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TRANSGENDER ATHLETES AND TITLE IX:
AN UNCERTAIN FUTURE

*“I, like everyone else, just want to compete and have fun while doing so.”*¹

I. WHAT IT MEANS TO BE TRANSGENDER: AN INTRODUCTION

Andraya Yearwood always knew she was different.² From a young age, Andraya liked to wear her mother’s heels and she began wearing skirts and wigs in middle school.³ At seventeen years old, Andraya began publicly identifying as a transgender woman and competed on Cromwell High School’s women’s track team in Connecticut.⁴ Although Andraya is legally able to compete, she experienced parents yelling profanities at her from the stands at track competitions.⁵ In some ways, Andraya was lucky she was able to compete at all; there are no national guidelines regarding which gender division transgender individuals must compete, resulting in individual states deciding policies at the high school level.⁶

The Connecticut Interscholastic Athletic Conference (“CIAC”) abides by Connecticut state law, which allows for “athletes to com-

1. See Carson Blackwelder, *How Billie Jean King Inspired This Transgender Athlete To Stand Up For LGBTQ Rights*, A PLUS (Oct. 4, 2018), https://aplus.com/the-aplus-interview/shawn-gatewood-transgender-rugby-athlete-ally-action-awards?no_monetization=true [<https://perma.cc/2C34-EL8J>] (interviewing female to male transgender rugby player, Shawn Gatewood, who promotes LGBTQ inclusion in athletics).

2. See Mirin Fader, *Andraya Yearwood Knows She Has the Right to Compete*, BLEACHER REP. (Dec. 17, 2018), <https://bleacherreport.com/articles/2810857-andraya-yearwood-knows-she-has-the-right-to-compete> [<https://perma.cc/SLD3-UA8N>] (discussing transgender high school track and field athlete Yearwood).

3. See *id.* (discussing how Yearwood was transgender before she “had the language to describe it”).

4. See Matthew Conyers, *At Cromwell High, Transgender Athlete Competes With Girls For First Time*, HARTFORD COURANT (Apr. 7, 2017, 6:00 AM), <https://www.courant.com/sports/high-schools/hc-hs-cromwell-track-andraya-yearwood-0407-20170406-story.html> [<https://perma.cc/8ZZC-A737>] (detailing Yearwood’s first time competing with women).

5. See Fader, *supra* note 2 (discussing public outcry associated with Yearwood’s participating in women’s track and field).

6. See Karma Allen, *Transgender Teens Outrun Track and Field Competitors but Critics Close Behind*, ABC NEWS (June 13, 2018, 4:02 PM), <https://abcnews.go.com/US/transgender-teens-outrun-track-field-competitors-critics-close/story?id=55856294> [<https://perma.cc/WC3U-XS5U>] (explaining criticism of transgender women competing in Connecticut track and field events despite CIAC allowance). For further discussion on state policies regarding transgender high school athletes, see *infra* notes 157–188 and accompanying text.

pete in the gender specific sport in which they identify.”⁷ In contrast, the state of Texas requires students to compete in the division corresponding to the sex listed on the individual’s birth certificate.⁸ Despite state law protecting Andraya’s right to compete, opponents have circulated a petition at track meets “calling on the state legislature to require athletes to compete in sports based on their gender at birth, unless the athlete has undergone hormone therapy.”⁹ Although Andraya’s experience as a transgender high school athlete is unique compared to her cisgender peers, it is all too familiar to other transgender athletes.¹⁰

This Comment argues the position of young transgender athletes presents unique issues challenging established legal categories used to determine Title IX compliance.¹¹ As a result, there is an increasingly growing problem in interpreting the law in regard to athletic requirements under Title IX.¹² Section II discusses what it

7. Lori Riley, *Coaches, Parents Question Policy For High School Transgender Athletes*, HARTFORD COURANT (June 5, 2018, 9:30 AM), <https://www.courant.com/sports/high-schools/hc-sp-hs-transgender-high-school-athletes-0520-story.html> [<https://perma.cc/2GB9-29DV>] (discussing Connecticut law and allowing athletes to compete with their corresponding gender identity). For further discussion on Connecticut’s policies regarding transgender high school athletes, see *infra* notes 173–188 and accompanying text.

8. See Fader, *supra* note 2 (explaining that different states have different high school policies because there are “no uniform federal guidelines that dictate in which gender division transgender athletes must compete”).

9. Riley, *supra* note 7 (discussing petition in Connecticut to prevent transgender high school athletes from competing in a category that corresponds with transgender individual’s gender identity, citing idea that “transgender athletes have an advantage”).

10. See Lauren Steele, *Chris Mosier on Making History as First Trans Member of Team USA*, ROLLING STONE (Aug. 2, 2016), <https://www.rollingstone.com/culture/culture-sports/chris-mosier-on-making-history-as-first-trans-member-of-team-usa-250971/> [<https://perma.cc/42NZ-NJ8J>] (interviewing Chris Mosier, first openly transgender male to make it onto U.S. National Team, stating “I knew that the minute I said, ‘I’m a trans athlete,’ that I would never get away from it. . . . But I asked myself, ‘Why does it matter?’ Well, it matters because there was no one else out there saying it”); see also Katy Steinmetz, *Meet The First Openly Transgender NCAA Division I Athlete*, TIME (Oct. 28, 2014, 3:00 PM), <http://time.com/3537849/meet-the-first-openly-transgender-ncaa-athlete/> [<https://perma.cc/R7WD-2QF4>] (interviewing Kyle Allums, first openly transgender NCAA Division I Athlete, stating “[h]earing female pronouns would make me dysphoric. It’s like being sick. It’s like having the flu. It’s like you want to rip the skin off of your body. It’s the most uncomfortable, unbearable feeling in the world. I could not focus on basketball feeling like that. All I wanted to do was escape my body and run away. . . . To bring that focus back to basketball, I needed to hear male pronouns”). For further discussion of what it means to be “cisgender,” see *infra* note 23 and accompanying text.

11. For a discussion on the interpretation of Title IX as it applies to transgender individuals, see *infra* notes 34–51 and accompanying text.

12. See Lauren Camera, *Title IX Faces Down the Culture Wars*, U.S. NEWS (Nov. 2, 2018), <https://www.usnews.com/news/the-report/articles/2018-11-02/trump->

means to be transgender and how that influences Title IX's interpretation.¹³ Section III examines Title IX itself; what it says, its original intent, and how its original intent affects transgender analysis.¹⁴ Section IV examines the battle of administrative interpretations of Title IX under both the Obama administration and Trump administration.¹⁵ Section V examines how Texas and Connecticut treat transgender athletes under Title IX.¹⁶ Section VI will examine potential proposals for transgender inclusion under Title IX as it currently exists, focusing on how the issue can most realistically be remedied on a state-by-state basis.¹⁷ Finally, Section VII discusses the future of transgender high school athletes and the law.¹⁸

II. WHAT IT MEANS TO BE TRANSGENDER

Confusion regarding the topic of transgender individuals begins with the definition of the word itself.¹⁹ The term transgender encompasses a variety of ways in which an individual's gender identity differs from that which was assigned to them at birth.²⁰ While sex is a label that is assigned at birth based on genitalia, gender identity is a "a social and legal status, and set of expectations from

obama-use-title-ix-as-a-tool-in-the-culture-wars [https://perma.cc/4CN4-EVNS] (discussing how Title IX is currently being debated because of its ambiguity).

13. For further discussion on what it means to be transgender and its influence on Title IX, see *infra* notes 19–33 and accompanying text.

14. For further discussion on Title IX itself, see *infra* notes 34–110 and accompanying text.

15. For a discussion on administrative interpretation of Title IX under Obama and Trump administrations, see *infra* notes 111–156 and accompanying text.

16. For a discussion on Texas' and Connecticut's interpretation of Title IX, see *infra* notes 157–188 and accompanying text.

17. For a discussion on proposals regarding transgender inclusion and Title IX, see *infra* notes 189–234 and accompanying text.

18. For a discussion on future of high school athletes and Title IX, see *infra* notes 235–238 and accompanying text.

19. See *What Does Transgender Mean?*, GLAAD, https://www.glaad.org/transgender/transfaq [https://perma.cc/8FSL-YT7D] (last visited Jan. 28, 2020) (discussing what it means to be transgender, how sexual orientation differs from gender identity, and proper pronoun usage); see also *Trans and Gender Nonconforming Identities*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/sexual-orientation-gender/trans-and-gender-nonconforming-identities [https://perma.cc/5Q2X-YFB5] (last visited Jan. 28, 2020) (explaining what transgender is, gender identity, gender dysphoria, passing, and how transgender identity differs from sexual orientation).

20. See Lisa Fields, *What It Means to Be Transgender*, WEBMD, https://www.webmd.com/sex/features/transgender-what-it-means#1 [https://perma.cc/V69C-DFGW] (last visited Jan. 20, 2020) (discussing how the meaning of being transgender is open-ended).

society, about behaviors, characteristics, and thoughts.”²¹ Unlike assigned sex, gender identity emphasizes “how [an individual feels] inside and how [they] express [their] gender through clothing, behavior, and personal appearance.”²² If an individual’s assigned sex and gender identity are essentially the same, then that person may be referred to as “cisgender,” or “cis” for short.²³ In 2016, roughly one and a half million adults in the United States identified themselves as transgender.²⁴

A person whose assigned sex and gender identity do not match may experience gender dysphoria, which “describe[s] the distress, unhappiness, and anxiety that transgender people may feel about the mismatch between their bodies and their gender identity.”²⁵ Individuals who experience gender dysphoria describe feeling uncomfortable in their own skin, feeling as though they are not living an authentic life, and feeling a sense of fear that they will be discriminated against for their gender non-conforming feelings or actions.²⁶

21. See *Gender and Gender Identity*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/sexual-orientation-gender/gender-gender-identity> [<https://perma.cc/2HUC-WUQ6>] (last visited Jan. 12, 2020) (explaining differences between assigned sex, gender, and gender identity).

22. See *id.* (supporting idea that individual can feel masculine and female or feminine and male).

23. See *LGBTQ+ Definitions*, TRANS STUDENT EDUC. RES., <http://www.transstudent.org/definitions/> [<https://perma.cc/8NRP-T33A>] (last visited Jan. 20, 2020) (stating definition of cisgender).

24. See Gabriella Borter & Barbara Goldberg, *Trump Says Transgender Policy Seeks to ‘Protect the Country’*, REUTERS (Oct. 22, 2018, 6:55 PM), <https://www.reuters.com/article/us-usa-lgbt/trump-says-transgender-policy-seeks-to-protect-the-country-idUSKCN1MW2XE> [<https://perma.cc/97CP-CLWP>] (“About 1.4 million U.S. adults identify as transgender, according to a 2016 estimate by the Williams Institute, a research center at UCLA Law School focused on sexual orientation and gender identity law and public policy.”).

25. See *Trans and Gender Nonconforming Identities*, *supra* note 19 (explaining gender dysphoria was previously called “gender identity disorder,” but this was changed to reflect progressive ideas that mismatching gender identity and assigned sex is not related to mental disorders); see generally *What Is Gender Dysphoria?*, AM. PSYCHIATRIC ASS’N, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [<https://perma.cc/TB25-LBLZ>] (last visited Jan. 28, 2020) (discussing gender dysphoria and its manifestation).

26. See Susan Milligan, *Isolated and Left Behind*, U.S. NEWS (Sept. 29, 2017, 6:00 AM), <https://www.usnews.com/news/the-report/articles/2017-09-29/transgender-americans-face-daily-struggles> [<https://perma.cc/V36S-DYEN>] (discussing difficulties transgender individuals face).

While lesbians, gays and bisexuals surely face their share of discrimination, trans people have added complications in their lives. Someone transitioning at work, for example, isn’t going to be able to hide it, even if he or she wanted to, whereas an individual could keep one’s sexuality private. Getting health care can be more stressful, especially if a person’s health records show a different gender than the one with which they

There is still a myriad of difficulties associated with being transgender despite the fact more and more of the American public is being introduced to transgender individuals, either in their personal lives or through popular media.²⁷ Transgender individuals face significant barriers regarding adequate healthcare; clinicians and healthcare staff often “lack clear anti-discrimination policies regarding gender identity and expression or fail to communicate those policies to patients and staff.”²⁸ Although Section 1557 of the Affordable Care Act (“ACA”) “prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities,” insurance providers often deny services such as “top surgery” and hormone therapy.²⁹

While the Obama administration “recognize[ed] gender largely as an individual’s choice and not determined by the sex as-

identify. They deal with perverse fascination about their genitalia, with people wanting to know if they’ve had body parts removed or restructured (transgender people may or may not have surgery, and say they do not see the presence or absence of male or female genitalia as dictating their gender identity).

Id.; see also Beth Prystowsky, *An Interview With My Transgender Friend*, CHI. NOW (Oct. 26, 2015, 10:50 AM), <http://www.chicagonow.com/ups-and-downs-of-a-yoga-mom/2015/10/an-interview-with-my-transgender-friend/> [<https://perma.cc/BWE7-NF69>] (interviewing transgender woman who discusses difficulties associated with transitioning).

27. See Jacob Bernstein, *In Their Own Terms*, N.Y. TIMES (Mar. 12, 2014), <https://www.nytimes.com/2014/03/13/fashion/the-growing-transgender-presence-in-pop-culture.html> [<https://perma.cc/ESX4-4RV7>] (profiling variety of transgender individuals who are influencing mainstream popular culture); see also Jenelle Riley, *Laverne Cox Changes the Narrative Around LGBTQ Communities*, VARIETY (Oct. 11, 2016), <https://variety.com/2016/tv/news/laverne-cox-lgbtq-national-coalition-of-anti-violence-programs-1201883997/> [<https://perma.cc/UZ9W-RV32>] (discussing how Laverne Cox, transgender woman and star of television show *Orange is the New Black*, has used her fame to support various transgender causes).

28. Kristin Lam, *Some Americans are Denied ‘Lifesaving’ Health Care Because They are Transgender*, USA TODAY (Dec. 11, 2018, 6:30 AM), <https://www.usatoday.com/story/news/2018/12/11/transgender-health-care-patients-advocates-call-improvements/1829307002/> [<https://perma.cc/88S8-3VCH>] (explaining issues associated with trying to receive proper medical care as transgender individuals).

