's "athletic interests and abilities."⁶⁹

Thus, under this test, girls and women must be provided equitable opportunities to participate in sport if they have an interest in sport and the requisite ability to play. For instance, the initial Policy Interpretation articulating the Three-Part test states that the "athletic interests and abilities of male and female students must be equally effectively accommodated."⁷⁰ The test provides that compliance hinges on meeting one of three assessments:

- 1) The number of male and female athletes is substantially proportionate to their respective enrollments; or
- 2) The institution has a history and continuing practice of expanding participation opportunities responsive to the developing interests and abilities of the underrepresented sex; or

67. See, e.g., Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments that Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325 (2012); Ellen J. Staurowsky, *Title IX and College Sport: The Long Painful Path to Compliance and Reform*, 14 MARQ. SPORTS L. REV. 95 (2003); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993).

68. *Intercollegiate Athletics Policy: Three-Part Test – Part Three*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (2010), <https://www2.ed.gov/about/offices/list/ocr/docs/title9-qa-20100420.html>.

69. BRAKE, *supra* note 5, at 68.

70. *A Policy Interpretation: Title IX and Intercollegiate Athletics*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (Dec. 11, 1979), <https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html>.

- 3) The institution is fully and effectively accommodating the interests and abilities of the underrepresented sex.⁷¹

The test has been further interpreted by OCR to emphasize an institution's obligations to accommodate students' interests and abilities in athletics, stating that, with respect to prong two, OCR will review "whether past actions of the institution have expanded participation opportunities for the underrepresented sex in a manner that was demonstrably responsive to their developing interests and abilities."⁷² With respect to prong three, OCR states that the institution must demonstrate that it is "fully and effectively accommodating the interests and abilities of its students who are members of the underrepresented sex."⁷³ OCR measures ability as "sufficient ability to sustain an intercollegiate team."⁷⁴

The Three-Part test is considered "the key metric"⁷⁵ used by courts to determine whether schools are in compliance with Title IX. Using this test, courts have long recognized that interest in participation is driven by opportunity. For instance, in *Pederson v. Louisiana State University*, the court stated that

Appellees argue brazenly that the evidence did not demonstrate sufficient interest and ability . . . and that, therefore, they cannot be liable under Title IX. The heart of this contention is that an institution with no coach, no facilities, no varsity team, no scholarships, and no recruiting in a given sport must have on campus enough national-caliber athletes to field a competitive varsity team in that sport before a court can find sufficient interest and abilities to exist . . . adopting this criteria would eliminate an effective accommodation claim by any plaintiff, at any time.⁷⁶

71. *Intercollegiate Athletics Policy: Three-Part Test – Part Three*, *supra* note 68.

72. *Id.*

73. *Id.*

74. *Id.*

75. Brian L. Porto, *Unfinished Business: The Continuing Struggle for Equal Opportunity in College Sports on the Eve of Title IX's Fiftieth Anniversary*, 32 MARQ. SPORTS L. REV. 259, 267 (2022).

76. *Pederson v. La. State Univ.*, 213 F.3d 858, 878 (5th Cir. 2000). The court went on to state that "LSU's hubris in advancing this argument is remarkable, since of course fewer women participate in sports, given the voluminous evidence that LSU has discriminated against women in refusing to offer them

Like the court in *Pederson*, courts consistently have held “that interest and opportunity are inextricably connected.”⁷⁷ Scholars point to the law’s focus on how interest in sport participation develops as a key reason why Title IX has been so effective, as one stated that “Title IX’s nuanced approach to the social and institutional forces that shape interest is what sets it apart from other antidiscrimination laws.”⁷⁸ While Title IX covers more than just opportunities to participate, the “interest” and “ability” that provide the trigger for an effective accommodation claim also, by extension, serve as the foundation for the other two areas of compliance—scholarships and equivalent benefits and treatment—because girls and women who do not have the interest and ability to engage in sport cannot claim scholarships or the other benefits that accompany participation.

It is apparent that if there are no opportunities to play, girls and women will likely not take up sport, so that focusing on interest and ability makes intuitive sense. And, of course, if one is not interested in sport or lacks the ability to play, Title IX’s non-discrimination guarantee in the context of sport is irrelevant. Requiring a girl or woman to have the interest in participating in sport an ability to play also is consistent with liberal notions of autonomy.⁷⁹ Title IX does not require girls and women to take up sport, but assumes that providing the opportunity will spur the choice to participate. Further, consistent with American meritocratic ideology⁸⁰ and the foundational values of sport, not just anyone can claim the protections of gender equity in sport,

comparable athletic opportunities to those it offers its male students.” *Id.* See also McCormick *ex rel.* McCormick v. Sch. Dist. Mamaroneck, 370 F.3d 275, 294-95 (2nd Cir. 2004) (also explaining the connection between motivation and interest in sports and opportunity, stating that “[t]he greater the potential victory, the greater the motivation to the athletes. Any championship motivates, but a great championship motivates more. The quality and achievements of a sports team are measured in reference to their relative success as compared to other teams. Winning the State Championship in New York means being the best team out of 649 teams in the state. Winning the Section I spring soccer championships, which is the best the girls in Pelham and Mamaroneck can hope for, means being the best team out of 19 (or possibly 13) teams Scheduling the girls’ soccer season out of the championship game season sends a message to the girls on the teams that they are not expected to succeed and that the school does not value their athletic abilities as much as it values the abilities of the boys.”); Cohen v. Brown Univ., 101 F.3d 155, 176 (1st Cir. 1996); Neal v. Bd. of Trs. of Cal. State Univs., 198 F.3d 763, 769 (9th Cir. 1999).

77. BRAKE, *supra* note 5, at 85.

78. *Id.*

79. BEN COLBURN, AUTONOMY AND LIBERALISM 2 (2010); Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 STAN. L. REV. 385, 394 (1996).

80. See LANI GUINIER, THE TYRANNY OF THE MERITOCRACY: DEMOCRATIZING HIGHER EDUCATION IN AMERICA, at xi (2015); MARK BOVENS & ANCHRIT WILLE, DIPLOMA DEMOCRACY: THE RISE OF POLITICAL MERITOCRACY 13 (2017).

but only those with a sufficient level of talent. Interest and ability also intersect with neoliberal assumptions of “individual investment in human capital through aptitude, choice, and training” to achieve “sporting prowess.”⁸¹ Though women’s sports advocates have asserted that at least one aspect of the three-part test should no longer be a basis for compliance,⁸² the “interest” and “ability” trigger would seemingly remain.

