

# Brigham Young University Education and Law Journal

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Volume 2007 | Number 1

Article 3

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Spring 3-1-2007

## Re-imagining Public Enforcement of Title IX

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# RE-IMAGINING PUBLIC ENFORCEMENT OF TITLE IX

*Julie A. Davies\* and Lisa M. Bohon\*\**

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\* Professor of Law, University of the Pacific, McGeorge School of Law. Thanks to Professors Brian Landsberg, Michaela White, and Sarah Redfield for their thoughtful comments. Sarah Redfield was instrumental in facilitating distribution of the questionnaire at a Franklin Pierce/University of Maine conference on Education Law. A special thanks to my research assistants over the course of this project: Jennifer Chapman, Brandon Dias, Patricia Eichar, Erin Hiley, Christina Morkner-Brown, and Brian Jones.

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I. INTRODUCTION

Title IX of the Education Amendments Act of 1972,<sup>1</sup> like other civil rights statutes, gave the federal government a crucial part to play in the eradication of discrimination,<sup>2</sup> but legal developments, experience with implementation of the enforcement strategy, and the progress made in the last generation make it important to reassess and rethink the

1. Title IX provides, in part: “No person . . . shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a) (2000).

2. See ROY L. BROOKS ET AL., CIVIL RIGHTS LITIGATION, CASES AND PERSPECTIVES 4 (2d ed. 2000) (stating that “basic civil rights perspectives have in common a fundamental belief that governmental regulation of individual or institutional behavior through laws banning discrimination or subordination is the best available way to fully or partially resolve the American race problem”). After the Civil War, the states had not adhered to the constitutional mandates of the Fourteenth Amendment. The nation was divided by a racial caste system that undermined national integrity and unity. BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE 27 (1997). Further, Southern states strongly resisted the Supreme Court’s desegregation rulings. See U.S. COMM’N ON CIVIL RIGHTS, 1961 COMMISSION ON CIVIL RIGHTS REPORT 65–77 (1961) (illustrating the resistance of several states, including passing of legislation removing compulsory attendance laws so white students did not have to attend desegregated schools and closing desegregated schools by pulling funding). Thus, many scholars believe federal intervention was and remains necessary. See Otis B. Grant, *Rational Choice or Wrongful Discrimination? The Law and Economics of Jury Nullification*, 14 GEO. MASON U. CIV. RTS. L.J. 145, 184 (2004) (arguing that since the reduction in federal enforcement of civil rights, there has been a rise in segregation); Michael Honey, *A Dream Deferred: After Bloody Battles for Desegregation, Blacks in Memphis are Still Behind*, 278 THE NATION 36 (May 3, 2004) (providing examples of successful Civil Rights litigation); see also Dennis D. Parker, *Are Reports of Brown’s Demise Exaggerated? Perspectives of a School Desegregation Litigator*, 49 N.Y.L. SCH. L. REV. 1069, 1080–82 (praising the ideas and successes of *Brown v. Board of Education*, 347 U.S. 483 (1954), for positive social and educational results). Critical theorists, however, challenge both the motives and the efficacy of civil rights laws, characterizing them as “aimed mainly at assuaging white guilt” and constituting “justice ‘on the cheap.’” Richard Delgado, Book Note, *Enormous Anomaly? Left-Right Parallels in Recent Writing About Race*, 91 COLUM. L. REV. 1547, 1554 (1991); Derrick A. Bell Jr., *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. SCH. L. REV. 1053, 1056 (arguing that progress through civil rights laws occurs only to the extent it is consistent with white self-interest). See also MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000) (theorizing that the civil rights movement arose to improve foreign relations after negative Russian propaganda regarding American racism surfaced during the Cold War).

government's role.<sup>3</sup> By most accounts Title IX has been extraordinarily successful in addressing the issues that prompted its enactment, so it is appropriate to identify the remaining challenges and to consider how federal enforcement resources should be marshaled in the future to best fulfill the public enforcement function. This article initiates that discussion with the goal of clarifying and strengthening the government's impact in future enforcement and the hope of gaining insights that may inform the government's public enforcement strategy for other civil rights statutes as well. As a result of this study, we suggest two primary changes: first, that the government disengage from complaint resolution while strengthening and reinforcing state and local enforcement and prevention efforts, and second, that the government's intermediate enforcement authority be strengthened.

To rethink the federal role in addressing this "second generation"<sup>4</sup> of sex discrimination in education, we begin by explaining why Title IX is the focus of our study and by describing its basic enforcement structure. We then discuss and evaluate private and public enforcement challenges and consider the outcome-based approach embodied by the No Child Left Behind Act. We conclude with specific suggestions as to the focus of public enforcement of Title IX in the future. These recommendations are informed, in large part, by an understanding of how Title IX is, in actuality, enforced. This knowledge was gathered from interviews with a number of individuals responsible for Title IX implementation and compliance at the state and local levels<sup>5</sup> and a questionnaire distributed to attendees at an education law conference. The interviews and questionnaire responses, which were quite different from what we anticipated, are useful tools in evaluating strategies to maximize enforcement strategy in the future.

Given our belief in the value and potential of Title IX, the proposal that the federal enforcement strategy must highlight enforcement and prevention at a local level may be surprising. There are a number of reasons for this prescription. First, as Susan Sturm has noted, when discrimination has become less overt, it is less likely to garner the

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3. Scholars have long recognized that elimination of the most basic forms of discrimination leads to an evolution of the issues to tackle rather than complete eradication of the problem. Following school desegregation, for example, second generation issues requiring attention involved "use of academic grouping and disciplinary processes in order to separate black students from white students." KENNETH J. MEIER ET AL., *RACE, CLASS AND EDUCATION, THE POLITICS OF SECOND GENERATION DISCRIMINATION* 9 (1989).

4. Susan Sturm uses the term to describe the phenomenon in the employment discrimination area. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468 (2001).

5. For a description of the methodology, see *infra* notes 148–149 and accompanying text.

attention of educational policy makers and more likely to fall beyond traditional enforcement efforts.<sup>6</sup> Second, federal priorities are dictated by those in power at any given time and thus subject to significant fluctuation. Third, limitations in funding federal enforcement make delegation of responsibilities an attractive supplement to ongoing efforts.<sup>7</sup> Finally, education has long been a product of state and local efforts,<sup>8</sup> and progress in combating sex discrimination has become accepted well enough that states and localities should be encouraged to reassume their role as experimental laboratories to pilot solutions that work.<sup>9</sup> Individuals who enforce Title IX at local levels, whether as school administrators, compliance officers or legal counsel, already handle the bulk of Title IX enforcement; they are more numerous than federal employees.<sup>10</sup> They are more keenly aware of the problems facing their communities and institutions than are federal enforcement personnel and can respond quickly to these problems. Ultimately, they are held more accountable when students fail.

Certain aspects of the Office for Civil Rights's (OCR) current Title IX enforcement strategy already support this goal,<sup>11</sup> but more can and should be done. By strengthening OCR's enforcement options short of fund termination, encouraging true enforcement partnerships between federal enforcement staff and those who implement Title IX, and promoting experimentation by fund recipients to tackle the seemingly insoluble problems, progress in delivering equal educational opportunities to students of both sexes will continue.

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6. Sturm, *supra* note 4, at 468–69.

7. See *infra* text accompanying notes 104–124.

8. Indeed, OCR's website informs readers that the federal role in education is limited due to the Tenth Amendment and that most education policy is decided at state and local levels. U.S. Dep't of Educ., Overview, <http://www.ed.gov/policy/landing.jhtml?src=rt> (last visited Mar. 20, 2007).

9. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The suggestion is not that the federal government relinquish its interest in enforcing non-discrimination laws governing education, but rather that it recognize that structural and political changes in state and local governments and their assumption of enforcement responsibilities under the current structure make them the natural vehicle to confront remaining gender-based obstacles in the educational system. See *infra* notes 241–244 and accompanying text for a comprehensive description of this role.

10. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., ANNUAL REPORT TO CONGRESS: FISCAL YEAR 2004, 3 (2005), available at <http://www.ed.gov/print/about/reports/annual/ocr/annrpt2004/report.html>. The report indicates that OCR had a full-time-equivalent staff of 655 persons. At the same time, 14,559 school districts, 4,168 colleges and universities, and 5,059 institutions conferring certificates below the associate degree level were covered by the civil rights laws that the agency enforces. Title IX's regulations require that there be a point-person for compliance for each funding recipient. 34 C.F.R. § 106.8(a) (2005).

11. See *infra* text accompanying notes 72–79.

## II. WHY TITLE IX AND WHY PUBLIC ENFORCEMENT?

Title IX has been so successful that one might question its selection as the topic of a study that seeks to assess and further the government's public enforcement function. Arguably elimination of sex discrimination in education has been accomplished, and for that reason, Title IX ought not occupy much federal time or money.<sup>12</sup> Even some of Title IX's beneficiaries are so far beyond the era of rampant sex discrimination that they have no awareness of Title IX and its significance.<sup>13</sup> While these arguments are not specious, a close examination of the reality of today's educational experience reveals that despite the progress, different and more difficult challenges remain.

Notwithstanding Title IX's success, various legal issues that have been the subject of media attention and legal action remain outstanding. For example, Title IX continues to be controversial because disputes regarding the allocation of resources to men's and women's athletic teams are ongoing.<sup>14</sup> Sexual harassment, which is actionable under Title IX,<sup>15</sup> continues to be alleged and publicized in prominent educational programs<sup>16</sup> as well as litigated in a stream of less visible cases.<sup>17</sup> A

12. A former Deputy Assistant Attorney General formerly with the Civil Rights Division expressed this view generally when asked about whether civil rights issues should be an area of focus in the last presidential election. His opinion was that the era when such matters were of central national concern had passed because the work had been done. Interview by Emil Guillermo with Roger Clegg, *in Insight* (Capital Public Radio broadcast October 8, 2004).

13. When pro tennis star Jennifer Capriati was interviewed in 2002 and informed that the Bush administration was contemplating changes to Title IX, she commented that she had no idea what Title IX was. Karen Blumenthal, *Title IX's Next Hurdle*, WALL ST. J., July 6, 2005, at B1.

14. The Supreme Court recently decided *Jackson v. Birmingham Board of Education*, involving a plaintiff teacher and girls' basketball coach who was allegedly fired for complaining that the girls' basketball team did not have equal funding or access to equipment or facilities. 125 S. Ct. 1497, 1502–04 (2005) (holding that retaliatory firing of whistleblowers is actionable under Title IX's private right of action); George Vecsey, *A High School Coach Blows the Whistle*, N.Y. TIMES, Mar. 30, 2005, at D1 (reciting inequities between the girls' and boys' teams involved in *Jackson*, including "unequal budgets, no ice for the girls' swollen ankles, 'the girls' J.V. eliminated but not the boys' J.V.'"); see also Erik Brady, *Women's Groups, OCR Spar over Title IX Surveys*, USA TODAY, May 17, 2005, at 10C (discussing OCR's recent move to define compliance by correlation with interests and abilities of female students as defined by surveys and the related backlash by certain women's groups).

15. Sexual harassment, though not specifically mentioned, is a form of prohibited sex discrimination. Catharine MacKinnon did much of the work that led to recognition of sexual harassment as a form of sex discrimination. See generally CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

16. See, e.g., Chris Dufresne, *Recruit Scandal Report Criticizes Top Officials*, L.A. TIMES, May 19, 2004, at D7 (discussing a final report by the Independent Investigative Commission which concluded that alcohol, sex and drugs were used to lure football recruits to the University of Colorado program, that the football coach behaved with insensitivity toward issues of sexual assault and sexual harassment and did not follow protocols, and that university officials knew of the use of

prominent civil rights practitioner with a practice including plaintiffs who complain of sex discrimination in education reported recently that her ten-year-old firm regularly had a list of fifty to a hundred and twenty people desiring representation.<sup>18</sup> Finally, issues remain relating to participation of girls and women in previously discouraged areas of academic concentration.<sup>19</sup>

Beyond the the litigated issues that garner the attention of courts and the public, systemic sex discrimination in education persists in ways that are diffuse and often difficult to redress. While this is true with regard to many types of discrimination,<sup>20</sup> it is an important point to appreciate, and these kinds of problems are the focus of our thinking about future federal enforcement efforts. Two examples illustrate the point.

sex and alcohol in recruitment, but waited too long to take corrective action); David Wharton et al., *University of Colorado is a Study in Sports Scandal*, L.A. TIMES, February 20, 2004, at A1 (detailing many incidents, but in particular, the allegations of former place kicker Katie Hnida, who alleged she was verbally harassed by teammates and raped by a player while on the University of Colorado team. When interviewed, the coach appeared to justify this behavior by commenting that "Katie was a girl and not only was she a girl, she was terrible. OK? There's no other way to say it. She couldn't kick the ball through the uprights."). See, e.g., Phoebe Sweet, *Wrestling Controversy Woman Says She Quit After Mistreatment*, BOSTON GLOBE, Sept. 22, 2002, at 40 (describing the experience of Cheryl Wong, who, after two and half years on the Boston University Division I men's wrestling team, quit because of harassment from teammates and lack of equal wrestling time).

17. See Julie Davies, *Assessing Institutional Responsibility for Sexual Harassment in Education*, 77 TUL. L. REV. 387, 420-34 (2002) (discussing circuit and district court opinions in sexual harassment cases); see also *Tesoriero v. Syosset Cent. Sch. Dist.*, 382 F. Supp. 2d 387, 390-94 (E.D.N.Y. 2005) (involving students' claims of sexual harassment by a teacher); *Theno v. Tonganoxie Unified Sch. Dist.*, 395 F. Supp. 2d 1299, 1301 (D. Kan. 2005) (involving a student's claim of sexual harassment by same-sex peers).

18. Pamela Y. Price, *Eradicating Sexual Harassment in Education*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 61, 64 (Mackinnon & Siegel, eds., 2004).

19. Math and science are obvious examples. Enrollment and test scores of girls in these classes have risen dramatically, except in higher level science and computer science courses. AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., GENDER GAPS: WHERE SCHOOLS STILL FAIL OUR CHILDREN 12-14 (1998). Women are still underrepresented in careers in science. For example, in 2002 only 27.6% and 20.7% of bachelor degrees in computer science and engineering, respectively, were earned by women, though women earned 57.4% of all bachelor degrees. ANDREA LIVINGSTONE & JOHN WIRT, U.S. DEP'T OF EDUC., NCES 2004-076, THE CONDITION OF EDUCATION IN 2004 IN BRIEF 12 (2004), available at <http://usa.usembassy.de/etexts/soc/coebrief2004.pdf>. A recent study by the American Association of University Women found that college educated women still earn only 71.5% of the salary of college educated men. Am. Ass'n of Univ. Women, *Women's Educational Gains and the Gender Earnings Gap* (2005), <http://www.aauw.org/research/statedata/index.cfm>. Girls also lag behind boys in participating in educational opportunities and achievement. For example, girls tend to drop out of or not enroll in the honors or gifted programs in early high school. AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., *supra*, at 26-27.

20. See Roy L. Brooks, RETHINKING THE AMERICAN RACE PROBLEM 40 (1990) (finding that today's employment discrimination is "'complex racial discrimination', (sophisticated or unconscious . . . frequently accompanied by nonracial factors,) and de facto segregation in high level jobs.").

In the first example, the discrimination is clear, but a *post facto* legal solution is impractical and probably unlikely. A teenage girl attended a banquet to mark the end of the water polo season. The water polo squad, part of a public school athletic program, included boys' and girls' teams at both the varsity and junior varsity levels. A group of parents, under the direction of an athletic director, had taken the lead in scouting and hiring team coaches. All season long, the girls' junior varsity team had struggled with an inexperienced and disorganized coach, lacking even uniforms until close to the end of the season. At the banquet, the rather small boys' varsity team stood up first, accompanied by a senior coach who had taken the time to order trophies and to prepare remarks about each participant. A junior varsity boys' coach, with a similarly small group, followed suit. Then the girls' coach stood up, and it became clear that there were twice as many female players as males, and that one inexperienced coach had been responsible for both varsity and junior varsity teams. In addition, the organizationally-challenged coach was unprepared to honor the female players with trophies or any introduction more personal than reading their names. Clearly the school district, in its formal policy-making capacity, would never have approved of this had it been asked. But apparently no alarm bells went off among any of the people responsible for hiring and paying coaches or monitoring their performance until the inequity was impossible to ignore. For reasons to be discussed in this article, this type of discrimination is very difficult to address and prevent, though it is clearly illegal.<sup>21</sup>

The second example illustrates the persistence of systemic gender-based disparities within our educational systems, disparities that the removal of formal barriers to entry has been unable to eradicate. A visit to advanced or accelerated classrooms from upper elementary through high school, and a glance at student leadership in those schools, will reveal an obvious gender disparity.<sup>22</sup> Boys are a distinct minority in

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21. See *infra* text accompanying notes 84–100.

22. See Michelle Conlin, *The New Gender Gap*, BUSINESS WEEK, May 26, 2003, at 75. Data indicate that girls have taken the lead in academics from elementary education through high school. CATHERINE E. FREEMAN, U.S. DEPT. OF EDUC., NCES 2005-16, TRENDS IN EDUCATIONAL EQUITY OF GIRLS & WOMEN 5 (2004), available at <http://nces.ed.gov/pubs2005/2005016.pdf>. Graphs from NCES's website compare fourth, eighth and twelfth graders' average reading and writing scores between 1992, 2002, and 2003. Female students had higher average scores than the boys in both reading and writing. The writing gap widened more for twelfth graders between 1998 and 2002 than it did for younger children in the same years. Girls identified and participated in gifted and honors programs in greater numbers than boys; likewise, they enrolled in AP and honors courses in numbers equal to or greater than boys except in physics. Even their enrollment in traditionally male dominated subjects like honors calculus and chemistry had improved relative to boys. AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., *supra* note 19, at 28. The absence of boys has been felt at the college level as well. Richard Whitmire, Commentary, *Concern Over Boys' College Enrollment Numbers*, in



accelerated programs. They are, however, a distinct majority in special education classes.<sup>23</sup> Studies document that boys are slipping behind or falling through the cracks in alarming numbers.<sup>24</sup> Lower rates of graduation from college and weaknesses or aversion to areas that comprise basic workplace requirements, such as reading,<sup>25</sup> will without doubt affect future earning capacity and career success.<sup>26</sup> Yet the absence of formal barriers seems to lull parents and school administrators into a troubling level of comfort with the *status quo*.<sup>27</sup> Strong statutory

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*Morning Edition* (NPR radio broadcast March 6, 2006).

23. Although combined nationwide totals are not available for reported data, projected OCR national data shows that of the diagnosed students, boys comprise 58.26% of the mentally retarded, 77.98% of the emotionally disturbed, and 67.40% of students with a specific learning disability. Office for Civil Rights, U.S. Dep't of Educ., OCR Elementary and Secondary School Survey: 2000 (2004), <http://205.207.175.84/ocr2000r>.

24. Peg Tyre, *The Trouble With Boys*, NEWSWEEK, January 30, 2006, at 46–50 (finding that boys are losing ground at every stage of the educational process). Slowly educators and scientists are realizing the gravity of the program. Non-profit organizations are developing new programs and strategies to improve boys' performance in their weaker subjects such as reading. *Id.* at 46 (citing the work of Harvard psychologist William Pollack, author of a popular book entitled *Real Boys*, and the non-profit Gurian Institute, which helps underachieving boys through grants to innovative high schools). See *Talk of the Nation with Lynn Neary* (NPR radio broadcast July 6, 2005) (interviewing a representative from Guys Read, a non-profit organization founded to encourage boys to read. The representative stated that boys have performed worse than girls at every reading level for the past twenty five years). However, there has been little real organized response among public schools, and indeed, all the indicia are that boys are falling further and further behind.

