

TITLE IX: BEYOND EQUAL PROTECTION

DAVID S. COHEN*

I. INTRODUCTION

Until the summer of 2001, Tara Brady was the starting center on the women's basketball team at Sacred Heart University, a small NCAA Division I school in Connecticut.¹ She had been heavily recruited by her coach,² and in her first two seasons with the team she had worked her way from a bench player to a starter with the second highest average point total on the team.³ She had been looking forward to her junior year and to helping the team continue to improve; however, in the summer before her third year at school, she found out something that changed her life and basketball career: she was pregnant.⁴

What happened after that is subject to dispute. According to the Title IX complaint filed by Ms. Brady in federal district court, upon finding out about her pregnancy her coach dismissed Ms. Brady from the team, rescinded her scholarship, and kicked her out of school for the year.⁵ According to Sacred Heart University, Ms. Brady voluntarily withdrew from school and the team to care for herself during her pregnancy.⁶ The case settled before any court or jury could determine what the facts of the case

* Staff Attorney, Women's Law Project, Philadelphia, Pa.; Lecturer-in-Law, University of Pennsylvania School of Law; J.D., Columbia University Law School, 1997. I would like to extend my thanks for the generous support and excellent feedback I received from Professor Linda Wharton, Michelle Seldin, Andrew Hyman, Lauren Sorrentino, Susan Frietsche, and especially Cassie Ehrenberg.

¹ SACRED HEART UNIV. OFFICE OF ATHLETICS COMMUNICATIONS, PIONEERS' 2001-02 WOMEN'S BASKETBALL MEDIA GUIDE 6 (2001).

² RICHARD KENT, INSIDE WOMEN'S COLLEGE BASKETBALL: ANATOMY OF A SEASON 66 (2000).

³ SACRED HEART UNIV. OFFICE OF ATHLETICS COMMUNICATIONS, *supra* note 1, at 23.

⁴ Chris Casavant, *Brady, Now a Mom, Wants Her Athletic Scholarship Back at SHU*, CONN. POST, May 10, 2002, available at LEXIS, Connecticut Post (Bridgeport, Conn.); Jeff Jacobs, *Son's Smile Erases Pain But Not the Injustice*, HARTFORD COURANT, Mar. 25, 2003, at C1.

⁵ Complaint at ¶ 25, *Brady v. Sacred Heart Univ.* (D. Conn. filed Mar. 24, 2003) (No. 3:03-CV-514) (on file with author).

⁶ In its only public comment on the lawsuit, Sacred Heart issued a statement saying that Brady left school voluntarily and that the suit is unfounded, adding, "As a Roman Catholic institution, Sacred Heart is offended that Ms. Brady would insinuate, for the sake of publicity, that Sacred Heart would, in any way, punish Ms. Brady for completing her pregnancy." Wayne Coffey, *A Pregnant Pause: Tara Brady Fights Sacred Heart After Hoops Career Gets Dunked for Having a Baby*, N.Y. DAILY NEWS, Apr. 12, 2003, at 98.

actually were;⁷ however, lurking among the many issues the case presented was one implicating the central meaning of Title IX: Does Title IX prohibit discrimination based on pregnancy?

Answering that question is much more complex than simply noting that the regulations promulgated under Title IX prohibit discrimination based on pregnancy.⁸ Wrapped into the issue is the much broader question of whether Title IX reaches conduct beyond that which the Equal Protection Clause prohibits. The purpose of this Article is to determine the relationship between Title IX's statutory prohibition of sex discrimination in federally funded education programs and the Equal Protection Clause's prohibition of state action that amounts to invidious discrimination based on sex.

The relationship between Title IX and the Equal Protection Clause is relevant to many areas of sex discrimination law. First and foremost, the issue has arisen when courts have attempted to determine the scope of Title IX's prohibition of sex discrimination. For instance, in Tara Brady's case, whether she could successfully bring a sex discrimination suit for monetary damages under Title IX, which says nothing on its face about pregnancy,⁹ requires a determination of whether a plaintiff can bring a claim for monetary damages grounded in Title IX's regulation that prohibits pregnancy-based discrimination. After the Supreme Court's decision in *Alexander v. Sandoval*,¹⁰ a Title VI case, which concluded that Title VI's regulations prohibiting disparate impact discrimination cannot form the basis of a private cause of action because Title VI itself prohibits only disparate treatment,¹¹ the Title IX pregnancy issue most likely will turn on whether Title IX itself, as opposed to its regulations, prohib-

⁷ Chris Casavant, *SHU, Athlete Settles Suit*, CONN. POST, Oct. 22, 2003, available at LEXIS, Connecticut Post (Bridgeport, Conn.).

⁸ The regulations promulgated under Title IX provide:

A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

34 C.F.R. § 106.40(b)(1) (2004). In addition, the regulations state:

A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

Id. § 106.40(b)(4).

⁹ Title IX states, in relevant part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." 20 U.S.C. § 1681(a) (1994).

¹⁰ 532 U.S. 275 (2001).

¹¹ *Id.* at 293.

its discrimination based on pregnancy.¹² If Title IX is coextensive with the Equal Protection Clause, which does not consider discrimination based on pregnancy as discrimination based on sex,¹³ then there is no private cause of action under Title IX for pregnancy discrimination.

Other issues concerning the scope of Title IX have also required courts to look to the Equal Protection Clause for guidance. In a different context, courts have looked to the relationship between Title IX and the Equal Protection Clause in determining whether a litigant can bring both a Title IX claim and a § 1983 claim based on the Equal Protection Clause in the same lawsuit.¹⁴ *Smith v. Robinson* holds that if the constitutional right the litigant seeks to vindicate through § 1983 is “virtually identical” to the statutorily conferred right, then the litigant cannot bring the § 1983 claim.¹⁵ Courts answering the § 1983 question have offered opinions on the relationship between Title IX and the Equal Protection Clause.¹⁶

When state educational entities faced with Title IX litigation raise the defense of sovereign immunity under the Eleventh Amendment,¹⁷ courts must resolve another issue about the relationship of Title IX and the Equal Protection Clause. The sovereign immunity defense raises the question of whether Congress enacted Title IX under Section 5 of the Fourteenth Amendment¹⁸ or under the Spending Clause in Article I,¹⁹ because Congress’s ability to abrogate sovereign immunity depends upon which source provides the authority for Title IX.²⁰

¹² See, e.g., *Jackson v. Birmingham Bd. of Educ.*, No. 02-1672, slip op. (U.S. Mar. 29, 2005) (applying *Sandoval* analysis to Title IX retaliation claim based on regulations and finding that private right of action exists).

¹³ See *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) (arguing that absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination based on sex, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of disability benefits, just as with respect to any other physical condition).

¹⁴ See generally Beth B. Burke, *To Preclude or Not To Preclude?: Section 1983 Claims Surviving Title IX’s Onslaught*, 78 WASH. U. L.Q. 1487 (2000) (analyzing cases and arguing that Title IX should preclude a plaintiff from asserting a § 1983 claim based upon a Title IX violation, but should not preclude a plaintiff from asserting any type of constitutional violation under § 1983); Michael A. Zwibelman, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. CHI. L. REV. 1465 (1998) (arguing that Title IX precludes neither § 1983 claims based on Title IX itself nor those based on constitutional rights).

¹⁵ 468 U.S. 992, 1009 (1984).

¹⁶ See discussion *infra* Part II.B.

¹⁷ “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI; see also *Hans v. Louisiana*, 134 U.S. 1, 21 (1890) (holding that, despite the plain language of the Constitution, the Eleventh Amendment applies to suits by citizens of the same state as well as by “Citizens of another State”).

¹⁸ “The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5.

¹⁹ “The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.” U.S. CONST. art. I, § 8, cl. 1.

²⁰ See *Seminole Tribe v. Florida*, 517 U.S. 44, 65, 72–73 (1996) (holding that, without

Finally, courts have also discussed the relationship between Title IX and the Equal Protection Clause in the athletic equity context. In perhaps the most hotly contested Title IX issue,²¹ Title IX's regulations require schools to provide "equal athletic opportunity" for men and women.²² The agency interpretations of this regulation have spurred schools and male athletes to challenge Title IX's requirements as contrary to the Equal Protection Clause.²³

In attempting to examine these issues and then delineate the relationship between Title IX and the Equal Protection Clause, this Article will use three different sources for its analysis. First, the Article will look to the text and history of Title IX.²⁴ Textually, Title IX reaches beyond the Equal Protection Clause in distinct ways; historically, Title IX was enacted in 1972, before the Supreme Court established the constitutional doctrine of heightened scrutiny for discrimination based on sex.²⁵ These differences in text and historical background affect Title IX's relation to the Equal Protection Clause and will be explored thoroughly.

Second, the Article will look at Title IX jurisprudence compared to equal protection jurisprudence.²⁶ In one important way, Title IX does not offer as broad a remedy as the Equal Protection Clause, as individuals cannot be defendants under Title IX but can be in a § 1983 lawsuit based on the Equal Protection Clause.²⁷ However, when comparing Title IX and the Equal Protection Clause in other doctrinal areas, it is clear that Title IX jurisprudence has reached beyond established equal protection law to protect students from discrimination based on sex more comprehensively than the Constitution does.²⁸ This Article will catalog these ways in which Title IX goes beyond the constitutional guarantee against sex discrimination.

waiver of immunity, Congress cannot abrogate states' Eleventh Amendment sovereign immunity when it legislates pursuant to Article I (of which the Spending Clause is a part)); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding that, regardless of waiver of immunity, Congress can abrogate states' Eleventh Amendment sovereign immunity when it legislates pursuant to Section 5 of the Fourteenth Amendment). See generally Melanie Hochberg, *Protecting Students Against Peer Sexual Harassment: Congress's Constitutional Powers To Pass Title IX*, 74 N.Y.U. L. REV. 235 (1999) (arguing that Title IX was passed pursuant to both the Spending Clause and the Fourteenth Amendment).

²¹ See, e.g., John Irving, *Wrestling With Title IX*, N.Y. TIMES, Jan. 28, 2003, at A21.

²² 34 C.F.R. § 106.41(c) (2004) ("A recipient . . . shall provide equal athletic opportunity for members of both sexes."). One factor in the athletic opportunity assessment is "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." *Id.* § 106.41(c)(1).

²³ See, e.g., Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930 (D.C. Cir. 2004); Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996) [hereinafter *Cohen II*].

²⁴ See discussion *infra* Part III.A.

²⁵ See *id.*

²⁶ See discussion *infra* Part III.B.

²⁷ See discussion *infra* notes 225–232 and accompanying text.

²⁸ See discussion *infra* Part III.B.

Third, and most useful to fully understanding this issue, this Article will look at the theoretical underpinnings of both Title IX and the Equal Protection Clause.²⁹ In most areas of sex discrimination jurisprudence, and especially under the Equal Protection Clause, the concept of formal equality—treating similarly situated individuals alike—has guided the courts.³⁰ Theorists have convincingly advocated for a more broad-based understanding of equality, but courts have consistently rejected those approaches for constitutional claims of sex discrimination.³¹ However, in the areas of athletics, sexual harassment, and sexual orientation, Title IX has evinced a broader conception of equality.³² In conceiving of Title IX's antidiscrimination mandate in a different theoretical way than the Equal Protection Clause's prohibition, this Article proves that Title IX has broader protections from sex discrimination than the Equal Protection Clause.

To reach the conclusion that Title IX offers more protection, this Article proceeds in the following way. In Part II, the Article surveys court decisions and commentary that have explicitly touched on the relationship between Title IX and the Equal Protection Clause. In Part III, the Article then develops its own analysis of the relationship between Title IX and the Equal Protection Clause, using the three bases of analysis briefly discussed already: the text and history of Title IX, the jurisprudential differences between Title IX and the Equal Protection Clause, and the theoretical differences between Title IX and constitutional sex discrimination law. Finally, in Part IV, the Article looks at some of the legal issues affected by an analysis of Title IX's relationship to the Equal Protection Clause, such as Tara Brady's pregnancy issue, and posits solutions based on the doctrinal and theoretical conclusions reached in Part III.

II. JUDICIAL AND SCHOLARLY ANALYSIS OF THE RELATIONSHIP BETWEEN TITLE IX AND THE EQUAL PROTECTION CLAUSE

Before engaging in a full analysis of the relationship between Title IX and the Equal Protection Clause, it is useful to examine the case law and academic commentary that have already directly addressed the issue.³³ Surprisingly, not much in-depth analysis has been written about the subject. Rather, for the most part, courts and commentators have dotted their opinions and articles with assertions about the matter not supported by much analysis. It is the rare opinion or article that has attempted to grapple

²⁹ See discussion *infra* Part III.C.

³⁰ See discussion *infra* Part III.C.1.

³¹ See *id.*

³² See discussion *infra* Part III.C.2.

³³ This Part addresses only cases and commentary that contain specific statements comparing Title IX and the Equal Protection Clause. For a discussion of cases that have implicitly compared the two by analyzing claims made under the different provisions in different sections of the opinions, see *infra* Part III.

with the issue in more than a superficial manner. This Part discusses these analyses as they relate to the four areas in which the relationship between the two laws has arisen: (1) Title IX's scope; (2) whether Title IX preempts a § 1983 claim based on the Equal Protection Clause; (3) whether Congress validly abrogated sovereign immunity under Title IX; and (4) whether Title IX's athletic requirements violate the Constitution.

A. Title IX's Scope

Comparisons between Title IX and the Equal Protection Clause have arisen most frequently in discussions of Title IX's scope. Courts and commentators have discussed this comparison in a variety of contexts, such as determining whether Title IX allows for liability based on a disparate impact theory,³⁴ evaluating challenges to unequal educational opportunities in prisons,³⁵ and considering challenges to school admissions policies.³⁶ The analytic approaches taken by courts and commentators can be grouped according to the object of the comparison in the analysis: comparing Title IX to Title VI; comparing Title IX to Title VII; and directly comparing Title IX to the Equal Protection Clause. This Part reviews the cases and commentary as grouped into these three categories.

1. Title VI and the Title IX-Bakke Syllogism

Perhaps the most common way courts and commentators compare Title IX and the Equal Protection Clause is indirectly, by comparing Title IX to Title VI.³⁷ The Seventh Circuit was the first court to make this indirect comparison. In *Cannon v. University of Chicago*,³⁸ the Seventh Circuit considered a Title IX claim of disparate impact³⁹ by noting initially that the

³⁴ See, e.g., discussion *infra* notes 38–51 and accompanying text.

³⁵ See, e.g., discussion *infra* notes 52–59 and accompanying text.

³⁶ See, e.g., discussion *infra* notes 60–64 and accompanying text.

³⁷ Section 601 of Title VI of the Civil Rights Act of 1964 provides: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d (2000). That language is similar to Title IX's language: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681 (1994).

³⁸ 648 F.2d 1104 (7th Cir. 1981) [hereinafter *Cannon II*]. The case was on remand from the Supreme Court, which had held that a litigant has a private cause of action under Title IX. See *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

³⁹ A woman who claimed that she was denied admission to medical school based on sex argued that the two schools to which she had applied both had policies discouraging or prohibiting admission for applicants over a certain age and that such policies had a disparate impact on women. *Cannon II*, 648 F.2d at 1104–05 (“[B]ecause women historically interrupt their higher education to pursue a family and other domestic responsibilities more often than men, these age policies disparately affected women.”).

Supreme Court had previously indicated that courts should look to Title VI law when determining the proper interpretation of Title IX.⁴⁰ The Seventh Circuit then noted that the Supreme Court had also held, in *Board of Regents v. Bakke*,⁴¹ that Title VI prohibits the same forms of discrimination that the Equal Protection Clause prohibits.⁴² Specifically, the Seventh Circuit quoted from Justice Powell's opinion in *Bakke*⁴³ as well as Justice Brennan's partial concurrence,⁴⁴ which three other Justices joined; together, those opinions indicated that a majority of the Court believed that Title VI was coextensive with the Equal Protection Clause and therefore prohibited only intentional discrimination, not disparate impact discrimination.⁴⁵ Also looking to post-*Bakke* case law, the Seventh Circuit observed that a total of "seven of the Justices of the Supreme Court support the view that a violation of Title VI requires intentional discrimination."⁴⁶ Therefore, the Seventh Circuit held that it would evaluate the plaintiff's Title IX claim under the intentional discrimination standard adopted from Title VI and the Equal Protection Clause.⁴⁷

The analytic tool employed by the Seventh Circuit forms the basis for many other courts' analyses. I call this tool the "Title IX-*Bakke* syllogism." As set forth in *Cannon*, the logic of the argument is fairly simple: Congress modeled Title IX after Title VI; in *Board of Regents v. Bakke*, the Supreme Court held that Title VI prohibits only intentional discrimination that violates the Equal Protection Clause; thus, Title IX also pro-

⁴⁰ *Cannon II*, 648 F.2d at 1106 (citing *Cannon*, 441 U.S. at 694-96). In *Cannon*, the Supreme Court noted that Congress had based Title IX's language on the language of Title VI, and the Court also based its decision, in part, on Title VI case law. *Cannon*, 441 U.S. at 703-04 (citing *Hills v. Gautreaux*, 425 U.S. 284, 286 (1976), and *Lau v. Nichols*, 414 U.S. 563, 566-69 (1974), as assuming a private right of action under Title VI).

⁴¹ 438 U.S. 265 (1978).

⁴² *Cannon II*, 648 F.2d at 1106-07.

⁴³ "In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Bakke*, 438 U.S. at 287 (opinion of Powell, J.).

⁴⁴ "We agree with Justice Powell that, as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection clause of the Fourteenth Amendment itself." *Id.* at 325 (Brennan, J., White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part). "In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies . . ." *Id.* at 328.

⁴⁵ *Cannon II*, 648 F.2d at 1107 (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 238-48 (1976)).

⁴⁶ *Id.* at 1107-08 (citing *Bakke*, 438 U.S. at 281-87 (opinion of Powell, J.); *Bakke*, 438 U.S. at 325-55 (Brennan, J., concurring in the judgment in part and dissenting in part); *Fullilove v. Klutznick*, 448 U.S. 448, 517 n.1 (1980) (Marshall, J., Brennan & Blackmun, JJ., concurring); *Bd. of Educ. v. Harris*, 444 U.S. 130, 159-60 (1979) (Stewart, J., Rehnquist & Powell, JJ., dissenting)).

⁴⁷ *Cannon II*, 648 F.2d at 1109. Because the plaintiff raised no allegation of intentional discrimination and merely a claim of disparate impact, the court rejected her Title IX claim. *Id.* at 1109-10 (asserting that "[a]n illegal intent to discriminate cannot be posited solely upon a mere failure to equalize an apparent disparate impact."). The court cited *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), an Equal Protection Clause case, to support its reasoning. *Cannon II*, 648 F.2d at 1109.

hibits only intentional discrimination that violates the Equal Protection Clause.⁴⁸

The Eastern District of New York used the Title IX-*Bakke* syllogism in the same manner as the Seventh Circuit in a recent challenge to the City University of New York Law School's affirmative action policy.⁴⁹ In finding that the plaintiff's claims of discrimination were insufficient because there was no allegation of intentional discrimination, the court addressed the standard of proving a Title IX violation. Based solely on the citation to *Bakke* in the Supreme Court's discussion of Title VI disparate impact regulations in *Alexander v. Sandoval*,⁵⁰ the court concluded that "intentional discrimination proscribed by Title IX is discrimination that violates the Equal Protection Clause."⁵¹

The Ninth Circuit drew a different conclusion from the Title IX-*Bakke* syllogism. In *Jeldness v. Pearce*,⁵² the court addressed claims of sex discrimination in the educational and vocational opportunities in the Oregon prison system.⁵³ On appeal, Oregon had claimed that "Title IX requires only the level of protection offered by the Equal Protection Clause."⁵⁴ In rejecting that claim, the court discussed the Title IX-*Bakke* syllogism. The court agreed that Title IX and Title VI should be interpreted the same in terms of "levels of protection and equality."⁵⁵ However, where the Seventh Circuit had found that this identity of interpretation restricted the plaintiff's options for proving discrimination by foreclosing a disparate impact claim,⁵⁶ the Ninth Circuit found that the syllogism actually gave Title IX sex discrimination plaintiffs more protection than constitutional sex discrimination plaintiffs.⁵⁷ Under the Ninth Circuit's version of the syllogism, because Title VI incorporates the Equal Protection Clause standard for race discrimination (classifications based on race are subject to strict scrutiny and can be upheld only if narrowly tailored to further a compelling government interest), Title IX should incorporate that standard rather than the Equal Protection Clause standard for sex discrimination (classifications based on sex are subject to intermediate scrutiny and can be upheld if substantially related to an important governmental objective).⁵⁸ Thus, under

⁴⁸ See *Cannon II*, 648 F.2d at 1106-10.

⁴⁹ In *Weser v. Glen*, 190 F. Supp. 2d 384 (E.D.N.Y. 2002), the court addressed the claims of a white, Jewish, seventy-nine-year-old retired businessman who argued that the City University of New York Law School at Queens College had an affirmative action program that "limited the number of seats available to white male applicants." *Id.* at 386.

⁵⁰ 532 U.S. 275, 280-81 (2001) (citing *Bakke*, 438 U.S. at 287).

⁵¹ *Weser*, 190 F. Supp. 2d at 395.

⁵² 30 F.3d 1220 (9th Cir. 1994).

⁵³ *Id.* at 1222.

⁵⁴ *Id.* at 1226. Oregon claimed that the Equal Protection Clause required "parity" rather than "equality" and that Title IX thus should have the same requirement. *Id.*

⁵⁵ *Id.* at 1227-28.

⁵⁶ *Cannon II*, 648 F.2d at 1106-08.

⁵⁷ *Jeldness*, 30 F.3d at 1227-28.

⁵⁸ *Id.* at 1227-28 & n.4 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986),

this interpretation of Title IX, Title IX prohibits more forms of sex discrimination than the Equal Protection Clause prohibits.⁵⁹

The Southern District of Georgia used similar logic in a challenge to the University of Georgia's affirmative action policy.⁶⁰ In considering the plaintiffs' Title IX claim, the court stated that both the plaintiffs and the defendants agreed that Title IX and the Equal Protection Clause were coextensive.⁶¹ However, the court, in addressing the litigants' use of the Title IX-*Bakke* syllogism, noted that "[s]ome uncertainty arises . . . from the fact that the Equal Protection Clause has been interpreted to treat racial and sexual classifications differently."⁶² Like the Ninth Circuit in *Jeldness*, the court acknowledged that Title IX and Title VI should be interpreted the same, so it held that "the standard for finding gender discrimination under Title IX is the same as Title VI's standard for racial discrimination, which is identical to the Equal Protection Clause's standard for racial classification—i.e., strict scrutiny."⁶³ It thus held that the university's use of sex in the admissions process must be narrowly tailored to further a compelling government interest,⁶⁴ rather than holding that it must meet the lower intermediate scrutiny standard of the constitutional prohibition on sex discrimination.

