COMMENTS

THE TRANS ATHLETE DILEMMA: A CONSTITUTIONAL ANALYSIS OF HIGH SCHOOL TRANSGENDER STUDENT-ATHLETE POLICIES

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Typically, high schools offer separate teams for boys and girls, but the increasing number of young people openly identifying as transgender ("trans") has complicated this sex-segregated approach. High school athletic associations across the country have adopted varied regulations regarding the eligibility of trans athletes: restrictive policies require trans students to compete on teams corresponding to their sex at birth without exception; fully inclusive policies allow all trans students to compete on teams consistent with their gender identity; and partially inclusive policies permit trans boys to play on all-boy teams without restriction but require trans girls to undergo specific medical interventions before playing on all-girl teams.

Plaintiffs challenging these policies will likely rely on Title IX of the Educational Amendments Act and the Equal Protection Clause of the Fourteenth Amendment. Under either claim, a high school athletic association would need to establish that classifying trans students by their sex assigned at birth rather than their gender identity—or vice versa—furthers a legitimate government interest.

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Restrictive policies fail rational basis review because forcing female-to-male (FTM) trans boys to compete against girls ironically undermines notions of fair play. Additionally, male-to-female (MTF) trans girls who have undergone a year of cross-gender hormone treatments enjoy no significant competitive edge over their cisgender girl peers. Fully inclusive policies are constitutionally valid because creating a welcoming educational environment for trans students is a legitimate state objective and an athletic policy that allows trans players to compete on teams consistent with their gender identity is rationally related to that goal. Finally, partially inclusive policies, which require MTF trans girls to undergo a year of hormone therapy before competing on all-girl teams, are valid because a state athletic association may rationally determine that, without medical intervention, trans girls have a competitive advantage and may endanger fellow female players.

Although partially inclusive athletic policies are legally permissible, high school athletic associations should pursue fully inclusive models that validate the dignity of trans students.

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INTRODUCTION

In February 2017, Mack Beggs, a transgender boy,[1] won the Texas high school girls' state wrestling championship amidst an uproar of controversy.[2] Beggs, who had undergone medically prescribed hormone therapy since October 2015 to aid in his transition, requested to compete against other boys, but the University Interscholastic League (UIL), the state officiating body that regulates Texas interscholastic sports, refused his request.[3] The official UIL policy restricts an athlete to only competing on single-sex teams that correspond to the sex indicated on the student's birth certificate.[4] A parent of a competitor filed a lawsuit alleging that Beggs's testosterone treatments provided him an unfair advantage over his female opponents, hazarding the bizarre position that "Beggs, who has identified as a boy for about two years, is a girl, but somehow not enough of a girl to wrestle against girls."[5] Although a Texas judge dismissed the lawsuit,[6] the Beggs controversy reveals how policies based

1. Beggs was born female but now identifies as male. *See infra* Section I.B (discussing transgender identity).

2. Christina Cauterucci, *The Trans Boy Who Won the Texas Girls' Wrestling Title Exposes the Illogic of Anti-Trans Policy*, SLATE (Feb. 27, 2017, 3:34 PM), http://www.slate.com/blogs/xx_factor/2017/02/27/the_texas_trans_boy_forced_to_wrestle_girls_exposes_the_illogic_of_anti.html.

3. *Id.*

4. *Id.*

5. *Id.*

6. Michael Florek, *Judge Dismisses Lawsuit Against UIL that Sought to Ban Transgender Wrestler from Competing*, DALLAS NEWS: SPORTSDAY (Apr. 25, 2017),

on strict sex binaries often lead to illogical results when confronted with the reality of fluid conceptions of gender identity.[7]

On the opposite end of the ideological spectrum, some states, like Connecticut, allow transgender student-athletes to compete on teams consistent with their gender identity irrespective of their sex assigned at birth.[8] Andraya Yearwood, a fifteen-year-old transgender girl,[9] outclassed her female competition at the 2017 Connecticut State Track and Field Championship, finishing first in both the 100-meter dash and 200-meter dash.[10] Some of her competitors voiced frustration, believing that Yearwood's male body—she has never undergone any hormone therapy that would suppress her natural testosterone levels—provided her a biological advantage in a sport based on physical strength and speed.[11] While the Beggs situation shows the foolishness of adhering to strict sex-based classifications in all circumstances, the controversy surrounding Yearwood exposes the possible folly of progressive policies that turn a blind eye to the reality of inherent biological differences between males and females.