25. Men now earn only 42.6% of all bachelor's degrees (reported in 2001–02) and earned significantly fewer in traditionally female-dominated fields such as health professions, education, English, and performing arts. LIVINGSTONE & WIRT, *supra* note 19, at 11 (2004). Valerie Lee, of the American Association of Women Educational Foundation, has stated, “[r]eading, writing, social studies, and foreign language are seldom discussed in this [gender equity] venue, although gender differences exist in these areas. . . . Why should we examine only curriculum areas where girls are disadvantaged?” Valerie Lee, *Is Single-Sex Secondary a Solution to the Problem of Gender Inequity?*, in SEPARATED BY SEX: A CRITICAL LOOK AT SINGLE SEX EDUCATION 42 (Susan Morse ed., 1998).

26. See, e.g., John Henry Shlegel, *Unfortunately, White-Collar is the Default Setting: Boys and Higher Education*, 53 BUFF. L. REV. 1035 (2005) (discussing the author's perception, confirmed by others, that college age females are far more attuned to education and career advancement than males of the same age, and suggesting that changes in the American economy, and the elimination of good jobs that entail physicality may be responsible for some of the indifference males exhibit to “getting ahead”). The author emphasizes that social class may be a factor influencing choices, as well as individual responsibility. *Id.*

27. Richard Whitmire, *supra* note 22 (reporting that teachers interviewed for a study on gender disparity were barely aware of the problem, and that their preparation for teaching included virtually no study of learning difference). WILLIAM POLLACK, *REAL BOYS* 231 (1998) (schools do not notice boys are not doing well in certain areas). There are many theories as to why boys appear to lag behind girls in so many areas of academic achievement. See Valerie Strauss, *Educators Differ on Why Boys Lag in Reading*, WASHINGTON POST, March 15, 2005, at A12 (stating that “there is no consensus on how much genetics, environment and culture are responsible for the gap,” and citing steps taken to change the types of books used for teaching boys to read, including nonfiction). Scientists have found that boys have smaller language centers in their brains and that boys develop

protection of state and local interests in curricular autonomy make direct federal intervention difficult.<sup>28</sup>

These examples underscore the existence of gender inequity in education despite the existence of enforcement mechanisms; this is a serious concern, though the persistence of inequity despite legislation is not unique to Title IX.<sup>29</sup> There are additional reasons to focus on Title IX in particular. First, although every facet of modern civil rights legislation plays an important role in overcoming discrimination, education is paramount. This was the lesson of *Brown v. Board of Education*,<sup>30</sup> and it remains true today. Second, Title IX's extraordinary impact makes it a useful vehicle for considering how public enforcement

more slowly than girls. *Id.* Some educators believe that the desire for children to learn to read as early as kindergarten works against male biology, causing boys to become discouraged when the skill does not come easily to them, causing boys to never “warm” to the idea of reading. *Id.* There are a number of books that analyze the basis for the view that there are biological differences in the brains of boys and girls, an understanding of which would benefit both genders. See LEONARD SAX, *WHY GENDER MATTERS* (2005); STEVEN E. RHOADS, *TAKING SEX DIFFERENCES SERIOUSLY* 26–28 (2004) (discussing the contribution of evolutionary psychology to understanding brain development in males and females as adaptations to life in certain environments, and physical differences in the brain that emerge from prenatal exposure to different levels of testosterone); see also Jean Stockard, *Why Sex Inequities Exist for Students*, in *SEX EQUITY IN EDUCATION* 50–63 (1980) (discussing literature from biology, academic psychology and sociology that attempts to explain reasons for cognitive differences). Some seek to convert this data into a gender war, pointing their fingers at efforts to equalize opportunity for girls as having undermined those for boys. See, e.g., MICHAEL GURIAN ET AL., *BOYS AND GIRLS LEARN DIFFERENTLY!: A GUIDE FOR TEACHERS AND PARENTS* (2001) (arguing that the modern “androgynous classroom is politically correct, but ill suited for the neurological, chemical and hormonal differences found in the male brain). Similarly, Christina Hoff Summers agrees that boys are the victims of “well intended—but completely out of control women’s groups.” Interview by Kevin Swanson with Christina Hoff Summers, Author, *THE WAR AGAINST BOYS*, in Colorado Springs, Co. (Aug. 28, 2004), available at <http://www.sermonaudio.com/sermoninfo.asp?currSection=&sermonID=9505141746>.

28. 20 U.S.C. § 7906(b) (2000) (precluding direct control or review of “a State, local educational agency or school’s instructional content, curriculum and related activities”); see also 20 U.S.C. § 7907(a) (2000).

29. See *infra* text accompanying note 44.

30. *Brown v. Bd. Of Educ.*, 347 U.S. 483, 493 (1954) (finding that “[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”). Today there is much skepticism among scholars about the significance of *Brown*. See, e.g., DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 114, 114 (2004) (arguing that today the resegregation of once desegregated schools results in many black and Hispanic children being enrolled in schools that are separate and often worse than those in the era of “separate but equal”). See also JOEL SPRING, *THE SORTING HAT: NATIONAL EDUCATION POLICY SINCE 1945*, at 229 (1976) (arguing that the emphasis on education during the 1960’s war on poverty was a means of conservatively dealing with the issue of social class-differences. Education would provide a bridge for the poor to enter the opportunity structure of society, and their entry into the middle class would not undermine the social and economic system; rather, it would eliminate problems for the middle class, such as delinquency, crime, and unemployment.).

should evolve.<sup>31</sup> It is easy to see the progress made in addressing the issues that were the impetus for the statute's enactment, and it is thus apparent that the first generation problems are largely gone.

When Title IX was introduced in 1972, there were significant barriers to the entry of women into all phases of public education. During the congressional hearings, witnesses talked about differential admissions standards for women and men, with women being admitted only if "especially well-qualified."<sup>32</sup> The state of Virginia had refused to even admit women into the College of Arts and Sciences of the University of Virginia until ordered by a court to do so in 1970.<sup>33</sup> Curricula in public schools perpetuated stereotyped gender roles, such as forcing boys into shop classes and girls into home economics.<sup>34</sup> Boys were encouraged to study science and math in high school, while girls were not well-represented in those courses, and professional career courses were overwhelmingly male.<sup>35</sup> In the realm of college athletics, the arena in which Title IX is most well-known, boys were virtually the exclusive recipients of recruitment energy and scholarship money.<sup>36</sup>

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31. Certainly a case can be made for the success of many other civil rights statutes. The government's focus on civil rights laws and policies, and the creation of an arsenal of tools to end discrimination, made a difference even as early as 1970. U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 29-54 (1970). For example, enactment of Title II of the Civil Rights Act of 1964, which made discrimination in public accommodations illegal, brought about almost immediate abandonment of the denial of access. This was attributed in part to the quick enforcement action by the Department of Justice shortly after passage of the Act to enforce the act and the Supreme Court decisions that upheld the Act as constitutional. *Id.* at 29-31.

32. H.R. REP. NO. 92-554 (1972), as reprinted in 1972 U.S.C.C.A.N. 2511, 2511-12. See also Roak J. Parker, *Compensatory Relief Under Title IX of the Education Amendments of 1972*, 68 EDUC. L. REP. 557, 559 (1991) (finding that women were only 29.3% of the freshman class of the most selective universities and, despite their higher grade point averages, they earned only 4% of the professional degrees in 1968-69).

33. *Kirstein v. Rector and Visitors of Univ. of Virginia*, 309 F.Supp. 184 (E.D. Va. 1970).

34. MYRA SADKER & DAVID SADKER, *FAILING AT FAIRNESS, HOW OUR SCHOOLS CHEAT GIRLS* 32 (1994) (discussion the vocational segregation that prevailed when Title IX was enacted, including the fact that even college bound girls were required to take domestic science or home economics and boys were required to take manual arts).

35. NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., *TITLE IX AT THIRTY: REPORT CARD ON GENDER EQUITY* 37 (2002), available at <http://www.newge.org/PDF/title9at30-6-11.pdf> (prior to Title IX, educators sometimes steered high school girls away from higher-level math and science classes and frequently excluded them from extracurricular activities, such as science and math clubs; access to higher education was extremely limited). In 1972, 44% of Bachelor of Arts degrees were awarded to women, 41% of Master of Arts Degrees, 16% of Doctorate degrees and 6% of professional degrees. *Id.* at 10. Today women earn 50% of medical degrees, 50% law degrees, and 57% of all college students are women. Blumenthal, *supra* note 13, at B1.

36. Blumenthal, *supra* note 13, at B15. Before Title IX, women received only 2% of overall athletic budgets and athletic scholarships did not exist. In 2001, 41.5% of the girls participating in high school athletics were girls, and 43% of college varsity athletes—a 403% increase. See also Julie Davies, *Title IX, Education Amendments (1972)*, in MAJOR ACTS OF CONGRESS 230-32 (Brian

Today, these facts seem like ancient history.

An additional reason for focusing on Title IX is that legislation enacted under the authority of the Spending Clause,<sup>37</sup> such as Title IX and its predecessor and companion statute, Title VI,<sup>38</sup> exemplifies an approach to government curtailment of discrimination that is seemingly simple and effective. Titles VI and IX, as well as the Rehabilitation Act of 1973<sup>39</sup> and the Individuals with Disabilities Education Act,<sup>40</sup> are premised on the theory that the government can eliminate discrimination in programs receiving federal funding by conditioning its grants on promises of compliance from recipients and by withholding funds for non-compliance.<sup>41</sup> Congress has seen the appeal of using this “carrot” to command compliance, exercising its Spending Power broadly.<sup>42</sup> Because federal funding is ubiquitous in education,<sup>43</sup> Titles VI and IX have extraordinary breadth and potential.<sup>44</sup>

Why Title IX as opposed to Title VI? Although the administrative enforcement structure and regulations for Titles IX and VI are virtually identical,<sup>45</sup> this article focuses on Title IX in part for practical reasons.

Landsberg, ed., 2004).

37. U.S. CONST. art. I, § 8, cl. 1. The Spending Clause of the Constitution gives Congress the power to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and the general Welfare of the United States.” Congressional power under the Spending Clause is viewed as very broad. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 232–33 (7th ed. 2004). *See also infra* text and accompanying notes 84–104.

38. 42 U.S.C. §§ 2000d–2000d-7 (2000).

39. 29 U.S.C. §§ 701 et seq. (2000).

40. 20 U.S.C. §§ 1400 et seq. (2000).

41. *See infra* text accompanying notes 64–69.

42. The Supreme Court had the opportunity to address the breadth of the Spending Clause in *Rumsfeld v. Forum for Academic and Institutional Rights*, 126 S. Ct. 1297, 1306–07 (2006), but declined to explore what would constitute an unconstitutional condition because it concluded Congress had the power to impose the Solomon Amendment’s access requirement directly.

43. The Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.) and the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965), dramatically increased the amount of federal aid to education. President Johnson and his advisors realized that merely prohibiting discrimination would not solve the deficits in educational opportunity. 1 ANDREA BAIRD ET AL., U.S. COMM’N ON CIVIL RIGHTS, EQUAL EDUCATIONAL OPPORTUNITY PROJECT SERIES 16–17 (1996).

44. The Supreme Court has traditionally adopted a broad view of Congress’ power under the Spending Clause. *See United States v. Butler*, 297 U.S. 1, 66 (1936) (holding that Congress’ power under the Spending Clause extends beyond the powers enumerated in the Constitution). For the view that the Spending Clause power has been interpreted too broadly, see Ilya Somin, *Closing the Pandora’s Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L. J. 461, 480–88 (2002) (arguing that all federal subsidies to state governments interfere with federalism by disrupting state, autonomy, political transparency, and competition).

45. Each department enforcing Title VI has its own set of regulations. The Department of Education’s regulations are found at 34 C.F.R. §101.1 et seq. (2005). Title IX regulations are at 34

Title VI's breadth of coverage diffuses enforcement responsibility through numerous departments of the government.<sup>46</sup> The history of its enforcement has been much more problematic than that of Title IX's, perhaps because it came first or because it dealt with race rather than sex.<sup>47</sup> Title IX, on the other hand, is enforced primarily by the Department of Education's Office for Civil Rights<sup>48</sup> and thus provides a more cohesive and integrated model for considering the government's role.

Having now explained the choice of Title IX as the focus of this study, the last question is why the focus is public as opposed to private enforcement.<sup>49</sup> When one looks at Title IX's impact, it is difficult to isolate one variable that is most responsible for its success. Both types of enforcement have clearly had an impact, as have external influences, such as political change, advocacy, and perhaps even the market system's elimination of the inefficiencies of sex discrimination.<sup>50</sup> But

C.F.R. § 106.1 et seq. (2005).

46. Title VI places a duty of non-discrimination on each federal department and agency which is empowered to extend federal financial assistance. 42 U.S.C.A. § 2000d-1 (West 2006). It has been applied in the context of education, housing, employment and many other contexts. *See also* RODNEY A. SMOLLA, *FEDERAL CIVIL RIGHTS ACTS* §§ 8.5-8.7 (3d ed. 2001).

47. *See* *Adams v. Richardson*, 480 F.2d 1159, 1166 (D.C. Cir. 1973) (en banc) (affirming a district court order for declaratory and injunctive relief against the Department of Health, Education, and Welfare on the ground that the department had been derelict in its enforcement responsibilities. The district court order was modified as to higher education but otherwise affirmed in its entirety.); *see also* Note, *Judicial Control of Systemic Inadequacies in Federal Administrative Enforcement*, 88 *YALE L. J.* 407 (1978); FREDERICK D. ISLER ET AL., *U.S. COMM'N ON CIVIL RIGHTS, FEDERAL TITLE VI ENFORCEMENT TO ENSURE NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS* 11-14 (1996). The 1996 report concluded deficiencies in Title VI enforcement were attributable to inadequate staff, inadequate training of staff, the low status within the agency of enforcing agents, ineffective mechanisms for monitoring and securing compliance, and an overall passive approach to implementation and enforcement. In the 1970s, Title VI enforcement was characterized by inaction, lack of coordination and indifference. ISLER ET AL., *supra*, at 15-16.

48. In addition to enforcing Title IX, OCR enforces Title VI, Title IX, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Title II of the Americans with Disabilities Act, and the Boy Scouts of America Equal Access Act. The OCR received 5,044 complaints in 2004 and resolved 4,968, including some filed in previous years. OFFICE FOR CIVIL RIGHTS, *supra* note 10. OCR may refer the complaint to the Department of Justice for judicial enforcement if the OCR is unable to obtain an agreement to correct the violation. 34 C.F.R. § 100.8 (2005). However, OCR will only refer the complaint as a last resort. OFFICE FOR CIVIL RIGHTS, *supra* note 10, at 4. The Supreme Court held in 1979 that Title IX affords private individuals an implied right of action. They need not report their claim to the OCR prior to filing suit. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 705-08 (1979).

49. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 65-71 (1992) (holding that the implied right of action recognized in *Cannon* supported a claim for damages); *Cannon*, 441 U.S. 677 (1979) (recognizing implied private right of action).

50. Notable law and economics scholars argue that the market is a more efficient response to discrimination than anti-discrimination laws. *See, e.g.*, RICHARD EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992); RICHARD A. POSNER, *ECONOMIC*

notwithstanding the probable effect of all of these factors and more, the federal government's unique role in enforcing civil rights statutes is deeply embedded in the structure of antidiscrimination laws.<sup>51</sup> Its performance, with regard to both Title IX<sup>52</sup> and other statutes,<sup>53</sup> has

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ANALYSIS OF LAW § 26.1 (4th ed. 1992). If these scholars are correct that the operation of the market will end discrimination, then the removal of formal barriers in education may have jumpstarted the process. However, their theories have been criticized extensively. BROOKS ET AL., *supra* note 2, at 402–03 (citing numerous critics).

51. The government's role, though more prominent in modern civil rights statutes, is notable even in Reconstruction-era legislation. The Ku Klux Klan Act, now 42 U.S.C. § 1983 (2000), did not directly charge the government with enforcement of rights, but made violations "under color of law" actionable. Reconstruction era legislation also contained criminal provisions enabling federal prosecution, the surviving remnants of which are found at 18 U.S.C. §§ 241–242 (2000) (conspiracy against rights and deprivation of rights under color of law). Modern antidiscrimination legislation includes Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e (West 2004); Title VIII of the Fair Housing Act of 1968, 42 U.S.C.A. §§ 3601–3631 (West 2006); 42 U.S.C. § 1982 (2000); Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000d (West 2004); The Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973–1973bb-1 (2000); Title II of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000a (West 2004); The Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12101–12213 (West 2004); Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400–1487 (West 2000 & Supp. 2005) and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2000). There are public enforcement mechanisms in all of these statutes. They are fulfilled by differing agencies and embody different structures. For example, the Fair Housing Act of 1968, 42 U.S.C.A. §§ 3601–3631, includes several avenues of enforcement through the Department of Housing and Urban Development (HUD). Under the Act, as amended, HUD gained the enforcement power to investigate and "to determine whether reasonable cause exists to believe that a discriminatory housing practice has occurred," 42 U.S.C.A. §§ 3610(b)(5), (g)(1), and to issue a charge on behalf of the injured person, initiating proceedings before an administrative law judge. *Id.* at § 3610(g)(2)(A). HUD or either party involved may choose to proceed in federal court instead of before an administrative law judge. *Id.* at § 3612(a). A proceeding under an administrative law judge does not permit recovery beyond actual damages and civil penalties in excess of \$50,000. *Id.* at § 3612(g)(3)(C). In federal court, recovery may include both actual and punitive damages, but a civil action may not proceed if an administrative law judge has already heard the case. *Id.* at § 3613(a)(3), (c)(1). The Civil Rights Act of 1964 established the Equal Employment Opportunity Commission (EEOC) as the enforcement agency for employment discrimination claims. 42 U.S.C.A. § 2000e-4. Like HUD, the EEOC originally had very weak enforcement power, which increased in 1972. See Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 5–6 (1996) (explaining that prior to 1972 EEOC did not have authority to file suit, only to reconcile meritorious claims. The 1972 Amendments gave the EEOC primary enforcement responsibility). The EEOC now may file complaints, issue subpoenas, award witness fees, and intervene in civil actions. 42 U.S.C.A. §§ 2000e-4–2000e-6. The Americans with Disabilities Act (ADA) adopts the public enforcement procedures of the Civil Rights Act of 1964. 42 U.S.C.A. § 12117(a).

52. See, e.g., Sudha Setty, *Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement*, 32 COLUM. J.L. & SOC. PROBS. 331, 340–42 (1999) (criticizing the OCR for failing to effect changes since enactment of Title IX and advocating for a comprehensive system of compliance including uniform standards, increased monitoring, and stricter compliance plans); AM. ASS'N OF UNIV. WOMEN LEGAL ADVOCACY FUND, A LICENSE FOR BIAS: SEX DISCRIMINATION, SCHOOLS, AND TITLE IX 21, 25 (2000) (highlighting the federal government's failure to ever withhold funds from a school for violating Title IX); see also Christopher Paul Reuscher, *Giving the Bat Back to Casey: Suggestions to Reform Title IX's Inequitable Application to Intercollegiate Athletics*, 35 AKRON L. REV. 117, 136–39 (2001) (arguing that limited budgets and

been subject to criticism, but given the limitations of private litigation, public enforcement remains an important component to Title IX's continued success. Subsequent sections of this article explain that importance in greater depth.<sup>54</sup>

### III. THE ENFORCEMENT STRUCTURE OF TITLE IX

To think about the future of public enforcement, one must understand the past and the present. This section recaps the non-discrimination legislation that led to Title IX and compares private and public enforcement agendas. It then describes the present public enforcement challenges of Title IX and, finally, completes the picture by recounting information about enforcement gained from interviews and

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Title IX compliance results in institutions cutting men's teams, therefore endangering the future of men's intercollegiate athletics.).