The Northern District of California offered a third twist on the Title IX-*Bakke* syllogism. In *Coalition for Economic Equity v. Wilson*,⁶⁵ the court addressed the issue of whether federal statutes preempted a California constitutional amendment prohibiting affirmative action based on race or sex.⁶⁶

and *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984), for the constitutional standard for race discrimination, and *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982), *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980), and *Craig v. Boren*, 429 U.S. 190, 197 (1976), for the constitutional standard for sex discrimination).

⁵⁹ *Jeldness*, 30 F.3d at 1228 (rejecting the district court's parity-only requirement and holding that "prison educational programs subject to Title IX must be 'equally' available to male and female inmates"). Specific to the prison context, this "equality" as opposed to mere "parity" requirement meant that prisons had to offer equivalent programs in women's prisons as are offered in men's prisons or, if equivalent programs are not offered in women's prisons, the women must have an equal opportunity to participate in the programs. *Id.*

⁶⁰ *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1367 (S.D. Ga. 2000). Three white women challenged the admissions system, which gave applicants "plus factors" or "points" for being non-white and male, claiming that it discriminated against them on the basis of race and sex. *Id.* at 1365–66.

⁶¹ *Id.* at 1367.

⁶² *Id.* (citing *Jeldness*, 30 F.3d at 1227 n.4).

⁶³ *Id.*

⁶⁴ *Id.* Under this heightened standard, the court rejected the university's claim that "gender diversity" justified its gender preference; therefore, the court found that the university violated Title IX. *Id.* at 1375–76. On appeal, the Eleventh Circuit affirmed the district court's ruling that the policy was racially discriminatory, but did not address the sex discrimination claims as the university did not appeal the district court's ruling on that issue. *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1242 n.8 (11th Cir. 2001).

⁶⁵ 946 F. Supp. 1480 (N.D. Cal. 1996), *rev'd on other grounds*, 122 F.3d 692 (9th Cir. 1997).

⁶⁶ *Id.* at 1517–19.

In discussing Title IX, the court wrote that “what constitutes permissible affirmative action under Title IX cannot be based on current Constitutional limitations.”⁶⁷ In a footnote, the court elaborated:

Congress’ intent regarding affirmative action under Title IX was manifested when the statute was enacted in 1972—well in advance of the currently controlling Constitutional standard of heightened scrutiny for gender classifications. Consequently, unlike Title VI, where Congress intended to track the standards of the Fourteenth Amendment, Congress could not have intended to import the Fourteenth Amendment standards for gender into Title IX.⁶⁸

Thus, rather than importing any Title VI standards into Title IX, the court rejected the Title IX-*Bakke* syllogism outright.

One academic commentator has also compared Title IX to Title VI as a way of indirectly comparing Title IX to the Equal Protection Clause.⁶⁹ William Thro has used the Title IX-*Bakke* syllogism to conclude that Title IX is coextensive with the Equal Protection Clause.⁷⁰ He argues that any view of Title IX that requires schools to take sex into account in order to conform with Title IX imposes unconstitutional requirements on schools.⁷¹

2. Title VII

A small number of courts have made a different indirect comparison of Title IX to the Equal Protection Clause by looking to Title VII,⁷² the statute that prohibits employment discrimination based on sex, among other things. In *Mabry v. State Board of Community Colleges and Occupational*

⁶⁷ *Id.* at 1519.

⁶⁸ *Id.* at 1519 n.51 (citing *United States v. Virginia*, 518 U.S. 515 (1996)) (citation omitted).

⁶⁹ In a lengthy article discussing *United States v. Virginia*, 518 U.S. 515, and its implications for same-sex education, Allison Herren Lee compares Title IX and Title VI, but she ultimately takes no position on the issue of whether Title IX and the Equal Protection Clause have the same standard, instead positing different outcomes for a Title IX challenge to private single-sex education based on standards courts might adopt for Title IX. Allison Herren Lee, *Title IX, Equal Protection, and the Richter Scale: Will VMI's Vibrations Topple Single-Sex Education*, 7 *TEX. J. WOMEN & L.* 37, 66–70, 86–88 (1997). In *Virginia*, the Court invalidated the Virginia Military Institute’s male-only admissions policy on equal protection grounds without considering any Title IX challenge to the policy. *See Virginia*, 518 U.S. 515; *see also* *United States v. Virginia*, 766 F. Supp. 1407, 1408 (W.D. Va. 1991) (“Because single-sex colleges and single-sex military schools are exempted from Title IX of the Civil Rights Act, 20 U.S.C. § 1681(a)(4) and (5), the United States alleged only a constitutional violation and no statutory violation.”).

⁷⁰ William E. Thro, *Judicial Paradigms of Educational Equality*, 174 *EDUC. L. REP.* 1, 17 & n.56 (2003) (stating that “Title IX prohibits gender discrimination to the same extent and under the same standards as the Equal Protection Clause”).

⁷¹ *Id.* at 22–23 & nn.74–75 (claiming that preferences based on gender “arguably violate[] the Constitution”).

⁷² *See* 42 U.S.C. § 2000e (2000).

Education,⁷³ the Tenth Circuit rejected a teacher's Title IX claim, reasoning that the teacher had failed to state a simple employment discrimination claim under Title VII and therefore could not state a discrimination claim under Title IX either.⁷⁴ Although the court did reject the teacher's claim, the court adopted a Title IX standard that includes both intentional discrimination and disparate impact discrimination.⁷⁵ The court reached that conclusion by comparing Title IX to Title VII and finding "no persuasive reason not to apply Title VII's substantive standards regarding sex discrimination."⁷⁶ Although the court never mentioned the Equal Protection Clause, it did reference the Seventh Circuit's decision in *Cannon* and rejected the holding in that case.⁷⁷ The court cautioned against making unnecessary analogies between Title IX and Title VI⁷⁸ and found the better analogy, at least in the context of educational employment discrimination claims, to be Title VII, which already has "a well-developed body of case law concerning employment-related sex discrimination."⁷⁹ This comparison to Title VII, a civil rights law that does permit disparate impact discrimination claims,⁸⁰ implicitly rejects the Title IX-*Bakke* syllogism that requires a showing of discriminatory intent.⁸¹

The First Circuit employed a similar analogy to Title VII law in *Lipsett v. University of Puerto Rico*.⁸² Because the plaintiff made no disparate impact sex discrimination claim, the court did not address whether Title IX prohibited such discrimination; however, with respect to the plaintiff's intentional discrimination claim, the court stated that it would apply the same standard that it applies to both Title VII and Equal Protection Clause sex-based intentional discrimination claims.⁸³ The court looked to the legis-

⁷³ 813 F.2d 311 (10th Cir. 1987). The court faced the claim of a college physical education teacher who claimed that her firing resulted from a decision by the college administration to retain two men who had spouses and children rather than herself, an unmarried woman with no children. *Id.* at 313.

⁷⁴ *Id.* at 318.

⁷⁵ *Id.* at 316-17.

⁷⁶ *Id.* at 316; *see also id.* at 317 ("[T]here is some similarity between the language used in portions of the two titles."). The court also found "no persuasive reason to have two separate substantive standards concerning sex discrimination in employment, to both of which recipients of federal financial assistance under Title IX must adhere in their employment practices." *Id.*

⁷⁷ *Id.* at 316 n.6.

⁷⁸ *Id.*

⁷⁹ *Id.* at 317.

⁸⁰ *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that an employment practice administered absent demonstrable discriminatory purpose but having racially disparate impact violates Title VII).

⁸¹ *See also Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 832-33 & n.14 (10th Cir. 1993) (rejecting in dicta the requirement of a showing of discriminatory intent in Title IX cases).

⁸² 864 F.2d 881 (1st Cir. 1988). In *Lipsett*, a medical school surgical resident claimed that she had been subjected to a hostile environment and quid pro quo sexual harassment. *Id.* at 884-94.

⁸³ *Id.* at 896-97; *cf. Jennings v. Univ. of N.C.*, 340 F. Supp. 2d 666, 677 (M.D.N.C. 2004) (using Title VII standard with respect to severity of harassment for both Title IX and Equal

lative history of Title IX, which indicated that general Title VII employment-discrimination standards should be employed for educational employment discrimination claims as well.⁸⁴ However, the court's holding was limited, as it only applied to employment-related intentional discrimination claims.⁸⁵

3. *Direct Comparison to the Equal Protection Clause*

Some courts and commentators have approached the Title IX-Equal Protection Clause comparison directly, although none have done so comprehensively. The first case to make the direct comparison, *Canterino v. Wilson*,⁸⁶ involved a challenge to unequal educational opportunities for women in the Kentucky prison system.⁸⁷ After determining that Title IX has no exception for educational programs within a prison system,⁸⁸ the court looked to the different requirements that the Equal Protection Clause and Title IX place on prison systems. The court addressed the issue as follows:

[T]he equal protection clause requires parity, not identity, of treatment for female prisoners in the area of jobs, vocational education, and training. This standard may be met in a number of different ways, as long as the opportunities available to women are substantially equivalent in substance, if not in form to those accorded men. To the extent that opportunities are available to male inmates due to the receipt of federal funds under [Title IX], the

Protection Clause claims).

⁸⁴ *Lipsett*, 864 F.2d at 897. The court noted that the legislative history of Title IX provides:

“One of the single most important pieces of legislation which has prompted the cause of equal employment opportunity is Title VII of the Civil Rights Act of 1964 Title VII, however, specifically excludes educational institutions from its terms. [Title IX] would remove that exemption and bring those in education under the equal employment provision.”

Id. (quoting H.R. REP. NO. 92-554 (1972), reprinted in 1972 U.S.C.C.A.N. 2462, 2512). The court also looked to agency guidelines which indicated that Title IX employment claims should be judged by Title VII standards. *Id.*

⁸⁵ *Id.*

⁸⁶ 546 F. Supp. 174 (W.D. Ky. 1982).

⁸⁷ *Id.* at 188–91 (describing prison educational programs).

⁸⁸ *Id.* at 210. Title IX exempts several types of institutions from its mandate, see 20 U.S.C. § 1681(a)(1)–(9) (1994), but there is no exemption for prisons. The court thus held that “[i]f there is a compelling need to exempt corrections from these requirements regarding education and employment programs, that argument should be addressed to the legislative branch.” *Canterino*, 546 F. Supp. at 210.

state must offer equivalent programs in form as well as in substance, to similarly situated women.⁸⁹

The court did not further explain the differences between the equal protection standard (“parity” and “equivalent in substance, if not in form”) and the Title IX standard (“equivalent programs in form as well as in substance”),⁹⁰ but it did find that the Kentucky system did not satisfy either mandate.⁹¹

Largely on the basis of *Canterino*, the Ninth Circuit reached the same conclusion in *Jeldness v. Pearce*.⁹² In a challenge to Oregon’s prison education system, the district court had found that “penological necessity” was a complete defense to disparate impact discrimination under Title IX, just as a state could show that its distinctions were “reasonably related to legitimate penological interests” to defeat a constitutional claim of sex discrimination.⁹³ The Ninth Circuit rejected this proposition by looking to the language of Title IX and observing that, contrary to the Equal Protection Clause’s mandates, the statute’s broad language describing the prohibited discrimination “suggests that the standard is ‘equality’ rather than ‘parity.’”⁹⁴ The court also looked to *Canterino* and found further support for an equality standard in that decision’s statement that Title IX requires prison programs to be equivalent in substance as well as in form.⁹⁵

Also in the context of prison challenges, two courts have made the direct comparison between Title IX and the Equal Protection Clause by looking at whether men and women are similarly situated in prison education programs. In *Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia*,⁹⁶ the District of Columbia Circuit, although expressing doubt that Title IX applied to differences in work, recreational, and religious programs available to female inmates,⁹⁷ nonetheless concluded that the equal protection concept of “treat[ing] similarly situated persons alike” applies in Title IX cases as well as in constitutional sex discrimination cases.⁹⁸ Based on the different numbers of inmates and thus opportunities required to be given them, the court

⁸⁹ *Canterino*, 546 F. Supp. at 210 (citations omitted).

⁹⁰ *Id.*

⁹¹ *Id.* at 212.

⁹² 30 F.3d 1220 (9th Cir. 1994). *Jeldness*’s use of the Title IX-*Bakke* syllogism is discussed *supra* notes 52–59 and accompanying text.

⁹³ *Id.* at 1223.

⁹⁴ *Id.* Like the *Canterino* court, the Ninth Circuit did not elaborate on the difference between “parity” and “equality.”

⁹⁵ *Id.* at 1226–27 (citing *Canterino*, 546 F. Supp. at 210).

⁹⁶ 93 F.3d 910 (D.C. Cir. 1996).

⁹⁷ *Id.* at 927. The appellants had not challenged the district court’s application of Title IX to the prison’s purely educational programs. *Id.* at 924.

⁹⁸ *Id.* at 924 (citing *Klinger v. Neb. Dep’t of Corr. Servs.*, 887 F. Supp. 1281, 1286–87 (D. Neb. 1995)).

concluded that men and women within the prison system were not similarly situated.⁹⁹

The District of Columbia Circuit relied upon a District of Nebraska case in its reasoning;¹⁰⁰ however, after the District of Columbia Circuit's decision, the Eighth Circuit reversed the Nebraska case on appeal. In *Klinger v. Department of Corrections*,¹⁰¹ another challenge by female prisoners to the lack of educational programs offered them as compared to male prisoners, the Eighth Circuit had previously held that the state had not violated the Equal Protection Clause because the male and female inmates, in different prisons with different circumstances, were not "similarly situated."¹⁰² After remand and another appeal, the court addressed whether the prisoners had made out a Title IX claim. Citing the Ninth Circuit's opinion in *Jeldness*, the court wrote that "[w]e agree with plaintiffs insofar as they assert that the standard for finding a Title IX violation differs from the standard applicable to a constitutional equal protection claim."¹⁰³ The difference, according to the Eighth Circuit, was that Title IX does not require, as the Equal Protection Clause does, a court to first find that men and women are "similarly situated"; rather, Title IX has legislatively declared that "female and male participants within a given federally funded education program or activity are presumed similarly situated for purposes of being entitled to equal educational opportunities within that program or activity."¹⁰⁴

Some scholars have also made the direct comparison between Title IX and the Equal Protection Clause, albeit in limited analyses.¹⁰⁵ In the con-

⁹⁹ *Id.* at 925–26.

¹⁰⁰ *Id.* at 924.

¹⁰¹ 107 F.3d 609 (8th Cir. 1997).

¹⁰² *Id.* at 612 (citing *Klinger v. Dep't of Corr.*, 31 F.3d 727, 733 (8th Cir. 1994)).

¹⁰³ *Id.* at 614 (citing *Jeldness v. Pearce*, 30 F.3d 1220, 1226–27 (9th Cir. 1994)).

¹⁰⁴ *Id.* at 614–15 (disagreeing with *Women Prisoners*, 93 F.3d at 927). The court nonetheless affirmed the judgment against the plaintiffs because they had compared their educational opportunities to those of men at one prison, not to those of men in the entire Nebraska prison system. *Id.*

¹⁰⁵ See discussion *infra* notes 106–108 and accompanying text. Another author refused to reach a conclusion on whether Title IX differs from the Equal Protection Clause with respect to disparate impact claims, noting instead in an article about voluntary desegregation through busing that there is a circuit split on whether the Equal Protection Clause standard of discrimination should be applied to Title IX claims. Sean Pager, *Is Busing Preferential? An Interpretive Analysis of Proposition 209*, 21 WHITTIER L. REV. 3, 27 (1999) (comparing *Roberts v. Colo. State Bd. of Agric.*, 988 F.2d 824, 834 (10th Cir. 1993), with *Cannon v. Univ. of Chicago*, 648 F.2d 1104, 1107–08 (7th Cir. 1981)). In the prison context, two notewriters have written about the relation between the Equal Protection Clause and Title IX. One piece advocated a Title IX standard based on Title IX's athletic equity requirements rather than the Equal Protection Clause, reasoning that the Equal Protection Clause standard is "too vague to effectuate any substantive changes in women's conditions of confinement." Christine M. Safarik, *Note: Constitutional Law—Separate But Equal: Jeldness v. Pearce—An Analysis of Title IX Within the Confines of Correctional Facilities*, 18 W. NEW ENG. L. REV. 337, 372 (1996). Another piece claimed that Title IX's standard of review "is similar to the standard of review imposed by an equal protection claim," but then reviewed the case law and accepted the conclusions in those cases that equal protection and

text of discussing peer harassment based on sexual orientation, Professor Joan Schaffner described the similarity between Title IX and the Equal Protection Clause simply: both require a showing that “the victim received different treatment because of his sex.”¹⁰⁶ She based this conclusion on the similar objects of the two prohibitions (sex discrimination) and Supreme Court case law that, according to her, requires a showing of intentional discrimination before making out a money damages claim under Title IX.¹⁰⁷ Professor Ivan Bodensteiner, in a comprehensive article about peer harassment in schools, states that “[t]he scope of the protection provided by Title IX is generally the same as that provided by the Equal Protection Clause, although it is not clear whether plaintiffs need to prove intentional discrimination.”¹⁰⁸ In support of this statement, he cited circuit cases that have held that Title IX includes disparate impact discrimination.¹⁰⁹

B. Title IX Preemption of § 1983

Comparisons of Title IX to the Equal Protection Clause have also arisen in the context of determining whether Title IX preempts lawsuits brought under 42 U.S.C. § 1983.¹¹⁰ A civil rights litigant attempting to enforce a federal statutory or constitutional right can bring a claim under § 1983. However, if the litigant attempts to assert a claim under § 1983 when another federal statute has an independent private cause of action for similar conduct, the Supreme Court has stated that courts must determine whether the claim under the federal statute preempts the § 1983 claim.¹¹¹

Title IX standards differed in prison education claims. Julie Kocaba, *The Proper Standard of Review: Does Title IX Require “Equality” or “Parity” of Treatment When Resolving Gender-Based Discrimination in Prison Institutions?*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 607, 612, 644–45 (1999).

¹⁰⁶ Joan E. Schaffner, *Approaching the New Millennium With Mixed Blessings for Harassed Gay Students*, 22 HARV. WOMEN’S L.J. 159, 174 (1999).

¹⁰⁷ *Id.* at 174 n.100 (referencing *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992)). *But see infra* Part III.B.2 (discussing the intentional discrimination standard).

¹⁰⁸ Ivan E. Bodensteiner, *Peer Harassment—Interference With an Equal Educational Opportunity in Elementary and Secondary Schools*, 79 NEB. L. REV. 1, 30 (2000).

¹⁰⁹ *Id.* at 30 n.139 (citing *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 832–33 (10th Cir. 1993); *Chance v. Rice Univ.*, 984 F.2d 151, 153 (5th Cir. 1993)).

¹¹⁰ Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983 (2000). In *Maine v. Thiboutot*, 448 U.S. 1 (1980), the Supreme Court held that a litigant can bring a claim under § 1983 for deprivation of federal statutory rights as well as constitutional rights. *Id.* at 4–5.

¹¹¹ *See, e.g.*, *Smith v. Robinson*, 468 U.S. 992, 1009 (1984) (holding that a claim under federal statute can preempt a claim under § 1983 for violation of a “virtually identical” consti-

If the § 1983 claim is a claim for a violation of a constitutional guarantee, the federal statute will preempt the constitutional claim if the statutory interest protected is “virtually identical” to the constitutional right and if “Congress intended the [independent statute] to be the exclusive avenue through which a plaintiff” may vindicate the right.¹¹²

Title IX litigation sometimes raises this preemption issue. The Supreme Court has held that Title IX has its own implied private cause of action.¹¹³ Often, Title IX litigants bring § 1983 claims along with their independent Title IX claims, and, in many of those cases, the § 1983 claim is for the deprivation of the constitutional right to be free from sex discrimination.¹¹⁴ When presented with this § 1983 claim and a Title IX claim, a court must determine whether the Title IX claim preempts the § 1983 claim for deprivation of constitutional rights.¹¹⁵ For the most part, the courts that have addressed the issue have focused on determining whether Title IX’s remedial structure indicates congressional intent to preempt a § 1983 remedy.¹¹⁶ The circuits have split evenly on this issue,¹¹⁷ with three circuits finding that Title IX’s remedial structure is sufficiently comprehensive to preempt a § 1983 claim¹¹⁸ and three circuits finding that it is not.¹¹⁹ The Supreme Court has not jumped into the fray to resolve the circuit split.

Only two of the courts that have addressed this issue have ventured beyond merely determining whether Congress intended Title IX’s remedial

tional provision); *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 20 (1981) (holding that a remedial scheme contained in federal statute can preempt claim under § 1983 for violation of that statute).

¹¹² *Smith*, 468 U.S. at 1009.

¹¹³ *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

¹¹⁴ *See, e.g., Bruneau v. S. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 754 (2d Cir. 1998).

¹¹⁵ *See cases cited supra* note 111.

¹¹⁶ *See, e.g., Sea Clammers*, 453 U.S. at 20. In *Sea Clammers*, the Court addressed whether a litigant could bring a § 1983 claim for violating a federal statute when that federal statute already contained a remedial scheme. *Id.* at 19–20. Although *Sea Clammers* addressed preemption of a § 1983 statutory claim whereas *Smith v. Robinson* addressed preemption of a § 1983 constitutional claim, courts that have confronted the issue of whether Title IX preempts a § 1983 constitutional claim have used both the *Sea Clammers* “sufficiently comprehensive” to “demonstrate congressional intent to preclude the remedy of suits under § 1983” language, *Sea Clammers*, 453 U.S. at 20, and the *Smith* language. *Smith*, 468 U.S. at 1009 (asking whether the rights are “virtually identical” and if “Congress intended the [independent statute] to be the exclusive avenue through which a plaintiff may assert” the right).

¹¹⁷ *See Bradford C. Mank, Using § 1983 to Enforce Title VI’s Section 602 Regulations*, 49 U. KAN. L. REV. 321, 368–69 (2001) (noting the split over this issue).

¹¹⁸ *Bruneau*, 163 F.3d 749 (finding that Title IX’s enforcement scheme combined with its implied private right of action are sufficiently comprehensive); *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857 (7th Cir. 1996) (same); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168 (3d Cir. 1993) (same); *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779 (3d Cir. 1990) (same). *But see Delgado v. Stegall*, 367 F.3d 668 (7th Cir. 2004) (not finding preemption in suit against individual defendant because Title IX does not reach such defendants, while § 1983 does).