Important, then, to understanding Title IX in its context is unpacking how interest and ability develop within American sport, before a girl reaches the education-based sports opportunities in high school and college that are protected by Title IX. In doing so, as with other areas of feminist theory, we should be mindful of “generational shift[s]”⁸³ that might undercut our traditional assumptions. In the context of Title IX, we must therefore understand youth sport.

B. The Youth Sport Pipeline

Youth sport is said to be “the foundation of sport in society,” so that the structure of and children’s experience in this context “matters.”⁸⁴ Indeed, it not only matters, but for purposes of Title IX, it can be argued it is crucial. Though heavily influenced by the norms shaped by Title IX, most youth sport experiences are not covered by it. Unlike in the 1970s, today’s girl who seeks to participate in sport likely will, and indeed in many cases must, enter athletics long before her first Title IX protected opportunity arises, in high school. A girl who hopes to claim a participation opportunity on a high school sports team, by and large, must therefore arrive at high school as an “athlete.” Many more will not have access to sport, not because of outdated assumptions about girls and sport, but because of cost.

81. Silk & Andrews, *supra* note 55.

82. For instance, the Women’s Sports Foundation Report states that prong two—demonstrating compliance through a history of expanding opportunities for girls and women—should be retired, as there is no longer a need, fifty years after Congress enacted Title IX, to give institutions time to adjust. Staurowsky et al., *supra* note 1, at 65.

83. Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 202 (2001) (explaining with respect to the link between sex and danger that “we might want to reassess the synergistic danger it presents today as compared with the period in which we first formulated these analyses twenty years ago. Such a generational shift highlights the fact that a feminist approach to sex and sexuality must . . . simultaneously address the reduction of dangers we face . . . and the possibilities for women’s experiences of pleasure” and that “sexuality . . . has a history” so that we must consider the “political, social, economic and cultural processes” operating in a given historical period).

84. Symeon Dagkas & Kathleen Armour, *Preface*, in INCLUSION AND EXCLUSION THROUGH YOUTH SPORT, *supra* note 49, at xv, xv.

This has important implications. Developing the requisite interest and ability to participate is a function both of the availability of future opportunities, as courts and Title IX's regulations correctly assume, and girls' present, pre-high school athletic experiences and understandings. Accordingly, it is important to consider the current U.S. youth sport experience and how this may operate to impact girls' interest in participating and ability if she does.

Youth Sport Data. Critical theorists argue that sport today is a significant cultural manifestation of neoliberal ideology, both reflecting it and reproducing it.⁸⁵ Whether or not this is the case, it is apparent from the available data that youth sport is an experience most frequently accessed by socio-economically privileged boys.⁸⁶

Because sport is presumed to be a private family issue, and not a subject of government intervention, understanding our current model for youth sport is both easy, because it is a ubiquitous feature of American life, but also empirically difficult. There is no uniform explanation of what youth sport is,⁸⁷ and the Department of Health and Human Services, in the 2019 *National Youth Sports Strategy* (NYSS), states that “youth sports is measured in a variety of ways.”⁸⁸ Much of the data on youth sport is collected by the private sector, from groups such as the National Sporting Goods Association.⁸⁹ U.S. youth sport is a collection of programs “on the local, state, and national

85. Silk & Andrews, *supra* note 55, at 15 (explaining that “neoliberal sporting cultures” are connected to larger political structures that “perpetuate” societal inequalities). In this view, sport is said to facilitate “an economy of affect through which power, privilege, politics, and position are (re)produced.” *Id.* at 5; *see also* Alan G. Ingham, *The Sportification Process: A Biographical Analysis Framed by the Work of Marx, Weber, Durkheim and Freud*, in *SPORT AND MODERN SOCIAL THEORISTS*, *supra* note 23, at 11, 14 (explaining that capitalism “became so naturalized that it influenced production in other spheres (such as sport) and became hegemonic.”); D. STANLEY EITZEN, *FAIR AND FOUL: BEYOND THE MYTHS AND PARADOXES OF SPORT* 125-26 (6th ed. 2016) (stating that sport is a form of “ideological control”); CLAUDIO COLAGUORI, *AGON CULTURE: COMPETITION, CONFLICT, AND THE PROBLEM OF DOMINATION* 22 (2012) (arguing that sport helps achieve hegemony by fostering societal buy-in “to the dominant project of power.”).

86. N. Jeremi Duru, *It's Not Child's Play: A Regulatory Approach to Reforming American Youth Sport*, 20 VA. SPORTS & ENT. L.J. 25, 41-42 (2021) (describing the problem of “socio-economic stratification” in youth sports).

87. B. DAVID RIDPATH, *ALTERNATIVE MODELS OF SPORTS DEVELOPMENT IN AMERICA*, at xvi (Ohio Univ. Press, 2018); Brett P. Giroir, Assistant Sec’y for Health, *The National Youth Sports Strategy*, U.S. DEP’T HEALTH & HUM. SERV. 12, 20 (2019), https://health.gov/sites/default/files/2019-10/National_Youth_Sports_Strategy.pdf (stating that “there is no standard definition of youth sports used in national surveys.”).

88. Giroir, *supra* note 87, at 12, 41 (stating that “there is a distinct lack of a single, comprehensive data source. No single system, Federal or non-Federal, measures all aspects of sports participation” and that “few surveys collect information on youth with disabilities and accessible physical activity or sports-related opportunities.”). The NYSS also notes that “another limitation” on the available youth sports data “is that there is little distinction between sports and other physical activities.” *Id.* at 43.

89. *Id.* at 40.

levels,”⁹⁰ generally coached by middle-class men.⁹¹ The National Council of Youth Sports (a private organization) estimates that about 60 million children between the ages of six and eighteen participate.⁹² The NYSS states that as of 2017, fifty-eight percent of children aged six to seventeen participated in sport.⁹³ Youth sport is said to be a \$15-19 billion industry.⁹⁴

In all research, youth sport participation rates are lower for girls, racial and ethnic minorities, children from “lower income households,” children with disabilities, and children who identify as lesbian, gay, or bisexual.⁹⁵ The NYSS states that seventy-six percent of children from socio-economically privileged households participate in sports, while only forty-one percent of those from “households at less than 100 percent of the poverty threshold” do.⁹⁶ This gap in participation undoubtedly has effects on the number of girls and women who seek to claim sports opportunities protected by Title IX.