53. See, e.g., Eugene R. Gaetke & Robert G. Schwemm, *Government Lawyers and Their Private Clients Under the Fair Housing Act*, 65 GEO. WASH. L. REV. 329 (1997) (highlighting problems in public enforcement of the federal Fair Housing Act that stem from 1988 amendments meant to strengthen enforcement); Terry W. Gentle, Jr., *Rethinking Conciliation Under the Fair Housing Act*, 67 TENN. L. REV. 425, 426–27 (2000) (arguing that the 1988 amendments to the Fair Housing Act, and in particular, the continued reliance on conciliation, are inadequate and urging a more formal dispute resolution mechanism); Robert G. Schwemm, *Private Employment and the Fair Housing Act*, 6 YALE L. & POL'Y REV. 375, 377–81 (1988) (discussing the weaknesses of the then existing public enforcement efforts). The U.S. Commission on Civil Rights recently issued an evaluation of HUD concluding that the agency had implemented many suggestions made in previous Commission reports, but that there were serious enforcement obstacles that delay processing of complaints and assessment of education and outreach campaigns. 4 OFFICE OF CIVIL RIGHTS EVALUATION, U.S. COMM'N ON CIVIL RIGHTS, TEN-YEAR CHECK-UP: HAVE FEDERAL AGENCIES RESPONDED TO CIVIL RIGHTS RECOMMENDATIONS? 132–33 (September 2004), available at <http://www.usccr.gov/pubs/10yr04/10yr04.pdf>; see also Selmi, *supra* note 51, at 57 (arguing that the efficacy of the EEOC is severely limited in employment discrimination litigation, resulting in a lower likelihood that the plaintiff will obtain relief if the complaint is filed with the EEOC rather than with private counsel); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1418–20 (1998) (comparing public and private enforcement of Title VII and the Fair Housing Act and concluding that though the government has a slightly higher success rate, the private sector brings in nearly thirty times the government's mean award); Stephen A. Plass, *Bedrock Principles, Elusive Construction, and the Future of Equal Employment Laws*, 21 HOFSTRA L. REV. 313, 318–37 (1992) (criticizing the limited relief provided by Title VII, which requires many to rely on § 1981's complimentary remedial provisions to fill the void and further criticizing subsequent restrictions imposed by the Supreme Court, making recovery for employment discrimination claims even more difficult). The U.S. Commission on Civil Rights found many continuing problems with EEOC in its TEN-YEAR CHECK-UP, though it praised the agency for making progress, particularly in education and outreach. It emphasized the need for the agency to become more action-oriented, issue a new compliance manual, issue new policy guidance on the ADA, monitor whether training employers makes any difference in their policies, complete timely investigation of charges, survey persons filing charges to ascertain their experience with the agency, and improve staff training. OFFICE OF CIVIL RIGHTS EVALUATION, *supra*, at 138–43.

54. See *infra* text accompanying notes 84–104.

surveys of state and local officials who work in some capacity with Title IX enforcement.

### *A. Historical Context of Title IX*

The idea of requiring federal-funding recipients to adhere to a policy of non-discrimination on grounds of race, creed, color and national origin can be traced to 1941. At that time, A. Phillip Randolph led a march on Washington, D.C. to protest the War Department's policy statement announcing that more "Negroes" would be drafted and that they would be maintained in segregated regiments.<sup>55</sup> By Executive Order 8802 President Roosevelt created the Committee on Fair Employment Practice (FEPC) in response to the protest.<sup>56</sup> The Executive Order declared that there would be no discrimination in federal employment or in defense contracts.<sup>57</sup>

Unfortunately, the FEPC lacked sufficient power and credibility to have any appreciable impact.<sup>58</sup> The agency expired in 1946, but President Eisenhower issued an order re-creating the FEPC in 1953.<sup>59</sup> In the meantime, numerous states had enacted their own Fair Employment Commissions.<sup>60</sup> President Kennedy created a new equal opportunity committee by Executive Order 10925 in 1961.<sup>61</sup> At the same time, Representative Adam Clayton Powell developed the habit of seeking to amend every federal educational bill to aid education by attaching the requirement of nondiscrimination.<sup>62</sup> These attempts rankled the southern

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55. HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA*, 10–12 (1990).

56. *Id.*

57. 6 Fed. Reg. 3109 (1941). In the Executive Order, President Franklin Roosevelt declared the policy of the United States to prohibit employment discrimination in the defense industries and the government based on race, creed, color, or national origin. Roosevelt declared that eliminating discrimination was necessary to have a successful national defense production effort. *Id.*

58. GRAHAM, *supra* note 55, at 11–14. The Committee lacked political credibility because it was created by Executive Order. Also, it lacked staff, funding and power over labor unions.

59. *Id.* at 17–18.

60. New York was the leader, having enacted the Ives-Quinn bill in 1945. The New York state FEPC was modeled after the NLRB. It had broad power, including the ability to resolve complaints by conciliation, the power to hold an administrative hearing, to call witnesses and compel evidence, and to make findings of fact. It could issue cease-and-desist orders and impose sanctions such as fines and imprisonment. *Id.* at 21.

61. Executive Order 10925, 26 Fed. Reg. 1977 (1961). Kennedy declared that the United States has an obligation to "ensure equal opportunity for all qualified persons, without regard to race, creed, color or national origin." *Id.* The Executive Order created a committee on equal employment opportunities and required that federal contractors provide the federal government with statistical reports on the work force. *Id.* Kennedy's version imposed greater obligations on contractors than had previously been the case. They were required to demonstrate compliance as a prerequisite to future contract work. GRAHAM, *supra* note 55, at 41.

62. BAIRD ET AL., *supra* note 43, at 14 n.60 (internal citations omitted).



states and led to the failure of proposals to increase aid.<sup>63</sup>

The enactment of Title VI<sup>64</sup> paved the way for an expansion of federal aid to education. The statute prohibits racial discrimination in all federally funded activities, including education<sup>65</sup> and it gave the federal government a needed tool to enforce *Brown v. Board of Education of Topeka Kansas*.<sup>66</sup> It requires federal agencies that provide financial assistance to enforce the statute by various means—issuing rules, regulations or orders establishing the standards for compliance,<sup>67</sup> terminating or refusing to grant federal financial assistance, or by any other means authorized by law.<sup>68</sup>

Title VI enabled fairly significant progress on desegregation, at least relative to prior efforts, and it also created a much greater federal influence in state and local education policies.<sup>69</sup> Nonetheless, the Department of Health, Education and Welfare's (HEW) performance in Title VI enforcement was heavily criticized, and as a result of class action litigation, the District of Columbia District Court found that HEW had failed to enforce Title VI.<sup>70</sup> Title VI enforcement in the education arena is now handled by the OCR within the Department of Education, while other departments throughout the government enforce Title VI in different arenas. Criticism of Title VI enforcement continues.<sup>71</sup>

63. *Id.*

64. Pub. L. No. 88-352, 78 Stat. 241 (1988) (codified as amended in 20 U.S.C. § 2000d).

65. BAIRD ET AL., *supra* note 43, at 13 (1996).

66. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955). The impact on education was strong because the government was funding many educational activities around the country, such as the National Science Foundation and the National Defense Education Act. The latter act resulted in a concentration of money in the South, because it had large numbers of military bases and installations. SPRING, *supra* note 30, at 177.

67. 42 U.S.C. § 2000d-1 (1988).

68. 42 U.S.C. § 2000d-2 (1988).

69. BAIRD ET AL., *supra* note 43, at 13–14 (1996). As Professor Spring recounts, prior to the passage of Title VI, the Office of Education's constituency was local and state school officials, and it was viewed as a public servant of those systems. Title VI placed the Office of Education in an adversarial position vis-à-vis many school systems. SPRING, *supra* note 30, at 179. The guidelines that were first established by the Department of Health, Education, and Welfare were considered very conservative by civil rights group like the NAACP, but they achieved much faster results than Supreme Court enforcement decisions. By the end of late 1965, the Office of Education announced that 97% of the southern school districts had submitted acceptable desegregation plans. *Id.* at 180.

70. *Adams v. Richardson*, 351 F. Supp. 636 (D.D.C. 1972), *enforced*, 356 F. Supp. 92 (D.D.C. 1973), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc).

71. The U.S. Commission on Civil Rights found a lack of coordination between agencies, lack of oversight by the Department of Justice, and a variety of lapses in regulations and policy. 1 OFFICE OF CIVIL RIGHTS EVALUATION, U.S. COMM'N ON CIVIL RIGHTS, TEN-YEAR CHECK-UP: HAVE FEDERAL AGENCIES RESPONDED TO CIVIL RIGHTS RECOMMENDATIONS? ch. 3 (2002). Professor Spring states that Title VI had little actual effect outside the South and accomplished only token integration in the South. President Johnson was unwilling to take a broad interpretation of the law that would attack de facto segregation because he needed southern support for his Vietnam

Eight years after Title VI was passed, Congress passed the Education Amendments Act, which included Title IX.<sup>72</sup> Although Title VII<sup>73</sup> and the Equal Pay Act<sup>74</sup> prohibited sex discrimination in employment in education, Title IX was the first statute to address the widespread sex discrimination in education as it affected students. Enforcement responsibility was transferred from HEW to the Department of Education upon its creation in 1979.<sup>75</sup> Within the Department of Education, OCR is given primary authority to enforce Title IX.

OCR's enforcement strategy has long involved the development of regulations, policy documents, and guidance materials that educate federal funds recipients in topics including Title IX compliance, investigation of and conciliation of disputes, compliance reviews and monitoring.<sup>76</sup> In addition, part of the OCR's public enforcement mission includes public education and providing technical assistance to funding recipients.<sup>77</sup> The sanction of cutting off funding has not been imposed, however, because it would deprive the primary beneficiaries of Title IX—the students—of resources on which their schools have come to depend.<sup>78</sup> While it is possible to view this failure to cut off funds as a weakness in the enforcement process, it is also plausible that the threat of a cut-off alone suffices to bring funding recipients into compliance.<sup>79</sup> In any event, Title IX's success has come to rest on this somewhat off-kilter strategy that seeks compliance without imposition of the ultimate penalty, supplemented with only sporadic litigation by the Department of Justice and litigation by private litigants.

Since recognition of an implied private right of action for violation

policy. SPRING, *supra* note 30, at 183. Johnson was also unwilling to take on the political machinery of Mayor Richard J. Daley in Chicago to cut off funds to the extraordinarily segregated and unequal public schools, thereby limiting future attempts to apply the provisions of Title VI in the North. *Id.*

72. 20 U.S.C. §§ 1681–1688 (2000).

73. 42 U.S.C. §§ 2000e–2000e-17 (2000). Title VII was amended in 1972 to apply to education.

74. 29 U.S.C. § 206(d) (2000).

75. The Department was created by the Department of Education Organization Act, Pub. L. No. 96-88 (1979) (codified as amended at 20 U.S.C. § 3401 (1988)).

76. BAIRD ET AL., *supra* note 43, at 149.

77. *Id.* at 7–8.

78. Between 1996 and 2003, OCR initiated fund termination hearings against two recipients (neither of which was on Title IX grounds), and it referred two cases to the Department of Justice for judicial enforcement. OFFICE OF CIVIL RIGHTS EVALUATION, *supra* note 53, at 137.

79. This was the case, for example, in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 65–71 (1992). The Supreme Court deemed a private damages action necessary because although the recipient came into compliance, this provided no remedy for the student who had been sexually harassed. *Id.* at 65–76. It has been argued that OCR is too lenient in accepting assurances of compliance by funding recipients as proof of compliance. AM. ASS'N OF UNIV. WOMEN LEGAL ADVOCACY FUND, *supra* note 52, at 62.

of Title IX in *Cannon v. University of Chicago*,<sup>80</sup> private litigation has been an important part of the enforcement scheme. Initially the Supreme Court was very supportive, influenced no doubt by HEW's admission that it lacked the resources to enforce all of the statutes within its domain.<sup>81</sup> In recent years, the Supreme Court has undercut the viability of private enforcement in some respects<sup>82</sup> and bolstered it in others.<sup>83</sup> These difficulties and others underscore the need to reexamine the government's role in ensuring compliance with the non-discrimination mandates of the law.

### *B. Differences Between the Private and Public Enforcement Agendas*

There are major differences between private and public enforcement of Title IX. The goals, relief sought, and funding of the enforcement effort all differ depending on whether the party seeking enforcement is a private party or the government. An argument could be made that one or the other should take on the primary enforcement role at this juncture, when most formal barriers have fallen away.

Title IX's focus, as is evident from the language of the statute, is prohibitory. No person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or subjected to discrimination."<sup>84</sup> The language expressly states that nothing in the statute "shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account

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80. *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979). In *Franklin*, the Court held this private right of action supported a claim for damages. *Franklin*, 503 U.S. at 76.

81. In *Cannon*, HEW admitted that it did not have the resources to police and enforce all federally funded education programs and it argued the necessity of an implied private right of action. *Id.* at 708 n.42.

82. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (holding that a private right of action does not exist to enforce disparate impact regulations under Section 602 of Title VI). This decision created doubt as to private, and perhaps public, enforcement of regulations under Title IX as well. *See infra* notes 111-114 and accompanying text. The Supreme Court also barred awards of punitive damages in statutes modeled on Title VI. *Barnes v. Gorman*, 536 U.S. 181, 185-90 (2002) (finding in context of a claim under Title II of the Americans with Disabilities Act, but with specific references to the remedies available under Title IX). The Court has also made it extremely difficult to bring a sexual harassment action under Title IX. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288-90 (1998) (holding that a school district may not be held liable for damages in an implied private right of action for the sexual harassment of a student by a teacher unless an official of the school district who had authority to institute corrective measures on the district's behalf had actual notice of, and was deliberately indifferent to, the teacher's conduct).

83. *See, e.g.*, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (recognizing a claim of retaliation for a public school teacher); *see also Davis v. Monroe County Bd. of Educ.*, 529 U.S. 629, 641-43 (2000) (recognizing the validity of private action against Board of Education in cases of student-on-student sexual harassment, albeit with very tough requirements for success).

84. 20 U.S.C. § 1681(a).

of an imbalance which may exist with respect to the total number of persons” receiving a benefit, “in comparison with the total number or percentage of persons of that sex” in the community.<sup>85</sup> In a general sense, then, OCR’s mission is to ensure compliance with this prohibition on intentional sex discrimination.<sup>86</sup> The Supreme Court’s recent Title IX decisions, in keeping with the statute’s Spending Clause origins, emphasize the contractual nature of the non-discrimination agreement, and reject the position that a funding recipient could be found to have violated the statute inadvertently or even negligently.<sup>87</sup>

OCR’s institutional goal of Title IX compliance differs considerably from the goal of private litigants who bring suit under Title IX. While these litigants might sometimes seek injunctive relief to force compliance,<sup>88</sup> more often, they seek damages for past wrongs.<sup>89</sup> Because of the statute’s Spending Clause origins, these damages actions run against the entities receiving federal funding pursuant to their agreement not to discriminate.<sup>90</sup> While one would think a lawsuit against an entity receiving funds would trigger changes in its policies or procedures,<sup>91</sup> the litigation process tends to focus on the individual

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85. *Id.* at § 1681(b).

86. However, OCR’s regulations purport to prohibit discrimination from facially neutral policies that have a gender-discriminatory effect, as well as to prohibit purposeful discrimination. *See, e.g.*, 34 C.F.R. § 106.21(b)(2) (banning the administration of any test or other criteria for admission “which has a disproportionately adverse effect on persons on the basis of sex, unless the use of such a test is shown to predict validly success in the education program or activity . . . and alternative tests are unavailable.”). At times, through its policy guidance, OCR has urged funding recipients to take actions beyond those prescribed in the regulations. For example, OCR urged adoption of sexual harassment policies (as opposed to a general non-discrimination policy) even though this was not required. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties, 62 Fed. Reg. 12,034 (March 13, 1997) (subsequently archived).

87. *See, e.g., Gebser*, 524 U.S. at 285–90 (1998); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640–41 (1999).

88. For example, they may challenge an institution’s policy. There are significant obstacles to obtaining standing to sue unless individuals can show they will be subject to application of the policy in the future.

89. Judith Resnik, *The Successes and Constraints of Current Remedies*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 250–51 (Catharine MacKinnon & Reva Siegel eds., 2003) (explaining constraints on actions to bring about structural change in employment context).

90. *See Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999) (finding that the “district court correctly dismissed the [plaintiff’s] claim against defendants in their individual capacities”); *Floyd v. Waiters*, 171 F.3d 1264, 1264–65 (11th Cir. 1999) (requiring that Title IX claims be brought against the funding recipient and not against an individual); *Smith v. Metro Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1019 (7th Cir. 1997) (stating that a Title IX claim may not be brought against an individual); *Schultzen v. Woodbury Cent. Cmty. Sch. Dist.*, 250 F. Supp. 2d 1047, 1056 (N.D. Iowa 2003) (dismissing a student’s Title IX claim against a school employee because the employee was not a funding recipient).

91. Representatives of entities involved in Title IX compliance indicated, in response to a

complaint.<sup>92</sup> Further, the law provides powerful protection for the funding recipients, refusing to hold them accountable on a *respondet superior* basis for those they employ.<sup>93</sup>

The financial constraints of private litigation also influence the types of cases filed. Despite the existence of a fee-shifting statute,<sup>94</sup> plaintiffs' attorneys, most of whom work on a contingent fee basis, stand a much better chance of getting paid if they litigate cases where substantial damages are at issue.<sup>95</sup> Oftentimes, if damages exist at all, they are negligible,<sup>96</sup> as is true in the water polo banquet example. Even if a person wanted to file a complaint,<sup>97</sup> attorneys might well view the issue as too minimal to merit the expenditure of time and resources.<sup>98</sup> In addition, individuals have real and legitimate hesitation to trigger the mechanism of the judicial system in response to all but the most egregious of injuries.<sup>99</sup> Thus, the focus of privately litigated sex

questionnaire, that litigation can trigger such changes. See *infra* text accompanying notes 176–177.

92. Systemic constraints, such as statutory restrictions on class actions brought by Legal Services Corporation offices, also contributes to this individualized focus. Omnibus Consolidated Rescission Appropriations Act of 1996, Pub.L. No. 104-34, 110 Stat. 1321 (1996).

93. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 285 (1998); Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 641–50 (1999).

94. 42 U.S.C. § 1988 (2000).

95. See, e.g., Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 600 (2001) (majority held that a litigant does not qualify as a "prevailing party" for purposes of recovering attorneys' fees under the fees statute merely because their lawsuit was a "catalyst" for change in the defendant's conduct). A court judgment or consent decree is therefore required. *Id.* at 604.

96. This is because damages are measured by a compensatory, or tort, model. Carey v. Phipps, 435 U.S. 247, 254–55 (1978). See generally Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 231–37 (1997).

97. There is a wealth of academic literature documenting disincentives to complain. See, e.g., Mark Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) (analysis of data concerning "litigation explosion" reaching the conclusion that it does not exist). Many injuries go unperceived. Keith O. Boyum, *Theoretical Perspectives on Court Caseloads: Understanding the Earliest Stages, Claim Definition*, in EMPIRICAL THEORIES ABOUT COURTS (Keith O. Boyum & Lynn M. Mather eds., 1983). Further, injury perception is relative to educational gains—better educated individuals are better able to perceive when their rights have been violated. Arthur Best & Alan R. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 LAW & SOC'Y REV. 701, 707, 722–23 (1977) (finding that high income and white households perceive more problems with goods than do poor and black households).

98. In theory, the Attorneys' Fees Awards Act should remove these financial constraints, but because most cases eventually settle, it does not. Davies, *supra* note 96, at 231–37.