¹¹⁹ *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997) (finding that Title IX’s sparse express remedies are not sufficiently comprehensive); *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996) (same); *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716 (6th Cir. 1996) (same).

structure to preempt a constitutional § 1983 claim and have addressed the important issue raised in *Smith v. Robinson* of whether the statutory and constitutional rights are “virtually identical.”¹²⁰ In *Waid v. Merrill Area Public Schools*,¹²¹ the Seventh Circuit addressed the claim of a teacher who brought a Title IX claim against the school district and a § 1983 claim based on the Equal Protection Clause against the individual school administrators she had accused of denying her a full-time teaching position because of her sex.¹²² In reviewing the variety of federal rights that protected the teacher from discrimination, the court wrote that “[a]s an employee of an educational institution that received federal funds, Waid had a statutory right under Title IX that was essentially identical to her constitutional rights against intentional discrimination.”¹²³ Furthermore, the court noted, without explanation or citation of authority, that both Title IX and the Equal Protection Clause “prohibit the same kind of conduct.”¹²⁴ The court then concluded that, in enacting Title IX, Congress intended to supersede a § 1983 claim based on constitutional principles of equal protection.¹²⁵

With even less analysis, the Second Circuit reached the same conclusion in *Bruneau v. South Kortright Central School District*.¹²⁶ In this case involving several students sexually harassing another student, the court wrote that the same factual predicate formed the basis of the Title IX and equal protection claims; therefore, the *Smith* “virtually identical” test was met.¹²⁷ The court did not inquire further into any legal, as opposed to factual, differences between the two claims, instead concerning itself only with whether the facts underlying both claims were the same.¹²⁸

Although most of the courts addressing § 1983 preemption of Title IX claims have not touched on the question of whether Title IX and the Equal Protection Clause are “virtually identical,” three scholarly pieces have touched on the issue, all concluding, with varying degrees of clarity, that Title IX is virtually identical to the Equal Protection Clause for the purposes of § 1983 preclusion.¹²⁹

¹²⁰ In *Lillard*, the Sixth Circuit addressed the “virtually identical” issue, but in a Title IX case that presented § 1983 constitutional substantive due process issues rather than equal protection issues. 76 F.3d at 723. The court found Title IX and constitutional substantive due process guarantees not to be virtually identical. *Id.*

¹²¹ 91 F.3d 857 (1996).

¹²² *Id.* at 860.

¹²³ *Id.* at 861 (citing *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530–31 (1982)).

¹²⁴ *Id.* at 862.

¹²⁵ *Id.* at 862–63.

¹²⁶ 163 F.3d 749, 758 (2d Cir. 1998).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Professor Bradford Mank implies, but does not specifically state, that Title IX and the Equal Protection Clause are virtually identical. See Mank, *supra* note 117, at 376 (“For example, in a case involving a sexual assault, a Title IX claim may be based on a sex discrimination theory, but a § 1983 suit may be premised on a substantive due process right to bodily integrity. Thus, a § 1983 suit is not necessarily duplicative of Title IX.”). Michael A.

C. Sovereign Immunity and Title IX's Constitutional Basis

A different aspect of Title IX's relationship to the Equal Protection Clause arises when courts address a defense of sovereign immunity. Because Title IX applies to state as well as private educational institutions that receive federal funding,¹³⁰ state entities that are defendants in Title IX litigation sometimes raise Eleventh Amendment sovereign immunity as a defense. Courts faced with this issue have universally rejected sovereign immunity as a defense to a Title IX claim.¹³¹ These courts have taken one of two tracks based on the two different contexts in which individuals can constitutionally sue states in federal court: when Congress abrogates states' sovereign immunity in legislation passed pursuant to an appropriate constitutional power or when states waive their own sovereign immunity.¹³²

Many of the courts that have concluded that states cannot raise sovereign immunity as a defense in Title IX lawsuits have begun their analysis by stating that Title IX is a Spending Clause statute.¹³³ As part of Title

Zwibelman states that Title IX and the Equal Protection Clause are the same because of the identity of the type of discrimination prohibited by the two provisions. *See* Zwibelman, *supra* note 14, at 1479 ("Because Title IX confers on plaintiffs a right to be free from discrimination based on sex, the plaintiff's [Equal Protection Clause-] based Section 1983 claim is 'virtually identical' to the right conferred by Title IX."); *id.* at 1480 ("A Section 1983 claim predicated on the right under the Equal Protection Clause to be free of discrimination on the basis of sex involves a right that is identical to the antidiscrimination right created by Title IX itself."); *id.* at 1481-82 ("[A]n equal protection based Section 1983 claim is identical to the right conferred by Title IX . . ."). Even though the article claims that Title IX and the Equal Protection Clause are "virtually identical," it nonetheless concludes that Title IX should not preclude § 1983 claims based on equal protection because "Title IX . . . lacks the carefully tailored administrative scheme that might provide evidence of congressional intent to preclude equal protection-based Section 1983 claims." *Id.* at 1480. Beth B. Burke argues that for claims against the government, Title IX is identical to the § 1983 claim. Burke, *supra* note 14, at 1517 ("Both Title IX and such Equal Protection claims address the same substantive rights. If asserted against the same parties and arising out of the same facts, the constitutional privilege and the federal statute meet the 'virtually identical' prong of the *Smith* preclusion test."); *id.* at 1499 n.77 ("A plaintiff asserting a violation of the Fourteenth Amendment's guarantee of equal protection under the law essentially duplicates her claim under Title IX, by alleging that she has a right to be free from sex discrimination in state-operated educational institutions."). The piece reaches this conclusion despite previously identifying the different standards for liability under Title IX and § 1983. *Id.* at 1491 (noting that Title IX requires "actual knowledge and deliberate indifference" whereas § 1983 requires "gross negligence"); *id.* at 1499 n.77 (similarly stating that "in contrast to Title IX's requirement of actual notice in addition to deliberate indifference to establish a Title IX violation, to prove a violation of the Equal Protection Clause, a plaintiff need only prove deliberate indifference"). Nonetheless, the article concludes that Title IX does not preclude a § 1983 claim because its remedial scheme is not comprehensive. *Id.* at 1518.

¹³⁰ *See infra* notes 189-194 and accompanying text.

¹³¹ *See infra* discussion accompanying notes 133-150.

¹³² *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996).

¹³³ The Supreme Court has stated that Title IX is Spending Clause legislation. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) ("When Congress attaches conditions to the award of federal funds under its spending power, U.S. Const., Art. I, § 8, cl. 1, as it has in Title IX and Title VI . . ."). However, it has never addressed whether Congress enacted Title IX under any other congressional powers. *See Franklin v. Gwinnett County*

IX, Congress has explicitly legislated that states “shall not be immune under the Eleventh Amendment” for violations of Title IX.¹³⁴ Therefore, because Congress can condition a state’s receipt of federal funds on a clear waiver of Eleventh Amendment immunity,¹³⁵ state entities that accepted federal funds after Congress passed the explicit waiver provision waived their Eleventh Amendment immunity.¹³⁶

Only one of the courts basing their sovereign immunity conclusion on Title IX’s Spending Clause origins wrote about the relationship between Title IX and the Equal Protection Clause. In one of the more thorough discussions of this relationship appearing in any context, the Eastern District of Virginia rejected the claim that Congress passed Title IX pursuant to the Equal Protection Clause.¹³⁷ Congress could not have done so, according to the court, because “[t]he protections afforded by Title IX differ from those afforded by the Equal Protection Clause in several important ways.”¹³⁸ Listing those differences, the court noted the following: Title IX is voluntary because only schools that choose to receive federal funds are covered by the statute;¹³⁹ Title IX prohibits discrimination by private schools as well as public schools;¹⁴⁰ and Title IX subjects schools to liability based on non-intentional discrimination.¹⁴¹ Ultimately, the court concluded that Title IX, in

Pub. Sch., 503 U.S. 60, 75 n.8 (1992) (“Because we conclude that a money damages remedy is available under Title IX for an intentional violation irrespective of the constitutional source of Congress’ power to enact the statute, we need not decide which power Congress utilized in enacting Title IX.”).

¹³⁴ 42 U.S.C. § 2000d-7(a)(1) (2000).

¹³⁵ See *Alden v. Maine*, 527 U.S. 706, 755 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 678 n.2 (1999).

¹³⁶ See *Pederson v. La. State Univ.*, 213 F.3d 858, 875–76 (5th Cir. 2000) (“We conclude that in accepting federal funds under Title IX [Louisiana State University] waived its Eleventh Amendment sovereign immunity.”); *Litman v. George Mason Univ.*, 186 F.3d 544, 557 (4th Cir. 1999) (“[W]e hold that [George Mason University], through its acceptance of Title IX funding, waived its Eleventh Amendment immunity”); *Litman v. George Mason Univ.*, 5 F. Supp. 2d 366, 377 (E.D. Va. 1998) (“Under Title IX and 42 U.S.C. § 2000d-7, properly enacted pursuant to Congress’ powers under the Spending Clause, it is clear that one of the conditions placed by Congress upon acceptance of federal funds under Title IX is the waiver of Eleventh Amendment immunity.”), *affirmed by* 186 F.3d 544 (4th Cir. 1999); *Beasley v. Ala. State Univ.*, 3 F. Supp. 2d 1304, 1325 (M.D. Ala. 1998) (“Alabama could, and in fact did, waive its eleventh amendment immunity when it accepted federal education funds after enactment of 42 U.S.C. § 2000d-7, even in the face of Alabama state law that may preclude the state legislature or any state officials from consenting to suit in federal court.”).

¹³⁷ *Litman*, 5 F. Supp. 2d at 373.

¹³⁸ *Id.*

¹³⁹ *Id.* (“A state agency can discriminate [in violation of Title IX] if it chooses to forego federal funds.”)

¹⁴⁰ *Id.* (comparing Title IX’s coverage to that of the Equal Protection Clause, which only reaches “state-sponsored entities” (citing *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)).

¹⁴¹ *Id.* at 373–74 (citing *Jeldness v. Pearce*, 30 F.3d 1220, 1231 (9th Cir. 1994); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993); *Mabry v. State Bd. of Cmty. Coll. & Occupational Educ.*, 813 F.2d 311, 317 (10th Cir. 1987); *Shuford v. Ala. State Bd. of Educ.*, 968 F. Supp. 1486, 1503–04 (M.D. Ala. 1997); *Sharif v. N.Y. State Educ. Dep’t*, 709 F. Supp. 345, 360–61 (S.D.N.Y. 1989)).

comparison to the Equal Protection Clause, “afford[s] protection from a greater range of defendants and . . . reach[es] a greater range of conduct.”¹⁴²

The other courts that have found that Title IX abrogates states’ sovereign immunity have done so on the basis of determining that Congress passed Title IX pursuant to Section 5 of the Fourteenth Amendment,¹⁴³ which gives Congress the power to enforce the Equal Protection Clause¹⁴⁴ and also is one of the constitutional provisions under which Congress has the authority to force states to abrogate their Eleventh Amendment immunity.¹⁴⁵ These courts all concluded that although Title IX was undoubtedly passed pursuant to the Spending Clause, it also could have been passed pursuant to Section 5 of the Fourteenth Amendment.¹⁴⁶

All three of the courts that have taken this direction in analyzing the sovereign immunity issue have engaged in a simple analysis comparing the goals of Title IX and the Equal Protection Clause. For instance, the Sixth Circuit concluded that Title IX could have been enacted pursuant to Section 5 of the Fourteenth Amendment because both proscribe “gender discrimination in education.”¹⁴⁷ The court offered no other analysis about the extent of the relationship. In reaching its conclusion, the Sixth Circuit cited two cases from the Seventh and Eighth Circuits.¹⁴⁸ The Seventh Circuit, in a case involving student-on-student sexual harassment, reached its conclusion by observing that “protecting Americans against invidious discrimination of any sort, including that on the basis of sex, is a central function of the federal government” under the Equal Protection Clause of the Fourteenth Amendment and that Title IX also prohibits “such discriminatory government conduct on the basis of sex” in state-run educational institutions that

¹⁴² *Litman*, 5 F. Supp. 2d at 374.

¹⁴³ See *Franks v. Ky. Sch. for the Deaf*, 142 F.3d 360 (6th Cir. 1998); *Doe v. Univ. of Ill.*, 138 F.3d 653 (7th Cir. 1998); *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997); *Thorpe v. Va. State Univ.*, 6 F. Supp. 2d 507 (E.D. Va. 1998).

¹⁴⁴ “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5.

¹⁴⁵ See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); see also *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65–66 (1996) (“Adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, [Section 5] alter[ed] the preexisting balance between state and federal power achieved by Article III and the Eleventh Amendment.”).

¹⁴⁶ Whether Congress explicitly stated that it was legislating on a particular basis is not the relevant inquiry; rather, the relevant inquiry is whether Congress *could* have passed the law pursuant to a particular constitutional provision. See *Equal Employment Opportunity Comm’n v. Wyoming*, 460 U.S. 226, 243–44 n.18 (1983) (“It is in the nature of our review of congressional legislation defended on the basis of Congress’s powers under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power.”); *Woods v. Miller*, 333 U.S. 138, 144 (1948) (“[T]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.”). Also, Congress can pass legislation pursuant to more than one constitutional power. See *Fullilove v. Klutznick*, 448 U.S. 448, 473, 475 (1980) (finding statute passed pursuant to both Spending Clause and Section 5 of the Fourteenth Amendment).

¹⁴⁷ *Franks*, 142 F.3d at 363.

¹⁴⁸ *Id.*

receive federal money.¹⁴⁹ The Eighth Circuit, in a case of sexual harassment against a student by a teacher, wrote simply: “Because the Supreme Court has repeatedly held that those substantive provisions [of the Fourteenth Amendment] proscribe gender discrimination in education, we are unable to understand how a statute enacted specifically to combat such discrimination could fall outside the authority granted to Congress by § 5.”¹⁵⁰

Of the two commentators who have addressed the issue of sovereign immunity and Title IX, only one offers insight into Title IX’s relation to the Equal Protection Clause.¹⁵¹ In that piece, the author acknowledges the possibility that Title IX reaches beyond the Fourteenth Amendment and writes that Title IX can be a remedial scheme enacted pursuant to Section 5 of the Fourteenth Amendment “even if it provides a higher standard of equality than the Court finds the Constitution demands Even if Title IX reaches beyond the protection granted by the Equal Protection Clause, it is consistent with the Court’s constitutional commitments, namely establishing gender equality, and within Congress’s Fourteenth Amendment power.”¹⁵²

D. *The Constitutionality of Title IX’s Three-Part Test*

The final area in which courts have addressed the relationship between Title IX and the Equal Protection Clause is in constitutional challenges to the Title IX regulations’ requirements for equity in athletics. Under the regulations, schools are required to “provide equal athletic opportunity” for males and females.¹⁵³ One of the factors in making this determination is “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.”¹⁵⁴ In 1979, the Department of Health, Education and Welfare¹⁵⁵ issued a policy inter-

¹⁴⁹ *Doe*, 138 F.3d at 660.

¹⁵⁰ *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997); *see also Thorpe v. Va. State Univ.*, 6 F. Supp. 2d 507, 516 (E.D. Va. 1998) (“Legislation aimed at prohibiting race or gender discrimination falls within the ambit of the Fourteenth Amendment jurisprudence which provides those classes of individuals assurance of equal protection [Therefore,] it is plain that the provisions of Title IX seek to enforce a central tenet of the Equal Protection Clause.”); *Franks v. Ky. Sch. for the Deaf*, 956 F. Supp. 741, 751 (E.D. Ky. 1996) (“However, because the focus of Title IX is to stamp out discrimination on the basis of sex in an educational setting . . . , this Court holds that Title IX . . . fall[s] under the umbrella of the Fourteenth Amendment.”).

¹⁵¹ *See Hochberg*, *supra* note 20. The other piece did not comment on the relationship of Title IX to the Fourteenth Amendment. *See Gregory J. Newman, The Seminole Decision’s Effect on Title IX Claims: Blockading the Path of Least Resistance*, 46 EMORY L.J. 1739 (1997).

¹⁵² *Hochberg*, *supra* note 20, at 275. The only authority the author cites for the possibility that Title IX reaches beyond the Fourteenth Amendment is *Litman v. George Mason Univ.*, 5 F. Supp. 2d 366 (E.D. Va. 1998). *Hochberg*, *supra* note 20, at 273–74 n.257. For a discussion of *Litman*, *see supra* notes 137–142 and accompanying text.

¹⁵³ 34 C.F.R. § 106.41(c) (2004).

¹⁵⁴ *Id.* § 106.41(c)(1).

¹⁵⁵ Congress has since created a separate agency responsible for education, the Depart-

pretation to aid schools' compliance with Title IX's regulations. The agency described what has since been referred to as the "three-part test" that is the measure of whether a school has provided equal athletic opportunity:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.¹⁵⁶

Application of this test has proven very controversial,¹⁵⁷ but so far no circuit court has found any fault with the requirement.¹⁵⁸

Of the several challenges brought against Title IX's athletics requirements, either through affirmative litigation against the requirements or raised as a defense to the application of the requirements to a school, three circuit courts have directly addressed the constitutionality of the athletics require-

ment of Education, with an enforcement division, the Office for Civil Rights. 20 U.S.C. § 3413 (1994). Congress transferred the educational responsibilities of the Department of Health, Education and Welfare to the newly created agency. *Id.* § 3441. The Department of Education has adopted the "three-part test." U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST, in Letter from Norma V. Cantú, Assistant Secretary for Civil Rights to Colleague (Jan. 16, 1996), available at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html> (last visited Apr. 18, 2005).

¹⁵⁶ 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

¹⁵⁷ NAT'L WOMEN'S LAW CTR., THE BATTLE FOR GENDER EQUITY IN ATHLETICS: TITLE IX AT THIRTY 10 (2002) ("Since the enactment of Title IX 30 years ago, critics of enhanced opportunities for women and girls have argued that the law's non-discrimination mandate is unnecessary for women and unfair to men. In particular, opponents argue that Title IX's implementing policies have caused schools to drop certain men's teams, such as wrestling"), available at <http://www.nwlc.org/pdf/Battle%20for%20Gender%20Equity%20in%20Athletics%20Report.pdf> (last visited Apr. 18, 2005); see also Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13 (2001) (criticizing the three-part test as not providing enough athletic equity for girls and women).

¹⁵⁸ See Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ., 263 F. Supp. 2d 82, 94-95 (D.D.C. 2003) (listing eight circuit courts that have approved of Title IX's requirements in challenges to the constitutionality or statutory authority of the regulations), *aff'd* 366 F.3d 930 (D.C. Cir. 2004).

ments. In its trail-blazing *Cohen v. Brown University* decisions, the First Circuit twice approved the constitutionality of the requirements.¹⁵⁹ Brown University had claimed that application of the three-part test to its athletics program violated the equal protection guarantees of the Fifth Amendment¹⁶⁰ because the test creates a sex-based classification discriminating against men.¹⁶¹ The court first rejected the challenge because Congress, pursuant to its broad powers to remedy past discrimination, had found in enacting Title IX that schools had long discriminated against women, especially in athletics.¹⁶² The case returned to the First Circuit in 1996, after the Supreme Court had revisited its affirmative action jurisprudence.¹⁶³ In the First Circuit's second take on Title IX's constitutionality, the court applied intermediate scrutiny and found that Title IX's objectives "are clearly important objectives" and that the remedial measures ordered in the case were "clearly substantially related to these important objectives" because "it is impossible to determine compliance or to devise a remedy without counting and comparing opportunities with gender explicitly in mind."¹⁶⁴

The *Cohen* decisions provided the foundation for the two other circuits that have addressed the constitutionality of Title IX's athletics requirements. The Seventh Circuit has twice found that Title IX's remedial scheme was substantially related to its legitimate goals because considering sex is the only way to make sure that schools do not decrease educational opportunities to the underrepresented sex.¹⁶⁵ The Ninth Circuit adopted the reasoning of the First and Seventh Circuits¹⁶⁶ and also noted that, because athletics teams are sex-segregated, "determining whether discrimination exists in athletic programs *requires* gender-conscious, group-wide comparisons."¹⁶⁷

¹⁵⁹ 991 F.2d 888 (1st Cir. 1993) [hereinafter *Cohen I*]; *Cohen II*, 101 F.3d 155.

¹⁶⁰ "[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the [Equal Protection Clause of] the Fourteenth [Amendment]." *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987); *accord* *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) ("[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process. This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.") (citations omitted).

¹⁶¹ *Cohen I*, 991 F.2d at 900–01.

¹⁶² *Id.* at 901 (citing *Metro Broad., Inc. v. Fed. Communications Comm'n*, 497 U.S. 547, 565–66 (1990), for principle that Congress has broad authority to remedy past discrimination).

¹⁶³ Specifically, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995), overruled *Metro Broadcasting*, the case on which *Cohen I* relied. *See Cohen I*, 991 F.2d at 901.

¹⁶⁴ *Cohen II*, 101 F.3d at 184.

¹⁶⁵ *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 639 (7th Cir. 1999); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 272 (7th Cir. 1994) ("While the effect of Title IX and the relevant regulation and policy interpretation is that institutions will sometimes consider gender when decreasing their athletic offerings, this limited consideration of sex does not violate the Constitution.").

¹⁶⁶ *Neal v. Bd. of Trs. of the Cal. State Univ.*, 198 F.3d 763, 772–73 (9th Cir. 1999).

¹⁶⁷ *Id.* at 773 n.8.

Two commentators have explicitly and thoroughly discussed Title IX's athletics requirements' relationship to the Equal Protection Clause. William Thro has repeatedly criticized the three-part test as unconstitutional.¹⁶⁸ At the heart of Mr. Thro's criticism is his belief that the athletics requirements, as interpreted by the courts, mandate "numerical parity," something the Constitution prohibits.¹⁶⁹ To Mr. Thro, if a school has to cut athletics teams, instead of looking to whether the resulting teams create further underrepresentation of one sex, the school must make the cuts "in a gender neutral fashion" in order to comply with equal protection guarantees.¹⁷⁰ Professor Deborah Brake, on the other hand, views Title IX's athletics requirements as a rejection of the constitutional requirements of formal equality, but nonetheless sees the decisions upholding the requirements as "on solid ground, both theoretically and doctrinally."¹⁷¹ She finds this solid footing for the same reasons the First, Seventh, and Ninth Circuits approved the constitutionality of the regulations: schools arrange and recruit for their sports teams based on sex, so any remedy to fight existing discrimination in that arrangement must take account of sex.¹⁷²

III. ANALYZING THE RELATIONSHIP BETWEEN TITLE IX AND THE EQUAL PROTECTION CLAUSE

As demonstrated with the case law and commentary discussed above, there is no single or even dominant view about the relationship between Title IX and the Equal Protection Clause. This Part provides the comprehensive analysis omitted or overlooked by the analyses described above. Looking first to the text and history of Title IX as compared to the Equal Protection Clause, then to the doctrinal developments of both Title IX and the constitutional prohibition against sex discrimination, and finally to the theoretical underpinnings of Title IX and the Fourteenth Amendment, this Part concludes that Title IX was intended to and does provide greater protection from sex discrimination than the Equal Protection Clause.