29. 45 C.F.R. 92 (2016) (establishing that ACA prohibits discrimination in health programs and activities); see also Emanuella Grinberg et al., *To Be Herself, She Needs to Change Her Body. But First, Comes the Battle with Insurers*, CNN (May 31, 2018), <https://www.cnn.com/2018/05/31/health/transgender-surgery-insurance/index.html> [<https://perma.cc/W5U3-KSHP>] (explaining how transgender individuals still need to fight for insurance providers to cover procedures that transgender communities view as necessary); see also Dr. Scott Mosser, *Introduction to Top Surgery, Transmasculine, Transfeminine and Neutrois Procedures*, GENDER CONFIRMATION CEN., <https://www.genderconfirmation.com/introduction-to-top-surgery/> [<https://perma.cc/7AAX-YSBJ>] (last visited June 20, 2019), (discussing “top surgery,” which is “defined as a variety of procedures which alter the gender-related characteristics of the chest to appear less like the gender identity that the patient was assigned at birth”).

signed at birth,” the Trump administration is “considering narrowly defining gender as a biological, immutable condition determined by genitalia at birth”³⁰ This potential proposal to effectively redefine gender has been described as “the most drastic move yet in a governmentwide effort to roll back recognition and protections of transgender people under federal civil rights law.”³¹ This proposal would treat sex as an immutable trait, and any disputes regarding a person’s sex would be clarified with genetic testing.³² If the Trump administration manages to provide this legal definition of sex, there will be serious consequences for transgender healthcare, education assistance, and Title IX.³³

III. PAST, PRESENT, AND FUTURE: SCHOOLS’ AND SPORTS’ INTERPRETATION

Young transgender athletes present a unique challenge to Title IX compliance because Title IX makes no mention of transgender individuals or gender identity.³⁴ As a result, interpreting Title IX presents a growing issue regarding athletic requirements and trans-

30. Erica L. Green et al., *‘Transgender’ Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html> [<https://perma.cc/E2ET-UVY4>] (explaining implementation of ideas stated in presidential memo from Trump administration leaked to New York Times “would be the most significant of a series of maneuvers, large and small, to exclude the population from civil rights protections and roll back the Obama administration’s more fluid recognition of gender identity”).

31. *Id.* (explaining potential impact of new policy on transgender individuals).

32. See Tris Mamone, *Why ‘Genetic Testing’ for Gender Is Dangerous Pseudoscience*, REWIRE NEWS (Oct. 26, 2018, 4:31 PM), <https://rewire.news/article/2018/10/26/why-genetic-testing-for-gender-is-dangerous-pseudoscience/> [<https://perma.cc/5782-G2B2>] (explaining how genetic testing is not accurate method of determining gender identity); see also Mary Emily O’Hara, *It’s Not Science’: Experts Push Back Against Trump Health Department’s Sex Verification Plan*, UCLA INST. FOR SOC’Y & GENETICS (Oct. 25, 2018), <https://socgen.ucla.edu/2018/10/25/its-not-science-experts-push-back-against-trump-health-departments-sex-verification-plan/> [<https://perma.cc/8YHG-MD9L>] (stating genetic testing to verify sex is not reliable method to determine individual’s biological sex).

33. See Anthony Rivas, *How Redefining Gender Under Trump Could Affect Transgender People’s Health*, ABC NEWS (Oct. 28, 2018, 2:11 PM), <https://abcnews.go.com/Health/redefining-gender-trump-affect-transgender-peoples-health/story?id=58742630> [<https://perma.cc/R6GP-K8L9>] (explaining how Trump’s definition of sex could negatively impact transgender healthcare and ability to obtain identification documents, among other issues).

34. See Lani Seelinger, *What Does Title IX Say About Gender? Transgender Rights Weren’t Explicitly A Part Of It*, BUSTLE (Oct. 22, 2018), <https://www.bustle.com/p/what-does-title-ix-say-about-gender-transgender-rights-werent-explicitly-a-part-of-it-12637732> [<https://perma.cc/F4LD-HQE4>] (discussing history of Title IX and its current challenges).

gender individuals.³⁵ Congress enacted Title IX as part of the Education Amendments of 1972.³⁶ Title IX states “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance.”³⁷ Title IX was passed because women faced significant inequality regarding their education.³⁸ Prior to Title IX, women “were often excluded from or had only limited access to educational programs,” were subject to university admission quota caps, and oftentimes required to have “higher test scores and grades for [their admission].”³⁹ Today, the protections created by Title IX are credited for increasing the rate of women’s education.⁴⁰

Title IX is often associated with its enforcement to ensure equal opportunity in athletics programs, which “are considered educational programs and activities.”⁴¹ The inclusion of athletics in Title IX is further supported by Title IX’s implementing regulations, stating that sex discrimination is not tolerated “in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient of federal funds.”⁴² According to The National Collegiate

35. See Brooklyn DeGumbia, *S.D. Holds the Record for Most Controversial Transgender Bills*, KOTA TV TERR. (Feb. 27, 2019), <https://www.kotatv.com/content/news/South-Dakota—506469861.html> [<https://perma.cc/K9PU-RN4F>] (discussing recent South Dakota bills targeting transgender youth).

36. See 92 P.L. 318, 86 Stat. 235; see generally *Equal Access to Education: Forty Years of Title IX*, U.S. DEP’T OF JUST. (June 23, 2012), available at <https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf> [<https://perma.cc/H5JV-EQLB>] (hereinafter “*Forty Years of Title IX*”) (explaining history and effect of Title IX).

37. *Forty Years of Title IX*, *supra* note 36, at 1 (explaining history and effect of Title IX).

38. See *id.* at 2 (“Once admitted to schools, women had less access to scholarships; were excluded from “male” programs, such as medicine; and faced more restrictive rules, such as early curfews, than their male peers. Discrimination extended beyond students; women faculty were more frequently denied tenure than their male counterparts, required to take pregnancy and maternity leaves, or prohibited from entering faculty clubs.”).

39. *Id.* (detailing various methods of discrimination towards women prior to Title IX).

40. See *id.* (“In 2009, approximately 87 percent of women had at least a high school education and approximately 28 percent had at least a college degree, up from 59 percent with a high school education and 8 percent with a college degree in 1970. Additionally, enrollment in higher education has increased at a greater rate for females than for males; since 1968, the percentage of women between the ages of 25 and 34 with at least a college degree has more than tripled.”).

41. *Title IX Frequently Asked Questions*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions> [<https://perma.cc/37HT-J3Q2>] (last visited Jan. 28, 2020) (hereinafter “*Title IX Frequently Asked Questions*”) (providing Title IX’s application to athletics).

42. 34 C.F.R. § 106.41 (2015) (explaining Title IX bars sex discrimination).

Athletic Association (“NCAA”), there are three ways in which Title IX applies to athletics:

(1) Participation: Title IX requires that women and men be provided equitable opportunities to participate in sports. Title IX does not require institutions to offer identical sports but an equal opportunity to play; (2) Scholarships: Title IX requires that female and male student-athletes receive athletics scholarship dollars proportional to their participation; and (3) Other benefits: Title IX requires the equal treatment of female and male student-athletes in the provisions of: “(a) equipment and supplies; (b) scheduling of games and practice times; (c) travel and daily allowance/per diem; (d) access to tutoring; (e) coaching, (f) locker rooms, practice and competitive facilities; (g) medical and training facilities and services; (h) housing and dining facilities and services; (i) publicity and promotions; (j) support services and (k) recruitment of student-athletes.⁴³

It is difficult to fully comprehend the impact Title IX has had on women’s athletics because its effects have only been felt since its enactment in 1972.⁴⁴ The best way to understand Title IX’s impact is to examine the dominance of the United States’ female athletes in the Olympics.⁴⁵ Title IX directly influences Olympic statistics because a large number of female athletes on Team USA participated in college athletics.⁴⁶ According to Team USA:

A number of sports contested by Team USA in 2016 had 90 to 100 percent of their athletes (men and women) with a background in college athletics: basketball, diving, fencing, field hockey, indoor volleyball, rowing, triathlon, soc-

43. *Title IX Frequently Asked Questions*, *supra* note 41 (explaining Title IX’s application to athletics).

44. See 92 P.L. 318, 86 Stat. 235 (discussing legal history and impact of Title IX).

45. See Bill Plaschke, *American Women are Dominating the Games, and It Didn’t Happen By Accident*, L.A. TIMES (Aug. 16, 2016), <https://www.latimes.com/sports/la-sp-oly-women-plaschke-20160816-snap-story.html> [<https://perma.cc/MHZ2-LJSL>] (“‘We give more opportunity to women in this country, and it’s not even close,’ said Donna Lopiano, former chief executive of the Women’s Sports Foundation and a nine-time Amateur Softball Assn. All-American. ‘You are seeing the effects of that in these Olympics.’”).

46. See Karen Price, *Impacts Of Title IX Still Felt By Team USA Athletes Today*, TEAM USA (June 22, 2017, 1:08 PM), <https://www.teamusa.org/News/2017/June/22/Impacts-Of-Title-IX-Still-Felt-By-Team-USA-Athletes-Today> [<https://perma.cc/EBG2-GG3B>] (discussing impact Title IX has had on Team USA).

cer, swimming, water polo and track and field. Of the 558 athletes on Team USA, 439 (including men) competed collegiately; 176 of the 211 U.S. medalists either had competed or were en route to competing collegiately.⁴⁷

Additionally, the number of Division I women's teams "jumped from 2,011 in 1981–82 to 3,339 in 2006–07, according to NCAA records; the number of women student-athletes in big-time programs more than doubled."⁴⁸ According to the NCAA, "[m]uch of this growth was triggered by lawsuits in the mid-1990s forcing colleges and universities to adhere to Title IX guidelines."⁴⁹ As of 2016, "[t]he U.S. women have won 41 medals, more than any entire nation except China and Britain. The women have won 17 gold medals, as many as any other country's entire delegation."⁵⁰ In the 2016 Olympic Games in Rio, Team USA reported that "[h]ad American women competed as their own country, they would have ranked *fourth* among all nations in the overall medal chart and tied for second in the gold-medal count with 27."⁵¹

A. Transgender Students' Uphill Battle for Legal Protection and Recognition

Although Title IX provides explicit protections for women, courts have generally interpreted that Congress did not consider transgender individuals when drafting Title IX.⁵² As a result, it is

47. *Id.* (reflecting upon how Title IX provided women with opportunities in sports that were previously dominated by men).

48. *College Sports 101: A Primer on Money, Athletics, and Higher Education in the 21st Century* at 18, KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS (Oct. 2009), available at <http://www.knightcommission.org/wp-content/uploads/2017/09/college-sports-101-1009-01.pdf> [<https://perma.cc/K6CM-9SSU>] (discussing Title IX's impact on increase of female NCAA athletes).

49. Jennifer Rubin, *U.S. Women's Olympic Dominance Is Not a Fluke*, WASH. POST (Aug. 22, 2016), <https://www.washingtonpost.com/blogs/right-turn/wp/2016/08/22/u-s-womens-olympic-dominance-is-not-a-fluke/> [<https://perma.cc/NAP8-XD5E>] (discussing success of Title IX, noting that "many conservatives have long opposed Title IX as federal meddling akin to a quota system").

50. Price, *supra* note 48 (discussing result of Title IX's impact on female athletes in Olympic competitions).

51. U.S. Olympic Comm., *Team USA Concludes Record-Breaking Rio 2016 Olympic Games With 121 Medals, 46 Golds*, TEAM USA (Aug. 21, 2016), <https://www.teamusa.org/News/2016/August/21/Team-USA-Concludes-Record-Breaking-Rio-2016-Olympic-Games-With-121-Medals-46-Golds> [<https://perma.cc/873X-9MPL>] (emphasis added) (discussing Team USA's results at 2016 Olympic Games).

52. See *Johnston v. Univ. of Pitt. of Com. System of Higher Edu.*, 97 F. Supp. 3d 657, 676–77 (W.D. Pa. 2015) (citing *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007)) ("[O]n a plain reading of the statute, the term [''] on the basis of sex[''] in Title IX means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex.").

for Congress, not the courts, to “identify those classifications which are statutorily prohibited.”⁵³ This battle of interpretation endangers the position of young transgender athletes because Congress has not yet addressed the issue.⁵⁴ It is difficult to predict how laws will be interpreted once Congress puts them into effect and it is equally difficult to interpret Congress’s intentions behind the law.⁵⁵ According to Professor Jeannie Suk Gersen:

Most laws have openness to them and words that are not clearly defined, and it is understood that agencies under the president or under a particular administration will interpret those congressional laws, and that policymaking is what happens when those laws are interpreted But you don’t want those agencies to go crazy and do something that’s totally outside of what Congress could have intended But you also want there to be some leeway for the agencies to make policy within the limits of what Congress has provided.⁵⁶

This delicate balance between the room to expand the law versus giving the law definite parameters is exactly what is at issue with the modern day debate regarding transgender high school athletes and Title IX.⁵⁷

In *Johnston* the court stated “[t]he exclusion of gender identity from the language of Title IX is not an issue for this Court to remedy. It is within the province of Congress—and not this Court—to identify those classifications which are statutorily prohibited.” *Id.* (deciding Congress alone has authority to clarify Title IX).

53. *See id.* (citing *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984)) (“Although the maxim that remedial statutes should be liberally construed is well recognized, that concept has reasonable bounds beyond which a court cannot go without transgressing the prerogatives of Congress. . . . For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating.”).

54. *See generally* Scott Skinner-Thompson & Ilona M. Turner, Comment, *Title IX’s Protections For Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC’Y 271, 274 (2013) (discussing Title IX’s influence on transgender high school athletes).

55. *See* Camera, *supra* note 12 (reviewing ambiguity in light of societal change).

56. *Id.* (noting Jeannie Suk Gersen as Harvard Law School professor).

57. *See* Jonathan H. Adler, *How Can ‘on the Basis of Sex’ Be Ambiguous?*, WASH. POST (Aug. 24, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/24/how-can-on-the-basis-of-sex-be-ambiguous/?utm_term=.e1bba106f757 [<https://perma.cc/GH43-FBAU>] (discussing ambiguity associated with Title IX’s usage of “on the basis of sex”); *see also* Katy Steinmetz, *What Does It Mean to Discriminate Because of ‘Sex?’ How the Legal Meaning of That Word Has Evolved*, TIME (Oct. 29, 2018), <http://time.com/5436230/legal-history-sex-discrimination-trump-transgender/> [<https://perma.cc/D3L2-8QLZ>] (explaining legal history behind “sex” and its legal interpretation).