99. Litigation in America is viewed as an irreparable breach of the relationship between parties where no future relationship is expected to exist. See Sally E. Merry, *Going to Court: Strategies of Dispute Management in an American Urban Neighborhood*, 13 LAW & SOC'Y REV. 891 894–95 (1979); Austin Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 LAW & SOC'Y REV. 339, 357 (1976) (regarding court action between parties: "Those

discrimination actions under Title IX, as in other civil rights statutes, tends to be much more individualistic and compensatory than systemic.<sup>100</sup>

These differences between the public and private enforcement of Title IX illustrate that each has its strengths and weaknesses. Looking both at the history of government enforcement of civil rights statutes<sup>101</sup> and the particulars of the administrative enforcement scheme for Titles VI and IX, it is clear how important the government's role has been.<sup>102</sup> Civil rights statutes were typically characterized by weak government enforcement mechanisms, which proved problematic and resulted in amendments that have increased the enforcement power of their

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whose relations are long standing, and those who expect to continue their interaction, will, I believe, seek informal alternatives which allow them to deal with the present trouble without damaging their entire relationship"); see also Kristin Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 421, 437–39 (1987) (in a study focusing on employment discrimination victims, Bumiller investigated why victims were reluctant to invoke legal protection, concluding that asymmetrical power relations that exist in most instances of discrimination lead most victims to suppress the anger they feel at discrimination, that individuals are guided by an ethic that encourages self-sacrifice rather than action, and that they have a fear of being cast as a victim and disrupting a delicate balance of power between themselves and others for the sake of a legal remedy). This fact in itself can create a powerful disincentive to complain. Pamela Price describes representing a fourteen-year-old victim of peer sexual harassment who fled her school rather than respond to the taunts of classmates who blamed her when she complained of peer-to-peer sexual harassment, and representing another client who was questioned with such hostility that she suffered nightmares in a case where the liability of a teacher for harassment was so clear that the individual had been fired by the community college employer. She tells clients that if they litigate, their privacy and reputation cannot be protected. Price, *supra* note 18, at 63. Students have much to lose, socially and professionally, if they become embroiled in conflicts with individuals at their school.

100. See, e.g., Judith Resnik, *The Rights of Remedies*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 247–248 (Catharine MacKinnon & Reva Siegel eds., 2003) (essay explores limits of individualized tort-law inspired model for redressing harassment).

101. Congress has utilized public enforcement in one form or another as a strategy for enforcing civil rights legislation since 1875, when the Civil Rights Act of 1875 gave the Attorney General power to maintain enforcement actions in various instances. LANDSBERG, *supra* note 2, at 8–9. Supreme Court decisions and legislative repeals ultimately undercut this authority. "For the next seventy years, the attorney general was limited to criminal prosecutions for denials of federal rights under color of law, conspiracy to deprive persons of federally protected rights, jury discrimination and slavery." The government's role was restored incrementally in 1957 to permit the Department of Justice to target voting discrimination. *Id.* at 10–12.

102. Professor Landsberg describes the development of the federal enforcement strategy as it developed in the Civil Rights Act of 1964, noting that the Act "created a three-pronged civil enforcement approach, consisting of private suits, civil suits by the Department of Justice, and nonlitigative administrative responsibilities of other federal agencies." LANDSBERG, *supra* note 2, at 14. Professor Landsberg explains that "Congress has generally preferred that civil rights claims be resolved by courts rather than administrative tribunals"—thus leading it to place much enforcement responsibility in the Department of Justice—but that Congress "has not acted consistently in choosing between courts and administrative enforcement... [or] between private and public enforcement. *Id.* at 21.

administrative agencies.<sup>103</sup> However, Titles VI and IX were exceptions because their enforcing agencies had the power to cut off funds. This power was, of course, attributable to their Spending Clause origins, and it will remain an option so long as they remain in force.

Despite this history, one might argue that Title IX's success in eradicating discriminatory barriers to equal access and participation in education suggests private litigation should become the dominant form of enforcement and public enforcement merely a back-up. Egregious discrimination could be litigated by private attorneys who receive fee awards, and administrative enforcement could center on maintaining the *status quo* by collecting data from funding recipients and monitoring compliance largely on the basis of paperwork submitted. The assumption would be that, in the absence of private litigation alleging a violation, the non-discrimination mandate is being satisfied.

In light of the difficulties entailed in obtaining representation for private litigation and the substantive and procedural obstacles to success, it would be naïve to think that private litigation can and should be the primary enforcement vehicle for Title IX in the years to come. This is particularly true if one perceives a need to address the subtle barriers to equal educational opportunities that still remain. However, public enforcement itself is hardly static. Rather, its focus and viability are always in the process of change, due to developments in case law and shifting priorities within the executive branch. This is the next factor to consider in imagining the future of public enforcement.

### *C. The Shifting of Federal Enforcement Priorities With Respect to Title IX*

One challenge in describing what public enforcement of Title IX should be in the future is that enforcement priorities change over time, both within the executive branch and within the judicial system. For example, although education has long been characterized as a matter of predominantly local interest,<sup>104</sup> school desegregation required strong federal leadership because state and local authorities were unwilling to

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103. For example, the Fair Housing Amendments Act of 1988 allowed the secretary of HUD to issue cease-and-desist orders against discrimination and to order payment of money damages. *Id.* at 19. See also James Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1051 (1989); Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 ADMIN. L.J. AM. U. 59, 87-96 (1993).

104. The Supreme Court has recognized this in numerous decisions. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[E]ducation is perhaps the most important function of state and local governments.”).

comply voluntarily with federal constitutional and statutory mandates.<sup>105</sup> Federal courts have seen fit to reduce their own roles.<sup>106</sup> Despite evidence that desegregation has not been completed and in the face of evidence of resegregation of schools, courts have lifted desegregation decrees in districts where violations of the 14<sup>th</sup> Amendment had been established.<sup>107</sup> Thus, within the judicial branch, federal oversight has waned.

Several Supreme Court decisions limit the reach of Title VI and Title IX in particular, thus reinforcing the perception that priorities have changed. Although the Supreme Court has long construed Congress's Spending Power to be very broad,<sup>108</sup> its decisions indicate awareness that the Spending Clause remedies are limited. The Court has stressed the contract-like nature of the Spending Clause, and affirmed that the relief granted should be analogous to a contract remedy.<sup>109</sup> The Court shows

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105. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 19 (1958) (recounting violence and disorder that followed from actions of the governor and legislature, and noting that although responsibility for public education is primarily the concern of the states, "it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements."); *Green v. Cty. Sch. Bd.*, 391 U.S. 430 (1968) (action for injunctive relief against school district's continued maintenance of an allegedly racially segregated school system; the Supreme Court vacated the court of appeal's affirmation of the district court opinion and remanded the case, noting that rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents." *Id.* at 441.

106. Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1465–67 (2003). Danielle R. Holley, *Is Brown Dying? Exploring the Resegregation Trend in Our Public Schools*, 49 N.Y.L. SCH. L. REV. 1085, 1087 (2004). A trilogy of Supreme Court cases in the 1990's made it easier for courts to lift desegregation decrees. See *Mo. v. Jenkins*, 515 U.S. 70, 86–102 (1995); *Freeman v. Pitts*, 503 U.S. 467, 490–91 (1992) (setting out the showing that must be made by a school operating under a desegregation order for complete and partial relief of that order); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247 (1991) (federal supervision of local schools intended as a temporary measure). Professor Holley examines the district court cases that follow this trilogy and finds that out of thirty-eight school districts that were declared unitary between 1990 and 2002, thirty-four became more segregated (or resegregated) and only four made gains in desegregation. Holley, *supra*, at 1095–96; see also GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., *BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE?* 19, 37 (2004), available at <http://www.civilrightsproject.harvard.edu/research/resseg04/brown50.pdf>.

107. CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., *DENVER PUBLIC SCHOOLS: RESEGREGATION, LATINO STYLE* 3–4 (2006), available at [http://www.civilrightsproject.harvard.edu/research/deseg/Denver\\_Reseg.pdf](http://www.civilrightsproject.harvard.edu/research/deseg/Denver_Reseg.pdf).

108. *United States v. Butler*, 297 U.S. 1, 65–66 (1936) (adopting Hamilton's view that Congress' power is broad so long as it spends to provide for the general welfare). The test for validity of Spending Clause legislation was distilled by Justice Rehnquist in *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987) (spending power must be in pursuit of the general welfare, Congress must condition the state's receipt of funds unambiguously, the conditions must be related to the federal interest in particular national projects or programs, and the legislation cannot violate another Constitutional provision).

109. *Barnes v. Gorman*, 536 U.S. 181, 189–90 (2002). In a decision concerning Title II of the Americans with Disabilities Act, the Court held a private plaintiff could not recover punitive damages.



little inclination to allow litigants to circumvent limitations on recovery by suing under other civil rights statutes, such as §1983.<sup>110</sup> The Supreme Court's decision in *Alexander v. Sandoval*,<sup>111</sup> holding that private litigants cannot bring claims of disparate impact based on Title VI regulations, may also signal a waning of federal interest in nondiscrimination issues in education.<sup>112</sup> By precluding persons from filing private claims for non-compliance with regulations on a disparate impact theory, the Court has relegated these claims solely to administrative enforcement or private litigation on very difficult legal theories.<sup>113</sup> The absence of private lawsuits means that funding recipients will not have the added incentive of avoiding litigation as they evaluate policies that may have a discriminatory effect.<sup>114</sup>

These Title VI decisions probably extend to Title IX as well. The Court acknowledged in *Cannon v. University of Chicago*<sup>115</sup> that the legislative histories of Title VI and Title IX are virtually identical. Although prior to *Sandoval* there were at least four different approaches

110. Recently, the Supreme Court vacated and remanded for reconsideration a ruling from the Sixth Circuit that invalidated Michigan's decision to schedule girls' athletic events during less desirable seasons on an Equal Protection theory in a § 1983 action. *Mich. High Sch. Athletic Ass'n v. Cmty. for Equity*, 544 U.S. 1012 (2005). One position, as argued in a proposed amicus brief by the Michigan Interscholastic Athletic Administrator's Association in Support of Petitioner, was that Title IX provides the sole remedial mechanism for addressing gender discrimination in educational institutions receiving federal funding.

111. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

112. The Court did not reach the question of whether the regulations prohibiting practices with discriminatory effects were valid; it limited its holding to a ruling that there was no private right of action to enforce them. *Id.* at 285–286. However, the Court's reasoning—specifically its focus on the requirement that federal funding recipients know of a violation before suffering any consequences for it—may suggest the Court would not uphold administrative enforcement of the regulations on a disparate impact theory. *Id.* at 289.

113. One possibility the *Sandoval* dissenters (Stevens, Souter, Ginsberg and Breyer) suggested to maintain private enforcement of the regulations was to bring an action under 42 U.S.C. § 1983 alleging violation of federal statutory law. *Id.* at 300 n.5. However, courts of appeal have not been receptive. *See, e.g., Peters v. Jenney*, 327 F.3d 307, 316 n.9 (4th Cir. 2003); *Save Our Valley v. Sound Transit*, 335 F.3d 932, 934 (9th Cir. 2003); *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771, 788 (3d Cir. 2001). A constitutional claim under § 1983 or a claim for violation of § 601 would require proof of intent. *See, e.g., Note, After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement*, 116 HARV. L. REV. 1774, 1777 (2003) (stating that after *Sandoval*, Title IX claimants are limited to § 1983 claims or must prove intentional discrimination for private enforcement).

114. *See* Tanya L. Miller, Note, *Alexander v. Sandoval and the Incredible Disappearing Cause of Action*, 51 CATH. U. L. REV. 1393, 1419–20 (2002) (recognizing that the lack of a private cause of action “is a concern in the areas of education and environmental justice, which rely heavily” on disparate impact regulations to remedy situations where discriminatory effect is obvious but where discriminatory intent is not present, such as in school testing and the siting of environmentally dangerous facilities in predominantly minority areas).

115. *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979).

to disparate impact analysis in the district courts,<sup>116</sup> several courts have extended the holding of *Sandoval* to Title IX.<sup>117</sup> Some have argued that elimination of the disparate impact theory would have less impact in Title IX enforcement than under Title VI, because most Title IX claims deal with conduct that is explicitly based on sex rather than on facially neutral policies with discriminatory effects.<sup>118</sup> However, disparate impact theory would surely be the vehicle to redress many of the “second generation”<sup>119</sup> sex discrimination claims. Although the uncertainty regarding disparate impact claims affects only private enforcement at this point, it may be a harbinger of a future ruling invalidating all disparate impact regulations, thus foreclosing even limited federal enforcement on such theories.<sup>120</sup>

Changes in priorities are visible well beyond the judicial system. Political change within the Executive Branch influences priorities within federal agencies. The budget process and congressional oversight give Congress an opportunity to influence enforcement priorities of the Department of Justice<sup>121</sup> and likely in other federal agencies as well. Certain projects have more political capital than others and will consume more resources.<sup>122</sup> Staff turnover and political appointments also

116. See Philip Anderson, *A Football School's Guide to Title IX Compliance*, 2 SPORTS LAW J. 75, 86–89 (1995) (discussing lower court opinions that 1) hold that Title IX and its regulations implement only disparate treatment theory; 2) hold that they encompass disparate impact theory as well; 3) recognize disparate impact theory under the regulations regardless of limitations on the statute; and 4) find that Title IX and its regulations implement a theory somewhere between disparate impact and disparate treatment).

117. See *Litman v. George Mason Univ.*, 156 F. Supp. 579, 587 (E.D. Va. 2001) (finding that “[i]n the wake of *Sandoval*” no private right of action exists to enforce a claim of retaliation under the disparate impact regulations of Title IX). See also Jonathan M.H. Short, “*Something of a Sport: The Effect of Sandoval on Title IX Disparate Impact Suits*,” 9 WM. & MARY J. WOMEN & L. 119, 133–36 (2002).

118. Adele P. Kimmel et al., *The Sandoval Decision and Its Implications for Future Civil Rights Enforcement*, 76 FLA. B. J. 24, 26–27 (2002). But see Andrea L. Silverstein, Note, *Standardized Tests: The Continuation of Gender Bias in Higher Education*, 29 HOFSTRA L. REV. 669 (2000) (commenting on the need and usefulness of disparate impact analysis to remedy discrimination with regards to the use of standardized testing as a criterion for admission in higher education).

119. Sturm, *supra* note 4, at 468.

120. In *Sandoval*, the Court assumed such regulations were valid for purposes of that decision. See *Sandoval*, 532 U.S. at 281–82. However, Justice Scalia, writing for the Majority, pointed out that O’Connor’s opinion in *Guardians Ass’n v. Civil Service Comm’n*, 463 U.S. 582 (1983), had suggested disparate impact regulations were not valid. *Sandoval*, 532 U.S. at 286 n.6. Scalia made this point despite the fact that five justices in *Guardians* would have found disparate impact regulations to be valid under Title VI. See *Guardians*, 463 U.S. at 584 n.2.

121. LANDSBERG, *supra* note 2, at 77–101 (noting that a successful organization must develop a clear understanding of mission and establish priorities and policies calculated to achieve it, and discussing factors that guide the choice of priorities within the Department of Justice).

122. The government has even been willing to funnel public money into paying commentators

influence policy within agencies; for example, it is reported that turnover in the Justice Department's Civil Rights Division coincided with a 40% decline in race and gender cases over the last five years, along with a corresponding increase in deportation and immigration matters.<sup>123</sup> The shifting nature of federal priorities and available resources, in addition to the multiplicity of obligations, make it possible to see how government enforcement of a non-discrimination mandate may change or drift. This is particularly true when formal barriers in education are nearly gone and when the number of complaints an agency receives about sex discrimination are far fewer than complaints in other areas.<sup>124</sup>

### *D. A Look at the Mechanics of Title IX Public Enforcement*

In addition to being aware of the broad trends, such as the shifting of priorities, that affect public enforcement, it is important to look at enforcement on the micro level—within the agency itself—to assess how the agency functions and discharges its enforcement responsibilities. At first glance, there appear to be few legal obstacles to administrative enforcement of Title IX. A closer look, however, reveals procedural and structural flaws that undermine OCR's Title IX enforcement. Those flaws may be remedied by refocusing OCR's role in public enforcement.

#### *1. OCR public enforcement of Title IX*

Title IX's regulations established a system that is, in theory, very straight-forward and efficient.<sup>125</sup> Students, parents and employees of educational institutions receiving federal funding are made aware of the non-discrimination obligation because the institutions post notices and

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to promote its pet initiatives, such as No Child Left Behind. Armstrong Williams, a prominent conservative commentator, acknowledged that he "was paid \$240,000 by the U.S. Department of Education to promote its initiatives [and policies] on his syndicated television show and to other African Americans in the news media. Williams subsequently apologized for "blurring the lines between his [job] as an independent commentator" and his job promoting policies of the Bush administration. David D. Kirkpatrick, *Payola for Promoting Policies*, S.F. CHRON., January 8, 2005, at A1, A6.

123. There is currently a great deal of turnover at the Justice Department's Civil Rights Division. Almost 20% of the division's lawyers left in 2005. Some lawyers believe a buy-out program "was aimed at pushing out [individuals] who did not share the administration's conservative views on civil rights laws." Career attorneys claim that "political appointees have cut them out of hiring and policy decisions." Dan Eggen, *Civil Rights Focus Shift Roils Staff At Justice, Veterans Exit Division as Traditional Cases Decline*, WASH. POST, November 13, 2005, at A1.

124. OCR received 283 complaints about sex discrimination, as compared to 946 about race or national origin discrimination and 2,624 regarding disability discrimination. OFFICE FOR CIVIL RIGHTS, *supra* note 10, at 5.

125. 34 C.F.R. §§ 106.1–106.71 (2005).

disseminate their policies in handbooks or other materials.<sup>126</sup> One way to bring a claim of sex discrimination to OCR is by filing a complaint.<sup>127</sup> The complaint need not be a formal document; a lawyer is not necessary.<sup>128</sup>

The filing of a complaint triggers an investigation to determine whether there is any substance to the allegation.<sup>129</sup> OCR employees, whether attorneys or staff persons, are trained about what the law requires and can, in many instances, provide a useful assessment as to whether there is a violation. If there is a plausible violation, then OCR works to obtain compliance with Title IX through a conciliation process with the goal of obtaining an agreement between the agency and the funding recipient.<sup>130</sup> That agreement should resolve the problem at hand and if necessary, effect a change in the entity's conduct or policies in the future. When it works the way it should, the simplicity of the administrative process and the ability to gain the agency's expertise is an advantage over private litigation, at least if the goal is to resolve the problem expeditiously.

## 2. Procedural and substantive flaws in OCR enforcement

The complaint process, though, encompasses only a small portion of the sex discrimination complaints that exist. As explained below, most complaints are filed initially with designated local officials or state agencies, so looking at cases that come to OCR is a bit like seeing the tip of an iceberg.<sup>131</sup> Focusing for a moment on that tiny slice of complaints, the question is whether OCR does a good job at what it handles. The answer depends on who is asked to answer the question. OCR believes it does a good job,<sup>132</sup> but the U.S. Commission on Civil Rights gave it a mixed evaluation in its Ten-Year Check Up.<sup>133</sup> Finally, the American

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126. The regulations require funding recipients to include a prominent statement of non-discrimination policy in any publications, including “[any] announcement, bulletin, catalog or application form.” *Id.* at § 106.9(b)(1).

127. *Id.* at § 100.7(b).

128. *Id.*

129. *Id.* at § 100.7(c).

130. *Id.* at § 100.7(d).

131. Only 6% (or 283) of the total complaints received in 2004 designated sex discrimination as the basis for the complaint. OFFICE FOR CIVIL RIGHTS, *supra* note 10, at 4. The individuals interviewed consistently stated that local compliance personnel see and attempt to resolve most complaints first. *See infra* note 153–154.