A. Text and History of Title IX

Comparing the text of Title IX and the text of the Equal Protection Clause is the starting point. The operative language of Title IX states:

¹⁶⁸ Thro, *supra* note 70, at 22–23 ("In effect, the OCR's interpretation gives a preference to the underrepresented gender and mandates discrimination against the overrepresented gender. Such a preference arguably violates the Constitution."); William E. Thro & Brian A. Snow, *The Conflict Between the Equal Protection Clause and Cohen v. Brown University*, 123 WEST'S EDUC. L. REP. 1013, 1016 (1998) ("[T]he First Circuit's reasoning is at odds with the federal Equal Protection Clause.").

¹⁶⁹ Thro, *supra* note 70, at 22 n.74; Thro & Snow, *supra* note 168, at 1032–35.

¹⁷⁰ Thro & Snow, *supra* note 168, at 1036 n.144.

¹⁷¹ Brake, *supra* note 157, at 60–61.

¹⁷² *Id.* at 60.

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any education program or activity receiving Federal financial assistance¹⁷³

The Equal Protection Clause, contained in Section 1 of the Fourteenth Amendment, states:

No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.¹⁷⁴

Any differences in language between the two provisions are highly significant, as the Supreme Court has said that “[t]here is no doubt that ‘if we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language.’”¹⁷⁵

Purely on the basis of the text of these two provisions, there are at least two stark differences that should bear on how they are interpreted with reference to one another. The first difference appears in the first two words of each provision. By starting with “No person,” Title IX speaks in the passive voice, focusing its attention on the fact that a person suffers from discrimination.¹⁷⁶ In contrast, the Equal Protection Clause starts with “No state,” speaking in the active voice and focusing its attention on the fact that a state is discriminating against a person within its jurisdiction.¹⁷⁷ This difference should be crucial. When asking what each provision prohibits, the answer should come from this difference in language; Title IX prohibits any person from being discriminated against, however that happens, while the Equal Protection Clause prohibits a state from discriminating. In this respect, the Equal Protection Clause is more restrictive because it prohibits only discrimination undertaken by any “state,”¹⁷⁸ whereas the language of Title IX does not specify who must undertake the discrimination, only that the person discriminated against is “excluded from participation in,” “denied the benefits of,” or “subjected to discrimination under” a federally funded educational institution.¹⁷⁹ In theory, then, the language of Title IX does not tie its prohibition to the federally funded educational institution itself acting, because a student who is, on the basis of sex, “excluded from

¹⁷³ 20 U.S.C. § 1681 (1994).

¹⁷⁴ U.S. CONST. amend. XIV, § 1.

¹⁷⁵ *N. Haven v. Bell*, 456 U.S. 512, 521 (1992) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)); *see also* *Jackson v. Birmingham Bd. of Educ.*, No. 02-1672, slip op. at 5 (U.S. Mar. 29, 2005) (noting that “by using such a broad term [as discrimination], Congress gave the statute a broad reach”).

¹⁷⁶ 20 U.S.C. § 1681.

¹⁷⁷ U.S. CONST. amend. XIV, § 1.

¹⁷⁸ *Id.*

¹⁷⁹ *See* 20 U.S.C. § 1681 (1994).

participation in” the educational institution by anyone falls within the strict language of Title IX.¹⁸⁰

Only a few jurists have noted this aspect of Title IX’s language. Justice Stevens pointed out Title IX’s passive voice in his dissent in *Gebser v. Lago Vista Independent School District*,¹⁸¹ stating that a school should be vicariously liable for its teacher’s sexual harassment of a student because, among other reasons, Title IX’s “use of passive verbs [focuses] on the victim of the discrimination rather than the particular wrongdoer.”¹⁸² Justice Stevens’s dissent cites to a dissenting opinion of Judge Rovner, in the Seventh Circuit, which set forth this reasoning more extensively:

Title IX is drafted from the perspective of the person discriminated against. That statute names no actor, but using passive verbs, focuses on the setting in which the discrimination occurred. In effect, the statute asks but a single question—whether an individual was subjected to discrimination under a covered program or activity.¹⁸³

The majority in *Gebser* never counters Justice Stevens’s plain language/passive voice argument, whereas the Seventh Circuit majority dismisses this reading as too novel and unconstitutional.¹⁸⁴ More recently, the District of Minnesota recognized this language difference between Title IX and the Equal Protection Clause when it denied a student’s constitutional claim for student-student sexual harassment but held that a school may be liable for student-student sexual harassment under Title IX.¹⁸⁵ The court characterized the language of Title IX as “broad,”¹⁸⁶ writing that “[w]ithout naming an actor, Title IX states in passive voice that no person on the basis of sex shall ‘be excluded from,’ ‘denied the benefits of,’ or ‘subjected to discrimination under’ any education program receiving federal funds.”¹⁸⁷ The Equal Protection Clause, in comparison, “restricts its force to state actors.”¹⁸⁸

Beyond this passive-active voice difference, there is at least one other important difference in the language of the two provisions. Title IX prohibits discrimination in “any education program or activity receiving Federal financial assistance,”¹⁸⁹ whereas the Equal Protection Clause pro-

¹⁸⁰ *See id.*

¹⁸¹ 524 U.S. 274 (1998).

¹⁸² *Id.* at 296 (Stevens, J., dissenting).

¹⁸³ *Smith v. Metro. Sch. Dist. Perry Township*, 128 F.3d 1014, 1047 (7th Cir. 1997) (Rovner, J., dissenting).

¹⁸⁴ *Id.* at 1027 n.15 (“Not only has no court adopted such an approach, but it would be impermissible: Title IX is Spending Clause legislation, and as such supports a monetary remedy only where discrimination is intentional.”).

¹⁸⁵ *Morlock v. W. Cent. Educ. Dist.*, 46 F. Supp. 2d 892 (D. Minn. 1999).

¹⁸⁶ *Id.* at 917.

¹⁸⁷ *Id.* at 917 n.15.

¹⁸⁸ *Id.* at 917.

¹⁸⁹ 20 U.S.C. § 1681 (1994).

hibits discrimination by the “state”¹⁹⁰ only. It is well-settled that the Equal Protection Clause does not reach purely private discrimination¹⁹¹ and that the mere receipt of federal (or state) funds does not subject an otherwise purely private actor to the constraints of the Fourteenth Amendment.¹⁹² On the other hand, by its language, Title IX covers all educational entities that receive federal funding.¹⁹³ In theory, that coverage could be less than (if no state educational entities received federal funding) or the same as (if only state educational entities received federal funding) the Equal Protection Clause. In reality, however, all state educational systems receive federal funding and many other private educational institutions, including most institutions of higher education, do as well.¹⁹⁴ Therefore, in this important way, Title IX’s explicit language extends its scope more broadly than the Equal Protection Clause.

The text of Title IX is important in one other way. As discussed above, the Title IX-*Bakke* syllogism relies on a textual comparison of Title IX to Title VI.¹⁹⁵ Indeed, the texts of the two provisions are virtually identical, with Title IX substituting “sex” for Title VI’s “race, color, or national origin” and narrowing the scope of its prohibition to educational institutions, rather than Title VI’s coverage of all institutions receiving federal funding.¹⁹⁶ The Supreme Court has warned, however, that although Title VI and Title IX are similar, too much focus on Title VI and its history when interpreting Title IX

¹⁹⁰ U.S. CONST. amend. XIV, § 1.

¹⁹¹ The Supreme Court has observed:

[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

Shelley v. Kraemer, 334 U.S. 1, 13 (1948); *see also* *Civil Rights Cases*, 109 U.S. 3, 11 (1883) (“Individual invasion of individual rights is not the subject-matter of the [Fourteenth] [A]mendment.”); *United States v. Harris*, 106 U.S. 629, 639 (1883) (holding the Fourteenth Amendment does not provide authority for a federal statute prohibiting individuals from denying others equal protection of the law).

¹⁹² *See* *West v. Atkins*, 487 U.S. 42, 52 n.10 (1988) (“In both *Blum* and *Rendell-Baker*, the fact that the private entities received state funding and were subject to state regulation did not, without more, convert their conduct into state action.”); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (holding that nursing home decisions to discharge or transfer Medicaid patients were not state action); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982) (“[T]he school’s receipt of public funds does not make the discharge decisions acts of the State.”).

¹⁹³ *See* 20 U.S.C. 1681 (1994).

¹⁹⁴ *See* U.S. DEP’T OF EDUC., FISCAL YEAR 2001–2006 STATE TABLES FOR THE U.S. DEPARTMENT OF EDUCATION 56 (2005) *available at* <http://www.ed.gov/about/overview/budget/statetables/06stbyprogram.pdf> (last visited Apr. 18, 2005).

¹⁹⁵ *See supra* Part II.A.1.

¹⁹⁶ A comparison version of the statutes would be as follows: “No person in the United States shall, on the ground of [Title VI: ‘race, color, or national origin’; Title IX: ‘sex’], be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any [Title IX: ‘education’] program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a) (1994); 42 U.S.C. § 2000e (2000).

is misplaced. It is Congress' intention in 1972 [when Title IX was passed], not in 1964, that is of significance in interpreting Title IX. The meaning and applicability of Title VI are useful guides in construing Title IX, therefore, only to the extent that the language and history of Title IX do not suggest a contrary interpretation. . . . For although two statutes may be similar in language and objective, we must not fail to give effect to the differences between them.¹⁹⁷

However, putting this warning about looking to the independent history and language of each statute aside for now, a comparison of Title IX to Title VI would prove, at least in one respect, that Title IX provides greater protection from sex discrimination than the Equal Protection Clause does. As the Ninth Circuit convincingly noted about the Title IX-*Bakke* syllogism, because Title IX is the same as Title VI, Title VI is the same as the Equal Protection Clause, and the Equal Protection Clause evaluates allegations of discrimination based on race under strict scrutiny, Title IX sex discrimination claims receive the same strict scrutiny as Title VI race discrimination claims receive.¹⁹⁸ Thus, even if the Title IX-*Bakke* syllogism is sound, Title IX's protections against sex discrimination are, in this manner, more extensive than the Equal Protection Clause's protections.¹⁹⁹ Regardless of whether the Ninth Circuit's unexplained language about "parity" (Equal Protection Clause) versus "equality" (Title IX) is the correct way to express this difference,²⁰⁰ analyzing Title IX sex discrimination claims under strict scrutiny²⁰¹ would be a more difficult test than the Equal Protection Clause's intermediate scrutiny for sex discrimination claims.²⁰²

¹⁹⁷ *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 529–30 (1982) (citations omitted). The Supreme Court recently reiterated an oft-repeated quote about words having different meanings in different contexts:

The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.

Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 596 n.8 (2004) (quoting Walter Wheeler Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 *YALE L.J.* 333, 337 (1933)).

¹⁹⁸ *Jeldness v. Pearce*, 30 F.3d 1220, 1227–28 & n.4 (9th Cir. 1994).

¹⁹⁹ The Seventh Circuit's take on the Title IX-*Bakke* syllogism is not incompatible with this conclusion, as the Seventh Circuit used the syllogism merely to conclude that Title IX prohibits only intentional discrimination; the court did not address the issue of what level of equality or scrutiny the statute provides. *Cannon II*, 648 F.2d at 1109.

²⁰⁰ *Jeldness*, 30 F.3d at 1226.

²⁰¹ Under strict scrutiny, the proper mode of analysis for classifications based on race, a classification is unconstitutional unless it serves "compelling governmental interests" and is "narrowly tailored" to further those interests. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

²⁰² Under intermediate scrutiny, the proper mode of analysis for classifications based on sex, a classification is unconstitutional unless it serves "important governmental objec-

Yet, given the Supreme Court's warning not to make indiscriminate comparisons between Title VI and Title IX, there is good historical reason to believe that a direct comparison and wholesale incorporation of Equal Protection Clause standards, even heightened race-based equal protection standards, into Title IX would be inappropriate.²⁰³ Congress enacted Title IX in 1972.²⁰⁴ At that time, equal protection sex discrimination jurisprudence was still in its infancy. Of the line of cases that culminated in granting sex-based classifications heightened scrutiny under the Fourteenth Amendment, only *Reed v. Reed*²⁰⁵ had been decided, and in that case the Court applied the base-level equal protection rational relation test.²⁰⁶ In the years immediately after Congress passed Title IX, the standard for sex discrimination claims under the Equal Protection Clause was unclear,²⁰⁷ partly because of the pending possible passage of the Equal Rights Amendment.²⁰⁸ The case that finally applied heightened scrutiny to a claim of sex discrimination, *Craig v. Boren*,²⁰⁹ came in 1976, four years after the passage of Title IX.²¹⁰ Because intermediate scrutiny did not develop until 1976, it would have been quite odd for Congress to have intended Title IX to be coex-

tives" and is "substantially related to the achievement of those objectives." *Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53, 60 (2001); *United States v. Virginia*, 518 U.S. 515, 533 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

²⁰³ Also, given that the Title IX-*Bakke* syllogism limits the scope of Title IX in one respect (by providing only for intentional discrimination claims) but broadens it in another (requiring claims to be reviewed under strict scrutiny), the device itself does not really assist the inquiry undertaken by this Article.

²⁰⁴ See 20 U.S.C. § 1681 (1994).

²⁰⁵ 404 U.S. 71 (1971).

²⁰⁶ The Court held that an Idaho preference for men to administer estates was unconstitutional because it made "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 76. The Court did state that the classification was "subject to scrutiny under the Equal Protection Clause," *id.* at 75, but it nonetheless analyzed the provision under the rational basis test of "whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the [provision]." *Id.* at 76.

²⁰⁷ The 1973 case of *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion), found four Justices supporting "strict scrutiny" for sex-based classifications. *Id.* at 682 (Brennan, J., for the plurality) ("At the outset, appellants contend that classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree . . ."). However, the 1975 case of *Stanton v. Stanton*, 421 U.S. 7 (1975), had invalidated a statute providing for a greater age of majority, for support payment purposes, for males than for females based on its drawing a distinction that was not "rational." *Id.* at 13–14 (deciding case on basis of *Reed v. Reed* and finding "nothing rational in the distinction drawn").

²⁰⁸ See *Frontiero*, 411 U.S. at 691–92 (Powell, J., concurring) (stating that not waiting for full consideration of the Equal Rights Amendment would "not reflect appropriate respect for duly prescribed legislative processes").

²⁰⁹ 429 U.S. 190 (1976).

²¹⁰ The Court held: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197. The Court did not, in that decision, label the level of scrutiny "intermediate scrutiny," although Justice Rehnquist labeled it as such in his dissent. *Id.* at 218 (Rehnquist, J., dissenting).

tensive with the Equal Protection Clause in 1972.²¹¹ In fact, the opposite conclusion is inescapable: because the Constitution did not provide much protection against sex discrimination in 1972, Congress must have intended Title IX to protect against more forms of sex discrimination than the Constitution. Otherwise, Congress would have intended Title IX to prohibit nothing other than classifications based on sex that were completely irrational. Legislative history expressing the understanding that Title IX was “remedial” legislation supports this conclusion.²¹²

Unlike the arguments from the text of Title IX, this argument from history does not prove that the actual scope of Title IX is broader than the current understanding of the Equal Protection Clause; it only proves that the scope of Title IX is broader than the understanding of the Equal Protection Clause in 1972. However, this historical understanding of the period of Title IX’s enactment does provide conclusive proof that the Title IX-*Bakke* syllogism is a logical device that has no basis in Title IX’s purpose or intent.

There is one other important piece of the historical puzzle. At the time Congress passed Title IX, an unusual regulatory procedure was in effect that required all education regulations to be laid before Congress before taking effect.²¹³ This procedure, according to the Supreme Court, “was designed to afford Congress an opportunity to examine a regulation and, if it found the regulation inconsistent with the Act from which it derives its authority, to disapprove it in a concurrent resolution.”²¹⁴ That Congress did not reject the regulations does not necessarily mean that the regulations are consistent with legislative intent, but it does give weight to that argument.²¹⁵ In fact, the Court has stated that “[w]here an agency’s statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.”²¹⁶

Pursuant to this procedure, the Department of Health, Education and Welfare promulgated regulations under Title IX²¹⁷ and, in 1975, submitted

²¹¹ Cf. *Jackson v. Birmingham Bd. of Educ.*, No. 02-1672, slip op. at 6–7 (U.S. Mar. 29, 2005) (inferring Congressional intent in Title IX based on currently developing Supreme Court jurisprudence). The part of the Title IX-*Bakke* syllogism that holds that Title VI is coextensive with the Equal Protection Clause, *see supra* note 45 and accompanying text, a conclusion I express no opinion about, is not subject to the same criticism advanced here. When Title VI was enacted, strict scrutiny for race-based classifications under the Equal Protection Clause had been well-established. *See, e.g., Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.”).

²¹² *See* Claudia S. Lewis, *Title IX of the 1972 Education Amendments: Harmonizing Its Restrictive Language with Its Broad Remedial Purpose*, 51 *FORDHAM L. REV.* 1043, 1046 & n.21 (1983) (citing legislative history indicating remedial purpose).

²¹³ 20 U.S.C. § 1232(d)(1) (1982), *repealed by* Pub. L. No. 98-511, 98 Stat. 2366 (1984).

²¹⁴ *N. Haven v. Bell*, 456 U.S. 512, 531–32 (1992) (internal quotations omitted).

²¹⁵ *Id.* at 533–34.

²¹⁶ *Id.* at 535 (internal quotations omitted).

²¹⁷ The regulations were authorized by 20 U.S.C. § 1682 which states:

them to Congress for review.²¹⁸ Congress reviewed the regulations to determine whether

they [we]re consistent with the law and with the intent of the Congress in enacting the law. [Congress' purpose was not] to decide whether or not there should be a Title IX but solely to see if the regulation writers have read it and understood it the way the law-makers intended it to be read and understood.²¹⁹

Despite the introduction of several resolutions disapproving the regulations in whole or in part,²²⁰ Congress did not disapprove the regulations, and they took effect soon thereafter.²²¹ The regulations included many specific prohibitions defining discrimination based on sex in education.²²² Although, as the Supreme Court warned, these regulations are not conclusive evidence of Title IX's legislative intent,²²³ the regulations and procedure that did not disapprove of them add to the body of textual and historical evidence that points to Title IX's broad scope and difference from the Equal Protection Clause.

B. Doctrinal Comparison of Title IX and the Equal Protection Clause

While a look at the language and history of Title IX clearly demonstrates its differences with the Equal Protection Clause, a doctrinal analysis pushes the comparison even further. In all but one of the important doctrinal areas discussed here, Title IX provides broader protection against discrimination than the Equal Protection Clause does.

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

20 U.S.C. § 1682 (1994).

²¹⁸ See *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong. 1 (1975) [hereinafter *Sex Discrimination Regulations Hearings*]; *Hearing on House Con. Res. 330 (Title IX Regulation) Before the Subcomm. on Equal Opportunities of the House Comm. on Education and Labor*, 94th Cong. 1 (1975).

²¹⁹ *Sex Discrimination Regulations Hearings*, *supra* note 218, at 1 (statement of Rep. O'Hara, Chairman, House Subcomm. on Postsecondary Education).

²²⁰ See *N. Haven v. Bell*, 456 U.S. 512, 533 n.24 (1982).

²²¹ *Id.* at 533.

²²² See 34 C.F.R. § 106.1–.71 (2004). Some of the regulations are discussed in more depth *infra* Part IV.

²²³ See *North Haven*, 456 U.S. at 533–34.

The one area in which Title IX provides less redress against sex discrimination than the Equal Protection Clause is in determining who can be held liable for discriminatory acts. As noted earlier, Title IX does cover a broader range of schools because any school accepting federal funds, not just public schools, must comply with Title IX.²²⁴ However, where Title IX and the Equal Protection Clause overlap in covering public schools, the Equal Protection Clause holds *any* “state actor” within the school liable for discrimination.²²⁵ A state actor can be a state entity or an individual acting in official or individual capacity.²²⁶ Generally, “a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law.”²²⁷ Thus, it is well-settled that someone suffering sex discrimination under the Constitution can hold individual defendants liable for their discriminatory acts.²²⁸

In contrast, the overwhelming majority of courts facing the issue have held that Title IX holds only the federal funding recipient liable. Although there is a credible argument that Title IX’s plain language subjects anyone to liability who denies someone participation in or excludes someone from an educational institution based on sex,²²⁹ only two courts have held that a litigant can bring a Title IX lawsuit against individuals, and both of those decisions limited their holdings to individuals acting in their official capacities.²³⁰ Every other court that has addressed the issue has stated that only educational institutions themselves can be held liable.²³¹ The Supreme

²²⁴ See discussion *supra* notes 189–194 and accompanying text.

²²⁵ 42 U.S.C. § 1983 provides the right of action for a violation of the Equal Protection Clause. Section 1983 applies to “[e]very person who [acts] under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia.” 42 U.S.C. § 1983 (2000).

²²⁶ *West v. Atkins*, 487 U.S. 42, 48–51 (1988).

²²⁷ *Id.* at 50.

To constitute state action, the deprivation must be caused by the exercise of some right or privilege created by the State or by a person for whom the State is responsible, and the party charged with the deprivation must be a person who may fairly be said to be a state actor. State employment is generally sufficient to render the defendant a state actor. It is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State.

Id. at 49–50 (citations omitted). Under the Fifth Amendment’s implied Equal Protection Clause, see discussion *supra* note 160, the same rules apply for sex discrimination engaged in by federal actors. See *Davis v. Passman*, 442 U.S. 228 (1979) (allowing damages action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against individual for violations of the Fifth Amendment’s implied Equal Protection Clause).

²²⁸ See *Davis*, 442 U.S. 228.

²²⁹ See discussion *supra* notes 179–188 and accompanying text.

²³⁰ *Mennone v. Gordon*, 889 F. Supp. 53, 56 (D. Conn. 1995) (“Thus, the plain language of the statute sets forth a functional restriction that does not preclude individual defendants, as long as they exercise a sufficient level of control.”); *Mann v. Univ. of Cincinnati*, 864 F. Supp. 44, 47 (S.D. Ohio 1994) (“Consequently, the Plaintiff’s suit is properly brought under Title IX against the University and against Mr. Monast and Mr. Clemens in their official capacity.”).

²³¹ See, e.g., *Hartley v. Parnell*, 193 F.3d 1263, 1270 (11th Cir. 1999); *Smith v. Metro.*

Court has not weighed in, but language from its Title IX opinions strongly hints that it would agree with the overwhelming majority of courts addressing this aspect of Title IX liability.²³²

1. Title IX's Absolute Protection Against Sex Discrimination

While the difference in who can be a Title IX defendant indicates broader remedies for a constitutional claim, all of the other important doctrinal differences demonstrate that Title IX's reach extends far beyond that of the Equal Protection Clause. For the basic inquiry into what kind of discrimination each provision prohibits, Title IX and the Equal Protection Clause differ in that Title IX is absolute whereas the Equal Protection Clause permits discrimination when there is an important government interest.²³³ Even if the Supreme Court's decision in *United States v. Virginia*²³⁴ changed the level of scrutiny applied to classifications based on sex,²³⁵ the decision nonetheless allows sex-based classifications if there is an "exceedingly persuasive justification."²³⁶ Title IX, on the other hand, has no justification-based exceptions to the various standards employed under the statute. For instance, in the context of sexual harassment under Title IX, a school is liable for the sexual harassment of a student if the school has actual knowl-

Sch. Dist. Perry Township, 128 F.3d 1014, 1018–19 (7th Cir. 1997); *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 901 (1st Cir. 1988); *Medina Perez v. Fajardo*, 257 F. Supp. 2d 467, 471 (D.P.R. 2003); *Norris v. Norwalk Pub. Schs.*, 124 F. Supp. 2d 791, 794–98 (D. Conn. 2000). In *Delgado v. Stegall*, the Seventh Circuit found that Title IX did not preempt a § 1983 equal protection claim against a teacher because the teacher could not be a defendant under Title IX but could be for the § 1983 claim. 367 F.3d 668, 674–75 (7th Cir. 2004).