While an administration can work with a statute, there is an undefined line in which administrative interpretation could be extended past its original intended meaning.⁵⁸ Professor Gersen argued that although it is unlikely that Congress considered transgender individuals in 1972, there is no reason that an interpretation cannot address them.⁵⁹ The idea of reasonably “stretching” Title IX’s interpretation within its limits is analogous to the infamous landmark case, *Obergefell v. Hodges*.⁶⁰ In *Obergefell*, the Court ruled that the right to marry was a fundamental right under both the Equal Protection Clause and the Fourteenth Amendment.⁶¹ As the dissent in *Obergefell* noted, however:

The majority’s decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court’s precedent. The majority expressly disclaims judicial “caution” and omits even a pretense of humility, openly relying on its desire to remake society according to its own “new insight” into the “nature of injustice.”⁶²

Obergefell is the perfect example of a court expanding the parameters of existing law to adopt to newly prominent social values and norms.⁶³ Justice Kennedy, writing for the *Obergefell* majority, advanced the view that the interpretation of law must be expanded in the face of injustice, declaring that those who wrote and ratified the Bill of Rights and the Fourteenth Amendment “did not presume to know the extent of freedom in all of its dimensions, and so

58. See Adler, *supra* note 57 (reviewing limits of statutory interpretation).

59. See Camera, *supra* note 12 (discussing present difficulties associated with interpreting Title IX).

60. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding right to marriage is fundamental and guaranteed to same-sex couples under Due Process Clause and Equal Protection Clause of Constitution).

61. See *id.* at 2604 (stating that “the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry”).

62. *Id.* at 2612 (Roberts, C.J., dissenting) (concluding marriage as fundamental right has no basis in existing law or precedent and changed societal values should not create such right).

63. See Richard Socarides, *A New Era for Gay Rights?*, NEW YORKER (June 17, 2015), <https://www.newyorker.com/news/news-desk/a-new-era-for-gay-rights> [<https://perma.cc/W7GV-ADXK>] (reporting society’s general acceptance of gay marriage prior to Supreme Court’s ruling).

they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.”⁶⁴ Despite Justice Kennedy’s reasoning in *Obergefell*, there is no guarantee that future Courts will agree with the idea of expanding law based solely upon judicial interpretation.⁶⁵ Moreover, this method of expansion advocated by Justice Kennedy is a double-edged sword; a liberal Supreme Court could use this reasoning to eventually expand the definition of sex to include gender identity, but a conservative Supreme Court could use the same logic to argue that sex consists of gender assigned at birth and not gender identity.⁶⁶

In April 2014, in an effort to help schools understand Title IX and its applicability, the Assistant Secretary of the Office for Civil Rights (“OCR”) within the Department of Education released a memorandum regarding questions about Title IX and related sexual violence.⁶⁷ This document was released in a question and answer format to provide guidance to schools “concerning their obligations under Title IX to address sexual violence as a form of sexual harassment.”⁶⁸ After the question “[d]oes Title IX protect all students from sexual violence?” the OCR states:

Answer: Yes. Title IX protects all students at recipient institutions from sex discrimination, including sexual violence. Any student can experience sexual violence: from elementary to professional school students; male and female students; straight, gay, lesbian, bisexual and transgender students; part-time and full-time students; students

64. *Obergefell*, 135 S. Ct. at 2598 (2015).

65. See Samantha Allen, *Inside the Fight to Save LGBT Rights at an All-New Supreme Court*, DAILY BEAST (July 3, 2018, 9:24 AM), <https://www.thedailybeast.com/inside-the-fight-to-save-lgbt-rights-at-an-all-new-supreme-court> [<https://perma.cc/ED2G-L5YV>] (discussing future of Supreme Court and LGBTQ rights); see also Cristian Farias, *The Future of Transgender Rights Now Rests With Brett Kavanaugh*, N.Y. MAG. (Oct. 23, 2018), <http://nymag.com/intelligencer/2018/10/future-transgender-rights-kavanaugh.html> [<https://perma.cc/M6FV-7RDT>] (suggesting how “on the basis of sex” may be re-interpreted by Supreme Court with addition of Justice Kavanaugh).

66. See Lydia Wheeler, *Transgender Fight Could Prove Major Test for Supreme Court*, THE HILL (Oct. 28, 2018, 5:14 PM), <https://thehill.com/regulation/court-battles/413420-transgender-fight-could-prove-major-test-for-supreme-court> [<https://perma.cc/47PK-H5XG>] (interpreting how Supreme Court may come to shape future of transgender law).

67. See *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP’T OF EDUC. 1 (2014), available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/5RRD-U9MF>] (explaining how Title IX applies to various issues).

68. *Id.* at ii (clarifying school’s obligations under Title IX).

with and without disabilities; and students of different races and national origins.⁶⁹

Shortly after, in December 2014, the OCR released “Questions and Answers on Title IX and Single Sex Elementary and Secondary Classes and Extracurricular Activities.”⁷⁰ The December memorandum stated that all students, “including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX.”⁷¹ Under Title IX, “a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.”⁷² While this document further establishes classroom protections for transgender individuals, it also specifically states, “[the] OCR does not address interscholastic, club, or intramural athletics in this document because extracurricular athletics are governed by separate Title IX regulations.”⁷³ The fact that the OCR’s guidance tried to promote transgender inclusion in schools, while simultaneously leaving athletics to the side, exemplifies exactly how difficult it is to promote true transgender inclusion.⁷⁴

Current policies regarding transgender youth and participation in high school sports falls to individual states.⁷⁵ State policies can vary widely; for example, Indiana and Nebraska both determine what team an athlete is able to play on based solely upon biological sex, while California allows students to participate on the team which aligns with the student’s gender identity.⁷⁶ Meanwhile, the

69. *Id.* at 5 (providing guide on Title IX’s application to sexual violence).

70. *Questions and Answers on Title IX and Single Sex Elementary and Secondary Classes and Extracurricular Activities*, U.S. DEPT OF EDUC. (2014), available at <https://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf> [<https://perma.cc/6CDQ-CKZQ>] (explaining how Title IX applies to various issues).

71. *Id.* at 25 (stating that all students are protected from sex-based discrimination under Title IX).

72. *Id.* at 25 (explaining that schools must treat transgender individuals consistent with their gender identity in single-sex classes).

73. *Id.* at 3 (refusing to address issues of Title IX and transgender athletes).

74. *See id.* (acknowledging that “extracurricular athletics are governed by separate Title IX regulations”).

75. *See* Malika Andrews, *How Should High Schools Define Sexes for Transgender Athletes?*, N.Y. TIMES (Nov. 18, 2017), <https://www.nytimes.com/2017/11/08/sports/transgender-athletes.html> [<https://perma.cc/KYX8-CWE7>] (“[W]ith no national governing body laying down rules, individual states have navigated the issue independently, weighing the shifting beliefs of schools, parents and athletes.”).

76. *See id.* (discussing disparate state policies regarding transgender inclusion).

NCAA has taken a progressive permissive approach to transgender inclusion.⁷⁷ Per the NCAA's rules, a transgender male, an individual who transitioned from female to male, "who has received a medical exception for treatment with testosterone for diagnosed Gender Identity Disorder or gender dysphoria and/or Transsexualism, for purposes of NCAA competition may compete on a men's team."⁷⁸ Similarly, a transgender female, an individual who transitioned from male to female, "being treated with testosterone suppression medication for Gender Identity Disorder or gender dysphoria and/or Transsexualism, for the purposes of NCAA competition may continue to compete on a men's team."⁷⁹

While parents, coaches, and politicians alike argue over transgender representation and exclusion, it is critical to remember the importance that athletic inclusion holds for individual transgender youths.⁸⁰ Olivia, a transgender high school sophomore in Indiana, was not allowed to continue playing tennis on her girls' high school team because Indiana used biological sex to decide what team a student is able to play on.⁸¹ To be able to continue to play on the girls' team, Olivia would need to have surgery.⁸² Olivia responded to the association's committee members, writing:

Imagine you are practicing your favorite sport one day when somebody comes and tell [sic] you that you are not able to participate on the team. . . . So many emotions are swirling through your head: confusion, anger, embarrass-

77. See Pat Griffin & Helen Carroll, *NCAA Inclusion of Transgender Student-Athletes*, NAT'L COLLEGIATE ATHLETIC ASS'N OFF. OF INCLUSION 1, 13 (Aug. 2011), available at https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf [<https://perma.cc/6AHY-W636>] (stating NCAA's policies towards transgender individuals).

78. *Id.* at 13 (stating policy promoting transgender inclusion). However, the NCAA does not allow a transgender male undergoing testosterone treatment to continue competing on women's team "without changing that team status to a mixed team . . ." *Id.* (contrasting with transgender female undergoing testosterone suppression "may continue to compete on a men's team but may not compete on a women's team without changing it to a mixed team status until completing one calendar year of testosterone suppression treatment").

79. *Id.* (discussing NCAA's policies regarding transgender inclusion).

80. See Andrews, *supra* note 75 (interviewing transgender girl named Olivia, who details why playing sports are important to her).

81. See *id.* (demonstrating how policies that exclude transgender individuals have significant impact for those they apply to).

82. See Anemona Hartocollis, *The New Girl in School: Transgender Surgery at 18*, N.Y. TIMES (June 16, 2015), <https://www.nytimes.com/2015/06/17/nyregion/transgender-minors-gender-reassignment-surgery.html> [<https://perma.cc/ZWE3-6ZQR>] (discussing medical debate regarding transgender reassignment surgery for minors).

ment. *Not only does this take away your right to play, but it takes away something that defines you.*⁸³

B. More Than Just Bathrooms

There are only a few cases directly dealing with transgender participation because legal issues regarding transgender students have only recently begun to be litigated.⁸⁴ As a result, analogies to other areas of Title IX can be used to explore how courts would likely rule on sporting questions.⁸⁵ One of the areas where courts are frequently asked to adjudicate issues of transgender inclusion is the question of which bathrooms transgender students should be permitted or required to use.⁸⁶ The issue of bathrooms and transgender individuals may simply have reached the courts first because more transgender students use bathrooms than participate in competitive sports.⁸⁷

One of the common concerns people have regarding transgender participation in sports is that transgender females have a competitive advantage when competing with cisgender females.⁸⁸ What is particularly unique about this fear is that it directly parallels arguments that had been used “in an attempt to justify restricting girls from participation in sports altogether, and, later, from participation on all-male sports teams where no equivalent was offered.”⁸⁹

83. Andrews, *supra* note 75 (emphasis added) (discussing how high schools struggle with transgender athletes).

84. See Michael Florek, *Judge Dismisses Lawsuit Against UIL that Sought to Ban Transgender Wrestler from Competing*, SPORTSDAY HS (Apr. 25, 2017, 9:23 PM), <https://sportsday.dallasnews.com/high-school/high-schools/2017/04/25/judge-dismisses-lawsuit-uil-sought-ban-transgender-wrestler-competing> [<https://perma.cc/PD46-YZAY>] (discussing dismissal of lawsuit alleging that Mack Beggs, transgender wrestler, posed risk of injury to other wrestlers and had unfair advantage).

85. See *Adams v. Sch. Bd.*, 318 F. Supp. 3d 1293 (M.D. Fla. 2018) (finding meaning of “sex” in Title IX encompasses gender identity when applied to transgender students).

86. See *id.* at 1296 (holding that school district violated rights of transgender student under Equal Protection Clause and Title IX in not allowing him to use boys’ bathroom, causing harm).

87. See generally Jeremy Bauer-Wolf, *More Than Just Bathrooms*, INSIDE HIGHER ED. (July 25, 2018), <https://www.insidehighered.com/news/2018/07/25/study-bathrooms-gender-identity-protection-policies-most-important-transgender> [<https://perma.cc/8JR8-X8BZ>] (discussing significance of transgender individuals being able to use bathrooms that correspond to their gender identity).

88. See Alistair Magowan, *Transgender Women in Sport: Are They Really a ‘Threat’ to Female Sport?*, BRITISH BROAD. CORP. (Dec. 18, 2018), <https://www.bbc.com/sport/46453958> [<https://perma.cc/A4CL-DXAL>] (discussing criticism of transgender athletes participating in various competitive sports).

89. Skinner-Thompson & Turner, *supra* note 54, at 274 (advocating for expanding Title IX to include transgender individuals).

While a lot of debate is centered around biology, many overlook the fact that “[c]ourts have routinely rejected arguments that physical differences between the sex justify exclusion of females from otherwise all-male sports teams.”⁹⁰ Rather than framing the discourse as if transgender individuals should play a sport on a team corresponding with their gender identity, the question should be whether the exclusion of transgender athletes is *justified*, both legally and ethically.⁹¹

Currently, federal law does not explicitly protect transgender individuals.⁹² The Fourteenth Amendment provides citizens of the United States equal protection under law, forbidding states from “deny[ing] to any person within its jurisdiction the equal protection of the laws.”⁹³ While sex is a protected class under the Equal Protection Clause of the Fourteenth Amendment, transgender status is not.⁹⁴

[T]ransgender individuals have no constitutional recourse for discrimination experienced in the workplace or schools unless they can demonstrate that the discriminatory law was based on *sex*, not gender . . . [making] it incredibly difficult for transgender youth athletes to successfully challenge discriminatory sports participation policies⁹⁵

Most analogous to the issue of transgender high school athletes is the debate regarding transgender individuals’ right to use restrooms that correspond to their gender identity.⁹⁶ The regula-

90. *Id.* (discussing past precedent in which courts reject arguments that cisgender females must be excluded from male sports teams).

91. *See id.* at 273–78 (advancing idea that it is not just about letting transgender students play, but about fairness); *see generally* Lawrence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 19–23 (2015) (reviewing concept of “equal dignity” set forth by *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)).

92. *See* Jessica Mason Pieklo, *Federal Law Protects Transgender Rights—But That Could Change as Early as the Spring*, REWIRE NEWS (Oct. 23, 2018, 2:29 PM), <https://rewire.news/article/2018/10/23/federal-law-protects-transgender-rights-but-that-could-change-as-early-as-the-spring/> [<https://perma.cc/KKE5-4G9Q>] (discussing how federal law protects transgender rights and predicting future transgender protections).

93. U.S. CONST., amend. XIV (creating equal protection).

94. *See* Kayla L. Acklin, “Hurdling” *Gender Identity Discrimination: The Implications of State Participation Policies on Transgender Youth Athletes’ Ability to Thrive*, B.C. J.L. & SOC. JUST. 107, 113 (2017) (discussing how federal cases do not discuss transgender athletes’ rights).