This Comment analyzes the potential constitutional challenges to various state regulations regarding inclusion of transgender student-athletes on single-sex interscholastic sports teams. Generally, public schools offer separate boys' and girls' teams for their sports programs, but the increasing number of young athletes identifying as transgender complicates this practice.[12] State officials must now craft athletic policies that recognize the dignity of transgender adolescents but still promote the goals of fair competition and student safety.[13] Currently, state high

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https://sportsday.dallasnews.com/high-school/high-schools/2017/04/25/judge-dismisses-lawsuit-uil-sought-ban-transgender-wrestler-competing.

7. *See infra* Section I.B (explaining the distinction between sex and gender).

8. CONN. GEN. STAT. § 10-15c (2017) (ordering Connecticut public schools to provide students "an equal opportunity to participate" in school activities "without discrimination on account of . . . gender identity or expression").

9. Yearwood was born male but now identifies as female. *See infra* Section I.B (discussing transgender identity).

10. Jeff Jacobs, *As We Rightfully Applaud Yearwood, We Must Acknowledge Many Questions Remain*, HARTFORD COURANT (June 1, 2017, 6:00 AM), http://www.courant.com/sports/hc-jacobs-column-yearwood-transgender-0531-20170530-column.html.

11. *Id.*

12. *See* Jan Hoffman, *Estimate of U.S. Transgender Population Doubles to 1.4 Million Adults*, N.Y. TIMES (June 30, 2016), https://www.nytimes.com/2016/07/01/health/transgender-population.html (explaining that, while only 0.6% of the adult population in America—or 1.4 million people—identifies as transgender, that number is twice what it was five years ago).

13. *See infra* Section II.C.

school athletic associations implement a wide range of regulations regarding the eligibility of transgender student-athletes to compete on single-sex teams.[14] This Comment classifies these varied policies into three general categories: restrictive, fully inclusive, and partially inclusive.[15]

This Comment argues that restrictive policies requiring transgender students to participate on sports teams consistent with their sex assigned at birth, without exception, fail to survive rational basis review and are, therefore, unconstitutional. Preventing female-to-male (FTM) transgender boys from playing on boys' teams serves no rational purpose.[16] Concerns about safety are paternalistic, and concerns about fair play are illogical.[17] Furthermore, requiring male-to-female (MTF) transgender girls to play on boys' teams in all circumstances is impermissibly overinclusive.[18] Transgender girls who have received cross-gender hormone treatments for more than a year pose no credible safety risk to female opponents and enjoy no significant competitive advantage. Any policy discriminating against transgender girls who are undergoing hormone therapy likely reflects unjustifiable animus. However, under rational basis review, a rule that requires a MTF transgender girl to undergo hormone therapy for one year before competing against other girls should survive a constitutional challenge.[19] Such a regulation is rationally related to the legitimate state goals of promoting competitive fairness and ensuring student safety.

Part I examines the history and purpose of single-sex sports in public schools and explores how the inclusion of transgender student-athletes poses new legal complications for the current sex-segregated approach. Part II details the various state policies currently concerning transgender high school student-athletes, focusing on restrictive, fully inclusive, and partially inclusive models. Part III establishes the legal framework that plaintiffs would likely use to contest these state regulations, analyzing how courts have interpreted the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments Act to provide relief to transgender individuals in the past. Part IV argues that transgender student-athlete policies only need to withstand rational basis review. Finally, Part V

14. *See infra* Section II.C.
15. *See infra* Section II.C.
16. *See infra* Section I.B (defining female-to-male (FTM) transgender boy).
17. *See infra* Section V.B.1.
18. *See infra* Section I.B (defining male-to-female (MTF) transgender girl).
19. *See infra* Section V.B.3.

argues that state policies that restrict students to competing on single-sex teams consistent with their sex assigned at birth, without exception, are constitutionally invalid; however, rules that require transgender girls to undergo specific forms of medical intervention before playing on all-girl teams likely pass constitutional muster.