Individual Choice, Not Public Policy. Also important to understanding youth sport, and by extension a girl’s interest and ability in participating, is appreciating how children come to be involved in sport and the background conditions that shape their experience. The prevailing legal assumption is that sport participation for children is a matter of individual choice made within the privacy of the family.

90. STEVEN J. OVERMAN, *THE YOUTH SPORTS CRISIS: OUT-OF-CONTROL ADULTS, HELPLESS KIDS* 8 (2014).

91. *State of Play 2020 Report, Ages 13-17*, PROJECT PLAY, ASPEN INST. SPORTS & SOC. PROGRAM (2020), <https://www.aspenprojectplay.org/state-of-play-2021/ages-6-12> [https://perma.cc/NH5F-VKES] (stating that most youth sports coaches are male, aged 25-44, and with annual incomes of \$75,000 or higher). While research established that youth sports coaches are largely male, data is not available on other identifying characteristics, such as race and ethnicity.

92. The National Council for Youth Sports is a membership association for the youth sports industry. The Council states that there are “60 million boys and girls registered in organized youth sports programs.” Youth Sports Greatest Resource, NAT’L COUNCIL OF YOUTH SPORTS, <https://ncys.org/> [https://perma.cc/7D49-GLQ2] (last visited Dec. 30, 2022). Other organizations also rely on this figure Intensive Participation in a Single Sport: Good or Bad for Kids? Lerner Children’s Pavilion, Hospital for Surgery, <https://www.hss.edu/pediatrics-intensive-participation-single-sport-good-bad-kids.asp> [https://perma.cc/U345-CBNE] (last visited Dec. 30, 2022).

93. Giroir, *supra* note 87, at 35.

94. *Id.* at 21; Laura Newberry, *Kids are Losing Interest in Organized Sports. Why That Matters*, L.A. TIMES (Dec. 6, 2021, 7:00 PM), <https://www.latimes.com/california/newsletter/2021-12-06/kids-are-losing-interest-in-team-sports-community-athletics-have-shrunk-why-that-matters-8-to-3> [https://perma.cc/J645-JEVC] (calling youth sport a “\$19 billion industry”).

95. Giroir, *supra* note 87, at 35.

96. *Id.* (explaining that “only 45 percent of youth from households with less than a high school education participated, compared to 73 percent of youth from households with a college degree or higher.”).

Youth sport programs initially were for boys and grew substantially during the 1950s and 1960s.⁹⁷ After Congress enacted Title IX in 1972, larger numbers of girls began participating, and during the 1970s and 1980s organized sport in the United States became “part of the process of growing up.”⁹⁸ Much of youth sport’s growth was the result of the changing norms, influenced by Title IX, around sport participation for girls.⁹⁹ Sociologists also explain that organized youth sport grew along with changing parenting practices, including the notion that being a “good parent” meant enrolling children in adult-led activities where children are properly supervised and kept “out of trouble.”¹⁰⁰ This approach coincided with neoliberalism’s emergence,¹⁰¹ as some critics note that youth sport programs can be viewed as part of parents’ “control over their children,”¹⁰² so that parents began to prefer activities for their children, like youth sport, that produced “skills and quantifiable achievements.”¹⁰³ In this way, youth sport can act as an instrument to teach children the prevailing societal ideologies by “socializing young people to become personally responsible, physically healthy, self-confident, and motivated to be successful.”¹⁰⁴ Scholars therefore attribute the evolution of the “family and childhood” as a primary reason for the popularity of organized youth sport.¹⁰⁵

Youth sport also fits well within the range of private family matters for which parents are legally trusted to act in their children’s best interests. Economists state that sport is a “type of personal investment,”¹⁰⁶ and as with

97. COAKLEY, *supra* note 65, at 110; *see also* Dennis Gildea, *Origin and Development of Organized Youth Sports*, in *THE ROUTLEDGE HISTORY OF AMERICAN SPORT* 110, 110 (Linda J. Borish et al. eds., 2017).

98. COAKLEY, *supra* note 65, at 111.

99. EITZEN, *supra* note 85, at 109.

100. COAKLEY, *supra* note 65, at 111-12.

101. Jay Coakley, *Positive Youth Development Through Sport: Myths, Beliefs, and Realities*, in *POSITIVE YOUTH DEVELOPMENT THROUGH SPORT* 22, 22 (Nicholas L Holt ed., 2016).

102. COAKLEY, *supra* note 65, at 134.

103. Coakley, *supra* note 101, at 22. Coakley goes on to state that showing oneself to be a “good” parent “came to be linked with parents’ efforts to enlist their children in visible, achievement-oriented, and culturally valued activities. Youth sports fit these requirements, and parents who effectively nurtured the sport dreams of their children were evaluated as morally worthy.” *Id.* at 25.

104. *Id.* at 24.

105. COAKLEY, *supra* note 65, at 112; OVERMAN, *supra* note 90, at 5 (stating that “[f]amily and community dynamics drive participation in organized sports” and that parents use sport to supervise and “socialize” their children); *see also* Coakley, *supra* note 101, at 25 (stating that “[t]he focus is on the family and individual development.”).

106. Matthew I. Horner et al., *Not Going Pro: On Seeking Lasting Returns from College Sports*, 2 *J. AMATEUR SPORT* 188, 192 (2016).

any investment, a rational individual choosing to participate in sport would be expected to weigh the risks, opportunity costs, and potential benefits.¹⁰⁷ Sport participation, then, is not considered a matter for the state or public policy but is a choice for the individual. The NYSS illustrates the thinking. The NYSS positions the individual at the center of youth sport.¹⁰⁸ The assumption is that children become involved in sport as a matter of individual choice, made in the privacy of one's family and completed through rational market transactions to enroll the child in a sports program. The NYSS states that to get more children to participate, children's and parents' "awareness" and "knowledge" of the benefits of sport must be increased.¹⁰⁹ Once educated about youth sport, the thinking goes, children and parents will make the smart choice to engage in sport. This choice, and the ability to make it, is the linchpin for developing the "interest" and "ability" that unlocks Title IX's gender equity protections.