132. OFFICE FOR CIVIL RIGHTS, *supra* note 10, at 5. The Annual Report serves the purpose of familiarizing members of Congress with the agency's achievements and contains statistics indicating the agency's efficiency and letters praising its work.

133. The study praises OCR's organization structure, its Title VI outreach and education, and its technical assistance. It praises the agency's success in exceeding performance targets for

Association of University Women's (AAUW) study<sup>134</sup> gave OCR a fairly negative evaluation.

The AAUW study was particularly critical of OCR procedures that affect its complaint handling, such as OCR's self-imposed limitation that complaints must allege sex discrimination that happened within a 180 day period prior to the filing of the complaint.<sup>135</sup> The AAUW study of OCR's investigation process found that this self-imposed statute of limitations results in refusal to investigate a huge number of complaints.<sup>136</sup> Although this is the same period provided under Title VII,<sup>137</sup> it may arguably have a more adverse effect on Title IX complainants, many of whom are students with little sophistication in their understanding of the law and how it pertains to them.

The AAUW study also faulted the time OCR takes to investigate and resolve complaints.<sup>138</sup> Even though OCR's latest reports indicate that it is resolving cases within six months, students embroiled in a conflict involving sex discrimination frequently want and need a speedier resolution. This is an incentive to use local complaint resolution methods.<sup>139</sup>

Another procedural flaw noted was failure to detect non-compliance with regulations. These failures may escape OCR's notice<sup>140</sup> and make it

complaint resolution rates and durations. It criticizes lack of tracking of expenditures for civil rights activities, the paucity of on-site reviews, the lack of social or behavioral science methodology to evaluate its progress. OFFICE OF CIVIL RIGHTS EVALUATION, *supra* note 53.

134. AM. ASS'N OF UNIV. WOMEN LEGAL ADVOCACY FUND, *supra* note 52, at 14–15.

135. 34 C.F.R. § 100.7(b).

136. AM. ASS'N OF UNIV. WOMEN LEGAL ADVOCACY FUND, *supra* note 52, at 51–57 (2000). During the AAUW investigation, OCR received 2,000 complaints, but took no investigative action in over half, due either to lack of jurisdiction or filing outside of the 180 day window.

137. 29 C.F.R. § 1601.13 (2005).

138. AM. ASS'N OF UNIV. WOMEN LEGAL ADVOCACY FUND, *supra* note 52, at 14–15. The AAUW Study, which spanned four years, 1993–1997, found that the length of time required to complete an investigation seemed to vary by region. OCR's latest annual report states that it resolved 91% of the complaints within 180 days, thereby exceeding its goal of 80%. OFFICE FOR CIVIL RIGHTS, *supra* note 10, at 4.

139. *See, e.g.*, Interviews, *infra* note 148, at 6 (A university general counsel explains that students find on-campus office friendlier, less-threatening than, and faster than the OCR. Furthermore, state law is broader than federal. Students can file under both in affirmative action office. Student-student harassment complaints tend to be resolved under Code of Student Conduct).

140. This is because OCR focuses so heavily on complaint investigation rather than compliance reviews. AM. ASS'N OF UNIV. WOMEN LEGAL ADVOCACY FUND, *supra* note 52, at 13. In the period of the AAUW survey, OCR initiated less than 20 compliance reviews dealing with sex discrimination. They found that numerous regional offices conducted no compliance reviews. *Id.* In fiscal year 2004, OCR closed initiated 53 compliance reviews and closed 29. OFFICE FOR CIVIL RIGHTS, *supra* note 10, at 5. Fifteen of those resolved “involved reviews of state departments of education to ensure that Title IX coordinators were designated and trained and that Title IX nondiscrimination policies and other information were published . . .” *Id.*

harder to know how to address a complaint, whether at the site or at OCR. Even though OCR has begun to address this issue,<sup>141</sup> ensuring compliance is a large challenge given the number of funding recipients.

On a substantive level, OCR observers have claimed the agency has the wrong enforcement priorities and does not use its clout to ensure compliance.<sup>142</sup> Critics argue the complaint-oriented focus diverts the agency from broad preventive oversight that could be achieved through compliance reviews.<sup>143</sup> In addition, some claim that OCR spends a disproportionately small amount of resources on sex discrimination matters, relative to complaints received.<sup>144</sup>

### 3. Maximizing efficacy by refocusing OCR's duties under Title IX

Since this article did not undertake independently to evaluate OCR's performance, it suffices to say that the agency faces many challenges in carrying out its enforcement responsibilities under Title IX and balancing these with its other enforcement mandates. The reality is that even in a perfect world—where OCR was flush with funding—there would never be enough funds to “police” all funding recipients to see if they put up posters and post notices, much less actually “walk the walk” with respect to Title IX enforcement. Some criticisms of the agency's commitment to prevention of sex discrimination and its procedures appear harsh. Its procedures are not unique to the agency or to Title IX claims, and the substance of its compliance reviews should surely be evaluated along with the numbers. However, there is room to enhance OCR's efficacy.

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141. OCR has since conducted a compliance review on this very issue. *Id.*

142. The Commission found that pre-award desk audits were extremely rare, so that funding recipients received money without the agency having proof that they were in compliance. OFFICE OF CIVIL RIGHTS EVALUATION, *supra* note 53, at 25; FREDERICK D. ISLER ET AL., *supra* note 47, at 213. OCR has taken the view that these are not effective compliance tools. It had also been suggested that OCR could maximize its enforcement clout by conducting post-award desk audits, but the agency has not done so. OFFICE OF CIVIL RIGHTS EVALUATION, *supra* note 53, at 26. There are a very small number of compliance reviews. In 2003, there were seventy-four, while in 2001, there were twenty-one, and in 2002, eleven. *Id.* at 27. OCR must make choices about what issues are the subject of compliance reviews, and while it has devoted resources to helping ensure that ELL students are not placed in special education, it has abandoned compliance reviews on topics such as girls' access to and participation in advanced math and science education. *Id.* at 28.

143. OCR can and does monitor compliance through desk audits (on the basis of paperwork) or by investigations in the field. It has been argued that OCR does too few of both to have a substantial impact. The TEN-YEAR CHECK-UP found it needed to issue guidelines relating to compliance obligations, and that it needed to conduct on-site compliance reviews that assess recipients' entire operations rather than a narrower slice of the issues. OFFICE OF CIVIL RIGHTS EVALUATION, *supra* note 53, at 137.

144. AM. ASS'N OF UNIV. WOMEN LEGAL ADVOCACY FUND, *supra* note 52, at 30–31 (of compliance reviews during the four-year investigation period, 3.2% dealt with sex discrimination, while sex discrimination constituted 10% of the total complaints received).

OCR's shortcomings most likely relate to budgetary constraints and to shifting enforcement priorities imposed on the agency by Congress and the Executive Branch.<sup>145</sup> These enforcement priority shifts have the negative consequence of fostering ideological drift,<sup>146</sup> creating a perception that certain types of complaints are disfavored, and inspiring an unseemly competition for attention among the beneficiaries of the statutes OCR is charged with enforcing. In addition, the perception of ineffectiveness is fed by the lack of strong enforcement options short of fund termination. With limited capacity to refer cases to the Department of Justice and a long-standing reluctance to cut off non-compliant funding recipients, OCR lacks intermediate level ammunition. All of these factors militate in favor of a more formal delegation of the complaint resolution function to local compliance personnel.

### *E. Looking Beyond the Iceberg's Tip*

OCR's enforcement process, described above, represents the tip of the iceberg in terms of Title IX enforcement. Adherence to Title IX and resolution of disputes falling within its parameters goes on daily under the supervision of the funding recipients and their agents. The funded entities undertake the nondiscrimination obligation as part of their contracts and provide personnel to handle grievances, as the regulations contemplate.<sup>147</sup> Therefore it is important to study their roles in the public enforcement process.

Two studies were conducted, and two means were employed to study the roles and attitudes of agents of funding recipients: interviews and questionnaires. Results of the two studies will be discussed together as they both cover the same topics and taken together will provide a more complete picture. The hypothesis prior to conducting the studies was that funding recipients would be very mindful of their responsibilities under Title IX *because* of the possibility that OCR would respond to a complaint or institute a compliance review. In other words, OCR's shadow would extend far beyond its actual enforcement activities.

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145. See LANDSBERG, *supra* note 2, at 79 (“[T]he budget process and congressional oversight provide Congress an opportunity to influence [enforcement] priorities” of the Department of Justice).

146. For example, The USCCR TEN-YEAR CHECK-UP criticizes OCR for archiving useful guidances prepared under the prior administration and for adopting a case-by-case approach in responding to queries from regional offices rather than developing formal guidance procedures that benefit the public and the funding recipients more directly. OFFICE OF CIVIL RIGHTS EVALUATION, *supra* note 53, at 135–36. The implication is that carefully developed policies and explanations suddenly disappear from the public domain, creating a gap in knowledge and uncertainty about the correct course of conduct.

147. See *supra* text accompanying notes 119–141.

## 1. Methodology

Eight interviews were conducted for exploratory purposes to develop the content of the questionnaire.<sup>148</sup> Later, the questionnaire was administered to volunteers at an education law conference in Portland, Maine, in 2003. Conference attendees were invited through public announcement to participate in a survey on how attorneys, administrators and compliance personnel perceive the effectiveness of Title IX enforcement. If they chose to participate, they could return the survey to a box located at the conference or return it in a self-addressed stamped envelope.<sup>149</sup> In particular, we were interested in learning whether and to what extent they were influenced by OCR. We also tried to gauge the

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148. Interviews with Anonymous Participants 1–8 (2003) [hereinafter Interviews] (transcripts on file with the B.Y.U. Education & Law Journal). The strengths and weaknesses of qualitative field research are discussed in EARL BABBIE, *THE BASICS OF SOCIAL RESEARCH* 304–05 (2d ed. 2002). Field research is not appropriate for arriving at statistical descriptions of a large population, but can provide important insights as to attitudes and behaviors. *Id.* at 305. Several preliminary interviews were done to develop the list of questions for the eight recorded interviews. All interviews were recorded with permission of the recipients. The recorded interviews were qualitative in that they were conducted with a general list of questions but not a specific set that must be asked with particular words and in a certain order. They were conducted by telephone or in person and the terms of the interviewees' participation included a guarantee of anonymity. Accordingly, the interviews are referenced here by number. Individuals selected to be interviewed were selected by "snowball sample," that is, by accumulating of interview subjects as a result of interviews with a few beginning subjects. *Id.* at 179. This type of sampling is used for exploratory purposes. Interviewees' occupations included general counsel for school districts, outside counsel, compliance officers, and school administrative staff. They worked in a variety of educational settings, from public middle and high school to the university level and were distributed, geographically, in differing regions of the country. A content analysis of the interviews was prepared for use in creating the questionnaire. Interviews, *supra*.

149. Survey Questionnaire & Results by Julie A. Davies & Lisa M. Bohon with Anonymous Participants in Portland, Me. (2003) [hereinafter Survey] (on file with authors). Forty participants from twelve different states completed the questionnaires. Of these, 23% were attorneys; 26% were school administrators; 6% were compliance officers; 42% were another profession, such as teachers, professors, school board members, etc.; and 3% declined to answer. The demographic characteristics of this volunteer sample were varied. Sixty-nine percent were female and 31% were male. In addition, 88% were European American, 3% were African American, 3% were Hispanic American and 6% were multi-ethnic. All participants were treated in accordance with the American Psychological Association guidelines for the ethical treatment of humans. Participants gave informed consent, they had the right to withdraw at any time, their data were collected anonymously and kept confidential, and they were debriefed at the end of the study. Participants were not compensated in any way. The five page questionnaire was submitted to and approved by the University of the Pacific Internal Review Board. *Id.*



level of their commitment to Title IX enforcement.<sup>150</sup>

## 2. Results

Contrary to the predictions of OCR's extensive influence, the interviewees felt that OCR was not a very important influence in compliance with Title IX for several reasons. First, the funded entity (whether their employer or their client) was described as having accepted and endorsed Title IX's mandate<sup>151</sup> and hence, OCR was not a factor in their deciding how to comply. Also, they lacked regular contact with OCR, so it was distant from their minds.<sup>152</sup> In their experience, only a fraction of the complaints alleging Title IX non-compliance are actually filed with OCR;<sup>153</sup> most are handled either internally or possibly through a state agency's investigation.<sup>154</sup> Because of the small number of complaints that are presented to the agency, the risk of an investigation by OCR or any contact with the agency is remote.<sup>155</sup>

Questionnaire respondents viewed OCR intervention as a moderate deterrent to discrimination. The questionnaire results showed that when asked to rate effective deterrents to sex discrimination, questionnaire respondents gave OCR an average of 3.49 on a 1 to 5 scale.<sup>156</sup> Respondents rated state and federal law more highly as deterrents of sex discrimination, and most important was an institution's desire to prevent discriminatory behavior.<sup>157</sup> They rated the threat that OCR would withhold money as lower than any other deterrent.<sup>158</sup>

Like the interviewees, questionnaire respondents indicated a high

150. Initially, we planned to distribute the questionnaire more broadly, but decided not to pursue that line of inquiry at this time. Thus, the results have limited generalizability.

151. Interviews, *supra* note 148, at 1, 3-7.

152. *Id.* at 1, 3-4.

153. *Id.* at 3 (most likely complaint would be made to State Department of Education after attempts to resolve internally have been tried; to extent there is contact with OCR, it is usually regarding special education); *id.* at 4 (State Department of Education, School Board Association, and high school activities association generally resolve disputes first) (most OCR complaints are filed by employees; parents less likely to go to OCR, perhaps because of lack of knowledge); *id.* at 6 (70%-80% resolved internally; state legislation is broader and encompasses more issues).

154. *Id.* at 2 (virtually all cases handled internally); *id.* at 3 (usually state agency handles); *id.* at 4 (parents unlikely to contact OCR); *id.* at 5 (at university level, affirmative action office, Dean of Students, and general counsel, in that order, would be likely to review a complaint); *id.* at 6 (70%-80% of complaints are resolved internally).

155. One might theorize that OCR would play a bigger role in handling complaints and motivating compliance in states without legislation that parallels Title IX. This could be investigated further.

156. Survey, *supra* note 149 (corresponding to a description of "moderately important").

157. *Id.* (rated an average of 3.86, 3.92 and 4.1, respectively).

158. *Id.* (This choice averaged 2.50, which placing it in the minimal importance range.).

degree of awareness and endorsement of the non-discrimination mandate. Respondents averaged 4.46 when asked whether their institutions included sex discrimination in its general non-discrimination policy and 4.32 when asked whether their institutions included sex discrimination in general grievance procedures.<sup>159</sup> They averaged 4.5 in stating that their educational institution has policies and procedures specifically covering sexual harassment and 3.7 in distribution of sexual harassment policy materials to students.<sup>160</sup>

One might anticipate that despite the rarity of OCR's intervention, when it intervenes it has a positive impact in inducing compliance and resolving problems.<sup>161</sup> The interviewees did not uniformly hold that view. Rather, they had mixed views of OCR's effectiveness and impact. Several interviewees who had been involved with OCR had positive impressions of the agency's personnel.<sup>162</sup> Several thought OCR's presence as a mediating force could be useful,<sup>163</sup> and they were sympathetic to the agency's funding woes, the variability of staff quality, and its vulnerability to political change.<sup>164</sup> Their most significant criticisms were that they perceived OCR to have prejudged them or the circumstances<sup>165</sup> and that agency personnel were rigid and inflexible<sup>166</sup> in response to problems that warranted more than a "cookie cutter" approach.

Likewise, the questionnaire participants gave the OCR mixed reviews. For example, OCR was seen as only sometimes helpful and oftentimes ineffective.<sup>167</sup> OCR was rated as lacking an understanding of

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159. *Id.*

160. *Id.*

161. Certainly the agency's own annual report indicates this is the case, and it includes several testimonial letters from satisfied complainants as well as examples of case resolutions. OFFICE FOR CIVIL RIGHTS, *supra* note 10, at 14–17.

162. Interviews, *supra* note 148, at 1; *id.* at 6 (always with the caveat that there are good people and bad people in any agency).

163. *Id.* at 1, 3, 5.

164. *Id.* at 5, 6.

165. *Id.* at 3–5.

166. *Id.* at 3 (OCR seems to have an agenda, not be neutral, and not willing to listen to reasonable solutions); *id.* at 4 (OCR possibly doesn't understand local internal dynamics and nuances, especially in a small rural school district; they want things done their way; it's like we come up to bat with one strike against us; they don't take advantage of my relationships and contacts with local people, when I might be able to help them); *id.* at 5 (they don't have a good sense of higher education; they don't understand all the layers of relationships; a lot of times, they aren't eager to get on the ground and talk to people. This makes them inefficient); *id.* at 6 (they handle investigation of complaints well, but struggle with issues that fall outside the norm, sometimes insisting on rigid or unrealistic solutions); *id.* at 8 (They didn't understand the problem they were supposed to be investigating).

167. Survey, *supra* note 149.

institutional objectives, the dynamics of mediation and the complainant's perspective.<sup>168</sup> In addition, OCR was described as being unwilling to learn the details necessary to resolve a complaint.<sup>169</sup> On the positive side, OCR was seen as expeditious, impartial, flexible, responsive and able to handle unusual cases.<sup>170</sup> In summarizing the attitudes of both the interview and questionnaire participants, we would describe OCR's performance as adequate but with room for improvement. Both groups thought the services OCR provides need to be tailored to the specific needs of the funding recipients, and that when involved in complaint resolution, attention needs to be paid given to the particular needs and unique problems of the parties to the dispute.<sup>171</sup>

Contrary to the opinions of advocacy groups urging that the agency devote more time to compliance reviews, the interviewees did not think more reviews would be particularly helpful in enlisting greater compliance.<sup>172</sup> The questionnaire respondents gave compliance reviews an average score of 3.21, indicating moderate importance but ranking it below other factors.<sup>173</sup> Compliance reviews may rank fairly low because the respondents believe it would be unpleasant to be the subject of a compliance review. However, the interviewees stressed that it was unnecessary because they consistently monitor compliance and gather data on such issues<sup>174</sup> and they viewed the process as a waste of time and money.<sup>175</sup> Some interviewees acknowledged private litigation is an

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168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*; Interviews, *supra* note 148.

172. Perhaps this is not surprising, given that they comprise the group that would be monitored. The basis for the AAUW's conclusion that compliance reviews are more effective than complaint resolution was that OCR was more likely to find violations requiring corrective actions in compliance reviews than in complaints filed with the agency. AM. ASS'N OF UNIV. WOMEN LEGAL ADVOCACY FUND, *supra* note 52, at 62. Also, the period for monitoring a compliance agreement was longer than the period for monitoring agreements reached after complaint resolution. *Id.*

173. Survey, *supra* note 149.

174. Interviews, *supra* note 148, at 1–3, 5 (“we . . . [had] a report on reports and it was just a listing of all the reports we produced”); *id.* at 6 (large institutions already have programs in place and expertise; possibly more effective with small institutions); *id.* at 7 (investigations of entities can waste a lot of tax dollars, because of time and money involved, and is hard to accept when district has good administration and legal counsel to advise it).