This Comment concludes by explaining that although both fully inclusive and partially inclusive policies are consistent with the Constitution and Title IX, high school athletic associations need to deeply consider whether they want to prioritize notions of fair competition over acknowledgment of the dignity and well-being of transgender girls who may be harmed by any policy short of full inclusion.

I. TRANSGENDER ATHLETES AND SEX-SEGREGATED HIGH SCHOOL SPORTS

This Section examines the history and purpose of single-sex sports teams in public schools—focusing both on cases where courts have upheld sex-segregated policies and cases where courts have struck down sex-based exclusions. Sections I.B and I.C further explore how the increased visibility of trans athletes disrupts the traditional gender paradigm underpinning interscholastic athletics. Finally, this Section concludes by explaining the importance of inclusion for the trans athletes at the mercy of these regulations.

A. History and Objective of Sex Segregation in High School Sports

Throughout American history, sports were traditionally the domain of boys and men.[20] During the nineteenth century, religious institutions, schools, and businesses organized and promoted team sports—especially football—as a means to engender "masculine qualities such as physicality, aggression, and dominance in male participants."[21] The few athletic opportunities available to female athletes tended to emphasize "fitness and socializing rather than competition," and sports for girls and women often had different rules based on stereotypical notions of female physical inferiority.[22]

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20. *See* Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 4 (2011).

21. *Id.*

22. *Id.* at 1, 4 (noting society's limitation of the scope of women "sporting practices," including requiring "modest and restrictive attire"); *see also* Cape v. Tenn. Secondary Sch. Athletic Ass'n, 563 F.2d 793, 794–95 (6th Cir. 1977) (per curium)

The state of female athletics forever changed in 1972 when Congress passed Title IX of the Education Amendments Act, which mandated that educational institutions receiving federal funds may not discriminate against students "on the basis of sex."[23] Title IX ensured that female students had equal opportunity and funding to participate in athletics, but the implementing regulations instituted a separate-but-equal framework for female sports, explicitly authorizing schools to sponsor separate teams for members of each sex.[24] The regulations stipulate that a school may even operate a single-sex team without offering a corresponding team for the opposite sex if (1) the sport is a contact sport or (2) athletic opportunities for members of the excluded sex have not been previously limited.[25]

Under a strict reading of the regulation, a school that sponsors a boys' football team but no girls' football team is justified in prohibiting a female student from trying-out for football. Similarly, a school that operates separate-sex teams for badminton—a noncontact sport—would be equally justified in prohibiting a female athlete from trying-out for the more competitive boys' badminton team regardless of her skill level.

Some feminist legal scholars have criticized Title IX, arguing that the legislation legitimizes unfounded sex-based discrimination and

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(holding that the modified rules made for girls' basketball that "call for six instead of five players on each team, impose half-court restrictions, and permit only forwards to shoot" are valid because the rules are reasonably tailored to the limited physical characteristics and capabilities of girls).

23. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–82 (2012).

24. Title IX states in part:

> (a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.
>
> (b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

34 C.F.R. § 106.41(a)–(b) (2017).

25. *Id.* § 106.41(b).

brands girls as inferior to boys,[26] much like the Supreme Court's decision in *Plessy v. Ferguson*[27] maintained racial segregation with its "separate but equal" accommodations requirement.[28] Most courts, however, have upheld Title IX's sex-segregated framework for interscholastic sports to protect athletic opportunities for girls.[29] When school athletic policies are at odds with that end, courts routinely strike down sex-based exclusions. For instance, courts typically permit physically talented girls to play on boys' teams for both contact and noncontact sports as long as the school does not offer a corresponding girls' team.[30] Courts are reluctant to enforce a school athletic policy that completely bars girls from playing certain sports.[31] For example, in *Darrin v. Gould*,[32] the Supreme Court of Washington invalidated a policy that prevented the two Darrin sisters from trying out for the Wishkah Valley High School boys' football team.[33] The court held that such a prohibition impermissibly discriminated against the Darrin girls "on account of their sex."[34] The ruling in *Darrin* is consistent with similar rulings that reject the unfounded and paternalistic claim that prohibiting a talented girl from playing a contact sport with boys is for