Centering the choice to participate in youth sport on the individual, however, assumes a measure of agency that children do not have. While the UN Convention on the Rights of the Child recognizes that "play" is a child's right,¹¹⁰ the U.S. is not a party—primarily because of the fear that granting rights to children would erode parental authority. In the U.S., while there are some circumstances in which children have legally recognized autonomy interests, the law generally assumes that "children [are] fundamentally dependent beings in need of adult supervision and control."¹¹¹ As a result, parents have wide authority to control their children, and many rights enjoyed by adults are limited or denied to children.¹¹² Parents then have broad authority over their children's engagement with sport, as children generally "are introduced to certain sports (and not others) at a young age and encouraged to play (or not) by significant others such as parents and teachers and coaches."¹¹³ As such, social theorists have questioned whether individuals really do, without at least some influence, "choose" to participate in sport.¹¹⁴

107. *Id.* at 198.

108. Giroir, *supra* note 87, at 61.

109. *Id.* at 61, 63.

110. G.A. Res. 44/25, Article 31 (Nov. 20, 1989). U.N. Convention on the Rights of the Child, <https://www.ohchr.org/sites/default/files/crc.pdf>.

111. Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1462 (2018).

112. SAMUEL M. DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM 129 (6th ed. 2020).

113. Ben Carrington & David L. Andrews, *Introduction: Sport as Escape, Struggle, and Art*, in A COMPANION TO SPORT, *supra* note 4, at 1, 9.

114. *Id.*

The conditions of such a choice are further constrained, the data show, by class, race, gender, and geography.¹¹⁵

Once in sport, children continue to be shaped by adult decisions. Research shows that coaches have a substantial influence on a child's training regimen and are the most important factor behind a child's early sport specialization and overtraining.¹¹⁶ As children continue in sports, coaches and parents' goals often become aligned, so that parents adopt what sports medicine specialists call "tragically flawed assumptions,"¹¹⁷ including that year-round sports training and specialization in one sport are necessary to develop talent.¹¹⁸ This can create an increasingly pressured environment for the child in that the child is "encouraged" to submit to the demands.¹¹⁹ This process is illustrated through seemingly benign messages such as those in the NYSS, which state that parents should discourage children from quitting sport, and instead urge them to continue for their benefit.¹²⁰ Critics explain that especially as individuals move to increasingly higher levels of sport, the "distinction between wanting to and having to becomes blurred."¹²¹ Youth sport therefore is not seen (as it is in countries like Norway)¹²² as a public good to be provided to all children. Consistent with classical liberal and neo-liberal values, sport is viewed as part of the range of private family decisions that parents are entrusted to make for their children.¹²³

Privatization. With this in mind, we can best appreciate what we know about children's experience in sport if they are enrolled—an experience that has undergone significant transformation in the decades since Congress enacted Title IX. Today's youth sport system is, for the most part, privatized and professionalized. It is a model that has significant barriers to entry, due to

115. *Id.*

116. Charles A. Popkin et al., *Early Sport Specialization*, 27 J. AM. ACAD. ORTHOPAEDIC SURGEONS 995, 996 (2019).

117. Daniel Gould, *The Professionalization of Youth Sports: It's Time to Act!*, 19 CLINICAL J. SPORTS MED. 81, 81 (2009).

118. *Id.* at 81-82.

119. See, e.g., MARK HYMAN, *UNTIL IT HURTS: AMERICA'S OBSESSION WITH YOUTH SPORTS AND HOW IT HARMS OUR KIDS* 31-33 (Beacon Press, 2009).

120. Giroir, *supra* note 87, at 54 (recommending that adults "encourage" children who want to quit sports to "keep trying and keep playing.").

121. Ingham, *supra* note 85, at 11.

122. Tom Farrey, *Does Norway Have the Answer to Excesses in Youth Sport?*, N.Y. TIMES (Apr. 28, 2019), <https://www.nytimes.com/2019/04/28/sports/norway-youth-sports-model.html>.

123. Coakley, *supra* note 101.

cost, so that millions of children, including girls, do not ever have the opportunity to participate.¹²⁴

In addition to the assumption that children's sport engagement is a matter of private family choice, scholars have documented that over the last several decades, youth sport programs increasingly have become privatized.¹²⁵ Thus, as youth sport participation grew, so did program privatization,¹²⁶ something at least one scholar called an "alarming trend."¹²⁷ Accordingly, today, youth sport is commonly referred to as a "pay-to-play model,"¹²⁸ an approach that is consistent with the U.S. system for amateur sport generally. In 1978, after Congress enacted Title IX, it enacted what is now known as the Ted Stevens Olympic and Amateur Sports Act. The statute created the modern United States Olympic and Paralympic Committee as a private, Congressionally chartered corporation, with oversight of private National Governing Bodies for sport.¹²⁹ The U.S. model for youth sport is therefore different from that in other countries¹³⁰ in that there is no government agency that funds, regulates, or otherwise supports youth sport.¹³¹ There is also no federal policy directed to youth sport,¹³² besides urging children to participate.

Of course, not all youth sport opportunities are private. Interscholastic sports programs (the majority of which are through public schools) serve about 8 million adolescents, including about 3.5 million girls.¹³³ Title IX applies in

124. Farrey, *supra* note 122; Coakley, *supra* note 101.

125. See Samantha King, *supra* note 55, at 76 (explaining "privatization" as a feature of neoliberalism).

126. COAKLEY, *supra* note 65, at 112-13; Gildea, *supra* note 97, at 91 (explaining that "[a]s the twenty-first century dawned . . . youth sports organizations were becoming increasingly privatized and costly for participants."); Joshua Newman & Kyle Bunds, *Special Issue Foreword: On the Political Economy of Amateur Athletics*, 2 J. AMATEUR SPORT 1, 8 (2016) (stating that "sport is now a deeply privatized and commercialized feature of most societies.").

127. COAKLEY, *supra* note 65, at 114 (stating that "[c]ommercial sport providers also have entered the youth sport scene in growing numbers as public programs have declined," and that private programs "provide few opportunities for children from low-income households."); see also OVERMAN, *supra* note 90, at 6 (citing the "privatization of youth sports" and stating that "private community-level organizations . . . have stepped in to fill the gap left by the diminished public sector.").