95. *Id.* at 116 (discussing how it is difficult to prove that certain laws targeting transgender individuals are discriminatory).

96. *See generally* Ariane de Vogue et al., *Trump Administration Withdraws Federal Protections for Transgender Students*, CNN (Feb. 23, 2017, 10:16 AM), <https://>

tion at the center of the bathroom debate is the “comparable facilities” regulation, which states that a school receiving federal funds “may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.”⁹⁷ The Obama administration’s *Dear Colleague Letter*, released on May 13, 2016, stated that for the purposes of Title IX a student’s gender identity is to be treated as the student’s sex and that “a school must not treat a transgender student differently from the way it treats other students of the same gender identity.”⁹⁸ Although “Dear Colleague” letters are non-binding, President Obama’s letter held a threat to withhold federal education money from states that did not comply with the expanded interpretation.⁹⁹ Soon after, United States District Court Judge Reed O’Conner of the Northern District of Texas issued an injunction in support of thirteen states that disagreed with the Obama interpretation; this served to effectively block these new guidelines because they “had the effect of law and contradicted existing legislative and regulatory texts.”¹⁰⁰ Nevertheless, this expanded interpretation of “sex” has created a difference of interpretation regarding whom Title IX is designed to protect.¹⁰¹ Those with conservative views voice con-

www.cnn.com/2017/02/22/politics/doj-withdraws-federal-protections-on-transgender-bathrooms-in-schools/index.html [<https://perma.cc/E99P-GGS2>] (reporting on impact of Trump administration’s *Dear Colleague Letter*).

97. 34 C.F.R. § 106.33 (2017) (discussing non-discrimination on basis of sex in education programs or activities receiving federal funding).

98. *Dear Colleague Letter: Transgender Students*, U.S. DEP’T OF EDU., 1, 2, (2016) available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [hereinafter “*Dear Colleague L*”] (discussing how Title IX applies to transgender students).

99. See de Vogue et al., *supra* note 96 (explaining that President Obama’s “Dear Colleague” letter was based on his administration’s interpretation of Title IX).

100. Jon Herskovitz, *U.S. Judge Blocks Obama Transgender School Bathroom Policy*, REUTERS (Aug. 22, 2016, 9:00 AM), <https://www.reuters.com/article/us-usa-lgbt/u-s-judge-blocks-obama-transgender-school-bathroom-policy-idUSKCN10X180> [<https://perma.cc/XS67-WHZE>] (discussing overreach of Obama administration’s *Dear Colleague* letter); see also *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015) (“On a plain reading of the statute, the term [‘]on the basis of sex[’] in Title IX means nothing more than male and female, under the traditional binary conception of sex consistent with one’s birth or biological sex.” (citing *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007))).

101. See e.g. *School Officials Agree: Policies Protecting Transgender Student Do Not Compromise the Privacy or Safety of Other Students*, NAT’L CTR. FOR TRANSGENDER EQUALITY, <https://transequality.org/what-experts-say> [<https://perma.cc/927Y-234A>] (last visited Feb. 9, 2019) (refuting common concerns regarding transgender inclusion); see also *Debunking the “Bathroom Bill Myth”*, GLAAD 1, 10–15 (2017), available at http://www.glaad.org/sites/default/files/Debunking_the_Bathroom_Bill_Myth_2017.pdf [<https://perma.cc/7JT7-S7YL>] (last visited

cerns regarding the rights and safety of cisgendered students, while those with liberal views tend to focus upon on the health and safety of transgendered students.¹⁰²

The most significant development regarding the transgender bathroom issue is the conclusion of *Grimm v. Gloucester County School Board*.¹⁰³ The plaintiff in this case, Gavin Grimm, was a transgender high school boy who sued his high school because they refused to let him use the boys' bathroom.¹⁰⁴ The *Grimm* court took into account emerging case law that held "excluding boys and girls who are transgender from the restrooms that align with their gender identity may subject them to discrimination on the basis of sex under Title IX, the Equal Protection Clause, or both."¹⁰⁵ Additionally, the *Grimm* court ruled that a transgender individual is able to state a Title VII claim for sex discrimination on the basis of a sex or gender-stereotyping theory.¹⁰⁶ The court then extended this logic

Feb. 9, 2019) (explaining proper reporting methods to utilize when discussing transgender issues, specifically regarding transgender bathroom inclusion); *see also* Herskovitz, *supra* note 100 (discussing overreach of Obama administration's Dear Colleague letter); *but see* L. Darnell Weeden, *Transgender Bathroom Rights and President Obama's Unauthorized Scheme To Transform Title IX*, 44 W. ST. U. L. REV. 1, 25 (2016) ("Although transgender students deserve protection from discrimination, the OCR [Office for Civil Rights] should not attempt to achieve its goal by sacrificing the rights of others with a bureaucratic bludgeon because the federal government has a duty to accommodate everyone's rights and not just transgendered [sic] students.").

102. *See* Weeden, *supra* note 101 (rejecting transgender inclusion by "endors[ing] an old fashion common sense test for determining whether an allegedly transgendered [sic] person is a male or female for purposes of bathroom assignments under Title IX. . . [and that] gender identity was sacredly assigned before birth [by t]he great Creator of life").

103. *See* *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 738 (E.D. Va. 2018) (holding that transgender individuals are allowed to use bathrooms that correspond to their gender identity).

104. *See* Camila Domonoske, 'I Hope This Will Set a Precedent,' Says Trans Teen Who Won Case Over Bathroom Access, NAT'L PUB. RADIO (May 23, 2018, 4:47 PM), <https://www.npr.org/sections/thetwo-way/2018/05/23/613759369/i-hope-this-will-set-a-precedent-says-trans-teen-who-won-case-over-bathroom-acce> [<https://perma.cc/P9AN-RWJH>] (discussing Gavin Grimm's lawsuit against his high school).

105. *Grimm*, 302 F. Supp. 3d at 741 (discussing changes in applicable law since motion to dismiss was originally considered); *see also* Fernando Stein, *AAP Statement on Protecting Transgender Youth*, AM. ACAD. OF PEDIATRICS (Feb. 23, 2017), <https://www.aap.org/en-us/about-the-aap/aap-press-room/pages/AAP-Statement-on-Protecting-Transgender-Youth.aspx> [<https://perma.cc/CNL2-J67Y>] ("Policies excluding transgender youth from facilities consistent with their gender identity have detrimental effects on their physical and mental health, safety and well-being. No child deserves to feel this way, especially within the walls of their own school.").

106. *See id.* at 745 (explaining that discrimination of the basis of transgender status constitutes gender stereotyping); *see also* *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that gender stereotyping constitutes sex discrimination under Title VII).

by stating that Title IX claims may cover transgender discrimination under the same gender stereotyping theory of discrimination.¹⁰⁷ Although the Supreme Court refused to hear this case, *Grimm* reflects a potential expansion of the definition of sex that may extend to Title IX.¹⁰⁸ Courts expanding the definition of sex to include gender identity would be an important first step towards allowing transgender students to participate in high school athletics corresponding to their gender identity.¹⁰⁹ However, this expanded definition would not instantly alter Title IX, nor alter the intentions of Congress at the time in which it was drafted.¹¹⁰

IV. THE BATTLE OF ADMINISTRATIVE INTERPRETATION

Title IX's vague language regarding transgender individuals has led to wildly shifting administrative guidance, interpretation, and enforcement.¹¹¹ While the Obama administration released guidance focusing upon transgender inclusion, the Trump administration's guidance focuses upon states' rights and biological determinism.¹¹² Administrative interpretation has the effect of influencing state laws and policies, thereby influencing the lives of transgender youth.¹¹³

107. See *Grimm*, 302 F. Supp. 3d at 746 (“[A]llegations of gender stereotyping are cognizable Title VII sex discrimination claims and, by extension, cognizable Title IX sex discrimination claims.”).

108. See Pete Williams, *Supreme Court Rejects Gavin Grimm's Transgender Bathroom Rights Case*, NBC NEWS (Mar. 6, 2017), <https://www.nbcnews.com/news/us-news/u-s-supreme-court-rejects-transgender-rights-case-n729556> [<https://perma.cc/T6GR-XE97>] (reporting on Supreme Court's rejection of hearing Grimm's case).

109. See Mary Emily O'Hara, *Gavin Grimm Just Won a Court Victory for Trans Students Everywhere*, THEM. (May 23, 2018), <https://www.them.us/story/gavin-grimm-virginia-ruling> [<https://perma.cc/WT5G-CBYQ>] (discussing expansion of gender by effectively rejecting traditional notions of biological gender).

110. For a further discussion on the interpretation of “sex” under Title IX, see *supra* notes 52–66 and accompanying text.

111. See FAQ: *What Did Obama Do for Transgender Students and How Did Trump Take It away?*, LAMBDA LEGAL (Feb. 25, 2017), https://www.lambdalegal.org/blog/20170225_trans-students-faq [<https://perma.cc/3DBY-TXMT>] (providing Trump administration's changes to Obama administration's enforcement of Title IX).

112. For a further discussion of how treatment of transgender rights has differed between presidential administrations, see *infra* notes 135-156 and accompanying text.

113. See e.g., Lilly Fowler, *Under Threat From Trump, Transgender Community Leans on Local Rights*, CROSSCUT (Oct. 23, 2018), <https://crosscut.com/2018/10/under-threat-trump-transgender-community-leans-local-rights> [<https://perma.cc/RKP2-VZZM>] (rejecting Trump administration's interpretation of gender and how transgender individuals will have to rely on state level protections regarding their transgender status).

A. Expansive Overreach: The Obama Administration Interpretation

The Obama administration released its *Dear Colleague Letter*, with a strong emphasis on transgender students and Title IX, on May 13, 2016.¹¹⁴ The Obama administration stated “a school must not treat a transgender student differently from the way it treats other students of the same gender identity,” consistent with federal law banning sex discrimination.¹¹⁵ Additionally, this guiding document states that “[u]nder Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity.”¹¹⁶ Most notably, the Obama administration states, “the desire to accommodate others’ discomfort cannot justify a policy that singles out and disadvantages a particular class of students.”¹¹⁷ Although Obama’s *Dear Colleague Letter* appears to be very liberal in terms of preventing the discrimination against transgender students, it actually leaves a significant gap in terms of protection regarding athletics.¹¹⁸ This advisory letter states, although a school is allowed to have sex-segregated athletics, a school cannot:

[A]dopt or adhere to requirements that rely on overly broad generalizations of stereotypes about the differences between transgender students and other students of the same sex (*i.e.* the same gender identity) or others’ discomfort with transgender students. Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students’ participation on the competitive fairness or physical safety of the sport.¹¹⁹

Unfortunately, this advisory letter does not elaborate further upon what “age-appropriate”, “sound”, or “current” research con-

114. See generally *Dear Colleague I*, *supra* note 98 (noting date of letter and laying out administration’s stance on Title IX).

115. *Id.* at 2 (announcing what constitutes compliance under Title IX).

116. *Id.* (promoting definition of transgender that is self-identifying).

117. *Id.* (rejecting idea that private biases or discomfort should have role in shaping policy).

118. See *id.* at 3 (declining to address what types of requirements for student participation are appropriate).

119. *Id.* (standing for proposition that schools are not able to prevent transgender individuals from participating in sport that corresponds with their gender identity on basis of personal feelings regarding said identity).

sists of.¹²⁰ As a result, a conservative state, as well as a liberal state, can choose to pick a scientific study that supports whatever they choose to do in regards to transgender students' sports participation.¹²¹ The Obama administration cited the NCAA's policies regarding transgender athletes as an example of appropriate research because "they consulted with medical experts, athletics officials, affected students, and a consensus report"¹²² However, the NCAA policy has similar gaps regarding specificity and the biology debate.¹²³ Under the section "Should the Participation of Transgender Student-Athletes Raise Concerns About Competitive Equity?" the NCAA states, "[t]ransgender girls who medically transition at an early age do not go through male puberty, and therefore their participation in athletics as girls does not raise the same equity concerns that arise when transgender women transition after puberty."¹²⁴ The NCAA continues by explaining that transgender women exhibit a range of physical variation amongst themselves, making the important point that "[t]he assumption that all male-bodied people are taller, stronger, and more highly skilled in a sport than all female-bodied people is not accurate."¹²⁵

However, both the NCAA's directive on transgender inclusion and the Obama administration's advisory letter leave important gaps regarding the specifics of transgender inclusion that allow for discrimination to occur.¹²⁶ For example, there is no explanation

120. See Anna Brown, *Republicans, Democrats Have Starkly Different Views on Transgender Issues*, PEW RES. CTR. (Nov. 8, 2017), <http://www.pewresearch.org/fact-tank/2017/11/08/transgender-issues-divide-republicans-and-democrats/> [<https://perma.cc/C2VB-XHH3>] (illustrating that Democrats and Republicans differ greatly regarding if someone is man or woman based upon their sex assigned at birth, further supporting idea that one could choose to "cherry pick" data and studies).

121. See Louis Jacobson, *The Age of Cherry-Picking*, POLITIFACT (Feb. 5, 2018, 12:44 PM), <https://www.politifact.com/truth-o-meter/article/2018/feb/05/age-cherry-picking/> [<https://perma.cc/XB27-QSK2>] (explaining modern instances of political "cherry picking" and how it damages our democratic process).

122. *Dear Colleague I*, *supra* note 98, at 7 n.18 (noting level of research required to complete proper analysis on collegiate athletics).

123. See Griffin & Carroll, *supra* note 77, at 7 (discussing argument that allowing transgender students onto their gender identity's team gives these students unfair advantage).

124. *Id.* (supporting participation of transgender girls in girls' sports, under certain conditions).

125. *Id.* (refuting assumption that males are inherently more athletic than females).