²³² See *Norris*, 124 F. Supp. 2d at 797, stating:

Moreover, holding that there is no individual liability under Title IX seems consistent with the Supreme Court's . . . statement in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 641 (1999), that "we have not extended damages liability under Title IX to parties outside the scope of [the government's enforcement] power." The government's enforcement power under Title IX consists primarily of withholding federal funds from the recipient, which is the school district, not, for example, an individual teacher or school board member.

Id. (second alteration in original) (non-Supreme Court citations omitted).

²³³ *Craig v. Boren*, 429 U.S. 190, 197 (1976).

²³⁴ 518 U.S. 515 (1996). In *Virginia*, the Supreme Court held that Virginia violated the Equal Protection Clause by offering the unique military education at the Virginia Military Institute to men only. *Id.* at 545–46.

²³⁵ *Compare Eng'g Contractors Ass'n v. Metro. Dade County*, 122 F.3d 895 (1997) (holding *Virginia* did not change intermediate scrutiny) and *Cohen II*, 101 F.3d at 183 n.22 (1st Cir. 1996) ("We point out that *Virginia* adds nothing to the analysis of equal protection challenges of gender-based classifications that has not been part of that analysis since 1979 . . ."), with Candace Saari Kovacic-Fleischer, *United States v. Virginia's New Gender Equal Protection Analysis*, 50 VAND. L. REV. 845 (1997) (arguing that the Court's analysis in *Virginia* resembled strict scrutiny).

²³⁶ *Virginia*, 518 U.S. at 531 ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action.") (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

edge of the harassment and is deliberately indifferent to it.²³⁷ If a school were to take no action in response to known sexual harassment at the hands of either a teacher or another student, the school would be liable under Supreme Court precedent regardless of whether the school had a persuasive justification for its complete inaction.²³⁸ In the prison context, this difference is even starker. As the cases discussed above set forth,²³⁹ courts review general prison regulations challenged under the Constitution under a very lenient standard, looking to whether the regulation is “reasonably related to legitimate penological interests.”²⁴⁰ Under Title IX, courts have not imported that standard to challenges of prison educational programs, holding rather that Title IX contains no exception for prison programs.²⁴¹ This holding is consistent with the actual language of Title IX, which contains several exceptions for institutions such as military and religious schools,²⁴² but contains no such exception for prison programs that qualify as educational.

2. Title IX’s “Intent” Standard

Likewise, the two provisions differ as to what level of intent a plaintiff must show to prove discrimination. Unlike the employment discrimination context in which differential impact is enough to prove discrimination under Title VII,²⁴³ well-established case law requires discriminatory intent rather than merely discriminatory impact to prove a violation of the Constitution.²⁴⁴ Title IX, in comparison to the clearly established law of the Constitution, is

²³⁷ See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291 (1998) (for harassment by teacher); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648–49 (1999) (for harassment by peer).

²³⁸ See *Gebser*, 524 U.S. at 291 (no exceptions mentioned); *Davis*, 526 U.S. at 648–49 (same); *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 259 (6th Cir. 2000) (finding deliberate indifference when no action other than talking to offending students was taken and without discussing exceptions based on justification); *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1248–49 (10th Cir. 1999) (finding deliberate indifference when school never informed law enforcement, investigated claims, nor disciplined the offending actor and without discussing any exceptions).

²³⁹ See discussion *supra* notes 52–59, 86–104 and accompanying text.

²⁴⁰ *Turner v. Safley*, 482 U.S. 78, 89 (1987).

²⁴¹ See *Jeldness v. Pearce*, 30 F.3d 1220, 1230 (9th Cir. 1994) (“We need only restate our conclusion that penological necessity is not a *defense* in a Title IX case, but only a factor in *how* Title IX is applied in prisons.”).

²⁴² 20 U.S.C. § 1681(a)(1)–(9) (1994).

²⁴³ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (codified at 42 U.S.C. § 2000e-2(k) (2000)).

²⁴⁴ *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (“[I]f a neutral law has a disproportionately adverse effect [upon a protected group], it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.”); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977) (“[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact.”); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.”).

much more complicated. The Supreme Court has indicated that Title IX does provide a monetary remedy for intentional discrimination,²⁴⁵ but has not explicitly addressed a claim of disparate impact under Title IX. Likewise, the Court has been silent as to what conduct constitutes discrimination for purposes of injunctive relief or administrative enforcement.²⁴⁶ Several courts have specifically held that Title IX does not allow for a claim based on disparate impact,²⁴⁷ but others have come to the opposite conclusion.²⁴⁸

Despite this confusion over Title IX and any intent requirement, there are at least two reasons to conclude that, even if Title IX requires a showing of intent, its definition of intent is more lenient than that required under the Equal Protection Clause. First, in the athletics equity context, every appellate court that has considered the issue has ruled that Title IX's athletic equity regulations are constitutional and can form the basis for a claim of injunctive relief.²⁴⁹ Nothing in the three-part test²⁵⁰ for determining

²⁴⁵ *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001) (“[*Cannon*] therefore held that Title IX created a private right of action to enforce its ban on intentional discrimination, but had no occasion to consider whether the right reached regulations barring disparate-impact discrimination.”); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642 (1999) (allowing “private damages action under Title IX where the funding recipient engages in intentional conduct that violates the clear terms of the statute”); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 74–75 (1992) (concluding that Title IX allows a monetary private damages action “in a case such as this, in which intentional discrimination is alleged.”); see also *Jackson v. Birmingham Bd. of Educ.*, No. 02-1672, slip op. at 9 (U.S. Mar. 29, 2005) (referring to Title IX’s prohibition on “intentional discrimination”).

²⁴⁶ The Department of Education considers itself free to hold educational institutions to a higher standard when seeking merely injunctive relief. See U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES iii–iv (2001) (drawing a distinction between standards for agency enforcement and private lawsuits for monetary damages), available at <http://www.ed.gov/offices/OCR/archives/pdf/shguide.pdf> (last visited Apr. 18, 2005).

²⁴⁷ See, e.g., *Horner v. Ky. High Sch. Athletic Ass’n*, 206 F.3d 685, 689 (6th Cir. 2000) (“[P]roof of intent, however defined, is the sine qua non to compensatory relief for any type of Title IX violation.”); *Cannon II*, 648 F.2d at 1109 (rejecting argument that disparate impact theory alone was sufficient to establish a violation of Title IX); *Weser v. Glen*, 190 F. Supp. 2d 384, 395 (E.D.N.Y. 2002) (“Thus, to the extent, if at all, plaintiff alleges disparate-impact discrimination, his claims must fail.”).

²⁴⁸ See *Cohen I*, 991 F.2d at 895 (“[A] Title IX plaintiff in an athletic discrimination suit must accompany statistical evidence of disparate impact with some further evidence of discrimination, such as unmet need amongst the members of the disadvantaged gender.”); *Mabry v. State Bd. of Cmty. Colls. & Occupational Educ.*, 813 F.2d 311, 316 n.6 (10th Cir. 1987) (“[Title VII is] the most appropriate analogue when defining Title IX’s substantive standards, including the question of whether ‘disparate impact’ is sufficient to establish discrimination under Title IX.”); *Mehus v. Emporia State Univ.*, 295 F. Supp. 2d 1258, 1271 (D. Kan. 2004) (“Plaintiff is not required to allege discriminatory intent.”); *Sharif by Salahuddin v. N.Y. State Educ. Dep’t*, 709 F. Supp. 345 (S.D.N.Y. 1989) (holding that a disparate impact challenge to use of Scholastic Aptitude Test to allocate state merit scholarships was appropriate under Title IX).

²⁴⁹ See *Nat’l Wrestling Coaches Ass’n v. U.S. Dep’t of Educ.*, 263 F. Supp. 2d 82, 94–95 (D.D.C. 2003) (listing eight circuit courts that have approved of Title IX’s requirements in challenges to the constitutionality or statutory authority of the regulations), *aff’d* 366 F.3d 930 (D.C. Cir. 2004).

²⁵⁰ 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979); see also discussion *supra* notes 156–

whether a school has effectively accommodated the interests and abilities of members of both sexes requires a showing of intentional discrimination, and administrative policy interpretations²⁵¹ as well as all the court interpretations have never added to the three-part test a requirement of proving intentional discrimination. It is possible that by virtue of the fact that sports teams are generally segregated based on sex²⁵² that the three-part test assumes a sex-based classification and is merely an application of discrimination principles within the context of that classification. However, understanding the Title IX standard for a violation of the three-part test in this manner is still different than the intentional discrimination standards of the Equal Protection Clause.

Furthermore, the standard that the Supreme Court has set forth for proving damages liability in Title IX sexual harassment cases is strikingly different than the standard for proving damages liability in Equal Protection Clause sexual harassment cases. Two circuit court cases clearly illustrate the burden a litigant faces when trying to establish that a school is liable for sexual harassment under the Constitution. In a case of student-student sexual harassment, the Seventh Circuit wrote that in order to prove a violation under the Equal Protection Clause for sexual harassment, a plaintiff “must show that the defendants acted with a nefarious discriminatory purpose [and] demonstrate intentional or purposeful discrimination.”²⁵³ “Discriminatory purpose,” the court continued, “implies that a decisionmaker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on the identifiable group.”²⁵⁴ In a case involving similar harassment, the Ninth Circuit wrote that, in order to prove a constitutional violation, the plaintiffs must prove that the school “acted in a discriminatory manner and that the discrimination was intentional.”²⁵⁵ Rejecting the constitutional claim, the court concluded that on the facts of the case there was “no direct evidence of gender animus, nor is there even evidence of system-wide disparate impact in punishments between genders.”²⁵⁶

This high burden for constitutional claims—showing sex-based animus or differential treatment—is nowhere in the Supreme Court’s analysis of sexual harassment claims under Title IX.²⁵⁷ In fact, in holding that Ti-

157 and accompanying text.

²⁵¹ See U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, *supra* note 155.

²⁵² 34 C.F.R. § 106.41(b) (2004) (“[A] recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.”).

²⁵³ *Nabozny v. Podlesny*, 92 F.3d 446, 453–54 (7th Cir. 1996).

²⁵⁴ *Id.* at 454.

²⁵⁵ *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000).

²⁵⁶ *Id.*

²⁵⁷ See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998) (stating holding without any mention of showing animus or differential treatment); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999) (same).

tle IX supports a claim for student-student sexual harassment after a showing of actual knowledge and deliberate indifference,²⁵⁸ the Court reversed the Eleventh Circuit's decision that had required a showing of sex-based differential treatment of sexual harassment complaints.²⁵⁹ Under the Court's Title IX sexual harassment jurisprudence, a plaintiff alleges a sufficient claim under Title IX regardless of any allegations of gender-motivated animus or differential treatment; all the plaintiff must show is that the school has been deliberately indifferent, for whatever reason, to known claims of sexual harassment.²⁶⁰ The Court talks of intent in all three of its opinions dealing with sexual harassment,²⁶¹ but it is obvious, for the reasons discussed here, that its definition of intentional action under Title IX is much less demanding than the definition of intent under the Equal Protection Clause.²⁶²

3. *Title IX's Standard for Municipal Liability*

Another major difference between Title IX and the Equal Protection Clause is the standard to hold a municipal entity liable. In a § 1983 claim for a violation of the Equal Protection Clause, a municipal entity is liable for discriminatory conduct if the actions of its employees are part of an official policy of the municipal institution.²⁶³ If the actions are taken by an official with final policymaking authority²⁶⁴ or if there is no official pol-

²⁵⁸ *Davis*, 526 U.S. at 650.

²⁵⁹ *Davis v. Monroe County Bd. of Ed.*, 120 F.3d 1390 (11th Cir. 1998) (holding that school could be held liable for student sexual harassment only if school treated complaints differently because of sex); *see also* *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996) (same).

²⁶⁰ *Davis*, 526 U.S. at 650; *Gebser*, 524 U.S. at 292.

²⁶¹ *Davis*, 526 U.S. at 642 (allowing "private damages action under Title IX where the funding recipient engages in intentional conduct that violates the clear terms of the statute"); *Gebser*, 524 U.S. at 287 (discussing concerns about notice when discrimination is unintentional); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 74–75 (1992) ("[N]otice problem does not arise in a case such as this, in which intentional discrimination is alleged.").

²⁶² Professor Deborah Brake has noted:

Despite its flaws, the *Davis* test for school liability moves beyond an intent standard that purports to evaluate the subjective motivations underlying an institution's response to sexual harassment. In this respect, *Davis* stands in some tension with the line drawn in discrimination law between intentional discrimination and disparate impact

Deborah L. Brake, *School Liability for Peer Sexual Harassment After Davis: Shifting from Intent to Causation in Discrimination Law*, 12 HASTINGS WOMEN'S L.J. 5, 29 (2001).

²⁶³ *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 690 (1978) ("Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.").

²⁶⁴ *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 359 n.2 (1990) ("The school board, of course, could only be held liable if, as a matter of state law, it had delegated final decisionmaking authority in this area to the school principal and assistant principal.").

icy, the discriminatory practice is “so permanent and well settled as to constitute a ‘custom or usage’ with the force of law.”²⁶⁵ Under Title IX, there is no such requirement, as *Gebser* and *Davis* both held that a school district is liable for sexual harassment of a student if the school had actual knowledge of and was deliberately indifferent to the harassment;²⁶⁶ nothing in *Gebser* or *Davis* indicates any adoption of the municipal entity liability jurisprudence for Title IX liability. Furthermore, in Title IX cases based on employees’ discriminatory acts other than sexual harassment, municipal school districts, as with all recipients of federal funding, can be liable based on simple principles of vicarious liability.²⁶⁷

Indicative of the different Title IX and Equal Protection Clause standards are two circuit court cases that found for the plaintiff on the Title IX claim but against the plaintiff on the constitutional claim. In *Murrell v. School District Number 1, Denver, Colorado*,²⁶⁸ the Tenth Circuit found that the plaintiff had pleaded sufficient facts to prove Title IX liability because the school’s “deliberate indifference to her claims totally deprived [the plaintiff] of its educational benefits.”²⁶⁹ In contrast, the plaintiff had not, “even [under] the most liberal construction” of her complaint, plead facts showing that the municipal defendant could be liable under the Equal Protection Clause, through § 1983, because she did not “demonstrate a custom or policy of the [school] to be deliberately indifferent to sexual harassment as a general matter.”²⁷⁰ A similar Fifth Circuit case, *Doe ex rel. Doe v. Dallas Independent School District*,²⁷¹ reached the same split conclusion, holding that although the plaintiff’s complaint stated enough facts to find the school district liable for sexual harassment under Title IX,²⁷² the plaintiff could not prove a constitutional violation because there was “no evidence suggesting that, at the time of the sexual abuse, the lack of an official policy on this issue was the result of an intentional choice on the part of the board of trustees.”²⁷³ In a footnote, the court recognized the difference between the standard of liability from *Gebser* and the standard for municipal liability for constitutional violations.²⁷⁴

²⁶⁵ *City of Canton, Ohio v. Harris*, 489 U.S. 378, 398 (1989) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 168 (1970)).

²⁶⁶ *Davis*, 526 U.S. at 648 (holding that “recipients may be liable for their deliberate indifference to known acts of peer sexual harassment”); *Gebser*, 524 U.S. at 290 (holding that “a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf has actual knowledge of discrimination in the recipient’s programs and fails adequately to respond”).

²⁶⁷ See generally David S. Cohen, *Limiting Gebser: Institutional Liability for Non-Sexual-Harassment Sex Discrimination Under Title IX*, 39 WAKE FOREST L. REV. 311 (2004).

²⁶⁸ 186 F.3d 1238 (10th Cir. 1999).

²⁶⁹ *Id.* at 1249.

²⁷⁰ See *id.* at 1249–50.

²⁷¹ 153 F.3d 211 (5th Cir. 1999).

²⁷² *Id.* at 220.

²⁷³ *Id.* at 217.

²⁷⁴ *Id.* at 220 n.8 (“Moreover, we note that, although they are similar, the standards for

4. Title IX's Affirmative Obligation

Another doctrinal difference between Title IX and the Equal Protection Clause is the difference in the nature of the obligations imposed. The Equal Protection Clause imposes a negative obligation on state actors: the obligation not to discriminate.²⁷⁵ It has never been interpreted to require states to take affirmative steps to remedy past discrimination.²⁷⁶ As Judge Posner of the Seventh Circuit has stated

Sex discrimination is treating a person worse because of her (or his) sex; it is not refusing to discriminate in favor of a person on grounds of her sex. The Constitution and Title VII have been held, with exceptions irrelevant here, to permit affirmative action; they do not require it.²⁷⁷

Yet Title IX law, while not specifically requiring affirmative action,²⁷⁸ by the nature of the definition of discrimination used in its various contexts,

school district liability under § 1983 and under Title IX are not identical.”); *see also* Davis v. DeKalb County Sch. Dist., 233 F.3d 1367 (11th Cir. 2000) (although rejecting both claims, applying *Gebser* analysis to Title IX claim and different, more difficult “policy” or “custom” municipal liability analysis to § 1983 claim); *Halseth v. Deines*, No. Civ. 04-196-AS, 2004 WL 2997565, at *6 (D. Or. Dec. 27, 2004) (finding plaintiff failed to state a claim under § 1983 because plaintiff did not allege a policy or custom but finding a claim under Title IX based on the same facts).

²⁷⁵ The Fourteenth Amendment begins: “No state shall . . .” U.S. CONST. amend. XIV, § 1.

²⁷⁶ *See* Austin Black Contractors Ass’n v. City of Austin, Tex., 78 F.3d 185, 186 (5th Cir. 1996) (“In making this ruling, we join the numerous other circuits that have previously determined that the Fourteenth Amendment does not require affirmative action.”). In a footnote, the court cited the other circuits that have reached the same conclusion. *See id.* at 186 n.3 (citing *Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d 412, 415 (7th Cir. 1988); *NAACP, Detroit Branch v. Detroit Police Officers Ass’n*, 821 F.2d 328, 331 (6th Cir. 1987); *Croson v. City of Richmond*, 779 F.2d 181, 187 (4th Cir. 1985), *vacated on other grounds*, 488 U.S. 469 (1989); *Associated Gen. Contractors of Cal. v. S.F. Unified Sch. Dist.*, 616 F.2d 1381 (9th Cir. 1980)).

²⁷⁷ *Yatvin*, 840 F.2d at 412 (citations omitted). *Yatvin* was decided in 1988, but its statement about the state of affirmative action law remains good law today, as Title VII precedent allowing affirmative action has never been overruled, *see generally* *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616 (1987); *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979), and the Supreme Court has allowed affirmative action under the Constitution in limited circumstances, *see* *Grutter v. Bollinger*, 539 U.S. 306 (2003) (allowing affirmative action program under the Equal Protection Clause).

²⁷⁸ Title IX states:

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area

does require institutions to take affirmative steps in certain situations. For instance, if a school does not have “substantial proportionality” between the number of people of the underrepresented sex in admissions and athletics, the school must take steps to remedy that disproportionality, must show a pattern of meeting the athletic interests of the underrepresented sex, or must have a history of expanding opportunities for the underrepresented sex.²⁷⁹ This affirmative obligation to act to provide more athletic slots for women is different than the negative prohibition on discriminatory acts contained in the Constitution. Likewise, in cases of sexual harassment, Title IX also imposes an affirmative obligation on schools once they receive actual notice of the harassment. Under both *Gebser* and *Davis*, schools must respond “in a manner that is not clearly unreasonable.”²⁸⁰ Although the requirement that the schools respond “not clearly unreasonable[ly]”²⁸¹ is a very minimal standard that does not adequately protect students from harassment of teachers and students,²⁸² it nonetheless imposes on schools an affirmative responsibility to act that is different in kind from the Constitution’s negative prohibition of discriminatory acts.

5. Title IX and Sexual Orientation Discrimination

Finally, Title IX and the Equal Protection Clause differ in how they treat discrimination based on sexual orientation. Courts that have addressed equal protection claims based on sexual orientation discrimination in education have analyzed the school’s actions under the most basic equal protection standard, the rational basis test.²⁸³ School action motivated by ani-

20 U.S.C. § 1681(b) (1994). Courts have stated that this section is a blanket statement about Title IX not requiring affirmative action, *see, e.g., Cohen II*, 101 F.3d at 170 n.11; however, a strict reading of the language of the section indicates that the prohibition is not as broad as the courts have stated. *See* 20 U.S.C. § 1681(b). The provision forbids “preferential or disparate treatment” based on imbalance between numbers at the “federally supported program or activity” and numbers in “any community, State, section, or other area.” *Id.* Notably, the language does not forbid comparisons within the same program or activity, as the list of comparison entities omits the language used earlier in the provision to describe the funding recipient—“federally supported program or activity.” *Id.* Thus, a strict reading of § 1681(b) shows that it is concerned with comparisons between the federally funded program and outside entities, not with comparisons within the federally funded program.

²⁷⁹ 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

²⁸⁰ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 649 (1999) (defining “deliberate indifference” standard from *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998)).

²⁸¹ *Id.*

²⁸² *See generally* Amy K. Graham, *Gebser v. Lago Vista Independent School District: The Supreme Court’s Determination That Children Deserve Less Protection Than Adults From Sexual Harassment*, 30 LOYOLA U. CHI. L.J. 551 (1999); Anne D. Byrne, *School District Liability Under Title IX for Sexual Abuse of a Student By a Teacher: Why Has the Supreme Court Allowed Schools to Put Their Heads in the Sand? Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989, 22 HAMLINE L. REV. 587 (1998).