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26. *See* EILEEN MCDONAGH & LAURA PAPPANO, PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS xi (2008) ("By condoning sex segregation in contact sports, Title IX ended up reinforcing the assumption that girls couldn't—or shouldn't—play with the boys."); Nancy Leong, *Against Women's Sports*, WASH. UNIV. L. REV. 5 (forthcoming 2018), https://ssrn.com/abstract=2923503 (arguing that sports leagues should operate on the assumption that participation should be coed).

27. 163 U.S. 537, 551–52 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).

28. *Id.* at 551–52 (upholding a Louisiana statute that required railroads to provide separate-but-equal accommodations for white and black passengers).

29. *See* Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168, 175 (3d Cir. 1993) ("[I]t would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys' athletic programs to the exclusion of girls' athletic programs in high schools as well as colleges.").

30. *See, e.g.*, Brenden v. Indep. Sch. Dist., 477 F.2d 1292, 1294, 1302 (8th Cir. 1973) (tennis and cross country); Saint v. Neb. Sch. Activities Ass'n, 684 F. Supp. 626, 627 (D. Neb. 1988) (wrestling); Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1021–22 (W.D. Mo. 1983) (eighth-grade football); Carnes v. Tenn. Secondary Sch. Athletics Ass'n, 415 F. Supp. 569, 570 (E.D. Tenn. 1976) (baseball); Darrin v. Gould, 540 P.2d 882, 883 (Wash. 1975) (en banc) (high school football).

31. *See, e.g.*, *Darrin*, 540 P.2d at 892–93 (holding that a blanket rule prohibiting girls from playing on boys' teams for contact sports is a violation of the Equal Protection Clause).

32. 540 P.2d 882 (Wash. 1975).

33. *Id.* at 883–84.

34. *Id.* at 893.

her own good.[35] In these cases, the female plaintiffs are aware of their physical abilities and are making an informed decision to compete against boys.[36] Furthermore, the *Darrin* court concluded that safety concerns are disingenuous because schools do not prevent smaller, weaker boys who are prone to injury from trying-out for contact sports against bigger, stronger boys.[37]

Courts are conflicted about whether girls are entitled to try-out for the more competitive boys' team when their school offers a girls' team for that particular sport. Title IX expressly allows schools to operate sex-segregated sports teams,[38] but schools must implement Title IX in a manner consistent with the Constitution.[39] In *O'Connor v. Board of Education*,[40] the U.S. District Court for the Northern District of Illinois upheld a policy that prevented Karen O'Connor, a talented female basketball player, from trying-out for the sixth-grade boys' basketball team because her school provided a sixth-grade team for girls.[41] The court reasoned that without sex-segregated teams, boys would dominate and deny girls an equal opportunity to participate in interscholastic sports.[42] The court conceded that the policy was illogical as applied to O'Connor, but it held a valid policy only needs to be reasonable in general, not in every specific case.[43]

Contrastingly, in *Pennsylvania v. Pennsylvania Interscholastic Athletic Ass'n*,[44] a Pennsylvania state court concluded that relegating all female students to the girls' team, regardless of ability, constitutes impermissible

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35. *See* Fortin v. Darlington Little League, Inc., 514 F.2d 344, 350–51 (1st Cir. 1975) (concluding that safety concerns are unsubstantiated and not a rational basis for excluding girls from Little League Baseball).

36. *See* Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1028–29 (W.D. Mo. 1983) (explaining that an average girl may have a higher potential for injury than the average boy, but not all girls are average).

37. *See Darrin*, 540 P.2d at 892 (noting that smaller, weaker boys could try-out for their high school's football team).

38. 34 C.F.R. § 106.41 (2017).