128. Giroir, *supra* note 87, at 21.

129. Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220501 et seq. (2022).

130. OVERMAN, *supra* note 90, at 7-8.

131. RIDPATH, *supra* note 87, at xvi (stating that "the United States does not have a centralized national sports policy or a governmental sports ministry to provide a governance framework, as is the case in many other countries."); Giroir, *supra* note 87, at 27, 46. (stating that "many countries around the world have a robust interest in sports participation and have ministries of sport or federally funded national organizations that support the country's sports system.").

132. RIDPATH, *supra* note 87, at xvi.

133. 2018-19 High School Athletics Participation Survey, *supra* note 12, at 54.

this context, and women's sport advocates have highlighted that there is much more work to be done to achieve gender equity, especially for girls of color. For instance, the Women's Sports Foundation explains that opportunities to participate in sport are significantly more limited in "heavily minority schools compared to heavily white schools," as they state that "[i]n a typical heavily minority school, there are only 25 spots available on sports teams for every 100 students; in a typical heavily white school, there are 58 spots available on sports teams for every 100 students."¹³⁴ As a result, the Women's Sports Foundation concluded that "[g]ender disparities in athletic opportunities were pervasive across schools; however, the gender disparities were greater in heavily minority schools"¹³⁵ Thus, the existing research documents well the importance of Title IX enforcement in high school sports, and focusing on this work will ensure greater opportunities for populations of girls and women who have been shut out of the promise of Title IX.

However, if we provide more participation opportunities in high schools, and ensure greater Title IX compliance, that likely will not address the pipeline problem. High school athletic programs often require students who hope to participate, to arrive with athletic skills. At least one scholar has stated that a "serious" problem with high school sports is that they operate like "big-time intercollegiate programs," emphasizing winning and talent.¹³⁶ Public high school programs often seek the most skilled performers, such that sport researchers describe interscholastic sport as "selective" and "highly competitive."¹³⁷ Accordingly, although publicly supported opportunities exist within most high schools, the competitive nature of those programs means that adolescents who hope to make the team in high school often must start in private youth sport programs as children.

Thus, by assigning control over amateur sports, including youth sport, to the private sector, and providing little regulation or policy direction, the U.S. has permitted the market to determine the youth sport experience.¹³⁸ Parents are partners in this transaction, as strong legal protection for their authority coupled with few rights for children and athletes, means youth sport largely

134. Staurowsky et al., *supra* note 1, at 26.

135. *Id.* The report further states that "[i]n a typical heavily white high school, girls had 82% of the athletic opportunities that boys had." "In a typical heavily minority school, girls had only 67% of the opportunities to play sports compared to opportunities provided for boys." *Id.*

136. COAKLEY, *supra* note 65, at 440.

137. RIDPATH, *supra* note 87, at 33; Newman & Bunds, *supra* note 126, at 10 (stating that "most opportunities for individuals in public schools are for those who compete in highly competitive sport activities.").

138. Coakley, *supra* note 101, at 22.

occurs within a legally insulated, private sphere. As explained below, it is a model that frequently turns sport participation into work.

Professionalization. Also reflecting our particular political and historical moment is that private providers often take a “professionalization” approach to engaging children with sport. The common assumption is that participating in youth sport necessarily benefits children and that conducting sport through the prevailing model is in fact required to generate the benefits of participation.¹³⁹ These views reflect what critical theorists call the “taken-for-granted” belief “in most Western societies”¹⁴⁰ that engaging in sport always leads to positive outcomes for children, and such beliefs permeate documents like the NYSS.

Yet for as long as the government has promoted participation, critics across multiple disciplines have documented concerns about the conduct of youth sport.¹⁴¹ For instance, scholars and sports medicine specialists have stated that youth sport injuries are a “major public health challenge,”¹⁴² with overuse injuries a “particular . . . concern.”¹⁴³ Researchers explain that “sport and physical activity spaces are highly normalized, regulated, and disciplined.”¹⁴⁴ Programs often encourage “specialization” at an early age, favor those who coaches believe are the most talented athletes, and exclude those who do not immediately contribute to winning.¹⁴⁵ Thus, according to sports researchers, this “professionalization” of youth sport has three primary

139. See *id.* at 27 (stating that there is “a near universal belief that sport participation automatically produces positive development outcomes for participants. As a result, the adults who control programs and teams have not felt that specific intervention strategies or new pedagogies were needed to achieve developmental goals.”); Peter A. Harmer, *Injury Research in Pediatric and Adolescent Sports*, in *INJURY IN PEDIATRIC AND ADOLESCENT SPORTS: EPIDEMIOLOGY, TREATMENT AND PREVENTION* 233, 234 (Dennis Caine & Laura Purcell eds., 2015) (stating that “it is clear that the very nature of competitive sport entails potential harm that threatens to undermine the value of participation.”).

140. Coakley, *supra* note 101, at 21.

141. HYMAN, *supra* note 119, at 6-14.

142. Phoebe Friesen et al., *Overuse Injuries in Youth Sports: Legal and Social Responsibility*, 28 *J. LEGAL ASPECTS SPORT* 151, 151 (2018); EITZEN, *supra* note 85, at 90.

143. Friesen et al., *supra* note 142, at 151. Medical groups such as the American Orthopedic Society for Sports Medicine have adopted campaigns to generate awareness of overuse injuries in youth sports. *AOSSM and NCYS Team Up to Stop Sports Injuries*, AM. ORTHOPAEDIC SOC. FOR SPORTS MEDICINE (Feb. 28, 2022), <https://www.sportsmed.org/about-us/news/aossm-and-ncys-team-up-to-stop-sports-injuries> [<https://perma.cc/GK8C-MJ2H>].