²⁸³ *See Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869, 874 (N.D. Ohio 2003) (“Moreover, the school officials’ discriminatory conduct must have no rational relationship to a legitimate governmental purpose.”) (internal quotations omitted); *accord Flores v. Morgan*

mus fails this rational basis test.²⁸⁴ While no court has found a rational basis for indifference toward harassment based on sexual orientation,²⁸⁵ it is conceivable that courts would permit, under the Constitution, other forms of educational discrimination²⁸⁶ based on sexual orientation, as they have unfortunately permitted, under the Constitution, discrimination against gays and lesbians in other areas of the law.²⁸⁷

While Title IX law is not fully developed in this area, it does appear that it is taking a less tolerant approach toward discrimination based on sexual orientation because, under the statute, such discrimination has been considered flatly prohibited as sex discrimination. For example, two cases involving sexual harassment based on sexual orientation focused on the gender-based motivations behind the harassment and applied the standard Title IX deliberate indifference test. The Northern District of California applied Title IX to harassment based on sexual orientation because of the similarities between harassment against gays and lesbians and harassment against girls:

Plaintiff was targeted by his classmates due to his perceived sexual status as a homosexual, and was harassed based on those perceptions. Thus, although Plaintiff's complaint makes no specific characterization of the harassing conduct as "sexual" in nature, it is reasonable to infer that the basis of the attacks was a perceived be-

Hill Unified Sch. Dist., 324 F.3d 1130, 1137 (9th Cir. 2003) (applying rational basis test to school permitting student-student harassment based on sexual orientation); *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996) (same).

²⁸⁴ *Schroeder*, 296 F. Supp. 2d at 875 (finding evidence that the school's actions were "motivated by animus against homosexuals"); cf. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

²⁸⁵ See, e.g., *Flores*, 324 F.3d at 1138 (finding no rational basis for permitting student to assault another based on sexual orientation); *Nabozny*, 92 F.3d at 458 ("We are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation, and the defendants do not offer us one."); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1089 (D. Minn. 2000) ("The School District offers no rational basis for permitting students to assault plaintiff on the basis of his sexual orientation while protecting other students from similar forms of harassment. Moreover, the Court can conceive of no legitimate government interest for doing so."). But see *Doe v. Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d 809, 830–31 (S.D. Iowa 2004) (finding no likelihood of success where student showed "minimal" differential treatment based on types of harassment and school responded to his complaints).

²⁸⁶ Discrimination in the educational environment can take forms other than harassment or athletics inequity. See generally Cohen, *supra* note 267, at 313.

²⁸⁷ See, e.g., *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d 804, 820 (11th Cir. 2004) ("Against this 'sum of experience,' it is rational for Florida to conclude that it is in the best interests of adoptive children, many of whom come from troubled and unstable backgrounds, to be placed in a home anchored by both a father and a mother."); see also *Equal Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997) (upholding city charter that removed antidiscrimination protections for gays and lesbians); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (holding that Department of Defense policy "subjecting all homosexual applicants for Secret and Top Secret clearance to expanded investigations and mandatory adjudications" did not violate the Equal Protection Clause).

lief about Plaintiff's sexuality, i.e. that Plaintiff was harassed on the basis of sex.

Furthermore, the Court finds no material difference between the instance in which a female student is subject to unwelcome sexual comments and advances due to her harasser's perception that she is a sexual object, and the instance in which a male student is insulted and abused due to his harasser's perception that he is a homosexual, and therefore a subject of prey. In both instances, the conduct is a heinous response to the harasser's perception of the victim's sexuality, and is not distinguishable to this Court.²⁸⁸

The District of Minnesota reached the same conclusion, but based its result on the gender-enforcing nature of sexual orientation harassment:

Plaintiff contends that the students engaged in the offensive conduct at issue not only because they believed him to be gay, but also because he did not meet their stereotyped expectations of masculinity. The facts alleged in plaintiff's complaint support this characterization of the students' misconduct. He specifically alleges that some of the students called him "Jessica," a girl's name, indicating a belief that he exhibited feminine characteristics. Moreover, the Court finds important the fact that plaintiff's peers began harassing him as early as kindergarten. It is highly unlikely that at that tender age plaintiff would have developed any solidified sexual preference, or for that matter, that he even understood what it meant to be "homosexual" or "heterosexual." The likelihood that he openly identified himself as gay or that he engaged in any homosexual conduct at that age is quite low. It is much more plausible that the students began tormenting him based on feminine personality traits that he exhibited and the perception that he did not engage in behaviors befitting a boy. Plaintiff thus appears to plead facts that would support a claim of harassment based on the perception that he did not fit his peers' stereotypes of masculinity.²⁸⁹

Both courts found that the harassment complained of by the student constituted sexual harassment under Title IX that schools were responsible for remedying if they had actual notice of the harassment.²⁹⁰ For non-

²⁸⁸ *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000).

²⁸⁹ *Montgomery*, 109 F. Supp. 2d at 1090.

²⁹⁰ *See id.* at 1090–93 (looking to Title VII law to conclude that the plaintiff stated a cognizable claim under Title IX); *Ray*, 107 F. Supp. 2d at 1170–71 (“[T]he Court finds it possible that a jury could find that Plaintiff was a victim of sexual harassment. The Court cannot say that Plaintiff as a matter of law, will not be able show that Plaintiff was a victim of ‘sexual harassment.’”); *see also* *Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d

harassment forms of discrimination, these courts would also apply the Title IX standard and protect against conduct that the Equal Protection Clause might consider constitutional under the deferential rational basis test.

C. Theoretical Differences Between Title IX and the Equal Protection Clause

There are almost as many strands of feminist theory as there are feminist scholars.²⁹¹ The most basic form of feminist theory takes root in general principles of formal equality that can be traced back to the Aristotelian ideal of “the same treatment of similar persons.”²⁹² As Professor Catharine MacKinnon has described this ideal:

If one is the same, one is to be treated the same; if one is different, one is to be treated differently. The concept is empirical (how one *ought* to be treated is based on the way one *is*) and symmetrical (as if on two sides of an equation, conjoined with a mathematical = sign)²⁹³

For the most part, constitutional anti-sex discrimination law falls under this rubric as the Equal Protection Clause’s fundamental principle, whether applied to classifications based on race, sex, or any other protected category, is that likes should be treated alike.²⁹⁴ If Title IX were just a Spending

869, 880 (N.D. Ohio 2003) (“A jury could find that this harassment, and the failure to punish it, was motivated by plaintiff’s sex.”).

²⁹¹ See, e.g., MARY JOE FRUG’S *WOMEN AND THE LAW* 57–59 (Judith G. Greenberg et al. eds., Found. Press 3d ed. 2004) (describing liberal, cultural, dominance, and post-modern feminism). See generally KATHARINE T. BARTLETT, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* (3d ed. 2002) (separating book into formal equality, substantive equality, nonsubordination, women’s different voices, autonomy, and antiessentialist feminism); Mary Joe Frug, *Sexual Equality and Sexual Difference in American Law*, 26 *NEW ENG. L. REV.* 665 (1992) (describing equality doctrine, equality theory, feminist theory, negative feminism, cultural feminism, feminist doctrine, and postmodern feminism); ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* (1988) (describing liberal, Marxist, radical, and socialist feminism). The different labels and schools provoked the following sentiment from Professor Jane Maslow Cohen with which I largely agree: “Like others who have witnessed the parade of recent attributions of clear titles and overlapping, changing, and obfuscating significations in relation to feminist theories, I try to use none of them, as I go about my work, and, whenever possible, refer to authors by name.” Jane Maslow Cohen, *Equality for Girls and Other Women: The Built Architecture of the Purposive Life*, 9 *J. CONTEMP. LEGAL ISSUES* 103, 167 n.323 (1998).

²⁹² ARISTOTLE, *POLITICS* 307 (Benjamin Jowett trans., Random House 1943), quoted in CATHARINE A. MACKINNON, *SEX EQUALITY* 4 (2001).

²⁹³ MACKINNON, *supra* note 292, at 4–5.

²⁹⁴ *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (“The Equal Protection Clause of the Fourteenth Amendment . . . is essentially a direction that all persons similarly situated should be treated alike.”); *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (“The Equal Protection Clause directs that all persons similarly circumstanced shall be treated alike. But so too, the Constitution does not require things which are different in fact or opinion

Clause version of constitutional equal protection principles, its unique history and jurisprudence would show the same tendency toward formal equality as equal protection jurisprudence. However, Title IX's broader protections described above illustrate that there is a more comprehensive view of equality at work in the statute and its application.²⁹⁵ This Part elaborates on this more comprehensive view, incorporating the previous discussion of the statute's language and doctrinal developments as compared to the Equal Protection Clause.

1. *The Constitution's Formal Equality Guarantee*

First, a fuller description of the theoretical basis of constitutional sex discrimination is instructive. One of the foundational constitutional antidiscrimination decisions is *Personnel Administrator of Massachusetts v. Feeney*.²⁹⁶ The case arose out of a challenge to an employment veterans' preference based on proof that the preference impacted women as a group more severely than men because women were less likely to be veterans.²⁹⁷ Despite the extreme difference in impact the policy had on men and women, the Supreme Court ruled that the Constitution does not reach discriminatory results, only actions taken with discriminatory intent.²⁹⁸ The decision is the quintessential application of formal equality principles:

Formal equality is a principle of equal treatment: individuals who are alike should be treated alike, according to their actual characteristics rather than assumptions made about them based on stereotypes. It is a principle that can be applied either to a single individual, whose right to be treated on his or her own merits can be viewed as a right of individual autonomy, or to a group, whose members seek the same treatment as members of other similarly situated groups. What makes an issue one of *formal* equality is that the claim is limited to treatment *in relation to* another, similarly situated individual or group and does not extend to demand for some particular, *substantive* treatment.²⁹⁹

In *Feeney*, the Court found that the law treated individuals the same based on sex: men and women with veterans' preferences were treated equally, and men and women without veterans' preferences were treated equally.³⁰⁰ Based on this decision, constitutional equal protection guarantees are not

to be treated in law as though they were the same." (citations omitted)).

²⁹⁵ See discussion *supra* Part III.B.

²⁹⁶ 442 U.S. 256 (1979).

²⁹⁷ See *id.* at 259.

²⁹⁸ *Id.* at 273 (stating that "the Fourteenth Amendment guarantees equal laws, not equal results").

²⁹⁹ BARTLETT, *supra* note 291, at 117.

³⁰⁰ See *Feeney*, 442 U.S. at 274-75.

concerned with policies and practices that result in perpetuating already-existing sex-based inequalities as long as the challenged policies and practices are facially neutral and have no discriminatory purpose behind them.³⁰¹ Thus, in many civil service employment areas, women still face serious challenges because of veterans' preferences that disadvantage them as a group, but treat them, on their face, the same as men.³⁰²

Criticism of the doctrine of discriminatory purpose as espoused in *Feeney* has been intense.³⁰³ Professor Reva Siegel strikes at the heart of *Feeney*'s formal equality doctrine, arguing that the discriminatory purpose doctrine allows courts to ignore the sociological and psychological evidence of unconscious bias that often infuses decisions that have a disparate impact on a particular group.³⁰⁴ As a result of this concern for formal differentiations while ignoring neutral laws that reinforce the status quo of inequality, "courts now use *Feeney*'s definition of discriminatory purpose to justify a decision to uphold facially neutral state action that has a disparate impact on protected classes."³⁰⁵ In the context of sex discrimination, this doctrine has a wide-ranging effect:

[A]ll circuits to consider the question have held that *Feeney* supplies the framework for determining whether "spousal" violence policies provide women equal protection of the laws; thus, facially neutral domestic violence policies do not violate equal protection unless plaintiffs can show they were adopted at least in part because of their impact on women. State action concerning sexual assault, child care, and child support is subject to the same standard of review. In all these domains, the state acts in ways that profoundly shape the life circumstances of minorities and women, but the Court has construed the Equal Protection Clause in terms that shield these forms of state action from challenge. Indeed, the Court has interpreted the Equal Protection Clause in terms that seem to

³⁰¹ See *id.* at 274.

³⁰² See, e.g., *Pennsylvania v. Flaherty*, 983 F.2d 1267, 1275 (3d Cir. 1993) ("Although veterans preference is not directly challenged in this suit, there was evidence, unrefuted, that the application of veterans preference points to the raw test score disadvantages women in the hiring practices of the City."); *U.S. v. Bd. of Trs. of Ill. State Univ.*, 944 F. Supp. 714, 720 (C.D. Ill. 1996) ("In this case, it may be true that the Illinois veterans' preference caused more white men to be hired as BSWs. But that effect of the veterans' preference program was not discrimination.").

³⁰³ See generally David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Randall L. Kennedy, *McClesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988); Gayle Binion, "Intent" and Equal Protection: A Reconsideration, 1983 SUP. CT. REV. 397.

³⁰⁴ See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1136-37 (1997).

³⁰⁵ *Id.* at 1139.

invite legislators to act without regard to the foreseeable racial or gendered impact of their actions.³⁰⁶

Ultimately, the status-enforcing doctrine of discriminatory purpose “sanction[s] [facially neutral] practices that perpetuate the race and gender stratification of American society.”³⁰⁷

Other constitutional sex discrimination cases suffer from the same formal equality problems. For instance, in *Rostker v. Goldberg*,³⁰⁸ the Supreme Court approved of the Military Selective Service Act, which authorized the President to require men to register for the draft but not women.³⁰⁹ The opinion reflects the deep-held formalism of constitutional sex discrimination jurisprudence, as the Court found that the law presented no constitutional problem because men and women were not similarly situated since only men were eligible for combat.³¹⁰ The Court ignored the fact that Congress itself created this dissimilarity³¹¹ and denied the effect the law has in perpetuating stereotypical views of women as weak and inferior to men.³¹² More recently, in *Nguyen v. INS*,³¹³ the Supreme Court upheld a statute that made it more difficult for a child born overseas to a United States citizen to claim citizenship through that parent if that parent was the father rather than the mother.³¹⁴ The Court’s formal equality analysis ignores that the statute “effectively place[s] financial and emotional responsibility for childrearing on the U.S. citizen mother of a child born abroad out of wedlock.”³¹⁵

³⁰⁶ *Id.* at 1140–41 (citing Reva B. Siegel, “The Rule of Love”: Wife Beating as Pre-rogative and Privacy, 105 *YALE L.J.* 2117, 2191 n.270, 2192 n.271 (1996) (referring to *Navarro v. Block*, 72 F.3d 712 (9th Cir. 1996); *Eagleston v. Guido*, 41 F.3d 865, 878 (2d Cir. 1994); *Ricketts v. City of Columbia*, 36 F.3d 775, 779 (8th Cir. 1994); *Brown v. Grabowski*, 922 F.2d 1097, 1101 (3d Cir. 1990); *Watson v. City of Kansas City*, 857 F.2d 690 (10th Cir. 1988); *Hynson v. City of Chester Legal Dep’t*, 864 F.2d 1026, 1031 (3d Cir. 1988)).

³⁰⁷ Siegel, *supra* note 304, at 1147.

³⁰⁸ 453 U.S. 57 (1981).

³⁰⁹ *Id.* at 78–79.

³¹⁰ The Court in *Rostker* reasoned:

The fact that congress and the Executive have decided that women should not serve in combat fully justifies Congress in not authorizing their registration, since the purpose of registration is to develop a pool of potential combat troops. . . . The Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality.

Id. at 79.

³¹¹ See *MACKINNON*, *supra* note 292, at 267–68.

³¹² See Katharine T. Bartlett, *Feminist Legal Methods*, 103 *HARV. L. REV.* 829, 840 (1990).

³¹³ 533 U.S. 53 (2001).

³¹⁴ *Id.* at 62–72.

³¹⁵ Christopher D. Totten, *Constitutional Precommitments to Gender Affirmative Action in the European Union, Germany, Canada and the United States: A Comparative Approach*, 21 *BERKELEY J. INT’L L.* 27, 56 (2003) (citing Manisha Lalwani, *The “Intelligent Wickedness” of U.S. Immigration Law Conferring Citizenship to Children Born Abroad and Out-of-Wedlock: A Feminist Perspective*, 47 *VILL. L. REV.* 707, 739–40 (2002)).

2. *Title IX's Reach Beyond Formal Equality*

Title IX, on the other hand, looks beyond formal equality and reaches into the realm of substantive equality. Theories of substantive equality look to “a rule’s results or effects” and “take account of [sex-associated] differences to avoid differential impacts that are considered unfair.”³¹⁶ The most obvious example of this reach into substantive equality is the athletics equity cases. For instance, in *Cohen v. Brown University*,³¹⁷ the First Circuit held that Title IX is concerned with reaching the substantive goals of the equalization of athletic participation, rather than merely anchoring athletic participation rates to the relative interests of the school’s male and female students.³¹⁸ The court understood that judging women’s equality based on the seemingly neutral measure of interest would defeat the purpose of Title IX, noting that “[i]nterest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience. The Policy Interpretation [of Title IX’s regulations] recognizes that women’s lower rate of participation in athletics reflects women’s historical lack of opportunities to participate in sports.”³¹⁹ The court continued, referring to the school’s defense that the court should look at statistical studies of different interest levels, by recognizing that “there exists the danger that, rather than providing a true measure of women’s interest in sports, statistical evidence purporting to reflect women’s interest instead provides only a measure of the very discrimination that is and has been the basis for women’s lack of opportunity to participate in sports.”³²⁰ According to the court, Title IX shapes women’s interest, rather than merely requiring equality based on a preexisting level of interest and observed that “[w]hat stimulated [the recent] remarkable change in the quality of women’s athletic competition was not a sudden, anomalous upsurge in women’s interest in sports, but the enforcement of Title IX’s mandate of gender equity in sports.”³²¹ The Ninth Circuit similarly adopted this critique of the seemingly neutral “interest” criteria:

Title IX is a dynamic statute, not a static one. It envisions continuing progress toward the goal of equal opportunity for all athletes and recognizes that, where society has conditioned women to expect less than their fair share of the athletic opportunities, women’s interest in participating in sports will not rise to a par with men’s overnight. The percentage of college athletes who are women rose from 15% in 1972 to 37% in 1998, and Title IX is at least par-

³¹⁶ BARTLETT, *supra* note 291, at 265.

³¹⁷ *Cohen II*, 101 F.3d 155.

³¹⁸ *Id.* at 178–81.

³¹⁹ *Id.* at 179.

³²⁰ *Id.*

³²¹ *Id.* at 188.

tially responsible for this trend of increased participation by women. Title IX has altered women's preferences, making them more interested in sports, and more likely to become student athletes. Adopting Appellees' interest-based test for Title IX compliance would hinder, and quite possibly reverse, the steady increases in women's participation and interest in sports that have followed Title IX's enactment.³²²

Had either of these courts considering the "interest" issue in Title IX athletics equity litigation adopted the formal equality paradigm of constitutional equal protection jurisprudence, they would have been concerned only with whether the school treated similarly situated, i.e., similarly interested, students the same; there would have been no need to look into how a seemingly neutral criterion, such as athletic interest, enforced already existing discriminatory patterns among women.

Professor Deborah Brake has written a comprehensive article about the theory of Title IX in the area of athletic equity.³²³ She writes that these athletic equity decisions, in rejecting the notion that Title IX only requires schools to treat similarly situated male and female athletes the same and in accepting the notion that the schools' policies themselves affect interest in athletics, "are a powerful indictment of a formal equality perspective that accepts the existence of sex difference as a basis for limiting the reach of equality law."³²⁴ She finds much to praise in this "anti-subordination and

³²² Neal v. Bd. of Trs. of Cal. State Univs., 198 F.3d 763, 769 (9th Cir. 1999) (citing Trudy Saunders Bredthauer, *Twenty-Five Years Under Title IX: Have We Made Progress?*, 31 CREIGHTON L. REV. 1107, 1107 (1998); Note, *Cheering on Women and Girls in Sports: Using Title IX To Fight Gender Role Oppression*, 110 HARV. L. REV. 1627, 1640-41 (1997)).

³²³ See Brake, *supra* note 157, at 13.

³²⁴ *Id.* at 56. Another commentator has observed that Title IX's athletic equity requirements go

beyond the liberal feminist "equality of opportunity" model . . . by requiring that college women be provided a greater level of sports opportunities than indicated by their relative level of interest. Rather, as long as their interests have been shaped by a discriminatory, sexist society, these women need a proportionate number of opportunities to play, regardless of their misleadingly low interest level. Title IX thus has become not just a tool to overcome stereotypes and allow women to act on their desires to play sports, but also a means to curtail the practice of socializing girls and women not to become athletes in the first place.

Note, *supra* note 322, at 1640-41. The Department of Education recently released a clarification to Title IX's enforcement guidelines that appears to be a step back from the three-part test's push toward substantive equality. In the new clarification, the Department of Education states that properly administered interest surveys that show insufficient interest for additional varsity teams would create a "presumption of compliance" with the interest prong of the three-part test and that complainants could overcome that presumption only with "direct and very persuasive evidence of unmet interest." See Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—Part Three, in Letter from James F. Manning, Assistant Sec'y for Civil Rights, to Colleague (Mar. 17, 2005), available at <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.html> (last visited Apr. 18, 2005). This new clarification could limit the impact Title IX has on increasing women's participation in athletics.

structuralist analysis,”³²⁵ but also cautions that it can and should go further than the courts have so far taken it and offers the criticism that the court’s

analysis in *Brown* falls far short of capturing the full extent to which institutions shape and suppress female interest in athletics. The processes that create and reproduce women’s inequality in sport are intricate and complex, and they lie deep within the structures of interscholastic and intercollegiate athletic programs.³²⁶

Despite this valid criticism of the limited approach in cases such as *Cohen* and *Neal*, the conception of equality that these cases espouse is strikingly different than the formal equality doctrine of equal protection. Whether the difference stems from understanding the socializing influence structures have on creating difference, from looking at the way current practices act to subordinate women’s interests, or merely from shaping Title IX into a law that requires a more substantive version of equality, what is important from these cases and this theoretical analysis is that Title IX athletics equity jurisprudence parts ways with the Equal Protection Clause in a fundamental way by jettisoning the simplistic theory of formal equality.

Looking at this aspect of Title IX does not fully answer the issue raised by this Article, for the limitation of Professor Brake’s and the courts’ analyses of athletic equity doctrine is that their notions of what Title IX requires in terms of reaching substantive goals of equality is based on Title IX’s regulations and policy interpretations rather than the statute itself. While every appellate court to have faced the issue has agreed that Title IX’s regulations are constitutional and permitted by the statute,³²⁷ none has stated that the language of Title IX itself requires the three-part test or any of the implementing regulations or policy clarifications. Thus, the theoretical argument developed here and by others based on the athletic equity decisions is vulnerable to a claim that the expanded notion of equality demonstrated by these cases, while a permissible agency expansion of Title IX as well as a constitutional use of sex distinctions, is different than what the Title IX statute itself requires. William Thro has advanced versions of this argument in his repeated challenges to Title IX’s application to intercollegiate athletics.³²⁸

The theoretical underpinnings of other aspects of Title IX law show that what is apparent from the theory behind athletic equity doctrine is also evident in other areas of Title IX. As noted above in the discussion of equal protection doctrine, courts have repeatedly absolved schools of liability under the Constitution for sexual harassment of a student by another stu-

³²⁵ Brake, *supra* note 157, at 45.

³²⁶ *Id.* at 73.

³²⁷ See discussion *supra* note 158 and accompanying text.