126. See Zolan V. Kanno-Youngs, *NCAA Members Slow to Adopt Transgender Athlete Guidelines*, USA TODAY (Aug. 3, 2015), <https://www.usatoday.com/story/sports/college/2015/08/03/ncaa-transgender-athlete-guidelines-keelin-godsey-caitlyn-jenner/31055873/> [<https://perma.cc/LR52-MN9Z>] (detailing how most NCAA Division I programs have either not adopted NCAA's transgender guide-

on how to approach a transgender girl who did not go through an early medical transition and instead went through a male puberty.¹²⁷ Similarly, failing to define what a tailored requirement based upon “competitive fairness” consists of may allow for bias to flourish and lead to discrimination in the everyday lives of transgender students.¹²⁸ Presently, the most effective and realistic method of promoting transgender inclusion is for individual states to enact inclusive policies.¹²⁹

Although some have criticized the vague language of the Obama *Dear Colleague Letter*, it had successfully placed a burden on high schools to provide research supporting potentially discriminatory policies; otherwise courts would find those policies discriminatory.¹³⁰ Unfortunately, the fact that a school district has a high burden to defend a patently discriminatory policy may not necessarily lead to litigation that would overturn such policy.¹³¹ It is important to consider the realities of a transgender high school athlete that is subject to a discriminatory policy; not only would they have

lines or are not aware of them, which may result in transgender individuals having to trailblaze their way to play).

127. See Kaitlin Menza, *How Does Transitioning Affect a Transgender Athlete's Sports Performance?*, SHAPE, <https://www.shape.com/lifestyle/mind-and-body/how-does-transitioning-affect-transgender-athletes-sports-performance> [<https://perma.cc/8NDH-2N6Q>] (last visited Jan. 28, 2020) (explaining physical changes that occur with transitioning and debating if there is advantage associated with such type of transition).

128. See Kirsten Frattini, *USA Cycling, UCI Address Questions on Transgender Women and Fair Competition*, CYCLING NEWS (Nov. 1, 2018), <http://www.cyclingnews.com/news/usa-cycling-uci-address-questions-on-transgender-women-and-fair-competition/> [<https://perma.cc/Y26U-37XH>] (debating what competitive fairness in cycling consists of with inclusion of transgender athletes).

129. For further discussion of transgender inclusion on a state-by-state level, see *infra* notes 157–188.

130. See Bob Cook, *Mack Beggs Is Defending the Girls Wrestling Title He Didn't Want*, FORBES (Feb. 17, 2018), <https://www.forbes.com/sites/bobcook/2018/02/17/mack-beggs-is-defending-the-girls-wrestling-title-he-didnt-want/#2e3cd7ba3171> [<https://perma.cc/69EG-9W7F>] (explaining how Mack Beggs was born female and has transitioned to male with testosterone under medical supervision, yet is forced to compete with females despite desiring to compete with other males); see also Jake Curtis, *The Transgen Tip of the Iceberg*, NATIONAL REVIEW (July 8, 2016, 8:00 AM), <https://www.nationalreview.com/2016/07/transgender-bathroom-wars-obama-bypasses-congress-crushes-local-government/> [<https://perma.cc/7BPM-YTTF>] (declaring content of *Dear Colleague Letter I* to be unconstitutional).

131. See *Transathlete*, <https://www.transathlete.com/k-12> [<https://perma.cc/8XB2-LWFF>] (last visited Jan. 21, 2019) (listing transgender athletics policies within United States, specifically noting discriminatory policies that could reasonably not fit Obama administration's requirements); see also Ann Hopkins: *Pioneering Law Firm Partner*, AMAZING WOMEN IN HISTORY (April 20, 2016), <https://amazingwomeninhistory.com/ann-hopkins/> [<https://perma.cc/89CL-TZJK>] (explaining various methods suggested to Ann Hopkins to “deal with” blatant discrimination she faced before she ultimately decided to take legal action).

to believe their high school's policy is discriminatory, but they would have to have the wherewithal to sue their school district.¹³² Moreover, an individual suing their school district is likely to be involved in the lawsuit long after their high school athletic career is over.¹³³ Lastly, after suing their school district and retaining legal counsel, a judge may still interpret a discriminatory policy as reasonable and non-discriminatory, or disregard the advisory letter all together.¹³⁴

B. Biological Determinism: The Trump Administration Interpretation

The issue of transgender inclusion is coming to the fore, and the Trump administration has taken a definitive stance advocating for transgender exclusion.¹³⁵ Four circuits agree that anti-transgender discrimination is a form of sex discrimination under Title IX.¹³⁶ However, despite this precedent, former Attorney General Jeff Sessions wrote a memo to federal prosecutors stating, "Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination

132. See Ray Glier, *What It Takes to Be a Transgender Athlete on High School and College Sports Teams*, THEM. (Oct. 13, 2018), <https://www.them.us/story/trans-athletes-school-sports> [<https://perma.cc/5AB5-GHNC>] (discussing difficulties of being young, transgender, and having to advocate for oneself to be able to participate in athletics corresponding to their gender identity).

133. See *id.* (discussing difficulties transgender youth face trying to advocate for their own inclusion).

134. See generally Eric A. Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. CHI. L. REV. 853 (2008) (discussing existence of judicial bias in courts); see Adam Cancryn, *Even if Democrats Win, Trump Has Them Beat on the Courts*, POLITICO (Nov. 5, 2018, 5:06 AM), <https://www.politico.com/story/2018/11/05/trump-courts-elections-judges-960754> [<https://perma.cc/Ry77-9QP7>] (explaining how appointment of Republican leaning judges can influence policy on district court level).

135. See Eric Levenson, *All the Ways the Trump Administration has Rolled Back Protections for Transgender People*, CNN (Oct. 22, 2018, 5:27 PM), <https://www.cnn.com/2018/10/22/politics/transgender-trump-protection-rollback-trnd/index.html> [<https://perma.cc/UP9J-GTXT>] (detailing Trump administration's stance on various transgender issues).

136. See *Federal Court Decisions*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/federal_court_decisions [<https://perma.cc/KB5G-6FYD>] (last visited Jan. 28, 2020) (providing map that shows twenty three states have "[f]ederal appeals court decision holding that federal law prohibits discrimination based on gender identity as a form of sex discrimination" and additional twenty one states plus District of Columbia have state laws prohibiting discrimination based upon gender identity); see also Robert Iafolla, *Supreme Court Can Settle Split on LGBT Bias in the Workplace*, BLOOMBERG LAW, (April 22, 2019, 9:54 AM), <https://news.bloomberglaw.com/daily-labor-report/supreme-court-can-settle-split-on-lgbt-bias-in-the-workplace> [<https://perma.cc/4WS6-F4PP>] (reflecting holdings of different circuits regarding LGBT discrimination under Title VII).

based on gender identity *per se*, including transgender status [because it is] . . . a conclusion of law, not policy.”¹³⁷ The Trump administration similarly excluded transgender individuals in a successful attempt to ban transgender individuals from serving in the US military.¹³⁸ The Trump administration stated “the policy will say ‘transgender persons with a history or diagnosis of gender dysphoria — individuals who the policies state may require substantial medical treatment, including medications and surgery — are disqualified from military service except under certain limited circumstances.’”¹³⁹ Currently, this transgender military ban still stands.¹⁴⁰ Although the Trump administration’s policies regarding transgender individuals may not literally apply to Title IX, because the advisory letter is non-binding, it proves a greater point; the Trump administration is willing to put forth exclusionary policies, even when experts recommend otherwise or when federal law conflicts.¹⁴¹ Many advocate that Title IX includes transgender individuals, yet there are others who argue that Title IX was never intended to include transgender individuals.¹⁴² Because advisory letters are

137. Laura Jarrett, *Sessions Says Civil Rights Law Doesn’t Protect Transgender Workers*, CNN (Oct. 5, 2017, 11:58 AM), <https://www.cnn.com/2017/10/05/politics/jeff-sessions-transgender-title-vii/index.html> [<https://perma.cc/M8Z9-55DM>] (explaining Trump administration’s view that transgender employees are not afforded discrimination protections under U.S. law).

138. See Sophie Tatum, *White House Announces Policy to Ban Most Transgender People From Serving in Military*, CNN (Mar. 24, 2018, 2:14 PM), <https://www.cnn.com/2018/03/23/politics/transgender-white-house/index.html> [<https://perma.cc/6B7A-9ZBV>] (discussing Trump administration’s transgender military ban).

139. *Id.* (explaining rationale behind transgender military ban).

140. See Robert Barnes & Dan Lamothe, *Supreme Court Allows Trump Restrictions on Transgender Troops in Military to Go Into Effect as Legal Battle Continues*, WASH. POST (Jan. 22, 2019), https://www.washingtonpost.com/politics/courts_law/supreme-court-allows-trump-restrictions-on-transgender-troops-in-military-to-go-into-effect-as-legal-battle-continues/2019/01/22/e68a7284-1763-11e9-88fe-f9f77a3bcb6c_story.html?noredirect=ON&utm_term=.cbc3c1baaace [<https://perma.cc/CM7L-LUZ3>] (discussing how transgender military ban is to preserve military “effectiveness and lethality.”); see also Andrew Chang & Jonathan Stempel, *U.S. Court Lets Trump Transgender Military Ban Stand, Orders New Review*, REUTERS (June 14, 2019, 11:15 AM), reuters.com/article/us-usa-trump-transgender/us-court-lets-trump-transgender-military-ban-stand-orders-new-review-idUSKCN1TF1ZM [<https://perma.cc/9E5L-8ZXP>] (summarizing legal challenges to Trump transgender military ban).

141. See James Esseks, *The Trump Administration Is Trying to Erase Trans People, but the Law Clearly Protects Them*, AM. CIV. LIBERTIES UNION (Oct. 22, 2018, 5:30 PM), <https://www.aclu.org/blog/lgbt-rights/transgender-rights/trump-administration-trying-erase-trans-people-law-clearly> [<https://perma.cc/4QHU-8QTU>] (detailing various legal protections for transgender individuals, specifically discussing different federal agencies that have protections for transgender individuals).

142. See *Controversy Over Title IX Protecting Transgender Students*, NAT’L PUB. RADIO (May 6, 2014, 11:50 AM), <https://www.npr.org/2014/05/06/310099267/con>

non-binding, and because the odds of a transgender high school athlete's case going to the Supreme Court are slim, the most effective way to effect change would be to amend Title IX to explicitly include transgender individuals in athletics.¹⁴³

Most notably, the Trump administration withdrew the Obama administration's *Dear Colleague Letter* on February 22, 2019.¹⁴⁴ The Trump administration's *Dear Colleague Letter* rejects the position that transgender individuals "require access to sex-segregated facilities based on gender identity."¹⁴⁵ This administration bases its reasoning upon the idea that "there must be due regard for the primary role of the states and local school districts in establishing educational policy."¹⁴⁶ Additionally, this *Dear Colleague Letter* does not provide any guidance for states and schools regarding transgender students.¹⁴⁷ Although *Dear Colleague* letters do not create or alter any laws, the Trump administration has stated it will not rely upon the views expressed in the prior advisory letters, which often shape regulations.¹⁴⁸ Further, some argue the abandonment of the Obama era *Dear Colleague* guidance "intentionally creates confusion about what the federal law requires."¹⁴⁹ Although Title IX and state level protections remain unchanged for transgender individuals, the Trump administration's interpretation of the ambiguous

trovrsy-over-title-ix-protecting-transgender-students [https://perma.cc/Y34N-VSYF] (debating original purpose and intent of Title IX).

143. See Emma Pettit, *Federal Proposal to Redefine Gender Throws College Policies Into Uncertainty*, CHRON. OF HIGHER EDUC. (Oct. 22, 2018), <https://www.chronicle.com/article/Federal-Proposal-to-Redefine/244878> [https://perma.cc/GY7M-TX29] (explaining ambiguities and debate with current version of Title IX and if it includes transgender individuals).

144. See *Dear Colleague Letter*, U.S. DEP'T OF EDUC. (2017) available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx> [https://perma.cc/7RBJ-DCPP] (hereinafter "*Dear Colleague II*") (withdrawing Obama's *Dear Colleague* letter).

145. *Id.* (rejecting transgender equality in favor of "states" rights).

146. *Id.* (discussing public policy).

147. See Sandhya Somashekhar et al., *Trump Administration Rolls Back Protections for Transgender Students*, WASH. POST (Feb. 22, 2017), https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643_story.html?noredirect=ON&utm_term=.6a646e57c88c [https://perma.cc/46FL-ERU7] (discussing Trump administration's *Dear Colleague* letter, stating "the withdrawal of the federal guidance will create another layer of confusion for schools and will make transgender students, who are already vulnerable, more so").

148. See *Dear Colleague II*, *supra* note 144 (advocating transgender exclusionary policy with zero citations to law or public policy).

149. See e.g., Somashekhar et al., *supra* note 147 (comparing "*Dear Colleague*" letters, discussing how without federal guidance schools will look to state guidance).

language may encourage more conservative actors to push the boundaries on transgender discrimination.¹⁵⁰

Currently, the Trump administration is considering “narrowly defining gender as a biological, immutable condition determined by genitalia at birth.”¹⁵¹ In a memo, the Department of Health and Human Services argued, “key government agencies needed to adopt an explicit and uniform definition of gender as determined ‘on a biological basis that is clear, grounded in science, objective and administrable.’”¹⁵² According to the leaked memo, “[t]he sex listed on a person’s birth certificate, as originally issued, shall constitute definitive proof of a person’s sex unless rebutted by reliable genetic evidence.”¹⁵³ According to *The New York Times*, The Department of Health and Human Services has asked the Departments of Education, Justice, Health and Human Services, and Labor to adopt this new definition of sex in its regulations to “establish uniformity in the government and increase the likelihood that courts will accept it.”¹⁵⁴ At some point, it is predicted that the Trump administration will present the proposal to the Justice Department, and, “[i]f the Justice Department decides that the change is legal, the new definition can be approved and enforced in Title IX statutes, and across government agencies.”¹⁵⁵ If this definition of sex were adopted, then a multitude of transgender individuals would be barred from participating in competitions that align with their gender identity, strictly because it would differ from their sex at birth.¹⁵⁶

150. See German Lopez, *The Trump Administration’s Latest Anti-Transgender Action, Explained*, Vox (Oct. 22, 2018, 11:40 AM), <https://www.vox.com/policy-and-politics/2018/10/22/18007978/trump-administration-lgbtq-transgender-discrimination-civil-rights> [<https://perma.cc/9JC6-XA9F>] (explaining LGBTQ individuals are not protected against discrimination under federal and most state law).

151. Green et al., *supra* note 30 (discussing leaked presidential memo which has not been publicly released).

152. For a further discussion pertaining to challenges regarding gender testing, see *infra* note 207 and accompanying text.

153. For a further discussion about how utilizing genetic testing to determine gender is unreliable, see *supra* note 32 and accompanying text.

154. For a further discussion of issues regarding lack of uniformity regarding transgender rights, see *supra* notes 58–66 and accompanying text.