144. Caroline Fusco, *Governing Play: Moral Geographies, Healthification, and Neoliberal Urban Imaginaries*, in *SPORT AND NEOLIBERALISM*, *supra* note 55, at 143, 146

145. Jean Cote' et al., *Children's Talent Development in Sport: Effectiveness or Efficiency?*, in *INCLUSION AND EXCLUSION THROUGH YOUTH SPORT*, *supra* note 49, at 172, 182-83.

characteristics: an emphasis on winning and identifying talent,¹⁴⁶ specializing in one sport at a young age, and training year-round.¹⁴⁷ An Aspen Institute survey showed that the average child participating dedicated nearly twelve hours per week to sport, with some children spending up to sixty hours per week.¹⁴⁸ Today's youth sport, then, is not simply play.¹⁴⁹

Professionalization aligns with political ideologies that value competition.¹⁵⁰ Participating in sport to compete and win, and not, for instance, for fun, play or fitness, is a defining characteristic of most U.S. youth sport experiences,¹⁵¹ but it is not required to provide children with the benefits of sport.¹⁵² Thus, for sport in the U.S. and many Western, capitalist societies, critical theorists point out that “the social and moral aspects of play” of youth sport are de-emphasized in favor of talent development, skill, and competing to win.¹⁵³

Valuing competition not only, as critical theorists state, helps teach children dominant political values, it generates substantial revenue.¹⁵⁴ Thus, among the many ways youth sport is commercialized is through “youth sport

146. See Ingham, *supra* note 85, at 11, 18 (describing the “feeder system” of sport where “most of us will be made expendable” because “the feeder system is one of allocation.”).

147. Gould, *supra* note 117, at 2; Martin Camiré & Fernando Santos, *Promoting Positive Youth Development and Life Skills in Youth Sport: Challenges and Opportunities Amidst Increased Professionalization*, 5 J. SPORT PEDAGOGY & RSCH. 27, 28 (2019); Popkin et al., *supra* note 116.

148. Jon Solomon, *Survey: Kids Quit Most Sports by Age 11*, PROJECT PLAY, ASPEN INSTITUTE (Aug. 1, 2019), <https://www.aspenprojectplay.org/news/kids-quit-most-sports-by-age-11> [<https://perma.cc/WC34-KTAZ>].

149. See Ingham, *supra* note 85, at 16 (stating that “[w]e have socially constructed expectations and our children become miniature “sportsters” while, in terms of development, they should be ‘gamesters.’).

150. See Grant Farred, *The Uncanny of Olympic Time: Michael Phelps and the End of Neoliberalism*, in *SPORT AND NEOLIBERALISM: POLITICS, CONSUMPTION AND CULTURE*, *supra* note 55, at 111 (explaining the neoliberal view that “competition . . . enables individuals in all walks of life to achieve their full potential” and that “[o]f course, the logic of all sport . . . coincides with the competitive thrust of neoliberalism.”).

151. EITZEN, *supra* note 85, at 5; Richard Giulianotti, *Introduction: Sport and Social Theorists—A Plurality of Perspectives*, in *SPORT AND MODERN SOCIAL THEORISTS*, *supra* note 23, at 1, 7 (stating that “in sports, the social and moral aspects of play atrophy, and the instrumental (often violent) elements of competition are prioritized.”).

152. Carrington & Andrews, *supra* note 113, at 9 (stating that “Western definitions of sport tend to assume that *competition* is axiomatic but this may be to unduly privilege a particular concept of sport.”) (emphasis in original); see Gould, *supra* note 117, at 81-82 (explaining the incorrect assumption of most youth sport parents and coaches that one cannot develop as an athlete in “an enjoyable, fun-filled atmosphere.”).

153. Giulianotti, *supra* note 151, at 1, 7. Participating in sport to compete and win, and not, for instance, for play or fitness, is a primary feature of U.S. youth sport. EITZEN, *supra* note 85, at 5.

154. See Ingham, *supra* note 85, at 18 (stating that “as we move from play . . . to sport, our physical practices become commodified.”).

tourism,” which is travel to support children’s sports competition. Scholars have characterized youth sports tourism as “an emerging market” that represents “at least 10 percent of the national leisure travel market.”¹⁵⁵ States have capitalized on this by enacting statutes aimed at attracting this type of travel,¹⁵⁶ including by building large tax-supported stadiums and undertaking other facilities development projects designed to host youth sport tournaments and competitions.¹⁵⁷ Researchers state that “youth sport tourism has grown into a distinct travel segment over the past decade” and that “communities have invested in sport tourism initiatives.”¹⁵⁸ Research from TD Ameritrade states that

about 63 percent of American families whose kids are involved in sports spend from \$100 to \$499 per child per month on sporting activities. Another 18 percent pay \$500 to \$999 per month and about 11 percent spend \$1,000 to \$1,999. And 8 percent report spending \$2,000 per month or more amounting to \$24,000 per year.¹⁵⁹

The City of Vicksburg, Mississippi, which invested heavily in attracting youth sport tourism, well illustrates the payoff. In 2019, the city was “expected to host 1,845 tournament teams and attract 175,000 visitors. The impact on hotel rentals is estimated at 25,000 room nights. The total economic impact is expected to be \$24 million.”¹⁶⁰ Travel tournaments and competitions in sports such as soccer, volleyball, softball, baseball, and lacrosse are analyzed by marketing researchers to gain insights into “youth sport consumers” and the optimal “service marketing mix.”¹⁶¹

Competition and youth sports tourism are not inherently wrong or harmful. However, it is important to understand how this model impacts children’s interest in

155. OVERMAN, *supra* note 90, at 42.

156. For instance, the State of Maryland has a program to bring more youth sports events to the state and “attract sports fans” and “tourists.” MD Code § 10-612.1; Iowa Code Ann. § 15E.321 (promoting “youth sports” and “sports tourism.”).

157. *See*, OVERMAN, *supra* note 90, at 43.

158. Mona Mirehie et al., *Towards an Understanding of Family Travel Decision-Making Processes in the Context of Youth Sport Tourism*, 21 J. DESTINATION MKTG. & MGMT. 100644, 1 (2021).

159. Becky Gillette, *Youth Sports Tourism a Home Run When it Comes to Economic Impact*, 41 MISS. BUS. J. (2019).

160. *Id.*

161. Eric Hungenberg et al., *A Glimpse into the Experience of Youth Sport Tourism Consumer: An Analysis of Parents vs. Coaches*, 26 J. SPORT & TOURISM 43, 43 (2022).

sport and ability to participate, as data suggest that the combination of privatization and professionalization have a important influence on children's engagement with youth sport. The NYSS notes that there are significant "barriers to entry" that prevent children from participating in sport,¹⁶² including, as stated above, high cost, including the cost of travel for competition.¹⁶³ For the children who do participate, professionalization takes a toll, such that most quit by age thirteen, if not sooner.¹⁶⁴ The biggest reason, according to surveys, is "lack of fun."¹⁶⁵ Other factors include long-term participation costs, "stress and burnout," "overuse injuries," and increasingly competitive environments as children progress.¹⁶⁶ The NYSS notes that girls quit sports "at a rate up to three times higher than their male peers."¹⁶⁷ We know, then, that for girls who do engage in sport, they often stop participating before their first Title IX opportunity in high school ever becomes relevant.