175. *Id.* at 1 (internal compliance reviews done periodically; people in education take their responsibilities to students seriously); *id.* at 2, 4 (education more effective than investigation); *id.* at 5 (nothing would change much because try to comply with law as understand it); *id.* at 6 (mostly not helpful. Large schools already have established programs. Might help small institutions, if they could take advantage of OCR's staff and resources, but the review itself strains their resources.); *id.* at 7 (outside investigations of people who have good legal counsel and administration are a waste of tax dollars in an era of enormous funding crises).

incentive to comply,<sup>176</sup> as did questionnaire respondents, who gave it moderate importance.<sup>177</sup> An interviewee indicated that she expects her clients to go beyond what is required by liability standards to comply with the statute;<sup>178</sup> another noted that at her institution “everybody is responsible for there not being discrimination” though this may not be true at other universities.<sup>179</sup> Several emphasized that their own jobs required that they spot the issues and make sure that clients know they are obliged to follow them.<sup>180</sup> Questionnaire respondents indicated that the most important reason to address Title IX compliance was to protect students from discrimination.<sup>181</sup> Avoidance of lawsuits and OCR investigation averaged much lower.<sup>182</sup>

When asked whether they had contact on any regular basis with OCR regarding changes in the law or the agency’s insights as to the handling of certain issues, (OCR’s public education function) the interviewees indicated they did not.<sup>183</sup> Likewise, only 11% of questionnaire respondents said their institutions had any contact whatsoever with OCR in the past year.<sup>184</sup> Among the interviewees, there was a sense that greater contact with OCR regarding the law and policies would be useful<sup>185</sup> in part because many of these individuals must conduct training of students and employees.<sup>186</sup> A number of those interviewed

176. *Id.* at 1 (whether the motive is loss prevention or to ensure people get what they are entitled to, the possibility of a lawsuit encourages significant attention); *id.* at 4 (a dispute over practice times assigned to girls teams was resolved because of litigation by girls against Activities Association).

177. Survey, *supra* note 149 (an average rating of 3.3).

178. Interviews, *supra* note 148, at 3 (if something is inappropriate at school, the expectation is that employees would deal with it, whether it meets the legal definition of harassment or not).

179. *Id.* at 6.

180. *Id.* at 1 (clients receptive to being told they are wrong and do not try to be bullheaded); *id.* at 4 (“I’m not going to sit here and tell you what you want to hear.”); *id.* at 7 (responsibility as legal counsel is to keep district apprised of any changes in law or regulation and this is done regularly).

181. Survey, *supra* note 149.

182. *Id.* (protecting students (4.48); avoiding lawsuits (3.70); avoiding OCR contact (3.40)).

183. Interviews, *supra* note 148, at 1–4 (not aware of any education/training by OCR); *id.* at 6 (used to receive materials and long-term assistance on disability issues, does not any more).

184. Survey, *supra* note 149.

185. *Id.* at 1 (more education useful, as opposed to compliance review “which has a wholly different connotation”); *id.* at 2 (no contact with OCR regarding what is important; it would be very useful); *id.* at 3 (helpful if could get approval of policies, or advice on compliance); *id.* at 4 (useful for OCR to hold workshops/ share insights about law and process); *id.* at 6 (materials much more helpful to committed institution than compliance review; it would be very helpful to be able to brainstorm alternatives with them); *id.* at 8 (interviewee’s community relishes local control, therefore training; sample materials, ability to interact on voluntary basis would be much better received).

186. *Id.* at 4 (“I’d rather be dealing with frivolous claims of sexual harassment [as a result of

stated it would be helpful to understand the agency's thinking about various issues that educational institutions confront.<sup>187</sup> Questionnaire recipients were asked to identify the functions OCR performs, and they proved to be very knowledgeable that OCR resolves complaints and less knowledgeable regarding its public education functions.<sup>188</sup> Like the interviewees, questionnaire respondents indicated more contact with OCR in a public education capacity would be useful.<sup>189</sup>

The conclusion drawn from these interviews and questionnaire responses was that the non-discrimination mandate was very clear to the interviewees, as was their commitment to follow it,<sup>190</sup> but the impact of *federal* enforcement efforts on their performance was diffuse and somewhat sporadic. It appeared that a heightening of OCR's public education function would be useful and appreciated.

### F. Conclusions on Enforcement Structure

There are many challenges to public enforcement of Title IX. The sheer magnitude of the U.S. government's funding of education makes oversight difficult. The number of funding recipients, coupled with the limitations of OCR's procedures and the apparent preference of potential complainants not to involve OCR seem to make the agency a marginal

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training] than having very serious things going on and a kid doesn't know what to do or how to deal with it."); *id.* at 7.

187. This was true despite the fact that many individuals who work in education administration receive information from professional associations, such as an association of school boards. *Id.* at 2-3, 6-8.

188. Survey, *supra* note 149. Only 42% believed OCR provided on-site technical assistance; 47% believed the agency established networks to allow recipients to share information about Title IX, while 82% knew about the complaint resolution function. *Id.*

189. *Id.* They rated highly telephone advice, ability to obtain OCR approval of their policies on a proactive basis, free regional workshops, educational materials to distribute to staff and students, and the ability to receive direction about OCR's position on issues outside the context of an investigation highly. *Id.*

190. The conclusions we drew about the level of awareness of Title IX and commitment to enforcement are somewhat at odds with a study conducted by the American Association of University Women. Their study consisted of visits with district administrators in twenty five rural school districts in twenty one states in 1990. Their data indicate 37% of the administrators saw "no Title IX issues" in their districts, and some of these administrators thought it was "stupid" or "frivolous" to worry about equal opportunities for boys and girls. American Association of University Women, *How Schools Shortchange Girls* 12 (1992). Their sample was deliberately rural; our sample was not, though it included individuals from rural areas. Our sample may suffer selection bias, in that people who attend an education conference may be more prone to be aware of and endorse Title IX's goals. However, even taking these differences into account the question is how to interpret the AAUW findings. It is not surprising that administrators would see no Title IX issues; part of this article's premise is that the second generation problems are much more difficult to see, and that is precisely why a much greater public education and outreach function would be an important reform.

player in some respects. The agency must struggle as well with enforcement obligations of various statutes, and its priorities and positions shift with change in the political climate. These obstacles are serious. They present an opening for laxity, indifference, or even defiance among funding recipients. Also, private litigation, while a counterbalancing force, suffers from so many legal and practical constraints that it is no substitute for consistent and vigilant public enforcement.

#### IV. SHOULD GENDER DISPARITY BE ADDRESSED BY ACCOUNTABILITY STANDARDS?

The previous sections analyze what appear to be strengths and weaknesses of current Title IX enforcement and serve as the basis for proposals as to how to move ahead. However, if the public enforcement function is being re-imagined, it is important to consider whether the gender disparity issues in education should be addressed using an outcome-based statute such as the No Child Left Behind Act of 2001 (“NCLB”).<sup>191</sup> NCLB seeks to eliminate race and class based disparities by imposing rigid achievement requirements and penalties for failure.<sup>192</sup> It is the most ambitious race-conscious statute since Title VI, and as such, a major educational and civil rights initiative.<sup>193</sup>

If it applied to gender, an outcome-based approach like that of NCLB would posit that sex should not affect reading, or achievement on tests, or placement in special education. It would require data on test results and other indicia of performance to be broken down by gender and demand the elimination of any statistically significant deviations in those test results or other indicia or performance differences. In the absence of satisfactory outcomes, funding recipients would encounter negative consequences. As under NCLB, OCR and the Department of Education would be heavily involved in implementation and enforcement,<sup>194</sup> but the statute itself, not the agencies, would specify the expected outcome, as well as many requirements and benchmarks to be

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191. No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301 et seq. (Supp. III 2003). The Act “is the short title for reauthorization of the Elementary and Secondary Education Act, which first passed in 1965.” Daniel Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act’s Race-Conscious Accountability*, 47 HOW. L. J. 243, 244 (2004).

192. *Id.*

193. *Id.* at 246.

194. NCLB appears front and center on the Department of Education website, U.S. Dep’t of Educ., Policy, <http://www.ed.gov/policy/landing.jhtml?src=rt> (last visited Mar. 22, 2007), and is also found on the OCR homepage, Office for Civil Rights, U.S. Dep’t of Educ., Overview of the Agency (Mar. 8, 2005), <http://www.ed.gov/about/offices/list/ocr/index.html>.

met. Compliance would be measured in these terms. As with NCLB, however, an outcome-based statute would raise concerns of creating uniformly *low* standards and creating an unconstitutional or at least highly intrusive federal influence over state affairs. In addition, the underlying goal of NCLB—equal test scores across races and social classes—may not be achievable in the gender disparity context, particularly given research detailing developmental differences by gender.

### *A. Relevant Features of NCLB*

NCLB seeks to eliminate race, disability, language, and class based disparities by imposing rigid achievement requirements and penalties for failing to meet those requirements.<sup>195</sup> States receiving funds under Title I must develop specific student achievement standards to apply to all public schools and students.<sup>196</sup> The Act also requires that states establish a definition of “adequate yearly progress” and that each group of students within a school meet the academic indicators established by the state.<sup>197</sup> The students’ scores on yearly statewide achievement tests are the means by which adequacy of progress is measured.<sup>198</sup>

Failure to achieve adequate yearly progress (AYP) can lead to adverse consequences for the underperforming school. If a school fails to meet the requirements of NCLB for two consecutive years, children attending the school will be eligible to transfer to a higher performing school.<sup>199</sup> Schools may be required to use up to 20% of their Title I funds on transportation and supplemental services.<sup>200</sup> Within twelve

195. Losen, *supra* note 191, at 245; Evan Stephenson, *Evading the No Child Left Behind Act: State Strategies and Federal Complicity*, 2006 B.Y.U. EDUC. & L.J. 157 (2006).

196. 20 U.S.C. § 6311(a)–(b) (Supp. III 2003); see Ronald D. Wenkart, *The No Child Left Behind Act and Congress’ Power to Regulate Under the Spending Clause*, 174 WEST’S EDUC. L. REP. 589, 590 (2003) (explaining that states must establish minimum requirements).

197. See 20 U.S.C. § 6311(b)(2)(C) (“(i) applies the same high standards of academic achievement to all public . . . school students in the state; (ii) is statistically valid and reliable”; (iii) results in continuous and substantial academic improvement for all students; (iv) measures the progress of public . . . schools and local educational agencies based on [the state developed] academic assessments . . . ; (v) includes separate measurable and annual objectives for [poor students, minority students, disabled students and English as a second language students]; (vi) [i]ncludes graduation rates . . . and at least one other academic indicator . . . for all public elementary school students . . .”).

198. Stephenson, *supra* note 195, at 161 (NCLB was crafted on the assumption that every child could score proficiently on tests administered yearly in math and reading within a given time period).

199. OFFICE OF PUB. AFFAIRS, U.S. DEP’T OF EDUC., A GUIDE TO EDUCATION AND NO CHILD LEFT BEHIND 17 (2004), available at <http://www.ed.gov/nclb/overview/intro/guide/guide.pdf>.

200. See Coulter M. Bump, Comment, *Reviving the Coercion Test: A Proposal to Prevent Federal Conditional Spending that Leaves Children Behind*, 76 U. COLO. L. REV. 521, 523–24, 551–

years, all students in each subgroup must meet or exceed the state's prescribed level of academic achievement.<sup>201</sup> If a school or district cannot make its annual yearly progress or improve by utilizing technical assistance provided by state and local educational agencies, the overseeing agency must intervene with corrective actions.<sup>202</sup> The Act contains reporting obligations which, though not new, are designed to prompt public pressure from parents and the community on schools that are not meeting their targets.<sup>203</sup>

### B. Federalism Concerns

Notwithstanding a shift toward less federal involvement in some educational contexts and case law diminishing the importance of agency regulations under Titles VI and IX,<sup>204</sup> NCLB initiative injects a much more intrusive and visible federal influence into the state and local educational structure.<sup>205</sup> This undeniable intrusiveness of the standards and the sanctions has given rise to federalism concerns.<sup>206</sup> While the Act places the responsibility on state and local agencies to develop educational plans, it also imposes a great many requirements on these state and local agencies. It narrows district level discretion and problem-solving incentives because proficiency is measured through standardized

52 (2005). Title I funds were meant to supplement local funds for low-income student populated schools, so the impact of NCLB is to dilute the funding for those particular individuals. *Id.*

201. 20 U.S.C.A. § 6311(b)(2)(F) (West 2006) (mandating a twelve year goal of 100% proficiency in math and reading).

202. Sanctions may include "closing schools, withdrawing federal funds, and firing staff at the harsh end, to requiring the school to hire a consultant . . . at the gentler end." Losen, *supra* note 191, at 259 (citing 20 U.S.C.A. § 6316(b)(7) (West 2000 & Supp. 2003)).

203. *Id.* at 260.

204. See *supra* text accompanying notes 104–124.

205. The statute was passed with bipartisan support as a response to achievement outcomes for minority students that are, and have remained, far below those of whites for many years. Losen, *supra* note 191, at 245 (citing 20 U.S.C. § 6301 (Supp. III 2003)). For twelfth grade students, only 17% of White students are below basic competency levels for reading compared to 43% of Black students and 36% of Hispanic students. *Keeping the Promise of "No Child Left Behind": Success or Failure Depends Largely on Implementation by the U.S. Department of Education: Hearing Before the H. Comm. on Educ. & the Workforce*, 107th Cong. 75 (2002), available at [http://www.civilrightsproject.harvard.edu/policy/testimonies/NCLB\\_072402.php](http://www.civilrightsproject.harvard.edu/policy/testimonies/NCLB_072402.php) (statement of Christopher Edley Jr., professor, Harvard University). The statute also responded to data that indicated resource inequalities, including less highly qualified teachers, in predominantly minority schools. See *id.* ("In California, for example, the proportion of unqualified teaching faculty is 6.75 times higher in high-minority schools . . . than in low minority schools . . .").

206. Indeed, there are concerns that Congress may have exceeded its concededly broad Spending Clause powers in enacting NCLB. Bump, *supra* note 200, at 522–23; Wenkart, *supra* note 196, at 590. This is because "the [NCLB's] requirements of a state accountability system and the requirement that all teachers . . . be 'highly qualified'" are not contingent on receipt of federal funding, and schools had no opportunity to decline to participate. Wenkart, *supra* note 196, at 596.



tests, and it is clear this is the path schools must follow in order to comply. Perhaps this aggressiveness is warranted; after all, it is a response to years of achievement gaps and too little progress in closing them. On the other hand, the statute's rigidity may well undermine its good intentions in dozens of ways, perhaps enough to bring public school systems to their knees in some areas, unless sanctions are delayed or standards lessened.<sup>207</sup>

### C. Efficacy Concerns

While a full analysis of NCLB is beyond the scope of this article, it is apparent that despite the statute's undeniably appropriate goals, there are reasons to worry about both the theory and operation of the law. For example, despite the statute's rigid expectation of academic proficiency, it gives states the flexibility to create their own standards to measure proficiency.<sup>208</sup> This creates a potential for gaming the process.<sup>209</sup> In fact, some states have already lowered their standards for proficiency in response.<sup>210</sup> In addition, many scholars and educators observe that NCLB is under-funded relative to its high demands of state and local entities.<sup>211</sup> In the absence of sufficient funding, underperforming schools will likely fail or opt not to accept Title I funding.<sup>212</sup> Sanctions will result in less money for underperforming schools; the schools may become more racially segregated because students of higher socio-

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207. Indeed, Losen suggests that some of the bipartisan support for the Act may have been motivated by some politicians' desire to undermine public schools by "[labeling] thousands of public schools as failing while generating no such data on private schools," thus paving the way for privatization of the schools. Losen, *supra* note 191, at 276.

208. Stephenson, *supra* note 195, at 161.

209. As Stephenson explains, there are several ways to evade the Act. Some relate to loopholes in the reporting of scores, such as using a "balloon" schedule, raising the minimum number of students that must be in a subgroup before it is tracked for accountability purposes, and using confidence intervals. *Id.* at 164–74. Stephenson argues that although these maneuvers are evasions of the intent and spirit of the act, they reduce the pressure on states to do something even worse—lower the standards for educational proficiency. *Id.* at 182–83.

210. *Id.* at 186. According to Stephenson, Colorado, Connecticut, Louisiana, Texas, Utah, Washington and Maryland have done so, and it appears Missouri will follow suit.

211. Bump, *supra* note 200, at 527–28. See also Tresa Baldas, *New Ammo for Funding Actions: Fresh Legal Arguments from Unlikely Source: No Child Left Behind Act*, 26 NAT'L L.J. 11, 11 (2005) (expressing concern that the failing schools are seeing no money to improve); see also CTR. ON EDUC. POLICY, FROM THE CAPITAL TO THE CLASSROOM: STATE AND FEDERAL EFFORTS TO IMPLEMENT THE NO CHILD LEFT BEHIND ACT vii (2003), available at [http://www.cep-dc.org/pubs/nclb\\_full\\_report\\_jan2003/nclb\\_full\\_report\\_jan2003.pdf](http://www.cep-dc.org/pubs/nclb_full_report_jan2003/nclb_full_report_jan2003.pdf) ("The Act is asking states to do more than ever before at a time when most states are facing severe financial strains.").

212. Derrick Z. Jackson, Commentary, *The Educating of George W. Bush*, CHI. TRIB., November 22, 2004, at 19 (legislators in many states discuss dropping out of program).

economic status are the ones most likely to avail themselves of the school choice provisions.<sup>213</sup> Many worry that the Act diverts money from education into the business of testing.<sup>214</sup> In addition, the power of parents or children who believe NCLB is not being vigorously enforced to take steps to do so is questionable.<sup>215</sup> Last, but certainly not least, there are reasons to doubt that the test-focused accountability approach of NCLB will actually work.<sup>216</sup>

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213. Losen, *supra* note 191, at 289–90. Losen emphasizes that in a highly diverse school, failure of any one major racial or ethnic group results in sanctions for the school. *Id.* at 290. Where there are fewer than a state specified number of students in the school in a given subgroup, that group does not trigger accountability. *Id.* Thus, “[No Child Left Behind’s] race-conscious accountability could undermine school integration efforts because it poses a greater enforcement threat in more diverse schools and districts.” *Id.* Losen’s concern also centers around the lack of requirements or funds for inter-district transfers: if an entire district fails, the student does not have governmental support for a transfer, and so minority sub-groups are left to fend for themselves in a failing school district. *Id.* at 289. *Cf.* Dan J. Nichols, Comment, *Brown v. Board of Education and the No Child Left Behind Act: Competing Ideologies*, 2005 BYU EDUC. & L. J. 151, 173–80 (2005) (indicating that possible resulting white flight from failing schools acts as nothing more than an inevitable result of market forces based upon the widening of choices for consumers of education).

214. Bump, *supra* note 200, at 541; *see also* Linda McNeil & Angela Valenzuela, *The Harmful Impact of the TAAS System of Testing in Texas: Beneath the Accountability Rhetoric*, in RAISING STANDARDS OR RAISING BARRIERS? INEQUALITY AND HIGH STAKES TESTING IN PUBLIC EDUCATION 127, 129 (Gary Orfield & Mindy Kornhaber eds., 2001) (discussing diversion of funds “away from such high quality curricular resources as . . . books toward test-prep materials and activities of limited instructional value” in the Texas system of accountability on which NCLB is modeled); Allison M. Dussias, *Let No Native American Child be Left Behind: Re-Envisioning Native American Education for the Twenty-First Century*, 43 ARIZ. L. REV. 819, 891 (2001) (“An intense focus on testing students can thus be counterproductive, as the students whose poor educational outcomes give rise to the perceived need to evaluate their schools’ performance by student testing feel compelled to leave their school by dropping out.”).

215. It is required that each state set up an administrative complaint process, but there is no procedure to file with a federal agency or to file a lawsuit. *See* 20 U.S.C.S. § 1231b-2 (LexisNexis 2006). There is, however, a possibility of appeal to the Secretary. *Id.* Losen notes that before NCLB, there were almost identical enforcement provisions that were rarely enforced. Losen, *supra* note 191, at 294–95.