155. For a further discussion regarding the impact of the lack of diversity in the legal profession, see *infra* notes 192–201 and accompanying text.

156. See Green et al., *supra* note 30 (stating that “[t]he department would have to decide what documentation schools would be required to collect to determine or codify gender. Title IX applies to a number of educational experiences, like sports and single-sex classes or programs where gender identity has come into play. The department has said it will continue to open cases where transgender students face discrimination, bullying and harassment, and investigate gender-based harass-

V. THE BATTLEGROUND: STATES' ROLE IN INTERPRETATION

The task of interpreting Title IX is left to states, presenting unique legal challenges regarding transgender youths and athletic participation.¹⁵⁷ While states like Texas put up significant roadblocks regarding inclusive transgender athlete participation, states like Connecticut center their policies on transgender inclusion.¹⁵⁸ As society's views towards gender develop further, states will have to adapt to the legal challenges posed by transgender participation.¹⁵⁹ Currently, the most effective method of obtaining transgender inclusion in athletics is through individual states enacting policies in furtherance of this goal.¹⁶⁰

A. Texas: Assigned Sex over Gender Identity

Texas is a state with conservative policies regarding its transgender high school athletes.¹⁶¹ Texas recently introduced a bill, Senate Bill ("S.B.") 2095, which would allow for a discretionary ban of transgender students participating in a high school sport based upon steroid use, even if said use is for a "valid medical purpose."¹⁶² S.B. 2095 begins by explaining a student *may* be able to use "a steroid that is dispensed, prescribed, delivered, and administered by a medical practitioner for a valid medical purpose and in the course of professional practice."¹⁶³ While this appears to be accepting of transgender students, S.B. 2095 continues by stating "[t]he league

ment as 'unwelcome conduct based on a student's sex' or 'harassing conduct based on a student's failure to conform to sex stereotypes.'").

157. See *Transalthele*, *supra* note 131 (comparing different state policies and noting differing treatment regarding transgender athletes).

158. See *id.* (highlighting high school policies that are inclusive, in need of modification, are discriminatory, or are non-existent).

159. See *Transgender Texas Wrestler Mack Beggs Wins Second High School Title*, ESPN (Feb. 26, 2018), http://www.espn.com/espn/story/_/id/22574441/transgender-texas-wrestler-mack-beggs-wins-second-high-school-title [<https://perma.cc/54NP-69YH>] (discussing transgender high school wrestler Mack Beggs and controversy that erupted in Texas because of his participation in high school wrestling). For a further discussion of controversy regarding transgender participation see *supra* notes 157–185 and accompanying text.

160. For a further discussion of Connecticut's policies promoting transgender athletic inclusion, see *infra* notes 173–188 and accompanying text.

161. See Cindy Boren, *Transgender Wrestler Mack Beggs Wins Second Texas State Girls' Championship*, WASH. POST (Feb. 25, 2018), https://www.washingtonpost.com/news/early-lead/wp/2018/02/25/transgender-wrestler-mack-beggs-wins-second-texas-state-girls-championship/?utm_term=.78ab28da7b66 [<https://perma.cc/23KV-RTR3>] (detailing Texas' transgender athlete policies).

162. Tx. S.B. 2095 (NS) (May 10, 2017) (introducing banning transgender athletes undergoing steroid treatment from competing in athletics).

163. *Id.* (implying acceptance of certain types of student steroid usage).

may declare a student ineligible for competition on the basis of steroid [or testosterone] use . . . if the league determines that the safety of competing students or the fairness of a particular competition has been or will be substantially affected by the student's steroid use."¹⁶⁴ Additionally, a closed session league hearing regarding a student's steroid usage will be conducted if a student violates the steroid policy.¹⁶⁵ Yet, S.B. 2095 provides no details regarding what a league hearing would consist of.¹⁶⁶

S.B. 2095 is a significant departure from the current policy established by the University Interscholastic League ("UIL"), a body that creates eligibility requirements to allow students to participate in interschool contests.¹⁶⁷ Although the UIL forces transgender students to compete as the gender listed on their birth certificates, they do allow for safe harbor exceptions to the prohibition of steroid use if an individual is transgender.¹⁶⁸ Not only would S.B. 2095 get rid of this safe harbor, but it would also subject students to a confidential league hearing regarding the student's steroid use.¹⁶⁹ Texas' law, as it currently stands, has been criticized for being unfair to transgender individuals.¹⁷⁰ Most notably, Texas has been criticized for "not understanding how hormones work."¹⁷¹ Leaving

164. *Id.* (discussing procedures regarding steroid usage).

165. *See id.* (omitting details regarding closed session league hearings).

166. *See id.* (omitting details regarding steroid use hearings).

167. *See UIL Statement Regarding 2017 Wrestling State Tournament*, U. INTERSCHOLASTIC LEAGUE (Feb. 22, 2017), <https://www.uil-texas.org/press-releases/detail/uil-statement-regarding-2017-wrestling-state-tournament> [<https://perma.cc/5AQ4-B83W>] (discussing University Scholastic League's policy regarding transgender individuals).

168. *See* Jim Vertuno, *Texas Bill Could Deny Transgender Wrestler a Title Defense*, CHI. TRIB. (May 11, 2017, 2:45 PM), <https://www.chicagotribune.com/sports/highschool/ct-texas-bill-transgender-wrestler-20170511-story.html> [<https://perma.cc/U6QX-PAX4>] (explaining UIL's safe harbor steroid provision "allows transgender students undergoing hormone therapy treatments under the direction of a doctor to compete").

169. For a further discussion of Connecticut's policies promoting transgender athletic inclusion, see *infra* notes 173–188 and accompanying text.

170. *See* Katelyn Burns, *Texas School Officials Don't Understand Transgender Athletes*, WASH. POST (May 4, 2017), https://www.washingtonpost.com/posteverything/wp/2017/05/04/texas-school-officials-dont-understand-transgender-athletes/?noredirect=ON&utm_term=.80d082e9b2d6 [<https://perma.cc/2M6T-72FX>] (discussing Texas' ban on transgender participation in high school athletics).

171. *See, e.g., id.* ("[By overzealously and erroneously attempting to ban so-called 'boys' (trans girls) from taking over girls' sports, Texas officials have managed to create a situation where an actual boy (Beggs) has taken over a girls' sport. If it really wants to be fair, Texas should look to other states, the NCAA, the International Olympic Committee and the many other sport governing bodies that make accommodations for trans teens going through medical transitions to bring its policy into alignment with science.").

transgender inclusion to individual states is a double-edged sword; while some states enact policies that allow for transgender inclusion, others choose to “protect” women’s sports at the expense of transgender members of our society.¹⁷²

B. Connecticut: Leading the Way for Transgender Inclusion

Connecticut may serve as an effective model for other states; its interpretation of Title IX strongly promotes transgender inclusion in athletics despite significant opposition.¹⁷³ The Connecticut Interscholastic Athletic Conference (“CIAC”) is the governing body for all inter-scholastic athletics for children of all ages up through high school within the state of Connecticut.¹⁷⁴ Since its establishment, the goal of the CIAC has been to “work[] to develop, maintain and enforce rules of eligibility and conduct that insure equitable athletic competition among Connecticut’s secondary schools.”¹⁷⁵ According to Article IX, Section B of the CIAC bylaws, students are able to play on a team that corresponds with their gender identity.¹⁷⁶ The CIAC claims “it would be fundamentally unjust and contrary to applicable state and federal law to preclude a student from participation on a gender specific sports team that is consistent with the public gender identity of that student for all other purposes.”¹⁷⁷

Meanwhile, Connecticut General Statutes 46a–64(a)(1) state that it is against the law to deny an individual “full and equal accommodations in any place of public accommodation” because of

172. See Alexandra DeScantis, *The High School Fighting to Save Women’s Sports*, NAT’L REV. (July 12, 2019, 6:30 AM), <https://www.nationalreview.com/2019/07/transgender-ideology-hurts-girls-sports-undermines-feminism/> [<https://perma.cc/9DWC-6CMX>] (exemplifying far-right conservative framing of issue of transgender athletic inclusion as “feminist” issue, mirroring reasoning of most transgender exclusionary policies in various individual states).

173. See Cam Smith, *Conn. Track Athletes File Federal Title IX Complaint Against State’s Transgender Sports Policy*, USA TODAY HIGH SCH. SPORTS (June 20, 2019), <https://usatodayhss.com/2019/conn-transgender-track-title-ix> [<https://perma.cc/NV5T-VWZY>] (discussing recent lawsuit filed with U.S. Education Department’s Office for Civil Rights).

174. See *About CIAC*, CONN. INTERSCHOLASTIC ATHLETIC CONF., http://ciac-sports.com/site/?page_id=13 [<https://perma.cc/J4L2-2WEW>] (last visited Feb. 9, 2019) (explaining what CIAC is, its history, and its policies).

175. *Id.* (acknowledging role of CIAC).

176. See CONN. INTERSCHOLASTIC ATHLETIC CONF., *Connecticut Interscholastic Athletic Conference Handbook 2018–2019*, at 54 (2017), available at http://www.cas.ciac.org/pdfs/ciachandbook_1819.pdf [<https://perma.cc/TH99-B3RH>] (last visited Jan. 28, 2020) (stating CIAC’s policy regarding transgender high school student athletes).

177. *Id.* (establishing policy favoring transgender inclusion).

their “gender identity or expression.”¹⁷⁸ Connecticut law has an expansive definition of gender identity, which is defined as:

[A] person’s gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person’s physiology or assigned sex at birth, which gender-related identity can be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held, part of a person’s core identity or not being asserted for an improper purpose.¹⁷⁹

Connecticut further cements these ideas in Section 10–15c of the Connecticut General Statutes.¹⁸⁰ Former Governor Dannel Malloy established protections for transgender high school students by introducing Executive Order Number 56, signed in response to the Trump Administration’s rollback of federal guidelines protecting transgender students.¹⁸¹ This executive order states “a school’s failure to accommodate a student’s gender identity or expression is subject to enforcement action by the Commission on Human Rights and Opportunities [“CHRO”],” while also establishing that “Connecticut law provides greater protections for transgender people than federal law”¹⁸²

All of these legal protections serve an important role in solidifying Connecticut’s commitment to transgender inclusion in the

178. Conn. Gen. Stat. § 46a–64 (2012) (allowing for transgender inclusion).

179. *Id.* (“[S]tudents in public schools must not be denied, on the basis of their gender identity or expression, an equal opportunity to participate in the public school activities, programs, and courses of study for which they are otherwise eligible.”).

180. *See* § 10–15c (2012) (establishing protections for transgender high school students).

181. *See Dear Colleague Letter, supra* note 144 (withdrawing previous federal guidelines, effectively denouncing “novel” interpretation of “sex”); *see also* Conn. Exec. Order No. 56 (Feb. 23, 2017), *available at* <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Others/Governor-Dannel-P-Malloy—Executive-Order-No-56.pdf> [<https://perma.cc/HJ56-A925>] (establishing protections against discrimination on basis of sex, sexual orientation, gender identity, or gender expression).

182. Conn. Exec. Order No. 56 (Feb. 23, 2017), *available at* <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Others/Governor-Dannel-P-Malloy—Executive-Order-No-56.pdf> [<https://perma.cc/6U7H-S7C7>] (explaining enforcement mechanisms for protection of transgender individuals).

face of both national and local backlash.¹⁸³ Bianca Stanescu of Glastonbury, Connecticut, the mother of a cisgender track high school athlete, recently started a petition to have the CIAC amend its policy regarding participating based upon gender identity.¹⁸⁴ Stanescu stated that:

When you look at the competitions and they turn into a complete blow out, you realize something is different My solution is to come up with something similar to [the] NCAA. If they did complete hormone therapy, just like [the] Olympics requires a waiting period, at that point they should be able to compete as a female.¹⁸⁵

However, if the CIAC were to change its bylaws to prevent transgender students from participating in a sport that corresponds to their gender identity, they would be in violation of Connecticut law.¹⁸⁶ According to former Governor Malloy's executive order, a school district hypothetically adopting this petition's guidelines would be subject to enforcement action by the CHRO.¹⁸⁷ According to the CHRO, "[a]s the state debates this issue, municipal employees working in scholastic athletics in the meantime must ensure that statements they make cannot be misconstrued as to suggest dis-

183. See Catherine Thorbecke, *Transgender Athletes Speak Out as Parents Petition to Change Policy That Allows Them to Compete as Girls*, ABC NEWS (June 22, 2018, 8:51 AM), <https://abcnews.go.com/news/story/transgender-athletes-speak-parents-petition-change-policy-compete-56071191> [<https://perma.cc/NB2Y-92ZN>] (discussing backlash against female transgender track and field high school athletes); see also Lori Riley, *Transgender High School Track Athletes From Connecticut Featured On 'GMA' Segment*, HARTFORD COURANT (June 22, 2018, 5:45 PM), <https://www.courant.com/sports/high-schools/hc-sp-hs-transgender-girl-athletes-0623-story.html> [<https://perma.cc/5XTB-QJMY>] (discussing publicity around transgender female high school track athletes Terry Miller and Andraya Yearwood).

184. See Amy Hudak, *Some Calling for Rule Change After Transgender Track Stars Smoke Competition*, NEWS 8 WTNH (June 13, 2018, 12:17 PM), <https://www.wtnh.com/news/connecticut/some-calling-for-rule-change-after-transgender-track-stars-smoke-competition/1237662827> [<https://perma.cc/9ZP3-X465>] (discussing petitions to alter Connecticut's policies regarding gender identity and athlete participation); see also *Change CIAC Eligibility Rules*, MOVEON, <https://petitions.moveon.org/sign/change-ciac-eligibility/?source=search> [<https://perma.cc/6WPA-E8P7>] (last visited Jan. 28, 2020) (listing petition to prevent transgender student athletes from participating in sport that corresponds with their gender identity).

185. See Hudak, *supra* note 184 (discussing local opposition to transgender participation in high school athletics).

186. For a further discussion on Connecticut law regarding sport participation and gender identity, see *supra* notes 178–182 and accompanying text.