This has important implications for the struggle for sex equality in sport. Before a girl ever reaches high school, it is very likely that our current model for youth sport has determined whether or not she is an athlete with the "interest" and "ability" to claim an opportunity guaranteed by Title IX. Political and historical forces that shape the current model for youth sport therefore may also conspire to limit girls' and women's ability to enjoy the benefits of Title IX, substantially diminishing the law's effectiveness no matter how much enforcement it gets. The reality is that by the time Title IX attaches, the statute and regulations serve to allocate opportunities for the girls and women who are left after the youth sport pipeline has had its say.

C. Youth Sport Discourse

Finally, also important to understanding youth sport's potential impact on Title IX's sex equality promise is exploring the current discourse on youth sport generally and how it shapes children's views of sport and who is or can be an athlete.¹⁶⁸ While Title IX's message of equality and empowerment undoubtedly changed the previous

162. Giroir, *supra* note 87, at 54.

163. *Id.*

164. Soloman, *supra* note 148; Julianna W. Miner, *Why 70 percent of Kids Quit Sports by Age 13*, WASH. POST (June 1, 2016, 7:00 AM), <https://www.washingtonpost.com/news/parenting/wp/2016/06/01/why-70-percent-of-kids-quit-sports-by-age-13/>.

165. EITZEN, *supra* note 85, at 121.

166. Giroir, *supra* note 87, at 55-56.

167. *Id.* at 55.

168. See ALEX MCHOUL & WENDY GRACE, *A FOUCAULT PRIMER: DISCOURSE, POWER AND THE SUBJECT* 58 (1993) (stating that there is an "essential link between power relations and their capacity to 'produce' the truths we live by."); Scraton & Flintoff, *supra* note 31, at 102 (stating that "Foucault highlights the significance of discourses . . . through which meanings and people are made and, importantly, through which power relations are maintained and changed.").

exclusionary discourse around girls and women in sport, it is worth asking how the nuances of the current narrative on youth sport might serve not only to encourage, but also negatively impact girls' thinking about participation in sport. In my previous work, I explored one of the ways Title IX's assimilation approach to gender equity in sport may have the unintended consequence of sending a message that some girls and women do not belong in sport.¹⁶⁹ We must also consider the way the discourse around sport generally can spur girls' interest, or not, in taking up athletics.

A key part of the arguments for Title IX as applied to sport is that sport participation confers numerous health and social benefits.¹⁷⁰ Moreover, one of the primary reasons cited by the federal government to encourage sport participation for children is that consistent exercise provides "indisputable" health benefits.¹⁷¹ For instance, the NYSS lists numerous gains from sport participation ranging from increased "confidence" and "self-esteem" to lower risk of suicide and "improved life skills."¹⁷² Additionally, the NYSS states that sport participation by adolescents can bolster mental health, reduce "youth violence and crime" and help "develop social and interpersonal skills" as well as provide "cognitive and academic benefits."¹⁷³ The follow-up to the NYSS, the President's Council on Sports, Fitness & Nutrition Science Board Report on Youth Sports, states that youth sport provides "distinct societal benefits" and is "one of the most powerful ways to promote health habits for a lifetime."¹⁷⁴ The Centers for Disease Control and Prevention also promote youth sport as part of the "Active People, Healthy Nation" public health initiative,¹⁷⁵ and the Government Accountability Office issued a report specifically touting the benefits of physical activity and youth sport in curbing childhood obesity, among other short and long-term gains.¹⁷⁶ Additional government reports and initiatives promote youth sport

169. Koller, *supra* note 35; Dionne L. Koller, *How the Expressive Power of Title IX Dilutes its Promise*, 3 HARV. J. SPORTS & ENT. L. 103 (2012).

170. Koller, *How the Expressive Power of Title IX Dilutes its Promise*, *supra* note 169, at 114.

171. Giroir, *supra* note 87, at 22; EITZEN, *supra* note 85, at 87-88 (stating that "the health benefits of exercise are the motive for requiring physical education and sports programs in schools, youth sports, community adult recreation" and that the "positive effects of physical exercise cannot be denied."); *Benefits of Youth Sports*, PRESIDENT'S COUNCIL SPORTS, FITNESS & NUTRITION SCI. BD. (Sept. 17, 2020), https://health.gov/sites/default/files/2020-09/YSS_Report_OnePager_2020-08-31_web.pdf. [<https://perma.cc/D765-JBV5>].

172. Giroir, *supra* note 87, at 49.

173. *Id.* at 49-50.

174. *PCSFN Science Board Report on Youth Sports*, PRESIDENT'S COUNCIL SPORTS, FITNESS & NUTRITION SCI. BD. 5 (Sept. 17, 2020), https://health.gov/sites/default/files/2020-09/YSS_ScienceBoard_Report_2020.09.01_opt.pdf [<https://perma.cc/8MNE-XG9S>] [hereinafter *Science Board Report*].

175. *Active People, Healthy Nation*, CDC (Jan. 27, 2022), <https://www.cdc.gov/physicalactivity/active-peoplehealthynation/index.html>.