216. It may instead lead to high schools pushing out underachieving students, who are disproportionately persons of color, so as not to be penalized by failure to make AYP. *Id.* at 291. Moreover, some argue that the statute’s test-based focus ignores the complex web of factors, some economic, some cultural, that must be addressed to overcome educational deficits. C. Joy Farmer, *The No Child Left Behind Act: Will It Produce a New Breed of School Financing Litigation?*, 38 COLUM. J.L. & SOC. PROBS. 443, 479–80 (2005) (noting lack of agreement among researchers as to what the factors are). There is also the possibility that student improvement is based on coaching students for the test and may not indicate real mastery. But in terms of test results, there is some positive news. For example, scores for reading at age nine, as reported by the National Center for Education Statistics, were greater in 2004 than almost any other year. MARIANNE PERIE ET AL., U.S. DEP’T OF EDUC., NCES 2005-464, NAEP 2004 TRENDS IN ACADEMIC PROGRESS: THREE DECADES OF STUDENT PERFORMANCE IN READING AND MATHEMATICS 9 (2005), available at <http://nces.ed.gov/nationsreportcard/pdf/main2005/2005464.pdf>. However, for ages seventeen and thirteen, the average reading scores showed no or little statistically relevant change. *Id.* Mathematics scores increased for both thirteen and nine-year-olds, and were higher in 2004 than in any preceding year, but remained statistically unchanged for seventeen year olds. *Id.* at 38. Key findings in 2005

Even if NCLB could eliminate disparities among achievement of racial groups, it would not be effective in eliminating the remaining sex-based disparities in education. NCLB's "proficiency" focus will, according to some research, ensure that schools commit enormous time and money to teach to the test, and in the process, they will replace more enriching and advanced curriculum with test-driven curriculum.<sup>217</sup> This approach would be highly unlikely to overcome barriers to girls' success in advanced science courses or to entice boys back into the educational enterprise with more diverse and appealing curriculum. Indeed, it promotes no inquiry into practices that lead to the disparities described above.<sup>218</sup> A focus on particular policies or practices that may exacerbate non-participation or non-achievement is precisely what is warranted.

Further, unlike race-based achievement gaps, scientific data tends to support the conclusion that gender disparities may be a result of developmental differences,<sup>219</sup> in which case an accountability standard would be unfair and unrealistic. What is needed is an effort to go beyond the achievement of formal equality and even minimal proficiency, in order to insure that curricular, behavioral and other educational practices

indicate that eighth graders as a whole have experienced a significant increase in math scores to their highest level since testing began. MARIANNE PERIE ET AL., U.S. DEP'T OF EDUC., NCES 2006-453, THE NATION'S REPORT CARD: MATHEMATICS 2005, at 5 (2005), available at <http://nces.ed.gov/nationsreportcard/pdf/main2005/2006453.pdf>. Though nationally only 36% of all students in fourth grade and only 30% of students in eighth grade scored at or above proficient, that percentage is higher than in any preceding year. *Id.* at 3. The score gap has also decreased between white and black students in fourth grade from thirty-four points in 1996 to twenty-six points in 2005 and in eighth grade from forty-one to thirty-four points. *Id.* at 7-8. Gender does not appear to have a large effect upon test scores for math, since the score gap between male and female students has never exceeded four points, and that gap narrows by eighth grade. *Id.* at 10-11. However, boys have consistently scored higher than girls, scoring at or above proficient at higher rates since testing began. *See id.* at 11 ("In 2005, male students scored higher on average than female students at both grades [four] and [eighth]."). For example, in 2005, 38% of fourth grade boys scored at or above proficient compared to 34% of fourth grade girls. *Id.* at 10. The statistics reported by the National Center for Education Statistics also indicate that average reading scores have increased among White, Black, and Hispanic students in both fourth and eighth grade since 1992. MARIANNE PERIE ET AL., U.S. DEP'T OF EDUC., NCES 2006-451, THE NATION'S REPORT CARD: READING 2005, at 5 (2005), available at <http://nces.ed.gov/nationsreportcard/pdf/main2005/2006451.pdf>. Nationally, there is no statistically significant change in the percentage of students at or above proficiency. *Id.* at 3. However, the score gap for fourth grade students has experienced a marked decrease since 2000, though there was no statistical difference between the 2005 and 1992 score gap. *Id.* at 6.

217. Losen, *supra* note 191, at 283-84 (citing ALFIE KOHN, THE CASE AGAINST STANDARDIZED TESTING: RAISING THE SCORES, RUINING THE SCHOOLS 35-41 (2000); McNeil & Valenzuela, *supra* note 214, at 127, 129; see also Kavan Peterson, *Test Scores Up, but Some Students Still Being Left Behind*, STATELINE.ORG, March 23, 2005, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=20378> (indicating that schools have sacrificed time spent on subjects like art and science to increase time spent teaching math and reading with the sole purpose of increasing test scores).

218. Losen, *supra* note 191, at 283-85.

219. *See supra* note 27.

do not hold back students of one sex or another.

Accordingly, public enforcement of Title IX should retain and strengthen OCR's enforcement authority while shifting emphasis away from complaint resolution.<sup>220</sup> Funding recipients should continue to be the primary agents to resolve complaints, though OCR would retain authority to intervene. OCR's primary mission with regard to funding recipients should be to give them the research and support needed to address persistent problems and experiment with solutions. This would consist of a much heightened public education function designed to provide materials, policies and advice, as well as strategies to overcome significant disparities that appear to be associated with gender. The next section explains this proposal in greater depth.

## V. REDEFINING THE PUBLIC ENFORCEMENT GOALS

To successfully rethink public enforcement goals, strengths of the existing strategy should be retained and amplified, and weaknesses minimized. The establishment of a state and local network that has internalized Title IX's mandate and the particulars of OCR's policies is a strength. The individuals comprising that network offer the potential of a constant presence and a closeness to the educational process that could lead to innovative programs. Thus, this article proposes that OCR can harness that strength best by enlisting these individuals as true partners and acknowledging the primacy of their enforcement responsibilities. A second proposal is that OCR's intermediate authority be strengthened. This would enhance OCR's ability to ensure focused compliance and would be a necessary check against neglect or indifference of funding recipients.

### *A. Redefining the Spheres of Enforcement Responsibility*

Because most problems of unequal treatment are not reported to OCR, or are not of the type that would be attractive to a private attorney even with the incentive of attorneys' fees, prevention is the key to their elimination. This requires awareness of the issues and close monitoring by people who work with and for funding recipients. As the water polo

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220. As long ago as 1975, HEW (which then administered Title IX) had "proposed to employ its enforcement resources . . . solely to remedy 'systemic discrimination rather than . . . a reactive or complaint-oriented approach geared toward securing individual relief for persons claiming discrimination.'" *Cannon v. Univ. of Chi.*, 441 U.S. 677, 708 n.42 (1979) (quoting 40 Fed. Reg. 24148 (1975)). This plan was abandoned after adverse comments. The agency's perception of the need to change its focus from complaint investigation motivated the agency to urge recognition of the implied private right of action in *Cannon. Id.*

example reveals, often this is easier said than done. It is highly unlikely that disparities in treatment, even if intentional among agents of a funding recipient, represent the entity's own policy.<sup>221</sup> Thus, funding recipients can help prevent disparities by developing strategies that intercept their employees and agents before they veer off course. For example, to avoid a practice like the disparity in water polo coaches, a school district would need to recognize the potential of an organizational structure to go awry if employees and parent volunteers are not educated about Title IX. A funding recipient would need to develop a system that would withhold hiring authority pending a report of how resources are being distributed. To prevent athletic schedules that slot women for less favorable seasons than men, a funding recipient must be aware of the ways this represents unequal treatment and have strategies to fix it.

The role of a federal enforcement agency in this setting should be to make enforcement easy: providing sample policies, checklists or guidelines, research on issues, or alternate procedures, all disseminated widely.<sup>222</sup> This involves partnering with the people on the front lines of enforcement; in a sense, making them an extension of what is admittedly a very limited federal workforce. If the federal agency senses a problem is widespread, it should exercise its power to do compliance reviews.

To address more intractable problems, such as gender disparities in achievement or enrollment in certain classes, OCR must address more directly the impact of certain educational policies. This is within OCR's regulatory power, and the agency has pursued similar issues, such as the disparity of English language learners in special education.<sup>223</sup> The problem is that its activities are limited to a few chosen priorities.

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221. Questionnaire and interview responses support the contention that Title IX's mandate and the responsibilities it imposes are taken seriously. *See supra* notes 148–190 and accompanying text.

222. Public education is one of OCR's functions, according to details furnished to the U.S. Commission on Civil Rights. OFFICE OF CIVIL RIGHTS EVALUATION, *supra* note 53, at 17. Some ways that this is accomplished are consistent with recommendations in this article, mailers, presentations, and information on the web. *Id.* However, the Commission recommended that these outreach programs need to reach out more broadly, to include local agencies, teachers, counselors, professional support staff and others in the Title VI context. *Id.* The Commission commended OCR on technical assistance in 1996, but found OCR had decreased it subsequently. *Id.* at 21. It found OCR had discontinued certain guidance and information documents available in 1996, but had failed to update key information, such as a brochure on improving math and science achievement for girls. *Id.* Overall, the Commission was positive about OCR's public education and technical assistance offerings. *Id.* at 136–37. The persons who were interviewed and who responded to the questionnaire were not as aware of the available public education and technical assistance functions as one would hope and expect, and responded positively to the idea of more information and concrete help being offered from OCR. *See supra* notes 188–189 and accompanying text.

223. OFFICE FOR CIVIL RIGHTS, *supra* note 10, at 5 (“OCR also [continues] . . . to review school districts' misidentification of minority and English language learners students in special education.”).

Another limitation is resource constraints. Yet another is the fact that Title IX itself makes clear that fund recipients are under no obligation to equalize gender representation. Even if it can regulate to address the problem, the agency may not be willing to do so, if past practice is any indication.<sup>224</sup>

An alternative way to tackle long-term problems of gender disparity in the educational system, would be to require local officials to address discrimination issues that OCR cannot or would not have the ability to monitor itself. As with prevention of disparate treatment, a heightened public education function would be a first step. The contract between the government and the funding recipients should expressly provide that funding recipients will devise measures to deal with these difficult problems. Experimentation should be valued<sup>225</sup> and incentives provided.<sup>226</sup> Compliance should be measured by responsiveness to the issue, as indicated by curricular offerings, parent education, or other means selected to tackle the problem, and of course, OCR should expect to see progress, though not on the rigid timeline of a program like NCLB.

### *B. The Need for Effective Intermediate Sanctions*

The other piece to this proposal is that OCR must have at its disposal effective intermediate remedies for violation of the law. The history of public enforcement of other important modern civil rights statutes has proven that Congress initially underestimated the need for strong enforcement authority.<sup>227</sup> Title VI and Title IX possessed a very strong enforcement mechanism from the outset —funding cut-off— but its

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224. Traditionally, Title VI and Title IX regulations have gone beyond the statutory text, in order to further the statutory mandate. Justice Scalia's pointed assumptions of the correctness of this in *Alexander v. Sandoval* could signal a withdrawal from this position. See *supra* notes 111–114 and accompanying text. It is worth pointing out that OCR has not used its regulatory power to push funding recipients when it could have done so. For example, although regulations require that funding recipients have a non-discrimination policy and post it, OCR stopped short of requiring a separate sexual harassment policy even though the agency in its Policy Guidance unequivocally endorsed the utility of such policies. Such reluctance is troubling in that it rewards funding recipients that do the bare minimum; they incur less costs of compliance and they haven't violated federal law if they don't follow best practices. Davies, *supra* note 17, at 410.

225. New regulations proposed by the Bush Department of Education would allow greater flexibility in anti-sex discrimination requirements to facilitate experimentation with single-sex education. Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 69 Fed. Reg. 11276 (March 9, 2004) (to be codified at 34 C.F.R. pt. 106).

226. NCLB has some incentive provisions. See, e.g., 20 U.S.C. § 6313(c)(4) (“financial incentives and rewards to teachers who serve in schools eligible under this section”); § 6317 (School Support and Recognition).

227. See *supra* note 101.

draconian nature has meant that the enforcing agencies are reluctant to use it.<sup>228</sup>

In moving into the next generation of Title IX claims, OCR needs more effective intermediate enforcement power in the event that a funding recipient is non-compliant.<sup>229</sup> Government litigation on behalf of a litigant or as a party, coupled with the types of powers given to the EEOC to intervene, award witness fees and issue subpoenas, would be such an intermediate step.<sup>230</sup> This would require the diversion of some resources, but the benefits of such a change would be that OCR would gain much more clout in the event it discerned issues of broad significance that needed resolution. Assuming that this increased enforcement power would be used sparingly and only in cases of real significance, overall litigation costs should not increase for entities receiving federal funds, and in fact, costs associated with private litigation might decrease.

In addition to identifying areas of strategic importance for compliance reviews, as is currently the case, the agency should focus on geographic areas where it has reason to think the need is greatest. Incidence of a steady stream of complaints from individuals in a particular school or region might be a sign of this, of course. The lack of state and local legislation addressing the same issues is another possible sign of greater need. It is logical to think that the level of assistance from a federal agency should be higher, and the federal oversight more focused, in areas where state and local counterparts are not already doing the same job.

## VI. BENEFITS AND LIKELY CRITIQUES OF ENFORCEMENT STRATEGY EMPHASIZING LOCAL/STATE RESOLUTION

Having described the contours of how public enforcement of Title IX should be focused in the future, this section considers the benefits and likely critiques of the proposal. The benefit to an approach that funnels assistance and resources to those on the front-lines of Title IX enforcement is that the federal enforcement effort would be magnified by

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228. See *supra* note 78.

229. OCR noted as much in its strategic plan, in which it indicated that it must develop proposals for remedial powers other than complete de-funding of recipients. Office for Civil Rights, U.S. Dep't of Educ., OCR Strategic Plan FY 2000 (March 9, 2005), <http://www.ed.gov/about/offices/list/ocr/strategic2000.html>.

230. *E.g.*, 42 U.S.C. § 2000e-4 (Equal Employment Opportunity Commission); § 2000e-5 (Prevention of Unlawful Employment Practices); § 2000e-6 (Civil Actions by Attorney General). Of course, if the Department of Justice handled this litigation, it would entail some extra resource expenditures in that agency.

this strategy; a network of individuals with the knowledge and skill to assist already exists. While adherence to formal equality is necessary in terms of access to services and opportunities, the next generation of sex-based educational barriers will not be solved merely through access. There must be ingenuity, the ability to perceive problems that may be affected by more than one attribute (such as sex and race), and a will to actually improve the educational outcome for students.

This strategy minimizes the weakness in the current enforcement process, such as the fluctuation of priorities within OCR, inadequate funding and competing enforcement responsibilities. It avoids the negative consequences that seem to be emerging from NCLB's inflexible and punitive approach.

#### *A. Critique 1: Intrusive and Burdensome Obligations on State and Local Entities*

The most likely objection to a proposal that places primary enforcement responsibility at a local and state level is that such a mandate is too intrusive of state and local autonomy in education. Not only are funding recipients asked to prohibit sex discrimination and collect data illustrating their compliance, but they must also figure out what practices lead to significant gender imbalances and initiate programs and strategies suitable to address them. All these actions are in addition to their other educational and nondiscrimination mandates. Some might argue that such requirements will deter practices that are perfectly legal and burden funding recipients in the process. Thus, even if the government could impose such obligations under its Spending Power, to do so would interfere unduly with local responsibility for curriculum and schools.

Imposing an obligation to test whether certain practices may lead to the disproportionate underachievement of boys in certain areas, or the absence of girls in higher science, however, in no way dictates the appropriate educational response. The proposal would, instead encourage experimentation and curricular diversity. Many of the changes that might lead to better results may not be burdensome at all, but rather a matter of tweaking curriculum or educating teachers.<sup>231</sup> These things are best done locally, but would be supported by research funded and distributed through the Department of Education. Finding solutions will of course be more burdensome than doing nothing, but the alternative is to move forward in a society in which children may be at risk of falling further

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231. See *supra* note 24 and accompanying text; Tyre, *The Trouble With Boys*, NEWSWEEK, January 30, 2006, at 46–50.



and further behind.

*B. Critique 2: Asking Educators to Go Further Than Prohibiting Sex Discrimination Will Create More Trouble Than It Solves*

In the employment context, Professor Eugene Volokh makes the case that sexual harassment law causes people to self-censor speech out of fear of exposing themselves or their employers to liability.<sup>232</sup> Likewise, Professor Vicki Schultz has argued, based on her reading of cases and other research, that “[i]n the name of preventing sexual harassment, many companies are punishing benign forms of sexual conduct that would not amount to sexual harassment or sex discrimination under the law.”<sup>233</sup> Extrapolating these critiques to the present case, one might envision that if educators and state and local administrative and compliance personnel were encouraged to address problems by devising remedies beyond a bare prohibition on sexual harassment, they would run amok. They might impose silly requirements that interfere with freedom of association or speech. Educators, state administrative personnel, and the like might institute equally problematic “reforms” that reinforce gender stereotypes, force unqualified students into classes they are not suited to attend or in which they are disinterested, and ultimately do more damage than good.<sup>234</sup>

These arguments deserve serious attention, but ultimately, they do not prevail here for the following reasons. First, one lesson that can be drawn from the Supreme Court’s Title IX sexual harassment cases is that the educational context is treated differently than employment.<sup>235</sup>

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232. Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1793, 1809–10 (1992). See also Eugene Volokh, *Freedom of Speech vs. Workplace Harassment Law: A Growing Conflict*, <http://www.law.ucla.edu/faculty/volokh/harass/> [hereinafter Volokh, *Growing Conflict*] (last visited Mar. 22, 2007) (cataloguing examples); Walter Olson, *Overlawyered.com*, *Fear of Flirting: Harassment Law Resources* (June 2003), <http://www.overlawyered.com/topics/harass.html> (cataloguing examples).

233. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2088 (2003) (citing Volokh, *Growing Conflict*, *supra* note 232). Schultz has attributed this to a skewed and mistaken understanding of what sex discrimination is, namely that it involves sexual conduct and interactions rather than discrimination.

234. See, e.g., Isabelle Katz Pinzler, *Separate But Equal Education in the Context of Gender*, 49 N.Y.L. SCH. L. REV. 785, 801 (2005) (discussing the potential to imbue single sex education with hidden or overt gender biases, even while providing equal resources). Professor Pinzler also calls on the Department of Education to provide reliable data on single sex schools. *Id.* at 805–06.

235. Davies, *supra* note 17, at 401–08, 414–20 (2002) (analyzing the difficulty of private damages litigation under *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274 (1998) and *Davis v.*

Although one can argue those decisions are not protective enough of students who are sexual harassment plaintiffs,<sup>236</sup> the Court recognized there must be a wider tolerance for student behavior and a wider berth for administrative response in education.<sup>237</sup> Second, the suggestion is not that OCR abandon its Title IX charge, but only that funding recipients be required, through their contracts, to creatively tackle problems they now ignore and which OCR cannot or will not tackle itself. Third, OCR should not set rigid benchmarks that force precipitous or reckless actions by funding recipients. Hence, the risk of funding recipients overreacting seems minimal. Finally, Professor Schultz's observations ultimately support this proposal. Her broader point is that sometimes the law focuses so narrowly that it overlooks the more serious problems. Widespread, long-term gender disparities signify a serious problem that can be addressed by widening our conception of the federal administrative role and allowing funded entities to understand and tackle these problems in creative ways appropriate to their community's needs and wants.

Ultimately, of course, it is true that any departure from a strict focus on formal equality introduces a potential for discrimination. The Department of Education and ultimately the courts would need to play a leading role in developing the parameters of such variations. There is no doubt that some of the issues are enormously difficult. However, promoting creative thinking and a reflective approach at the ground level will be crucial if further progress is to be made in eradicating sex discrimination in education. Progress will not happen without this administrative prodding at the federal level. Educational institutions are overwhelmed with demands to collect data, meet standards, and provide proof of compliance.<sup>238</sup> They face various sanctions from federal and state authorities, and the outrage from parents and the media when they fail. Faced with these demands, the easiest course of action is to comply with formalities, and leave real thought about problems to the time when complaints are made. In the long run, this reactive approach is ill-suited to carry out thoughtful strategies to eradicate sex discrimination in education. Reactive solutions may solve some problems, if they are

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*Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

236. Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983 and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 793 (1999).