187. See Conn. Gen. Stat. § 46a–64 (2012) (detailing details of enforcement).

criminatorial intent and that all athletes competing continue to have full access to teams.”¹⁸⁸

VI. PROPOSALS: LOOKING FORWARD

Any potential proposals for transgender inclusion in high school athletics and beyond will be limited by society’s current values and political feasibility.¹⁸⁹ LGBTQ issues are becoming more relevant for a larger subsection of Americans; the number of US adults identifying as LGBTQ has risen from three and a half percent in 2012 to four and a half percent in 2017.¹⁹⁰ Despite this growth, a variety of states have policies that make it difficult for transgender high school athletes to compete in athletics that correspond with their gender identity.¹⁹¹ Unfortunately, it is difficult to establish proposals for transgender athlete inclusion because there is a lack of understanding regarding what it means to be transgender, feeding into many individuals viewing them as an “other”.¹⁹² This misunderstanding of transgender individuals has led to bigotry, both intentional and unintentional, which does

188. CHRO, *The Civil Rights of Transgender Athletes competing in Connecticut Public Schools*, CONN. COMM’N ON HUMAN RIGHTS AND OPPORTUNITIES (July 17, 2018), <https://ctchro.wordpress.com/2018/07/17/the-civil-rights-of-transgender-athletes-competing-in-connecticut-public-schools/> [<https://perma.cc/BTV2-GVSV>] (discussing Connecticut’s laws and policies regarding transgender high school student athletes).

189. See Ryan T. Anderson, *Transgender Ideology Hurts Kids*, HERITAGE FOUND. (Jan. 30, 2018), <https://www.heritage.org/gender/commentary/transgender-ideology-hurts-kids> [<https://perma.cc/D3GQ-9XG7>] (arguing transgender inclusions harms our society). For a further discussion on the current political climate, see *infra* notes 222–225 and accompanying text.

190. See Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, GALLUP (May 22, 2018), <https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx> [<https://perma.cc/VN6N-7UFZ>] (stating rise in US adults whom identify as LGBTQ); see also *LGBTQ Family Building Survey*, FAM. EQUAL. COUNCIL (Feb. 6, 2019), <https://www.familyequality.org/resources/lgbtq-family-building-survey/> [<https://perma.cc/5D4X-R7YE>] (stating increase in LGBTQ individuals who are interested in starting families shows shifting societal values).

191. See generally Acklin, *supra* note 94, at 120–27 (analyzing inconsistency among state participating policies as applied to transgender high school athletes).

192. See *Number of Americans Who Report Knowing a Transgender Person Doubles in Seven Years, According to New GLAAD Survey*, GLAAD (Sept. 17, 2015), <https://www.glaad.org/releases/number-americans-who-report-knowing-transgender-person-doubles-seven-years-according-new> [<https://perma.cc/66AR-BEHQ>] (reporting statistics about what percentage of US population knows someone who is transgender); see also *Trans Myths*, CANADIAN AIDS SOCIETY (2014), available at <https://www.cdnaiids.ca/wp-content/uploads/Fact-Sheet-Trans-Myths.pdf> [<https://perma.cc/D2JQ-KXEC>] (last visited Jan. 28, 2020) (presenting common forms of transgender discrimination, emphasizing how seemingly “minor” actions and statements can have detrimental effects).

nothing to help create potential solutions.¹⁹³ Additionally, it is difficult to establish proposals regarding transgender athlete inclusion because it makes individuals have to look within themselves and consider nuanced issues; what is gender, what does it mean to be a woman or a man, and what should the core of athletics be about.¹⁹⁴ It is also important to note the human effect that debating various proposals have on transgender high school students; these students are often subject to public scrutiny despite simply wanting to be able to live their lives in a way that is most authentic to them.¹⁹⁵

Additionally, another significant yet often overlooked issue within the discussion of transgender inclusion is the lack of LGBTQ representation within the field of law.¹⁹⁶ The percentage of transgender lawyers is not tracked independently of those that identify as lesbian, gay, bisexual, or queer.¹⁹⁷ The issue with this lack of representation is that those in the legal field influence not only legal issues, but also national discourse.¹⁹⁸ Moreover, this same lack

193. See Mike Gutierrez, *Misconceptions About Being Transgender*, ENVTL. RES. INST., <https://www.arcgis.com/apps/Cascade/index.html?appid=1c75515975034cfbbb44722bcfbf5618> [<https://perma.cc/HE85-ZW9J>] (last visited Feb. 21, 2019) (stating common misconceptions regarding transgender individuals).

194. See Elizabeth Weingarten, *How To Shake Up Gender Norms*, TIME (Jan. 20, 2015), <http://time.com/3672297/future-gender-norms/> [<https://perma.cc/BSZ5-BUGW>] (considering future of gender norms in American society); see also Lisa Kaczke, *Bill Gutting South Dakota Transgender Sports Policy Dies in Senate Committee*, ARGUS LEADER (Jan. 24, 2019), <https://www.argusleader.com/story/news/politics/2019/01/24/south-dakota-legislature-bill-gutting-transgender-sports-policy-dies-committee/2662834002/> [<https://perma.cc/USK9-X7KK>] (reporting on proposed South Dakota bill, where significant support based upon concerns for maintaining perceived “fairness” in athletics).

195. See Jenna Callari, *Ashleigh Lucina Embracing True Self as a Transgender Student-Athlete*, WKBW BUFFALO (Nov. 20, 2018), <https://www.wkbw.com/sports/high-school/ashleigh-lucina-embracing-true-self-as-a-transgender-student-athlete> [<https://perma.cc/7QSF-HMVD>] (interviewing Ashleigh Lucina, transgender high school cross country athlete, and discussing importance of feeling accepted at her high school).

196. See *LGBT Representation Among Lawyers in 2017*, NALP (Jan. 2018), <https://www.nalp.org/0118research> [<https://perma.cc/7YUA-FAU6>] (noting percentage of openly LGBTQ lawyers in 2017 was 2.64%).

197. See *id.* (discussing increase in lawyers identifying at LGBT, noting additional geographic disparities in representation); see also Patrick Folliard, *Getting Real: Transgender Attorneys Talk About Coming Out in the Workplace*, MCCA, <https://www.mcca.com/mcca-article/getting-real-transgender-attorneys/> [<https://perma.cc/W8C4-6VYS>] (last visited Jan. 28, 2020) (briefing interviews with transgender attorneys about their transitions and its influence on their careers).

198. See generally Michael L. Closen & Robert J. Dzielak, *The History and Influence of the Law Review Institution*, 30 AKRON L. REV. 15, (1996) (discussing importance of law review and law journal legal scholarship and how it has shaped laws throughout history).

of representation exists within Congress.¹⁹⁹ Although legal scholars and those in government comment regularly about issues that may not directly affect them, their legislation and discourse impacts transgender lives, and this is precisely why a lack of understanding or first-hand experience can be detrimental.²⁰⁰ Even on a more accessible level, legal scholarship regarding transgender individuals exists in which pronouns are deliberately used incorrectly, despite acknowledging this incorrect usage.²⁰¹ Presently, transgender inclusion can be achieved by abolishing gendered sports and Title IX, amending Title IX to encompass transgender individuals, or to continue to leave policies to individual states.²⁰²

A. Abolish Gendered Sports and Abolish Title IX

Some scholars believe that gendered sports should be abolished because gender itself is a construct.²⁰³ To some extent, wo-

199. See Kit Rampogal, *Only 0.1 Percent of Elected Officials are LGBTQ, New Report Finds*, NBC NEWS (June 22, 2018, 9:09 PM), <https://www.nbcnews.com/feature/nbc-out/only-0-1-percent-elected-officials-are-lgbtq-new-report-n885871> [<https://perma.cc/K6B4-LUPL>] (discussing lack of LGBTQ representation within Congress).

200. See Patricia Reaney, *Stigma, Discrimination, Lack of Laws Hamper Transgender Employees*, REUTERS (Aug. 28, 2015, 9:01 AM), <https://www.reuters.com/article/usa-work-transgender/stigma-discrimination-lack-of-laws-hamper-transgender-employees-idUSL1N10T24T20150828> [<https://perma.cc/8GQD-JPY6>] (discussing how misunderstanding transgender community leads to inequality).

201. See Ray D. Hacke, “Girls Will Be Boys, and Boys Will Be Girls”: *The Emergence of the Transgender Athlete and a Defensive Game Plan for High Schools That Want to Keep Their Playing Fields Level — For Athletes of Both Genders*, 18 TEX. REV. ENT. & SPORTS L. 131, 131 (2018) (deliberately stating that, “[t]o avoid confusion, this article uses the terms ‘man,’ ‘woman,’ ‘boy,’ ‘girl,’ ‘male,’ and ‘female’ according to their traditional definitions. The author recognizes that transgender males define themselves as female and transgender females define themselves as male, and individuals who consider themselves “allies” of transgender persons honor those self-definitions. The author intends no disrespect to transgender persons by his use of traditional definitions.” This author acknowledges using incorrect pronouns throughout this piece despite acknowledging that they are incorrect.); see also *Debunking the “Bathroom Bill Myth”*, GLAAD at 14, available at http://www.glaad.org/sites/default/files/Debunking_the_Bathroom_Bill_Myth_2017.pdf [<https://perma.cc/R2FQ-3ATA>] (last visited Feb. 9, 2019) (explaining proper reporting methods to utilize when discussing transgender issues, specifically advising to avoid “pronoun confusion when examining the stories and backgrounds of transgender people prior to their transition” and that writers and reporters should use the correct term(s) to describe a transgender individual’s gender identity).

202. For further discussion of potential methods of achieving transgender inclusion, see *infra* notes 200–234 and accompanying text.

203. See Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 901 (2019) (considering nonbinary gender identities, stating that “[n]onbinary gender rights might take the form of recognition of a third-gender category, elimination of unnecessary legal sex classifications, or thoughtful integration of nonbinary people into rules or spaces that require binary categories”); see e.g., Alice Sanders, *Is Gender Segregation in Sports Necessary*, PUB. BROAD. SERV. (July 29, 2016, 12:24 PM),

men are already participating in some traditionally male dominated sports.²⁰⁴ Additionally, the Tokyo 2020 Olympic Games has added more mixed gender events, including table tennis, swimming, and triathlon.²⁰⁵ According to the International Olympic Committee, adding more combined events was done in an effort to attract younger viewership.²⁰⁶

More importantly, distinguishing athletes on the basis of a subjective gender identity renders impossible or offensive any attempt to distinguish between male and female categorization on an objective basis.²⁰⁷ While an objective test predicated upon literal anatomical parts is arguably desirable for simplicity's sake, all tests of gender lead to a variety of significant issues, both socially and scientifically.²⁰⁸ A chromosomal test may appear to be objective, but an

<http://www.pbs.org/how-we-got-to-now/blogs/howwegottonext/is-gender-segregation-in-sports-necessary/> [<https://perma.cc/ZV7N-KRE9>] (recounting history of gendered sports in United States).

204. See Gretchen Reynolds, *Major League Baseball? (And Not Just on TV)*, N.Y. TIMES (Sept. 22, 2018), <https://www.nytimes.com/2016/09/22/well/move/when-will-women-play-major-league-baseball-and-not-just-on-tv.html> [<https://perma.cc/9WKH-45PD>] (reporting on cisgender female baseball players who play with cisgender males).

205. See *Tokyo 2020: Mixed-gender Events Added to Olympic Games*, BBC (June 9, 2017), <https://www.bbc.com/sport/olympics/40226990> [<https://perma.cc/AP24-AHW2>] (discussing how more mixed gender events were added to 2020 games in effort to make it "more fun").

206. See Bill Chappell, *Olympics Shift: IOC Doubles Number of Mixed-Gender Events, Adds 5 Sports*, NPR (June 9, 2017, 1:13 PM), <https://www.npr.org/sections/thetwo-way/2017/06/09/532256014/olympics-shift-ioc-doubles-number-of-mixed-gender-events-adds-5-sports> [<https://perma.cc/4BH2-US8M>] (discussing addition of more mixed gender events to 2020 Olympics).

207. See Robin Marantz Henig, *How Science is Helping Us Understand Gender*, NAT'L GEOGRAPHIC (Apr. 2016), <https://www.nationalgeographic.com/magazine/2017/01/how-science-helps-us-understand-gender-identity/> [<https://perma.cc/YKJ7-FS7K>] (explaining theory of gender being on spectrum and essentially open to individual's own interpretation regarding self-identification). "A recent survey of a thousand millennials ages 18 to 34 found that half of them think 'gender is a spectrum, and some people fall outside conventional categories.' And a healthy subset of that half would consider themselves to be nonbinary, according to the Human Rights Campaign. In 2012 the advocacy group polled 10,000 lesbian, gay, bisexual, and transgender teens ages [thirteen] to [seventeen] and found that [six] percent categorized themselves as 'genderfluid,' 'androgynous,' or some other term outside the binary box." *Id.*; see also Adam Rogers & Megan Molteni, *Trump's Plan to Redefine Gender Makes No Scientific Sense*, WIRED (Oct. 24, 2018, 11:09 AM), <https://www.wired.com/story/trumps-plan-to-redefine-gender-makes-no-scientific-sense/> [<https://perma.cc/9H2K-VVQ5>] (explaining how there is no simple "test" to determine gender).

208. See generally Erin Buzuvis, *Hormone Check: Critique of Olympic Rules on Sex and Gender*, 31 WIS. J.L. GENDER & SOC'Y 29 (2016) (discussing Olympic policies regarding hormone levels, intersex, and transgender individuals); see also Jeré Longman, *Caster Semenya Will Challenge Testosterone Role in Court*, N.Y. TIMES (June 18, 2018), <https://www.nytimes.com/2018/06/18/sports/caster-semenya-iaaf-law-suit.html> [<https://perma.cc/5TBM-PQEX>] (discussing Caster Semenya's appeal of

individual may be intersex, leaving this effectively useless.²⁰⁹ Additionally, regulating high school athletes' hormone levels is an overreach on the part of schools.²¹⁰ Potentially requiring a student to medically adjust their hormone levels can be medically unsound, strip the student of their medical autonomy, and is socially unacceptable.²¹¹ In the absence of an easily applicable test that will reliably distinguish between categories and avoid harming transgender youth, it may be preferable not to make the distinction at all.²¹² For example, new categorizations for participation may be developed, such as by age or body mass.²¹³ Some scholars even argue that sexual dimorphism is a result of social conditioning and that the elimination of sexual distinction in sport will allow cisgender female athletes to compete with cisgender male athletes.²¹⁴

track and field governing body's policy regarding testosterone levels in cisgender female athletes). "Semenya said the rule stigmatized women who do not conform to perceived notions of femininity and permitted discrimination against them. She argued that she should be able to compete the way she was born without 'being obliged to alter her body by any medical means,' according to a statement released by her lawyers." *Id.* (exploring potential stigmatization of cisgender female athletes).