176. *K-12 Education: School-Based Physical Education and Sports Programs*, REPORT TO CONGRESSIONAL REQUESTERS, U.S. GOV'T ACCOUNTABILITY OFF. 4-5 (Feb. 2012), <https://www.gao.gov/>

as providing numerous benefits to children.¹⁷⁷ The NYSS states that the government’s goal is to increase “youth engagement” in sport in areas with lower rates of participation¹⁷⁸ and influence the “U.S. youth sports culture” so that ultimately all children will have the “motivation” to participate.¹⁷⁹

While physical fitness is without doubt beneficial, some scholars have argued that ostensibly helpful, positive narratives around physical fitness, including sport, link up with political messages around wellbeing that define virtuous children as those who “become the agents of their own health,” while children who are not as responsible are ones who “choose” not to participate in sport.¹⁸⁰ Caroline Fusco coined the term “healthification” to explain efforts to inspire individuals to take responsibility for their health,¹⁸¹ and Rich and Evans describe the “healthification of sport” which is “less about the pleasure of movement” and instead is about being a “morally good citizen.”¹⁸² Thus, the discourse of youth sport is bound up with narratives on childhood obesity, with sport positioned as an important way for individuals to make smart choices and take responsibility for a healthy lifestyle.¹⁸³ This likely has implications for girls’ and young women’s views of sport, as “[w]ithin obesity discourse young women are assumed to be both in control of their own destiny and able to shape their future lives and health” if they engage in recommended practices such as taking up athletics.¹⁸⁴ Further, scholars have described the image of “the toned, sporting female” who takes responsibility for engaging in healthful practices, while such narratives obscure how the ability to undertake “particular ‘health’

assets/gao-12-350.pdf [https://perma.cc/F524-HZ8R]. The report cited health, academic, personal, and social benefits, stating that “research indicates that increased physical activity in general . . . and sports participation in particular, yields a number of important benefits for elementary and secondary students.” *Id.* at 4.

177. Toben F. Nelson, *Sport and the Childhood Obesity Epidemic*, in *CHILD’S PLAY* 82 (Michael A. Messner & Michela Musto eds., 2016); Letter from Jacqueline M. Nowicki, Dir., Educ., Workforce, and Income Security Issues, to Lamar Alexander & Virginia Foxx, *K-12 Education: High School Sports Access and Participation*, U.S. GOV’T ACCOUNTABILITY OFF. 1 (Sept. 14, 2017), <https://www.gao.gov/assets/gao-17-754r.pdf> [https://perma.cc/7SND-XJPJ] (stating that “[p]articipation in organized sports is associated with many benefits, such as positive health outcomes, improved academic achievement, and increased self-esteem.”).

178. Giroir, *supra* note 87, at 3.

179. *Id.*

180. Fusco, *supra* note 144, at 149; Emma Rich & John Evans, *Physical Culture, Pedagogies of Health, and the Gendered Body*, in *A COMPANION TO SPORT*, *supra* note 4, at 179, 182 (connecting these discourses to “neoliberal politics”).

181. Fusco, *supra* note 144, at 148-49.

182. Rich & Evans, *supra* note 180, at 186 (stating “[t]he imperative to dutifully take care of one’s body emerges from a neoliberal hegemony that . . . shape[s] contemporary Western life.”).

183. *Id.* at 182.

184. *Id.* at 183.

practices are mediated by social class, gender, ethnicity, and culture.”¹⁸⁵ Through these messages, participation in sport can be part of a “body pedagogies”¹⁸⁶ that generates “pressure” on girls and women to display the proper control over one’s body. Similarly, related discourses on sport also include the message that sport is a means to control or “save” children, in that youth sport has long been cited as a “solution[] to the ‘problem’ of youth and urban spaces.”¹⁸⁷

Thus, in addition to “celebratory discourses” that spotlight women and the “progress” that has been achieved toward gender equity¹⁸⁸ in sport, more complex narratives about maintaining a healthy body and using sport as a means of controlling children’s behavior are also an important part of the messaging around sport. We therefore cannot view Title IX’s equality and empowerment messages standing alone. Such messages are instead part of the overall societal discourse about sport, health, childhood obesity, and behavior control, and they circulate in a political environment that both urges girls to make the “choice” to participate in sport, while providing little funding or other support to make that happen. The interest and ability to participate in sport are therefore developed or discouraged within this larger political context, and going forward, efforts to achieve gender equity in sport must fully account for it to ensure that the greatest number of girls and women are in a position to claim the opportunities protected by Title IX.

III. CONCLUSION

Political economy scholars have described sport as a “non-neutral, significant and meaningful aspect of everyday life in modern capitalist societies.”¹⁸⁹ Through the enormous success of Title IX, sport indeed has been a meaningful part of the larger movement for women’s equality since the 1970s. As we celebrate the progress that has been made, it is also important to be mindful of the fact that sport is of course a social construct, not a divinely given or naturally occurring phenomenon. As such, sport can surely be configured to ensure all individuals have the opportunity to participate. Fifty years after Congress enacted Title IX, it is long past time for sport to be constituted in a way that fully values and includes girls and women.¹⁹⁰ To most effectively work

185. *Id.* at 186.

186. *Id.* at 192.

187. Fusco, *supra* note 144, at 145.

188. Rich & Evans, *supra* note 180, at 180.

189. Kimberly S. Schimmel, *Sport and International Economy: An Introduction*, in *THE POLITICAL ECONOMY OF SPORT* 13 (John Nauright & Kimberly S. Schimmel eds., 2005).

190. Carrington & Andrews, *supra* note 113, at 19. (stating that “[s]port is neither endowed with nor evokes any universal elements, functions values or experiences. It possesses no transcendent substance, and is in fact wholly relational.”).

toward this reality, we must appreciate the larger system in which Title IX-protected opportunities exist.¹⁹¹

To that end, this article asserted that significant power structures affecting girls and women in sport are not just manifest in the high schools and colleges that determine the number and quality of sports opportunities.¹⁹² Power is also circulating at the foundation of the sport system—a space we often take for granted or view as benign—in the operation of youth sport. Thus, through the daily interactions, discourses, understandings, and struggles of the girls who enter youth sport, and those who never have the opportunity, the power to define gender equity in sport in many ways takes hold long before Title IX becomes relevant. To truly achieve gender equity in sport, then, we should not just settle for Title IX, but must instead think bigger.

191. See David Inglis, *Theodor Adorno on Sport: The Jeu D'Esprit of Despair*, in *SPORT AND MODERN SOCIAL THEORISTS*, *supra* note 23, at 81, 94 (stating that “if sporting activity is ever to have a chance of being free from oppression in practice, it will be necessary . . . to think about how sports could be organized and played in freer and liberating ways.”).

192. See C.L. Cole et al., *Michel Foucault: Studies of Power and Sport*, in *SPORT AND MODERN SOCIAL THEORISTS*, *supra* note 23, at 207, 222 (stating that “[i]n the wake of neoliberalism . . . we imagine that Foucauldian work will become even more useful for scholars interested in studying sport” and that the authors urge a new way of thinking about power and struggle in sport).