³²⁸ Thro, *supra* note 70, at 22–23 nn.74–75; Thro & Snow, *supra* note 168, at 1036 n.144.

dent if the schools have not treated those complaining of sexual harassment differently based on sex.³²⁹ This conclusion is consistent with formal equality theory, because the schools are being held to the simple standard of having to treat similarly situated students, those who have complained of sexual harassment, alike regardless of sex. Title IX, on the other hand, holds schools liable for failing to respond reasonably to known sexual harassment by a student.³³⁰

Davis represents a theory of substantive equality at odds with the constitutional theory of formal equality for two reasons. First, while more an issue in the substantive due process area, the Constitution does not require a state actor to act affirmatively to remedy a problem created by a third party.³³¹ This oft-criticized principle has roots in the same formal equality notions that inform equal protection jurisprudence, as the state's failure to act is immune from scrutiny because it is, by not acting, acting neutrally. This due process conception of neutrality by inaction sometimes pours into equal protection doctrine relating to affirmative action, as the failure to take affirmative action to remedy past societal discrimination is seen as race- or gender-neutral rather than as reinforcing already existing discrimination.³³² Some courts have also applied the concept to student sexual harassment claims, holding that the Equal Protection Clause does not require an affirmative response by the school.³³³ By requiring schools to act reasonably in response to known sexual harassment by another student, Title IX rejects this notion of neutrality through inaction in the face of third-party actions.³³⁴

More important, however, is that *Davis* imposes on schools in the sexual harassment context the same type of requirement that the regulations and policy interpretation impose on schools in the athletics context. Schools are not required merely to treat similarly situated students alike; rather, they must work to remedy sexual harassment.³³⁵ In requiring schools to do

³²⁹ See *Nabozny v. Podlesny*, 92 F.3d 446, 453–54 (7th Cir. 1996); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000); see also discussion *supra* notes 253–256 and accompanying text.

³³⁰ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999).

³³¹ See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989).

³³² Kimberlé Crenshaw & Gary Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683, 1711 (1998) (“The designation of neutrality, or special treatment, or affirmative action, all depends on the baseline that one takes as the starting point.”); Siegel, *supra* note 306, at 2185–86 (“As the recent life of the colorblindness trope illustrates, civil rights rhetoric can supply ‘legitimate,’ ‘nondiscriminatory’ reasons for opposition to affirmative action and other reforms intended to break down remaining racial and gender inequalities.”).

³³³ *Morlock v. W. Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 918 (D. Minn. 1999).

³³⁴ See Erwin Chemerinsky, *Government Duty To Protect: Post-DeShaney Developments*, 19 *TOURO L. REV.* 679, 698–99 (2003).

³³⁵ Of course, the requirement from *Davis* and *Gebser* is not burdensome on the schools. Schools do not have to remedy the harassment or take any particular measures to work toward remedying the harassment; rather, all they have to do is not be clearly unreasonable in their

so, the Court has imposed on schools a mandate that appreciates the damaging effects that peer sexual harassment has on students' education, particularly that of girls and young women,³³⁶ and that forces schools to make some attempt to equalize educational opportunities that would otherwise be lost as a result of peer sexual harassment. By looking behind a practice that appears neutral on its face and requiring a remedy that attempts to substantively equalize educational access, Title IX goes far afield of equal protection formal equality theory.³³⁷

The formal equality of the Equal Protection Clause is also evident in the way it addresses discrimination based on sexual orientation. A long line of cases has refused to give any heightened scrutiny to such discrimination.³³⁸ While it seems obvious that even basic formal equality theory should require protected status for an essential identifying characteristic such as sexual orientation,³³⁹ constitutional doctrine has not developed that way. Courts have not reviewed laws discriminating based on sexual orientation under heightened scrutiny, reasoning that sexual orientation is not an immutable characteristic that should be removed from consideration in legiti-

efforts or lack thereof to remedy the harassment. *See Davis*, 526 U.S. at 648–49. There is much to criticize in this extremely low standard, and many have already done so. *See, e.g.*, articles cited *supra* note 282.

³³⁶ *See, e.g.*, Hochberg, *supra* note 20, at 240–41 (“Studies . . . show that [negative feelings stemming from sexual harassment] often translate into bouts of depression, decreased participation in the classroom, and overall poorer academic performance. Victims may try to evade their harassers by avoiding classes, modifying their schedules, skipping school, or, in extreme cases, changing schools.”); JUNE LARKIN, *SEXUAL HARASSMENT: HIGH SCHOOL GIRLS SPEAK OUT* 16 (1994) (“We can’t continue to push female students forward without acknowledging all the ways they get set back. Unless we confront the problem of sexual harassment in schools, our lofty statements about providing gender equitable education are meaningless. Harassment is a major barrier to girls’ education.”), *quoted in* Diane M. Welsh, *Limiting Liability Through Education: Do School Districts Have a Responsibility To Teach Students About Peer Sexual Harassment?*, 6 AM. U. J. GENDER & L. 165, 173 (1997); Monica L. Sherer, Comment, *No Longer Just Child’s Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2133–35 (1993) (describing effects of peer sexual harassment and concluding that “[s]exual harassment leads to diminished educational opportunity for young women”).

³³⁷ *See also* Brake, *supra* note 262, at 34 (“By replacing the legal inquiry into intent and animus with a more objective search for causation, *Davis* represents a welcome move toward a more workable and theoretically sound approach to discrimination.”).

³³⁸ For cases holding that homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes, see *Lofton v. Sec’y of the Dep’t of Children and Family Servs.*, 358 F.3d 804, 816 (11th Cir. 2004); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292–93 (6th Cir. 1997); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987). The Ninth Circuit briefly reviewed discrimination against gays and lesbians under heightened scrutiny, but the decision was quickly withdrawn. *Watkins v. U.S. Army*, 847 F.2d 1329, 1349 (9th Cir. 1988), *withdrawn*, 875 F.2d 699, 711 (9th Cir. 1989).

³³⁹ *See* David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1004 n.31 (2002) (listing sources calling for heightened equal protection scrutiny for discrimination based on sexual orientation).

mate decisionmaking.³⁴⁰ In essence, the courts have said that state action that treats gays and lesbians differently is allowed because formal equality theory allows states to treat differently those who have differences that are not classified as suspect. As a result, state action that discriminates against gays and lesbians is reviewed under the same equal protection standard as any legislation: it simply must not be irrational.³⁴¹ Also, under the current constitutional theory of formal equality, the basic requirements of *Davis* and *Rostker* prohibiting intentional sex discrimination are not offended by treating people differently based on sexual orientation.³⁴²

³⁴⁰ See, e.g., *High Tech Gays*, 895 F.2d at 573–74 (“Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes. The behavior or conduct of such already recognized classes is irrelevant to their identification.”).

³⁴¹ See *Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (applying rational basis review to find state action that discriminated based on sexual orientation unconstitutional because, being based solely on animus toward gays and lesbians, it had no rational basis).

³⁴² Some have made a compelling sex discrimination formal equality argument against discrimination based on sexual orientation. These scholars have argued that statutes that discriminate based on sexual orientation classify based on sex because they deny people, based on that classification, the ability to do something that a person of the opposite sex would be able to do. For instance, in the context of marriage, while a woman could not marry a woman, a man could; to these scholars, treating men and women differently in this way is sex discrimination. See, e.g., Nan Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL’Y 397, 411 (2001); WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 153–72 (1996); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 11–23 (1994). The theoretical link to sex discrimination is based on the imposition of heteronormativity; “the persistence of negative social and legal attitudes toward homosexuality can best be understood as preserving traditional concepts of masculinity and femininity as well as upholding the political, market and family structures premised upon gender differentiation.” Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 188; see also Hunter, *supra*, at 406–12 (arguing that laws discriminating based on sexual orientation, such as marriage laws, constitute “forcible imposition of heteronormativity,” “produce and enforce norms that privilege masculinity,” and “constrain all women”). Despite this compelling argument, courts have, for the most part, not followed suit. The formal equality argument against discrimination based on sexual orientation constituting sex discrimination is that (1) state action discriminating based on sexual orientation has no intent to treat men and women differently, and (2) the state action treats similarly situated men and women alike, as it treats gays and lesbians the same. See, e.g., Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471 (2001); Stephen Clark, *Same-Sex but Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L.J. 107 (2002); Jay Alan Sekulow & John Tuskey, *Sex and Sodomy and Apples and Oranges—Does the Constitution Require States To Grant a Right To Do the Impossible?*, 12 BYU J. PUB. L. 309 (1998); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1; see also *Lawrence v. Texas*, 539 U.S. 558 (2003) (Scalia, J., dissenting). Only a small handful of courts have adopted this argument, and only one did so under the federal Equal Protection Clause. See *Nabozny v. Podlesny*, 92 F.3d 446, 454–55 (7th Cir. 1996) (federal Constitution); *Baehr v. Lewin*, 852 F.2d 44, 64–68 (1993) (state constitution); *Brause v. Bureau of Vital Statistics*, Alaska Dep’t of Health & Soc. Servs., No. 3AN-95-6562 CI, 1998 WL 88743, at *5 (Alaska Super. 1998) (state constitution). Concurring opinions in both the Vermont Supreme Court and the Massachusetts Supreme Judicial Court have also advocated in support of this argument under their state constitutions. See *Baker v. Vermont*, 744 A.2d 864, 904–12 (Johnson, J., concurring in part and dissenting in part); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 971–72 (Mass. 2003) (Greaney, J., concurring).

The Title IX decisions discussed earlier³⁴³ demonstrate that Title IX is taking a different path with respect to sexual orientation than the Equal Protection Clause. While the cases did not recognize the plain sexual orientation discrimination claim, all looked deeper than the formal equality constraints of the Constitution and recognized the gender-enforcing nature of sexual orientation discrimination. Julie Baird describes these types of arguments that have prevailed under Title IX as recognizing “gender non-conformity” claims.³⁴⁴ Anthony Verona and Jeffrey Monks also talk about these claims as recognizing the way gender norms are forced onto students:

That sexual orientation is interwoven with gender identity and expression is manifested quite clearly in common instances of anti-gay discrimination and harassment. Many gay boys, long before engaging in same-sex sexual activity, share the experience of being taunted and teased for “acting queer” or “looking like a faggot” simply because they are not as aggressive or masculine-appearing as other boys. These boys are not harassed because of the sex of their intimate partner, of course, but because of how they express their gender. More specifically, they are harassed and bullied because of their failure to conform to the gender norms assigned to their sex (i.e., their degree of masculinity if they are male or femininity if they are female).³⁴⁵

Title IX’s concern with gender nonconformity distinguishes it from the purely formal equality theory of the Equal Protection Clause. Combined with the affirmative responsibilities the Supreme Court has placed on schools to act when faced with sexual harassment,³⁴⁶ Title IX’s recognition of gender nonconformity claims means that schools must go beyond the Equal Protection Clause’s requirement that they formally treat males and females the same with respect to gender expression and instead must attempt to create an accepting environment for all types of gender expression.

The idea that Title IX incorporates a more substantive theory of equality than the Equal Protection Clause also finds support in the textual differences noted above, as well as the history of the statute.³⁴⁷ From a purely grammatical standpoint, the use of an active voice prohibition in the Equal Protection Clause is consistent with formal equality principles, as the language prohibits the state from actively treating people differently based

³⁴³ See discussion *supra* notes 288–290 and accompanying text.

³⁴⁴ Julie A. Baird, *Playing It Straight: An Analysis of Current Legal Protections To Combat Homophobia and Sexual Orientation Discrimination in Intercollegiate Athletics*, 17 *BERKELEY WOMEN’S L.J.* 31, 60 (2002).

³⁴⁵ Anthony E. Varona & Jeffrey M. Monks, *En/gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 *WM. & MARY J. WOMEN & L.* 67, 67 (2000).

³⁴⁶ See discussion of *Davis supra* notes 331–337 and accompanying text.

³⁴⁷ See discussion *supra* Part III.A.

on a protected status such as sex. The passive voice of Title IX suggests the opposite, that the statute focuses on the experience of the person discriminated against and prohibits anything that results in discrimination against someone based on sex. This grammar-based argument, in conjunction with the theoretical basis of the doctrinal developments noted in this Part, demonstrates that Title IX reaches beyond the Constitution's guarantee of mere formal equality.³⁴⁸

Possibly even more important is the remedial basis of Title IX, as recognized throughout the legislative history of the statute.³⁴⁹ Discussions such as the following indicate the legislature's concern with the substantive results of educational antidiscrimination laws rather than with the formal equalization of opportunity:

Today [in 1972] women make up about 37 percent of the labor force. But women hold only a small portion of the desirable positions. For example, in the United States, only 2 percent of dentists and 7 percent of physicians are women. In contrast, in Denmark, 70 percent of dentists are women, while in Germany 20 percent of physicians are women. The limited presence (about 2 percent) of women as full professors in our major universities is particularly striking. This compares with an annual doctorate production of about 12 percent women.³⁵⁰

Were Congress concerned merely with the equalization of opportunity and the formal treatment of students by schools, discussions like this one, which focuses on the resulting numbers of women in professions, would have been absent from the legislative history. Likewise, Congress was concerned with remedying the "persistent, pernicious discrimination which [was] serving to perpetuate second-class citizenship for American women."³⁵¹ The reason for the concern was that "education provides access to jobs and financial security[, and] discrimination [in this area] is doubly destructive for women."³⁵² This focus on the effects of educational discrimination on women's labor prospects and financial status shows concern for women's substantive measures of equality beyond merely receiving a nondiscriminatory educational experience.

Understanding Title IX as a statute that guarantees a more substantive form of equality than the Constitution requires comports with an un-

³⁴⁸ Cf. Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 235-57 (Kimberlé Crenshaw et al. eds., 1995) (critiquing the Constitution's formal equality jurisprudence for failing to account for racism as experienced by the victims of racial inequality).

³⁴⁹ See Lewis, *supra* note 212, at 1046 & n.21.

³⁵⁰ 118 CONG. REC. 274 (1972) (statement of Sen. McGovern).

³⁵¹ 118 CONG. REC. 3935 (1972) (statement of Sen. Bayh).

³⁵² *Id.*

derstanding of the importance of education to a society that values equal opportunity. If schools were required, under Title IX, merely to act in accordance with principles of formal equality, Congress would not have mandated that girls and women receive the full and equal education that would give them the tools to participate in broader society. But, as demonstrated here, Title IX's purpose was broader—to equalize education and eliminate differences based on sex. By avoiding messy inquiries into schools' intentions, requiring schools to act to equalize athletic opportunity and prevent the barriers created by sexual harassment, and understanding the threat to education created by harassment based on sexual orientation, Title IX's broader doctrinal scope and more inclusive prohibitive language shapes schools' obligations toward girls and women in a way that the Constitution, as currently interpreted, does not. In effect, Title IX more closely approaches the ideal of guaranteeing full educational equality for girls and women.

IV. THE IMPLICATIONS OF TITLE IX'S GREATER REACH

Textually, doctrinally, and theoretically, Title IX paints a more complete version of equality than the Equal Protection Clause. Understanding this difference has ramifications for certain contested and undecided Title IX doctrinal areas. The remaining portion of this Article considers this understanding of Title IX with respect to three of the four areas discussed in Part II of this Article: the scope of Title IX, preemption of § 1983 constitutional claims, and Title IX's constitutional source.³⁵³

A. *Title IX's Scope*

After *Alexander v. Sandoval*,³⁵⁴ the scope of Title IX, the statute,³⁵⁵ has become an important issue that courts must consider before allowing litigation to continue under any of Title IX's regulations. In *Sandoval*, the Court considered the question of whether a litigant has a private right of action to enforce Title VI's disparate impact regulations,³⁵⁶ even though the Court had previously held that Title VI itself prohibited only inten-

³⁵³ This Part will not discuss the issue of the constitutionality of the three-part test of Title IX's regulations because courts have not reached opposite conclusions on the issue and the resolution of the issue has more to do with the justification for Title IX's regulations than with the statute's relationship with the Equal Protection Clause.

³⁵⁴ 532 U.S. 275 (2001).

³⁵⁵ I sometimes refer to Title IX as "Title IX, the statute" to distinguish the statute from the regulations.

³⁵⁶ *Sandoval*, 532 U.S. at 278. The Department of Justice promulgated a regulation under Title VI that forbade federal funding recipients from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . ." 28 C.F.R. § 42.104 (2004).

tional discrimination.³⁵⁷ In reaching the conclusion that there is no private right of action to enforce the disparate impact regulations,³⁵⁸ the Court reasoned that only regulations that “authoritatively construe the statute itself” are enforceable through a private cause of action because a “Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well.”³⁵⁹

Because Title IX, like Title VI, is enforceable through an implied private right of action³⁶⁰ and also has a series of regulations to enforce the statute,³⁶¹ any litigant who attempts to enforce, by way of a private lawsuit, a regulatory prohibition under Title IX will have to contend with *Sandoval*. The determinative question will be whether a particular regulation is an “authoritative interpretation of the statute.”³⁶² The comparative analysis set forth in this Article will be useful in answering this inquiry with respect to at least three of Title IX’s regulations: the regulation prohibiting discrimination based on pregnancy, the regulations prohibiting disparate impact discrimination, and the regulation prohibiting retaliation for reporting an alleged Title IX violation.

1. Pregnancy

Many commentators view the Court’s decision in *Geduldig v. Aiello*³⁶³ as an essential component of its installation of formal equality in constitutional theory.³⁶⁴ *Geduldig* concerned a challenge to California’s disability insurance system based on the fact that, for the purpose of determining who was eligible for temporary disability payments, the system excluded those who could not work because of pregnancy from the definition of disability.³⁶⁵ The Court evaluated the program under the basic equal protection

³⁵⁷ *Sandoval*, 532 U.S. at 278.

³⁵⁸ *See id.* at 293.

³⁵⁹ *Id.* at 284. Because the disparate impact regulations could not be an “authoritative interpretation” of a statute that prohibits only intentional discrimination, no private right of action exists to enforce those regulations absent an independent Congressional intent to create a private right of action to enforce the regulations separate from the statute. *See id.* at 285–86. The Court found no such independent Congressional intent. *See id.* at 288–93.

³⁶⁰ *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 678 (1979).

³⁶¹ 34 C.F.R. § 106.1–71 (2004).

³⁶² *Sandoval*, 532 U.S. at 284; *see also* *Jackson v. Birmingham Bd. of Educ.*, No. 02-1672, slip op. at 9 n.2 (U.S. Mar. 29, 2005) (noting that *Sandoval* requires interpreting the statute’s terms to determine what that language prohibits).

³⁶³ 417 U.S. 484 (1974).

³⁶⁴ *See, e.g.,* MACKINNON, *supra* note 292, at 247. Most people familiar with constitutional sex discrimination jurisprudence who read the previous Part of this Article probably wondered why it omitted discussion of pregnancy discrimination. I certainly agree that *Geduldig* forms a central part of the Court’s enshrinement of formal equality principles, but chose to withhold the discussion of the case for this Part’s consideration of Title IX’s pregnancy regulation.

³⁶⁵ *Geduldig*, 417 U.S. at 486.

rational basis standard: “Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point.”³⁶⁶ To the Court, the statute’s under-inclusiveness was justified by the state’s interest in keeping the program self-supporting, in keeping payments sufficient for disabilities covered rather than covering all disabilities inadequately, and in maintaining the contribution rate at an affordable level.³⁶⁷ The Court concluded that these reasons “provide an objective and wholly noninvidious basis for the State’s decision not to create a more comprehensive insurance program than it has.”³⁶⁸

Only briefly did the Court consider the sex discrimination issue raised by the disability program. The Court wrote that there was “no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program.”³⁶⁹ Articulating the basic formal equality argument against finding that discrimination based on pregnancy is discrimination based on sex, the Court stated: “There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.”³⁷⁰ In a footnote, the Court elaborated:

The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in [prior sex discrimination cases]. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the

³⁶⁶ *Id.* at 495.

³⁶⁷ *Id.* at 496.

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 496–97.

first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.³⁷¹

Although the Court decided the case in 1974, when only the first of the string of cases that culminated in intermediate scrutiny for classifications based on gender had been decided,³⁷² its holding as to what constitutes a sex-based classification survived,³⁷³ as the Supreme Court relied on it in its more recent decision of *Bray v. Alexandria Women's Health Clinic*.³⁷⁴

Critiques of *Geduldig* have been legion.³⁷⁵ The basic criticism from feminists who look beyond mere formal equality is that the Court's holding subordinates women by failing to take into account this unique biological difference between the sexes.³⁷⁶ As Deborah Ellis has written, "because only women can become pregnant, women's equality is violated when reproductive freedom is denied. Women's reproductive capacity, moreover, has long served as the rationale to deny women equal opportunities in the workforce and the political process."³⁷⁷ Thus, any conception of feminism that has as a goal a more substantive form of equality would include discrimination based on pregnancy as discrimination based on sex because of this concern about subordinating women based on biological difference.³⁷⁸

³⁷¹ *Id.* at 496 n.20.

³⁷² See generally *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973). *Craig v. Boren*, 429 U.S. 190 (1976), which set forth the intermediate scrutiny standard (although not calling it such), came two years later.

³⁷³ Although its holding as to what constitutes discrimination based on sex is still good law, the Court has not followed *Geduldig's* ultimate holding—that discrimination based on pregnancy is constitutional—in areas outside of insurance programs. See *Turner v. Dep't of Employment Sec.*, 423 U.S. 44, 46 (1975) (holding that presumption against working while pregnant violated due process principles requiring individualized determinations).

³⁷⁴ 506 U.S. 263, 271 (1993) (citing holding of *Geduldig* for proposition that animus directed at those who seek an abortion is not the same as animus toward women); see also *Maher v. Roe*, 432 U.S. 464, 470–71 (1977) (applying rational basis equal protection review to restrictions prohibiting Medicaid funding for abortions); *Harris v. McRae*, 448 U.S. 297, 322–24 (1980) (same).

³⁷⁵ See Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 (1984) ("Criticizing *Geduldig* has since become a cottage industry. Over two dozen law review articles have condemned both the Court's approach and the result. In addition, other general analyses of constitutional doctrine include denunciations of the decision.").

³⁷⁶ Sylvia Law argues

that laws governing reproductive biology should be scrutinized by courts to ensure that (1) the law has no significant impact in perpetuating either the oppression of women or culturally imposed sex-role constraints on individual freedom or (2) if the law has this impact, it is justified as the best means of serving a compelling state purpose.

Id. at 1008–09.

³⁷⁷ Deborah A. Ellis, *Protecting "Pregnant Persons": Women's Equality and Reproductive Freedom*, 6 SETON HALL CONST. L.J. 967, 972 (1996) (citing *Hoyt v. Florida*, 368 U.S. 57, 62 (1961); *Muller v. Oregon*, 208 U.S. 412, 421 (1908); *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring)).