209. See *What Is Intersex?*, INTERSEX SOC'Y OF N. AM., http://www.isna.org/faq/what_is_intersex [<https://perma.cc/6BNV-UHKF>] (last visited Feb. 20, 2019) (defining term intersex as being "used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn't seem to fit the typical definitions of female or male. For example, a person might be born appearing to be female on the outside, but having mostly male-typical anatomy on the inside. Or a person may be born with genitals that seem to be in-between the usual male and female types").

210. See *Students: Your Right to Privacy*, ACLU, <https://www.aclu.org/other/students-your-right-privacy> [<https://perma.cc/BZ3L-FRWE>] (last visited Oct. 26, 2019) (indicating that ability to impose school sponsored drug testing of athletes varies from state to state).

211. See Shaun Assael, *High School Testing Loses Momentum*, ESPN (Mar. 5, 2009), <https://www.espn.com/espn/otl/news/story?id=3951039> [<https://perma.cc/A6G9-QT2W>] (discussing how high school steroid testing is declining after finding little steroid use among high school athletes); see also John McDermott, *There's No Easy Answer to the Debate Over Trans High School Athletes*, MEL MAG., <https://melmagazine.com/en-us/story/theres-no-easy-answer-to-the-debate-over-trans-high-school-athletes> [<https://perma.cc/D4A8-EZCY>] (last visited Feb. 20, 2019) ("[A]ttempting to regulate a high school athlete's hormone levels comes with its own batch of issues. Making a teenager's athletic eligibility contingent upon taking life-altering hormonal drugs is a thorny legal proposition few high schools will ever want to broach."). Additionally, high school athletes are minors, at differing stages in their natural hormone development, and may not even have access to hormone treatment. *Id.* (exploring issues associated with schools' involvement regarding students' hormone levels).

212. See Clarke, *supra* note 203 at 966–75 (presenting possibility of eliminating athletic gender classifications to ensure inclusion of nonbinary athletes).

213. See *id.* at 969 (describing Paralympic approach of categorizing athletic participation upon other factors than gender).

214. See Alice Sanders, *Is Gender Segregation in Sports Necessary?*, MEDIUM (July 13, 2016), <https://howwegettonext.com/is-gender-segregation-in-sports-ne>

However, abolishing gendered athletics would arguably lead to unintended consequences.²¹⁵ Abolishing women's sports entirely could push female athletes into sports where sexual dimorphism is less of a physical disadvantage compared to men.²¹⁶ More importantly, abolishing gendered sports would be an abolishment of Title IX itself.²¹⁷ While Title IX has undeniably increased the participation of women in athletics, it still fails to ensure athletic gender equality for women.²¹⁸ A variety of universities participate in "padding" their numbers of female athletes by having them falsely register for multiple sports, or even register men *as* women.²¹⁹ For example, "[a]t the University of South Florida, more than half of the 71 women on the cross-country roster failed to run a race in

cessary-dc188150f242 [https://perma.cc/85F7-GYQV] (advocating that advancement in sports training and technology can narrow athletic "performance gap" between men and women).

215. See Lily Rothman, *How Title IX First Changed the World of Women's Sports*, TIME (June 23, 2017), <http://time.com/4822600/title-ix-womens-sports/> [https://perma.cc/H5AN-XU7G] (explaining how Title IX led to athletic equality for women, supporting idea that abolishing gendered sports could lead to disparities similar to those that existed before Title IX).

216. See Alison Beard, *Women Respond Better Than Men to Competitive Pressure*, HARV. BUS. REV. (2017), <https://hbr.org/2017/11/women-respond-better-than-men-to-competitive-pressure> [https://perma.cc/W5WE-EB7W] (last visited Feb. 20, 2019) (explaining research showing that cisgender male athletes' performance suffers in high stakes games more than cisgender female athletes); see also Melissa Dahl, *The Obscure Ultra-Endurance Sport Women are Quietly Dominating*, N.Y. MAG. (Sept. 11, 2016), <https://www.thecut.com/2016/09/the-obscure-endurance-sport-women-are-quietly-dominating.html> [https://perma.cc/YCJ8-6GX9] (discussing studies supporting idea that cisgender women perform better than cisgender men in ultra-distance swimming); Jade De La Rosa, *Is Women Winning Ultras Overall a Trend?*, TRAIL RUNNER (May 30, 2018), <https://trailrunnermag.com/people/is-women-winning-ultras-overall-a-trend.html> [https://perma.cc/K6HW-22CX] (explaining that cisgender women perform better than cisgender men in running ultra-marathon running events due to physiological differences such as utilizing calories differently and enhanced fatigue resistance).

217. For a further discussion on requiring gender equity in athletic opportunities among other requirements, see *supra* notes 34–43 and accompanying text.

218. See *e.g.*, *Biediger v. Quinnipiac Univ.*, 691 F.3d 85 (2d Cir. 2012) (holding that Quinnipiac University in Connecticut violated Title IX. The university violated Title IX because it required women cross-country runners to be members of both indoor and outdoor track team, added women to athletic rosters for purposes of participation being counted only for those women to be eliminated from said positions, among other discriminatory actions which ultimately "fail[ed] to provide [female student]. . . with equal athletic participation opportunities"); see also James J. Hefferan, Jr., *A Sporting Chance: Biediger v. Quinnipiac University and What Constitutes a Sport for Purposes of Title IX*, 26 MARQ. SPORTS L. REV. 583 (2016) (exploring what sports "count" for purposes of Title IX in light of *Biediger*).

219. See Katie Thomas, *College Teams, Relying on Deception, Undermine Gender Equality*, N.Y. TIMES (Apr. 25, 2011), <https://www.nytimes.com/2011/04/26/sports/26titleix.html> [https://perma.cc/KVH6-68HB] (explaining tactics various universities have used to artificially inflate numbers of their female athletes for purposes of appearing to comply with Title IX requirements).

2009. Asked about it, a few laughed and said they did not know they were on the team.”²²⁰

B. Amend and Include

The most conclusive method to promote transgender inclusion in athletics would be to amend Title IX to include gender identity.²²¹ However, passing a bill in Congress to include “true” gender equality in Title IX would arguably be impossible with today’s political climate.²²² Moreover, a broad array of groups, ranging from women’s interest groups to conservative interest groups, would oppose this expansion of Title IX.²²³ It is difficult to predict what the next presidential election will bring, especially considering that many found the election of Donald Trump to be surprising.²²⁴ Obama arguably chose to expand the definition of sex to include transgender individuals precisely because it would be so difficult to amend Title IX; by unilaterally writing his *Dear Colleague Letter*, he was almost able to bypass efforts to halt this expansion.²²⁵ As a re-

220. *Id.* (summarizing ways in which universities fail to comply with Title IX).

221. For a further discussion on how Title IX does not currently apply to transgender individuals, see *supra* notes 52–53 and accompanying text. See also Stacey Michel, *Not Quite a First Place Finish: An Argument That Recent Title IX Policy Clarification from the United States Department of Education Does Not Adequately Protect Transgender Interscholastic Athletes*, 25 TUL. J.L. & SEXUALITY 145 (2016) (advocating for Title IX to be amended to include gender identity to protect transgender athletes).

222. For a further discussion on the Trump Administration’s regressive policies regarding transgender individuals, see *supra* notes 135–156 and accompanying text.

223. See Ryan Anderson & Melody Wood, *Gender Identity Policies in Schools: What Congress, the Courts, and the Trump Administration Should Do*, HERITAGE FOUND. (Mar. 23, 2017) (advocating for government to “respect federalism, local decision-making, and parental authority in education” by not expanding sex under Title IX to include gender identity); see also Dawn Ennis, *Martina Navratilova on Trans Athletes: ‘Letting Men Compete as Women is Unfair’*, SBINATION OUTSPORTS (Feb. 17, 2019, 9:57 AM), <https://www.outsports.com/2019/2/17/18227992/martina-navratilova-trans-athletes-are-men-competing-as-women-is-unfair> [<https://perma.cc/2E66-BXS9>] (criticizing tennis athlete Martina Navratilova’s op-ed in which she states that she believes transgender women athletes should not be allowed to compete with cisgender women, citing multitude of false claims). Navratilova’s opinions mimic those of cisgender women who believe that transgender athletes should be excluded from participating in sport that corresponds with their gender identity. *Id.*

224. See Karen Tumulty *et al.*, *Donald Trump Wins the Presidency in Stunning Upset over Clinton*, WASH. POST (Nov. 9, 2016), https://www.washingtonpost.com/politics/election-day-an-acrimonious-race-reaches-its-end-point/2016/11/08/32b96c72-a557-11e6-ba59-a7d93165c6d4_story.html?noredirect=ON&utm_term=.56800f6ff226 [<https://perma.cc/TUX6-BVTD>] (exploring how Donald Trump’s election surprised Hilary Clinton supporters and staffers).

225. For a further discussion on President Obama’s *Dear College Letter*, see *supra* notes 99–100 and accompanying text.

sult, the most effective and realistic method of promoting transgender inclusion is for individual states to enact inclusive policies, despite its obvious potential pitfalls.²²⁶

C. The Federalism “Solution”

Whether transgender inclusive athletic policies exist is currently left to individual states.²²⁷ Different states have widely different policies regarding transgender students.²²⁸ As Justice Brandeis said, states are “laboratories for democracy,” suggesting that in the absence of an accepted federal policy, states can tailor their own policies and witness its results, for better or worse.²²⁹ However, it is important to note that a federalism-based solution would lead to disparate treatment for transgender students across state lines.²³⁰ The vast differences between state policies mimic the issue of gay marriage pre-*Obergefell*.²³¹ In his majority opinion, Justice Kennedy wrote:

Indeed, faced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court granted review to determine whether same-sex couples may exercise the right to marry. Were the Court to uphold the challenged laws as constitutional, it would

226. For further discussion of state interpretation of Title IX, see *infra* notes 157–188 and accompanying text.

227. For a full breakdown of state policies regarding high school transgender athletes, see *supra* note 131 and accompanying text.

228. For a further discussion of Texas’ and Connecticut’s Policies, see *supra* notes 161–188 and accompanying text.

229. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

230. See Rokia Hassanein, *New Study Reveals Shocking Rates of Attempted Suicide Among Trans Adolescents*, HUM. RTS. CAMPAIGN (Sept. 12, 2018), <https://www.hrc.org/blog/new-study-reveals-shocking-rates-of-attempted-suicide-among-trans-adolescen> [<https://perma.cc/YRP9-XA4G>] (discussing high rates of attempted suicide and suicide amongst transgender youth). The study states that “[m]ore than half of transgender male teens who participated in the survey reported attempting suicide in their lifetime, while 29.9 percent of transgender female teens said they attempted suicide.” *Id.* “Among non-binary youth, 41.8 percent of respondents stated that they had attempted suicide at some point in their lives.” *Id.*

231. See *generally* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that right to marriage is fundamental and guaranteed to same-sex couples under Due Process Clause and Equal Protection Clause of Constitution); see also Jake Curtis *supra* note 130 (advocating for states’ rights regarding Title IX).

teach the Nation that these laws are in accord with our society's most basic compact.²³²

Accepting or being complacent with the idea that federalism “resolves” the high school transgender athlete issue amounts to federal acceptance of the fact that the lives of transgender youth around the country are severely impacted.²³³ Like *Obergefell*, leaving disparate state policies in place would “maintain and promote instability and uncertainty.”²³⁴

VII. CONCLUSION: MOVING FORWARD

The position of young transgender athletes will continue to present unique issues that will challenge established legal categories used to determine Title IX compliance.²³⁵ With increased societal acceptance and awareness, transgender individuals will continue to push the boundaries of existing legal interpretation in regards to athletic requirements under Title IX.²³⁶ It is clear that transgender athletes are making themselves heard, and it is only a matter of time until the law adjusts to incorporate these individu-

232. *Obergefell*, 135 S. Ct. at 2606 (indicating that laws reflect society's values).

233. See Donna St. George, *Transgender Students Prevail with School Policy in Maryland*, WASH. POST (Oct. 8, 2017), https://www.washingtonpost.com/local/education/transgender-students-prevail-with-school-policy-in-maryland/2017/10/08/f4814330-a7b7-11e7-850e-2bdd1236be5d_story.html?noredirect=on&utm_term=.d32f5af8b52a [<https://perma.cc/V93L-N43U>] (discussing adoption of progressive transgender policies in Maryland public schools and how lack of such policies previously affected its transgender youth).

234. *Obergefell*, 135 S. Ct. at 2607 (explaining how being married in one state but having that marriage be seen as invalid in another state promotes “severe hardship” that is compounded by fact that “hundreds of thousands of these marriages have already occurred”).

235. See generally Skinner-Thompson & Turner, *supra* note 89 (advocating for transgender inclusion in high school athletics).

236. See Chris Mosier, *Op-ed: Pushing Trans Youth Away From Sports Is Harmful*, OUT (Jan. 15, 2019, 11:45 PM), <https://www.out.com/sports/2019/1/15/trans-athletes-south-dakota-chris-mosier> [<https://perma.cc/9HD8-6E9D>] (noting importance of transgender youth sports); see also Dirk Smith, *Transgender Athletes Face Hurdles but Move Forward to Participate Equally in Sports*, COMPETE NETWORK (Nov. 16, 2018), <https://competenetwork.com/transgender-athletes-face-hurdles-but-move-forward-to-participate-equally-in-sports/> [<https://perma.cc/V9JD-755X>] (presenting challenges and accomplishments regarding transgender athlete participation); Cyd Zeigler, *New USA Hockey Transgender and Non-Binary Policy Earns Praise*, SBNA-TION OUTSPORTS (Jan. 25, 2019, 7:59 AM), <https://www.outsports.com/2019/1/25/18196633/usa-hockey-trans-policy> [<https://perma.cc/GW9Q-6CMF>] (detailing USA hockey's new inclusive policies, created in consultation with transgender athlete and advocate Chris Mosier).

als.²³⁷ Presently, it appears that the only methods of achieving transgender inclusion in athletics are to abolish gendered sports and Title IX, to amend Title IX to include transgender individuals, or to leave the issue to individual states in the hope that policies become more progressive with time.²³⁸

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237. See Mosier, *supra* note 236 (discussing recent developments in transgender participation in athletics); Smith, *supra* note 236 (reviewing same); Zeigler, *supra* note 236 (reporting on same).

238. For further discussion of potential methods of transgender inclusion, see *supra* notes 201–234 and accompanying text.

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