237. *Davis*, 526 U.S. at 651–52 (explaining that courts must bear in mind that schools are unlike the adult workplace, and justifying limitations on funding recipient's Title IX liability accordingly).

238. Schools must file many reports with state and local governmental entities on topics such as crime statistics, NCLB, special education, etc.

reported, but do not give funding recipients a real incentive to think through issues and devise solutions. By focusing solely on equality of opportunities, it accepts as a given that boys do not read as well as girls, or that girls have less interest in higher level science than do boys. This does not serve society well for the future.

*C. Critique 3: Primary Enforcement Responsibility at State and Local Levels Means Less Federal Effort*

Some might view the suggestion that state and local entities tackle not only primary complaint resolution but also the longer term issues of gender disparity as a recipe for “enforcement-lite”—a virtual abdication of the federal antidiscrimination mandate. These critics might favor massive federal intervention with bright-line benchmarks for achievement, following NCLB, or alternately, a more liberally funded, more aggressive OCR that takes a much harder look at compliance issues. Previous sections of this article have argued that rigidity deprives funded entities of the flexibility they need to make fundamental changes. This is evident already in implementation of NCLB.<sup>239</sup> The insistence on testing and meeting benchmarks based upon the potential pain of serious financial penalties discourages curricular innovation that may lead to better learning. It deprives communities of choices and limits their ability to solve problems creatively. Research suggests it is through greater flexibility that we will surmount some gender-based learning disparities, such as boys’ lower reading skills.<sup>240</sup>

The other response to the “enforcement-lite” critique is that this is not a suggestion for “watering down” the federal role, but for ramping up to support the whole host of state and local employees who *already* play the major role in carrying out Title IX’s mandate.<sup>241</sup> Unless priorities

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239. NCLB, for example, requires that every secondary teacher be certified to teach in the field to which they are assigned. While this requirement makes sense on its face, seemingly precluding schools from staffing Physics classes with English teachers, it ignores certain realities that influence staffing and may create a worse educational environment than already exists.

240. Tyre, *supra* note 24, at 47 (describing how “the education system has become obsessed with a quantifiable and narrowly defined kind of academic success” that ignores developmental differences).

241. A historical perspective on the shifting of power between the state and federal spheres indicates the issues are more nuanced than they appear in the course of public debate. Even in the pre-1861 period that most embodied the idea of dual federalism, there were benefits and limitations from the diffusion of power in the states. Government was closer to the people and there was significant innovation among states. Harry M. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives* 9 U. TOL. L. REV. 619, 635–36 (1978). The New Deal era represented a “virtual revolution in federal-state power,” and Congress attached significant conditions to grants in kind. *Id.* at 646. Schreiber argued that despite social gains, there were significant costs to accretions of federal power in the 1930s, namely the “diminution in diffusion of

change radically to make sex discrimination central and OCR's budget is raised dramatically in response, the best ways to make progress on sex discrimination in education are to foster the role of non-OCR employees in creative problem-solving and to empower OCR to take intermediate legal actions against non-compliant recipients.<sup>242</sup> Since public education and technical assistance are currently a part of OCR's mission, these goals would merely become more prominent. The agency would engage in affirmative outreach and education; it would provide materials and research to employees of funding recipients, and it would review policies and documents. Employees would make time to proactively discuss problems an institution confronts wholly outside the context of a complaint or compliance review. OCR would conduct or fund primary research that would shed light on the efficacy of certain educational methodology.<sup>243</sup> It would cultivate relationships with state and local personnel so that these individuals view themselves as extensions of the federal enforcement team. Thus, federal enforcement power would be strengthened by a diffusion of power and responsibility.<sup>244</sup>

*D. Critique 4: State and Local Interest and Commitment to Title IX  
Will Be Merely Formalistic and Uncommitted to  
Significant Systemic Change*

Some might argue that this proposal presumes too much cooperation and caring from those working in the educational community at the local

power as a bulwark of liberty." *Id.* at 648. Schreiber traces the insulation and secrecy of federal and administrative agencies to later failures of government. *Id.*

242. This is a more modest proposal than, for example, the "Creative Federalism" of the Johnson administration, which attempted to create coalitions of state and local elected officials, private institutions, businesses, labor unions, and individuals, all of which were far too much to manage and coordinate. *Id.* at 663. Others have discussed the benefits of "cooperative federalism," or the recognition of state agencies as constructive partners with the federal government in other contexts, such as telecommunications. Phillip J. Weiser, *Cooperative Federalism and Its Challenges*, MICH. ST. L. REV. 727, 728–29 (2003). However, each situation is inherently different because of differences in the federal statutory schemes.

243. Professor Isabelle Katz Pinzler, for example, has suggested that the Department of Education fund a study on the efficacy of single sex education. She argues that prior studies have proven flawed and could not substantiate the benefits of single sex education, if indeed any exist. Isabelle Katz Pinzler, *Separate But Equal Education in the Context of Gender*, 49 N.Y.L. SCH. L. REV. 785, 800–06 (2005).

244. This is not a suggestion for a devolution of power, as that term is used in the literature. The term "devolution" refers to a transfer of specific powers or functions from a superior government to a subordinate government, in which the federal government surrenders all powers associated with the devolved functions. John Kincaid, *The Devolution Tortoise and the Centralization Hare*, NEW ENGL. ECON. REV., May/June 1998, at 13, 14–15. If anything, this proposal is more of a delegation model, where one government acts as a representative of another. *Id.* at 15.

level. As with critiques of Human Resources personnel in the employment context,<sup>245</sup> one might contend that compliance personnel and administrators focus only on formalities and that enlisting their support to attack gender-based disparities or analyze procedural glitches in the nondiscrimination mandate is unrealistic. However, this issue has been the subject of study elsewhere, and scholars in other areas have also come to the conclusion that neither courts nor administrative agencies acting alone can transform organizations.

In the employment context, Professor Susan Sturm advocates and documents through a case study the evolution of cooperative problem-solving approaches.<sup>246</sup> Sturm follows the histories of three companies that developed a structure of internal problem solving that informs both the courts and also translates and mediates workplace practice.<sup>247</sup> She argues that the types of problems inherent in employment discrimination cases of the second generation are simply not amenable to resolution by fixed rules in all cases. To be sure, fixed rules still have a role, but more is needed to make real progress.<sup>248</sup>

As Sturm recognizes, any contention that the regulatory role of courts and administrative agencies should become more “dynamic and reciprocal” may be met by the objection that it will sacrifice accountability. In the employment context, employers who lack “the capacity or incentive to develop effective systems would face little pressure or support to change.”<sup>249</sup> Sturm meets this objection by emphasizing the role of legal intermediaries, a set of actors who operate “within and across the boundaries of workplaces” to build the capacity and constituencies needed to operate accountable systems, to pool and critically assess examples from other institutions, and to “generat[e] effectiveness norms” to construct practices that sustain “an ongoing reflexive inquiry.”<sup>250</sup>

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245. See, e.g., Sturm, *supra* note 4, at 538–39 (discussing court reliance upon formalities established by human resource personnel for making determinations in discrimination claims).

246. *Id.* at 465, 479–522.

247. *Id.* at 458, 479–522.

248. As Sturm describes it, the role of law in the design and implementation of internal problem-solving and dispute resolution processes in the three companies she studied was to regularize “reflection about day-to-day conduct in relation to general legal standards,” to dictate the goals and offer incentives to meet goals, and to motivate liability avoidance behavior. *Id.* at 520. However, “law never provided the sole justification or constrained experimentation with the means of achieving legality. Related problems that did not themselves constitute legal violations could be addressed through the systems developed in part to reduce legal exposure. This is in contrast to the tendency of a rule-enforcement system to create separate, formalistic procedures that discourage problem solving or integration with underlying systemic concerns.” *Id.* at 520–21.

249. *Id.* at 523.

250. *Id.*

Professor Lauren Edelman's studies focusing on organizational response to law have identified factors that make institutions more responsive to legal norms. A number of her findings lend credence to the idea that state and local commitment to Title IX can be more than a formality. In empirical studies of organizations, Edelman found varying degrees of receptiveness to equal employment mandates.<sup>251</sup> Her data indicated that "proximity to the public sphere renders organizations more sensitive to the legal environment[]." <sup>252</sup> Educational entities are more likely to be evaluated on the basis of their compliance with mandated and non-mandated norms, than, for example, businesses.<sup>253</sup> Edelman finds that "organizations' collective response to law becomes the de facto construction of compliance"<sup>254</sup> and that even waning political support is unlikely to result in a significant dismantling because of the symbolic value of equal opportunity offices or certain rules or procedures that have been instituted to ensure equal opportunity.<sup>255</sup> Another recent study also confirms the ability of educational institutions to internalize and effectuate non-discrimination mandates, finding that educational professionals hastened to address same-sex sexual harassment after it became clear it was included within the scope of Title IX.<sup>256</sup>

While there are cautionary findings in Edelman's work,<sup>257</sup> there is much to support a proposal like that made in this article, and to inform its implementation in the context of Title IX. Her data indicated that publicly oriented organizations, including schools, are more sensitive to legal environments than private businesses.<sup>258</sup> Schools expect to be accountable for various student outcomes, and unlike businesses, should

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251. Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1548 (1992) [hereinafter Edelman, *Legal Ambiguity*] (discussing data collected from 248 private firms, 50 colleges and universities, and 48 government offices); see also Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401, 1413–17 (1990).

252. Edelman, *Legal Ambiguity*, *supra* note 251, at 1548–49. Edelman considers the sector of which an organization is a part and its administrative linkages to the federal government. She describes the link between federal funding recipients and federal government as an administrative link that cuts across societal sectors and helps to merge the public and private spheres.

253. *Id.* at 1549.

254. *Id.* at 1568.

255. *Id.* at 1568–69.

256. Jodi L. Short, *Creating Peer Sexual Harassment: Mobilizing Schools to Throw the Book at Themselves*, 28 LAW & POL'Y 31 (2006). Short states that schools developed an institutionalized response to peer sexual harassment "largely on their own initiative and in response to their own perceived institutional needs and values." *Id.* at 37.

257. She finds that ambiguous laws that emphasize procedure rather than substance lead to procedural responses, some of which may be useful and some of which may not. Edelman, *Legal Ambiguity*, *supra* note 251, at 1539–43. Weak enforcement "decouples" rules. *Id.* at 1544.

258. *Id.* at 1548–49.

not be torn by conflicting goals.<sup>259</sup> She confirmed the importance of personnel working in institutions in the institutionalization of legal norms.<sup>260</sup> Although educators and the public at large certainly questioned the value of educating women at one time,<sup>261</sup> that time has passed.<sup>262</sup>

When one considers the pressure on educational entities to produce achieving students and the scarcity of resources to devote to litigation, it is even clearer how motivated educational entities and their staffs should be to enforce Title IX. The challenges are in perceiving that certain policies may discriminate,<sup>263</sup> in achieving a sensible balance of resource allocation,<sup>264</sup> and in avoiding mechanistic formalism. These are not insignificant, but are of a fundamentally different nature than was previously true. These challenges will best be met through enhancement and acceleration of OCR's public outreach function, which should extend to every funding recipient on a regular basis, and through giving the agency increased intermediate enforcement authority.

### *E. Thoughts About Broader Application*

One goal of this article was to assess what we should take as the lessons from our experiences with public enforcement of Title IX. It is

259. *See id.* at 1549 (illustrating that schools are directly responsible for compliance to executive orders, have institutionalized "rule-based governance," and are subject to public scrutiny based on "conformity with institutionalized norms").

260. *Id.* at 1546.

261. For example, differing admissions requirements, with a higher standard required for women, communicated clearly the idea that only the most brilliant women should take a seat that could otherwise be filled by a male. *See supra* text accompanying notes 32–36.

262. As society has become accustomed to women in education, the public-at-large has begun to assert the need for equality. As Arthur Bryant, Executive Director of Trial Lawyers for Public Justice, describes, "[o]ne major reason for the growing support and impact of Title IX is that fathers have daughters. Most men are blind to the second-class treatment of women in athletics. They don't want to see it as unfair or discriminatory until they have daughters who want to play sports. Then their eyes open and, at last, they finally get it." E-mail from Arthur Bryant, Executive Dir., Trial Lawyers for Pub. Justice, to Julie Davies, Professor of Law, Univ. of the Pacific (dated March 12, 2006) (on file with author).

263. For example, one issue that has received attention recently is scheduling of high school sports, which deprived girls, but not boys, of the opportunity to compete in regional and state championships or forced girls, not boys, to stop playing sports they were previously able to play. *McCormick ex rel. McCormick v. Sch. Dist. Mamaroneck*, 370 F.3d 275, 279 (2d Cir. 2004); *Alston ex rel. Alston v. Virginia High Sch. League, Inc.*, 144 F. Supp. 2d 526, 527–29 (W.D. Va. 1999). Jodi Short credits scholars and popular press who called attention to peer sexual harassment with planting the seeds that ultimately resonated with the educational community and led to their acceptance of the outcome in *Davis v. Monroe County Bd. of Education*, 526 U.S. 629 (1999). Short, *supra* note 256, at 42–52.

264. Ongoing disputes regarding funding of men's and women's sports at the university level have proven challenging, contentious, and difficult to resolve. *See supra* note 14.

important to consider whether the observations and suggestions about improving public enforcement would fit into a broader picture of the government's role in enforcing other antidiscrimination laws. Whether one looks at housing,<sup>265</sup> employment,<sup>266</sup> school desegregation,<sup>267</sup> or other civil rights issues, there is a sense that society has reached a type of plateau. To be sure, there are still clear violations of the laws that require redress, but in so many areas, the larger problems lie just under the surface. The inability or unwillingness of government enforcement agencies to tackle these problems is a source of great frustration, and even disillusionment, with antidiscrimination legislation.<sup>268</sup>

The proposals outlined here Title IX might well apply in other contexts, particularly with other Spending Clause legislation. Giving local and state entities greater discretion to innovate and experiment to eliminate the effects of race discrimination, for example, might be welcomed by critical theorists. These critics are frustrated by the lack of progress in educational achievement in minority communities and are fed up with the results of years of enforcing (or not enforcing) *Brown v. Board of Education*.<sup>269</sup> Some have questioned whether it is right to deny a community that desires the ability to open a racially segregated school that could provide a decent educational experience to African-American students.<sup>270</sup> They might well embrace a system that encourages local funding recipients to tackle these problems in creative ways that go well beyond where the courts or agencies have been willing to go. The suggested approach, if carried over to Title VI, could enable them to do

265. See, e.g., Michelle Chen, *Discrimination, Segregation Still Prevalent in Housing*, NEW STANDARD, June 22, 2005, <http://newstandardnews.net/content/?items=1965> (recounting the increasing complexity of discriminatory practices, the large number of instances that never surface due to underreporting and the lack of sustained commitment by any level of government).

266. See, e.g., Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) (arguing that while Title VII jurisprudence sufficed "to address the deliberate discrimination prevalent in an earlier age," it is inadequate to address the most prevalent type of discrimination today—the subtle unconscious bias Title VII also intended to remedy); Michael Selmi, *Why are Employment Discrimination Cases so Hard to Win?*, 61 LA. L. REV. 555, 561–68 (2001) (ascribing various sources of unconscious bias to judges hearing employment discrimination claims that make these cases difficult to win).

267. See *supra* notes 106–107 and accompanying text.

268. ROY L. BROOKS, *INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUALITY* 1–3 (1996) (describing the perspective of limited separationists); Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1402–03 (arguing that the Supreme Court did not appreciate that "social realities preclude the attainment of meaningful integration through simple judicial or legislative fiat").

269. *Id.* at 1409–13.

270. BROOKS ET AL., *supra* note 2, at 26 (describing the three pronged test limited separationists propose must be met to make it legal to have separate institutions).



this.<sup>271</sup>

But because race is treated differently than gender,<sup>272</sup> Title IX and Title VI have to be treated differently. Overt sex discrimination has more easily been broken because of the sheer numbers of girls in school, because of their even distribution in the educational system, and because educators, administrators and parents can all relate to the thrill and pride of seeing children of both sexes participate in the system and succeed. Sadly, it is all too easy to dismiss inadequate educational results, not to mention resources and facilities in racially segregated schools outside one's neighborhood. These differences suggest that even though Titles VI and IX are virtual twins, the enforcement strategy must be different.<sup>273</sup>

Societal problems and the difficulties in enforcing civil rights legislation vary too much to make a "one size fits all" strategy practicable. The very nature of public education and the cross-directions different statutes present make fixing problems difficult. NCLB, for example, by putting a premium on testing and teaching to the test, may increase disparities in achievement between boys and girls by making curriculum more rigid, spurring elimination of recess or periods of physical activity in elementary education, and by putting resources into achieving proficiency at the cost of more advanced learning. Knowledge, innovation, flexibility, and motivation extending far beyond federal employees will be needed to address these problems. Different yet similar questions about the federal role in the future will inevitably need to be answered for each unique statute in order to continue progress in elimination of discrimination and to allocate resources wisely and effectively.

## VII. CONCLUSION

While society has not outgrown the need for Title IX or the enforcement of its prohibition on sex discrimination, there has been enormous success in eliminating formal barriers to equal education. At the same time, despite both administrative and private enforcement,

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271. Obviously steering around Equal Protection jurisprudence is a challenge. Limited separationists believe their perspective is constitutional because they read the Equal Protection Clause to vindicate non-subordination rather than colorblindness. *Id.*

272. Richard A. Wasserstrom, *Racism, Sexism and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 588-94, 603-15 (1977) (thoughtful examination of the social realities of race and sex in culture, and consideration of possible ideals regarding racial or sexual differentiation).

273. Losen argues there must be a far more aggressive enforcement of Title VI disparate impact regulations in addition to revisions to NCLB. Losen, *supra* note 191, at 248.

difficult issues remain to be solved. Title IX enforcement must grapple with these problems if education is truly to be purged of sex-based discrimination.

While there are, unfortunately, cases where individuals are discriminated against on account of sex, sex discrimination is far less common than it was when formal barriers to participation existed. The types of problems that predominate now are much more difficult. They include lapses in the systems now in place to prevent discrimination (e.g. the water polo example) and systemic sex-based disparities in the educational system that are typically accepted as part of the *status quo* (e.g. boys regularly score lower than girls on standardized tests, particularly in reading or writing).

Legal, monetary, and political obstacles make these problems very difficult to address through private litigation or through the current public enforcement by OCR. At the same time, since Title IX's inception, a corps of enforcement personnel charged with enforcing Title IX and any state or local legislation paralleling the statute has grown and assumed primary responsibility for solving problems before they grow into lawsuits. Their sheer numbers dwarf any enforcement staff the federal government could assemble, and they understand and accept the non-discrimination mandate.

In the years that come, the federal enforcement effort should enlist this population to make progress on the intractable issues and should refocus its own efforts in order to support them with research, creative options, legal advice and any other services that would help them. OCR should retain the ability to resolve complaints but should not place its resources in that direction. It should hold funded entities accountable by gaining commitments to tackle such issues in their funding contracts, and it should monitor their progress. At the same time, these entities should be allowed flexibility and autonomy to devise solutions to these problems that are suitable and acceptable for their sites. OCR should be given strengthened intermediate enforcement capacity for instances where funding entities are in violation of the law, and it should continue to grapple with broader policy issues.

The United States can rightly feel proud of its implementation of Title IX's non-discrimination mandate in education. We as a society, however, must now tackle the harder issues. Fairness and maximization of the promise of our children demand it.