³⁷⁸ Congress recognized this problem, at least with respect to employment, in enacting

Title IX's regulations, unlike the Equal Protection Clause, prohibit discrimination based on pregnancy. Section 106.40(b)(1) of Title IX's regulations provides: "A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom"³⁷⁹ After *Sandoval*, this regulation is not enforceable through a private right of action if it is not an "authoritative interpretation" of Title IX.³⁸⁰

The important determination then is whether Title IX itself prohibits discrimination based on pregnancy. If Title IX incorporated the equal protection standard of *Geduldig*, discrimination based on pregnancy would not constitute discrimination based on sex under Title IX.³⁸¹ However, as demonstrated in this Article, Title IX and the Equal Protection Clause are different historically, doctrinally, and theoretically. Historically, in the lay before procedure used for Title IX's regulations, Congress approved the pregnancy regulation as consistent with Title IX; doctrinally, Title IX prohibits a broader range of actions than the Equal Protection Clause; and theoretically, Title IX's standards aim for a more substantive form of equality. Prohibiting discrimination based on pregnancy, a form of discrimination that subordinates women based on a unique biological difference, naturally follows from this more substantive version of equality. Therefore, even after *Sandoval*, a litigant should have a private right of action to enforce Title IX's regulation prohibiting discrimination based on pregnancy because the regulation is an "authoritative interpretation" of the statute. Tara Brady, the basketball player discussed in the Introduction who alleged that her school denied her an education based on pregnancy,³⁸² should have been able to have her day in court under Title IX.

the Pregnancy Discrimination Act. See 42 U.S.C. § 2000e (2000).

³⁷⁹ 34 C.F.R. 106.40(b)(1) (2004).

³⁸⁰ See *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001). Two recent articles have addressed Title IX's pregnancy prohibition but neither reaches a definitive or thoroughly reasoned conclusion about *Sandoval's* application. See Adina H. Rosenbaum, Note, *Citizen-Soldier-Parent: An Analysis of Virginia Military Institute's Parenting Policy*, 78 N.Y.U. L. REV. 1262, 1275 n.74 (2003) (arguing that even if *Sandoval* were interpreted to allow private rights of action to enforce disparate impact cases under Title IX, this interpretation would not apply to an action brought by the government against the Virginia Military Institute); Melissa E. Scott, Comment, *No Pregnancy and No Parenthood: The Likely Legitimacy of VMI's Parenting Policy*, 76 TEMP. L. REV. 411, 433 (2003) (concluding that, because Title IX mirrors Title VI, it is "extremely likely" that courts will apply *Sandoval* to Title IX).

³⁸¹ That *Geduldig* still applied rational basis scrutiny to the disability program at issue in the case, see *Geduldig v. Aiello*, 417 U.S. 484, 495–96 (1974), would be of no import to Title IX, as Title IX prohibits discrimination based on sex only. Unlike the Equal Protection Clause, Title IX does not concern itself with classifications based on categories other than sex or classifications that are otherwise irrational.

³⁸² See discussion *supra* notes 1–7 and accompanying text.

2. *Disparate Impact Discrimination*

As noted earlier in this Article,³⁸³ there is disagreement in the lower courts over whether Title IX prohibits some form of disparate impact discrimination. Some courts have held that Title IX prohibits intentional discrimination only, while others have upheld claims based on disparate impact. The Supreme Court has not addressed the issue, although in an oddly revisionist portion of *Sandoval*, the Court noted that its decision in *Cannon* really was a holding “that Title IX created a private right of action to enforce its ban on intentional discrimination.”³⁸⁴ Despite the questionable nature of this revisionist restatement of *Cannon*’s holding,³⁸⁵ this new reading of *Cannon* still leaves open the possibility that Title IX prohibits disparate impact discrimination as well as intentional discrimination. As several of Title IX’s regulations prohibit actions that have a disparate impact based on sex,³⁸⁶ the disparate impact inquiry is the same as the *Sandoval*-type inquiry for pregnancy.

The conclusions reached in this Article clearly speak to this matter. Although the Supreme Court has in dicta stated that Title IX prohibits intentional discrimination,³⁸⁷ it has never stated that Title IX’s coverage is limited *only* to intentional discrimination. In fact, its conclusions with respect to sexual harassment, especially with respect to sexual harassment by students, indicate that Title IX is less concerned with intent and more concerned with

³⁸³ See discussion *supra* notes 247–248 and accompanying text.

³⁸⁴ *Sandoval*, 532 U.S. at 282; see also *Jackson v. Birmingham Bd. of Educ.*, No. 02-1672, slip op. at 5–9, 13, 14 (U.S. Mar. 29, 2005) (referring repeatedly to Title IX’s prohibition of “intentional” discrimination). *Sandoval* notes that *Cannon* “had no occasion to consider whether the right reached regulations barring disparate-impact discrimination.” *Id.* The Court stated in a footnote that only Justice Powell’s dissent in *Cannon* discussed the issue, concluding that Title IX, like Title VI, prohibited only intentional discrimination because of *Bakke*. *Id.* at 282 n.2 (citing *Cannon*, 441 U.S. at 748 n.19 (Powell, J., dissenting)).

³⁸⁵ This reading of *Cannon* is curious, as the *Cannon* Court, other than in dissent, said nothing about intentional discrimination in its decision. The *Sandoval* Court took the passage from *Cannon* noting respondents’ concession arguendo that petitioner’s “applications for admission to medical school were denied by the respondents because she is a woman” to mean that the Court assumed intentional discrimination. See *Sandoval*, 532 U.S. at 282 (citing *Cannon*, 441 U.S. at 680); however, no such conclusion is warranted because the Court could have merely been saying that disparate impact discrimination was a form of discrimination “because [the applicant] was a woman,” but that it was not going to address whether that constituted discrimination under Title IX in that opinion. The Court’s assumption reveals nothing about intentional discrimination versus disparate impact.

³⁸⁶ See 34 C.F.R. § 106.21(b)(2) (2004) (admissions testing); *id.* § 106.22 (admissions preference based on attending single-sex school); *id.* § 106.23(b) (recruiting at single-sex schools); *id.* § 106.34(d) (skill or progress standards in physical education classes); *id.* § 106.37(b) (sex-specific scholarships); *id.* § 106.51(a)(3) (contractual relationships with employment-related entities); *id.* § 106.51(a)(4) (employment preference based on attending single-sex school); *id.* § 106.52 (employment testing); *id.* § 106.53(b) (employment recruiting at single-sex schools).

³⁸⁷ See cases cited *supra* note 245 and accompanying text.

causation.³⁸⁸ The language of Title IX also speaks of actions that have the effect of discriminating based on sex.³⁸⁹ Furthermore, although *Sandoval* forecloses a disparate impact lawsuit based on Title VI, and Title IX and Title VI phrase their prohibitions against discrimination with substantially the same language, the Court has stated that the two are to be given independent interpretations when their distinct histories require.³⁹⁰

As demonstrated above,³⁹¹ at its root, Title IX has a fundamentally more substantive conception of equality than that envisioned by the Equal Protection Clause, one that looks to practices that result in keeping women from educational opportunities and tries to remedy them to create equality in education. More substantive conceptions of equality tend to accept that a showing of disparate impact is enough to prove discrimination. As Professor David Schwartz has written, “[i]t is not surprising that [substantive equality] theorists have long been drawn to disparate impact theory as an exemplar, and have tended to argue for universal or wider application of a disparate impact theory.”³⁹² With this theoretical understanding of Title IX, as well as its plain language and doctrinal developments, it follows that Title IX’s disparate impact regulations should be considered an “authoritative interpretation” of Title IX’s statutory prohibition and therefore enforceable in a private right of action.

³⁸⁸ See discussion *supra* notes 257–262 and accompanying text.

³⁸⁹ See discussion *supra* Part III.A.

³⁹⁰ See *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 529 (1982) (citations omitted) (“The meaning and applicability of Title VI are useful guides in construing Title IX, therefore, only to the extent that the language and history of Title IX do not suggest a contrary interpretation.”). This conclusion may appear to put equality advocates in an awkward position of saying that sex discrimination should receive heightened protection over race discrimination. Such a conclusion though ignores the descriptive rather than normative conclusion that this Article reaches. Race and sex discrimination *should* be prohibited similarly, and both constitutional and statutory prohibitions against race and sex discrimination *should* go beyond mere formal equality. However, when Title IX was enacted, Congress legislated against an inadequate constitutional backdrop for sex discrimination and felt the need to fill the gap; the same cannot be said for Title VI, and the differences discussed in this Article reflect such difference in congressional intent. More fundamentally, this Article’s conclusion that Title IX is broader than the Equal Protection Clause does not foreclose courts from more broadly interpreting Title VI in the future to bring Title VI in line with more substantive theories of equality.

³⁹¹ See discussion *supra* Part III.C.2.

³⁹² David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1772–73 (2002) (citing CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 206–08 (1979); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 5 (1995); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1034 (1986)).

3. Retaliation³⁹³

The most heavily litigated post-*Sandoval* Title IX issue has been whether there is a private right of action under the regulation that prohibits retaliation. Title IX's regulations incorporate Title VI's procedural regulations, one of which prohibits retaliation for complaining of a violation of the statute.³⁹⁴ After *Sandoval*, most of the lower courts that have addressed the issue have found that there is no private right of action for retaliation under Title IX.³⁹⁵ For instance, the Eleventh Circuit, reasoning that Title IX's plain language says nothing about retaliation or the ability to enforce regulations promulgated under the statute, concluded that it was not "free to imply a private right of action to redress [the regulation]."³⁹⁶

A few lower courts, however, found that, after *Sandoval*, there is a private right of action under the retaliation regulation. The first to do so, the Western District of Kentucky, reasoned that because Title IX prohibits intentional discrimination, it also prohibits retaliation because retaliation is a form of intentional discrimination.³⁹⁷ The court based its conclusion on Supreme Court precedent holding that "a prohibition on discrimination should be judicially construed to include an implicit prohibition on retaliation against those who oppose the prohibited discrimination."³⁹⁸

The Western District of Kentucky relied on a similarly reasoned Fourth Circuit decision about retaliation under Title VI's regulations.³⁹⁹ In *Peters v. Jenney*,⁴⁰⁰ the Fourth Circuit stated that "[r]etaliation of this sort bears such a symbiotic and inseparable relationship to intentional racial discrimination that an agency could reasonably conclude that Congress meant

³⁹³ The issue of whether Title IX includes a claim for retaliation was not addressed earlier in this Article because, to the best of my knowledge, none of the courts addressing the issue have directly commented on Title IX's relationship to the Equal Protection Clause. However, as the analysis in this Article is instructive with respect to retaliation, I include it at this point in the Article.

³⁹⁴ See 34 C.F.R. § 106.71 (2004) (incorporating Title VI regulation prohibiting retaliation, 34 C.F.R. § 100.7(e) (2004)). Section 100.7(e) provides:

No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

34 C.F.R. § 100.7(e) (2004).

³⁹⁵ See, e.g., *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1346 (11th Cir. 2002), *reversed*, No. 02-1672, slip op. (U.S. Mar. 29, 2005); *Mock v. S.D. Bd. of Regents*, 267 F. Supp. 2d 1017 (D.S.D. 2003); *Atkinson v. Lafayette Coll.*, No. CIV.A. 01-CV-2141, 2002 WL 123449 (E.D. Pa. Jan. 29, 2002) (appeal pending before the Third Circuit).

³⁹⁶ *Jackson*, 309 F.3d at 1346, *reversed*, No. 02-1672, slip op. (U.S. Mar. 29, 2005).

³⁹⁷ *Johnson v. Galen Health Inst., Inc.*, 267 F. Supp. 2d 679, 695 (W.D. Ky. 2003).

³⁹⁸ *Id.* at 696 (citing *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969); *Perry v. Sindermann*, 408 U.S. 593 (1972)).

³⁹⁹ *Id.* at 695 (relying on *Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003)).

⁴⁰⁰ 327 F.3d 307 (4th Cir. 2003).

to prohibit both, and to provide a remedy for victims of either.”⁴⁰¹ The court concluded that, after *Sandoval*, a litigant could bring a private right of action under Title VI’s retaliation regulation.⁴⁰² In a subsequent Title IX case, the Fourth Circuit summarily held that “the decision in *Peters* compels the conclusion that Title IX likewise includes a private right of action for retaliation.”⁴⁰³

The Supreme Court resolved this split of authority by concluding that Title IX does include a private right of action for retaliation.⁴⁰⁴ The Court took the straightforward approach of reviewing case law stating that retaliation is a part of any intentional discrimination prohibition and thus concluded that Title IX’s prohibition on intentional discrimination was intended to include retaliation as well.⁴⁰⁵

However, if the Court had wanted to delve deeper into the underpinnings of Title IX, its quest to answer the Title IX retaliation question could have benefited from the analysis in this Article as well. Title IX’s more substantive conception of equality includes prohibiting acts that perpetuate sex-based inequality in education.⁴⁰⁶ The Supreme Court, referring to retaliation for complaining of racial discrimination in property transactions, has stated that allowing retaliation “would give impetus to the perpetuation of racial restrictions on property.”⁴⁰⁷ Title IX’s similar concerns about sex-based discrimination in education lead to the same conclusion: its statutory prohibition includes a prohibition against retaliation, and the retaliation regulation can be enforced after *Sandoval* through a private right of action.

B. Preemption of § 1983 Equal Protection Clause Claims

As already described in Part II, there is a split among the circuits as to whether a litigant can bring both a Title IX claim and an Equal Protection Clause claim brought through § 1983.⁴⁰⁸ To reiterate the applicable standard, for claims of constitutional preemption, courts look to whether the statutory and the constitutional claim are “virtually identical” and to whether

⁴⁰¹ *Id.* at 318.

⁴⁰² *Id.* at 318–19.

⁴⁰³ *Litman v. George Mason Univ.*, No. 01-2128, slip op. at 1, 2004 WL 345758, at *1 (4th Cir.) (reversing *Litman v. George Mason Univ.*, 156 F. Supp. 2d 579 (2001)); *see also* *AB v. Rhinebeck Cent. Sch. Dist.*, 224 F.R.D. 144, 151–53 (S.D.N.Y. 2004) (finding retaliation claim under Title IX, but without any analysis under *Sandoval*).

⁴⁰⁴ *Jackson v. Birmingham Bd. of Educ.*, No. 02-1672, slip op. (U.S. Mar. 29, 2005).

⁴⁰⁵ *Id.* at 4 (“Retaliation against a person because that person has complained of sex discrimination is another form of intentional discrimination encompassed by Title IX’s private cause of action.”); *see also* Bradford C. Mank, *Are Anti-Retaliation Regulations in Title VI or Title IX Enforceable in a Private Right of Action: Does Sandoval or Sullivan Control This Question?*, 35 SETON HALL L. REV. 47, 104–06 (2004).

⁴⁰⁶ *See* discussion *supra* Part III.C.2.

⁴⁰⁷ *Sullivan v. Little Hunting Park*, 396 U.S. 229, 237 (1969).

⁴⁰⁸ *See* discussion *supra* Part II.B.

Congress intended for the statutory claim to be the “exclusive avenue” for plaintiffs to redress denials of their rights.⁴⁰⁹ Based on the analysis in this Article, Title IX and Equal Protection Clause claims should not be considered virtually identical. Title IX provides greater protection from sex discrimination than the Equal Protection Clause does. Therefore, Title IX claims should not preclude equal protection claims, regardless of the comprehensiveness of Title IX’s remedial scheme, because the two prohibitions against sex discrimination are not identical.⁴¹⁰ This conclusion is contrary to the conclusion reached by the Seventh Circuit, the only circuit court to have discussed the “virtually identical” issue,⁴¹¹ as well as the three commentators who have addressed the issue,⁴¹² but is the correct analysis based on the previously described differences in language, history, doctrine, and theory.⁴¹³

C. Sovereign Immunity

The issue of Title IX’s constitutional source arises when state schools raise the defense of sovereign immunity in Title IX litigation. Although every court to have addressed the issue has concluded that a state has no defense of sovereign immunity in a Title IX lawsuit, courts are split as to the reason. Some have concluded that Title IX is a Spending Clause statute and that states accepting federal money waive their sovereign immunity; others have concluded that Title IX is a statute enacted under both the Spending Clause and Section 5 of the Fourteenth Amendment and that Congress validly abrogated sovereign immunity under Section 5.⁴¹⁴

⁴⁰⁹ *Smith v. Robinson*, 468 U.S. 992, 1009 (1984).

⁴¹⁰ Resolving the issue based on this analysis makes it unnecessary to address the messy issue of whether, in answering the preemption question, Title IX’s remedial scheme includes the implied cause of action or just the statutory agency enforcement process. One court noted:

All of the Circuits addressing the issue have recognized that monetary damages are available under Title IX’s implied right of action. The key difference among the decisions is that some consider the implied right of action to be evidence of a comprehensive scheme, while others do not. . . . The Circuits which have found preemption have held that an implied right of action is evidence of Congressional intent to make Title IX the exclusive remedy for constitutional claims. On the other hand, the Circuits holding that Title IX’s statutory scheme does not supplant § 1983 for constitutional and statutory claims have cited the statute’s sparse express remedies as evidence that Congress did not intend it to be a comprehensive scheme.

Doe v. Old Rochester Reg’l Sch. Dist., 56 F. Supp. 2d 114, 118 (D. Mass. 1999).

⁴¹¹ *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 861 (7th Cir. 1996) (“Waid had a statutory right under Title IX that was essentially identical to her constitutional rights against intentional discrimination.”).

⁴¹² Mank, *supra* note 117, at 368–77; Burke, *supra* note 14, at 1517; Zwibelman, *supra* note 14, at 1479–80.

⁴¹³ See discussion *supra* Part III.

⁴¹⁴ See discussion *supra* Part II.C.

The conclusion reached in this Article raises the question of whether Congress could have enacted Title IX pursuant to Section 5 of the Fourteenth Amendment given that Title IX provides protection from sex discrimination above and beyond what the Equal Protection Clause provides. The Supreme Court recently discussed the issue of “prophylactic” Section 5 legislation and stated that

Congress may, in the exercise of its § 5 power, do more than simply proscribe conduct that we have held unconstitutional. “‘Congress’ power ‘to enforce’ the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.’”⁴¹⁵

Valid prophylactic legislation must exhibit “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁴¹⁶ One commentator’s analysis of this issue concluded that, even if Title IX has a broader sweep than the Equal Protection Clause, it is consistent with the Constitution and within Congress’s power under Section 5 of the Fourteenth Amendment.⁴¹⁷ After *Nevada Department of Human Resources v. Hibbs*,⁴¹⁸ that conclusion seems even stronger. In *Hibbs*, the Supreme Court found that the Family and Medical Leave Act, which requires employers, including state employers, to grant leave to employees, was properly classified as prophylactic legislation because Congress aimed to fight discrimination based on sex classifications⁴¹⁹ and did so in a reasonable manner, despite its affirmative requirement.⁴²⁰ Likewise, Title IX, which provides a more affirmative requirement in the interest of remedying discrimination based on sex, should be considered valid legislation under Section 5 of the Fourteenth Amendment.

⁴¹⁵ *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 727 (2003) (quoting *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000))); *see also* *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966)).

⁴¹⁶ *Flores*, 521 U.S. at 520.

⁴¹⁷ Hochberg, *supra* note 20, at 275.

⁴¹⁸ 538 U.S. 721 (2003).

⁴¹⁹ The court noted in *Hibbs*:

Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test—it must “serv[e] important governmental objectives” and be “substantially related to the achievement of those objectives,” *Virginia*, 518 U.S. at 533—it was easier for Congress to show a pattern of state constitutional violations.

Id. at 736.

⁴²⁰ *Id.* at 738 (comparing Family and Medical Leave Act to Title VII and stating that a mere prohibition on sex discrimination, like in Title VII, would not be enough because it would allow states to “provide for no family leave at all”).

Nonetheless, this conclusion does not make much of a doctrinal difference. The Court has repeatedly stated that Title IX is Spending Clause legislation,⁴²¹ and this Article's conclusion that Title IX is broader than the Equal Protection Clause does not alter that analysis.⁴²² All the courts addressing the Spending Clause-basis of Title IX have agreed that states have waived their sovereign immunity when they accepted federal funds.⁴²³ Therefore, even if the conclusion reached here about Congress's additional Fourteenth Amendment authority for enacting Title IX is wrong, Title IX's full impact on state educational institutions would remain in place.

V. CONCLUSION

Title IX is certainly not a panacea. On its face, there are many institutions and practices exempt from its reach.⁴²⁴ Its regulations allow for sex segregation in athletics,⁴²⁵ a practice that is controversial and possibly unconstitutional.⁴²⁶ The standard by which courts judge institutions when their employees and students sexually harass students is woefully inadequate.⁴²⁷ And, there is some evidence that schools trying to expand athletic opportunities for women in order to comply with Title IX do so in a way that hurts women of color.⁴²⁸

⁴²¹ See cases cited *supra* note 133.

⁴²² *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981), requires that Spending Clause legislation give recipients of federal funds fair notice of the requirements imposed by the legislation. This Article's conclusion about the breadth of Title IX is not inconsistent with Title IX's Spending Clause origins because "[t]he Supreme Court has explained that so long as a spending condition has a clear and actionable prohibition of discrimination, it does not matter that the manner of that discrimination can vary widely." *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004). Title IX has a clear prohibition against discrimination, so its broad protections are compatible with its Spending Clause origins. See *id.* (drawing from *Davis's* conclusion that Title IX protects against student-on-student harassment even though Title IX's language is not that specific).

⁴²³ See cases cited *supra* note 143.

⁴²⁴ 20 U.S.C. § 1681(a)(1)–(9) (1994).

⁴²⁵ 34 C.F.R. § 106.34(c) (2004) ("This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.").

⁴²⁶ See generally Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381 (2000).

⁴²⁷ See Cohen, *supra* note 267, at 328–35.

⁴²⁸ See Tonya M. Evans, *In the Title IX Race Toward Gender Equity, the Black Female Athlete Is Left To Finish Last: The Lack of Access for the "Invisible Woman,"* 42 HOW. L.J. 105, 105 (1998) ("To the extent that the main thrust of solutions to gender inequity and a lack of adherence to Title IX mandates has been the addition of opportunity in the country club sports or those sports not traditionally accessible to Black women, we lose yet again."); cf. Alfred Dennis Mathewson, *Black Women, Gender Equity and the Function at the Junction*, 6 MARQ. SPORTS L.J. 239, 250–51 (1996) (acknowledging that Title IX has increased sports opportunities for black women but noting that "the efficacy of Title IX to remedy the historical station of Black women in sports is limited" because of inadequate access to equipment and specialized facilities).

Yet, for the areas Title IX does cover, the statute has emerged as a superior source for educational equality. There is still a long road to travel in providing women and girls, and in some circumstances men and boys as well, full educational opportunities and access regardless of their sex. But, in Title IX, Congress and the courts have given students a tool that provides greater protection against discrimination, as well as an affirmative avenue for reform, than the Constitution. In light of the criticism heaped on the formalistic view of constitutional antidiscrimination law as interpreted by the Supreme Court, Title IX's advances are a welcome addition to the anti-discrimination pantheon and a possible model for future advances in other areas of sex discrimination law.