39. *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 255–56 (2009) (holding that Title IX does not preclude an Equal Protection Clause challenge alleging unconstitutional gender discrimination in schools).

40. 545 F. Supp. 376 (N.D. Ill. 1982).

41. *Id.* at 378, 384.

42. *Id.* at 379.

43. *Id.* at 381 ("If the classification is reasonable in substantially all of its applications, I do not believe that the general rule can be said to be unconstitutional simply because it appears arbitrary in an individual case.") (quoting O'Connor v. Bd. of Educ. of Sch. Dist. 23, 449 U.S. 1301, 1306 (1980)).

44. 334 A.2d 839 (Pa. Commw. Ct. 1975).

sex discrimination.[45] The Commonwealth of Pennsylvania challenged the constitutionality of a provision of the Pennsylvania Interscholastic Athletic Association's bylaws, mandating that "[g]irls shall not compete or practice against boys in any athletic contest."[46] The court held that such a policy was invalid with respect to sports for which no girls' team exists.[47] For those "boy" sports, all girls, even girls more skilled than their male classmates, are effectively barred from participating due to their sex.[48] In dicta, the court further reasoned that even when schools offer separate teams for boys and girls for the same sport, if the school restricts an exceptionally talented girl to the girls' team, she "still may be denied the right to play at that level of competition which [her] ability might otherwise permit . . . solely because of her sex."[49] The court recognized that preventing girls from playing against boys undermines the purpose of Title IX,[50] ensuring that female students have equitable access to the educational benefits of competitive athletics.

Following that reasoning, courts are most likely to uphold sex-segregated athletic policies when boys sue to gain positions on girls' teams.[51] Because the Department of Education drafted the Title IX implementation regulations to increase opportunities for female athletes, courts have been unsympathetic to male plaintiffs relying on the statute.[52] High schools may reasonably prevent boys from trying-out for girls' teams because boys have physical advantages that would be unfair to opposing players and would limit female participation.[53] In *B.C. v. Board of Education*,[54] a New Jersey appellate court upheld a

45. *Id.* at 842.
46. *Id.* at 840.
47. *Id.* at 842.
48. *Id.*
49. *Id.*
50. *Id.* at 841 (addressing a challenge to the Equal Rights Amendment in the Pennsylvania Constitution, which, like Title IX, prohibits the "denial or abridgment of equality of rights because of sex") (citing PA. CONST. art. 1, § 28).
51. *See, e.g.*, Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168, 169 (3d Cir. 1993) (field hockey); Clark v. Ariz. Interscholastic Ass'n, 695 F.2d 1126, 1127 (9th Cir. 1982) (volleyball); B.C. v. Bd. of Educ., 531 A.2d 1059, 1061 (N.J. Super. Ct. App. Div. 1987) (field hockey); Forte v. Bd. of Educ., 431 N.Y.S.2d 321, 322 (N.Y. Sup. Ct. 1980) (volleyball).
52. *See Forte*, 431 N.Y.S.2d at 324 ("[The] policy of preventing male participation in girls' inter-scholastic teams is a discernable and permissible means toward redressing disparate treatment of female students in scholastic athletic programs.").
53. *See Clark*, 695 F.2d at 1131 (concluding that, due to average physiological differences, "males would displace females to a substantial extent" if boys could try-out for the all-girl volleyball team).
54. 531 A.2d 1059 (N.J. Super. Ct. App. Div. 1987).

state athletic policy that prevented a high school boy from playing on his school's all-girl field hockey team even though the school did not sponsor a field hockey team for boys.[55] The court explained that because boys have a real physical advantage over girls, New Jersey's sex-segregated athletics policy necessarily "prevents males from dominating and displacing females from meaningful participation in available athletic opportunities."[56]

Notably, there are two recorded instances in which courts have permitted boys to participate on girls' teams.[57] In both cases, the holdings were limited to situations where schools did not sponsor a boys' team for the sport in question.[58] For example, in *Gomes v. Rhode Island Interscholastic League*,[59] the U.S. District Court for the District of Rhode Island permitted a boy to play on an all-girl volleyball team, but the court recognized that typically a sex-segregated sports policy is desirable.[60]

Generally, courts acknowledge that Congress passed Title IX to increase educational opportunities for girls and women. As such, courts tend to invalidate sex-segregated athletic policies when those policies deny girls the opportunity to play traditionally masculine sports; however, courts will enforce those same policies to prevent male plaintiffs from ruining the integrity of female athletics.

B. Distinguishing Sex from Gender and Understanding Transgender Identity

The increasing number of young athletes identifying as transgender has forced education policymakers to reexamine the social purpose and legal justifications for sex-segregated sports teams. For this Comment, "transgender" refers to an "individual whose gender identity

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55. *Id.* at 1061, 1066.

56. *Id.* at 1065.

57. *See* Attorney General v. Mass. Interscholastic Athletic Ass'n, 393 N.E.2d 284, 296 (Mass. 1979) (holding that a complete bar on boys competing on girls' teams violates the Equal Rights Amendment of the Massachusetts Constitution because the policy is not narrowly tailored to safety concerns or providing athletic opportunities to girls); Gomes v. R.I. Interscholastic League, 469 F. Supp. 659, 665 (D.R.I. 1979) (concluding that because boys have been denied the opportunity to play volleyball, boys must be permitted to play on an all-girl team if the school does not sponsor a male volleyball team), *vacated as moot*, 604 F.2d 733, 736 (1st Cir. 1979).

58. *Mass. Interscholastic Athletic Ass'n*, 393 N.E.2d at 296.

59. 469 F. Supp. 659, 665 (D.R.I. 1979), *vacated as moot*, 604 F.2d 733, 736 (1st Cir. 1979).

60. 469 F. Supp. at 666 (stating that "[s]eparate but equal volleyball teams do appear the most advantageous athletic approach" because of the physical differences between boys and girls).

(one's internal psychological identification as a boy/man or girl/woman) does not match the person's sex at birth."[61] An FTM transgender boy is a young person who was born with a female body but identifies as a male, and an MTF transgender girl is a young person who was born with a male body but identifies as a female.[62] "Cisgender" refers to an individual who exclusively identifies as his or her sex assigned at birth—someone who is not transgender.[63]

Although "gender" and "sex" are often used interchangeably, the two terms have distinct meanings.[64] "Sex" describes an individual's biological characteristics (e.g., chromosomes, hormone profiles, and internal and external sex organs), while "gender" refers to an individual's personal identification as male or female based on internal awareness.[65] Trans proclivities are deeply rooted and may present in children as young as two or three years old.[66] Some trans individuals seek hormone therapy and gender-reassignment surgery to change their bodies to better reflect their gender identity, but others simply choose to live their lives as a gender different from their sex assigned at birth without medical intervention.[67]

The steps an individual may take toward transitioning are often dependent upon age and physical development.[68] The World Professional Association for Transgender Health (WPATH) has established different medical protocols for transitioning dependent upon a trans person's age.[69] For young children, WPATH recommends a purely social transition free from medical intervention.[70] For children approaching puberty, a doctor may choose to prescribe hormone blockers

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61. PAT GRIFFIN & HELEN J. CARROLL, ON THE TEAM: EQUAL OPPORTUNITY FOR TRANSGENDER STUDENT ATHLETES, NATIONAL CENTER FOR LESBIAN RIGHTS 9 (2010), https://www.ncaa.org/sites/default/files/NCLR_TransStudentAthlete%2B(2).pdf. Throughout this Comment, the shorthand for "transgender" is "trans."

62. *Id.*

63. *GLAAD Media Reference Guide – Transgender*, GLAAD, https://www.glaad.org/reference/transgender (last visited Feb. 7, 2018). Throughout this Comment, the shorthand for "cisgender" is "cis."

64. Jill Pilgrim et al., *Far from the Finish Line: Transexualism and Athletic Competition*, 13 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 495, 498 (2003).

65. *Id.* at 497–98.

66. Buzuvis, *supra* note 20, at 12–13.

67. GRIFFIN & CARROLL, *supra* note 61, at 9.

68. *Id.* at 13–14.

69. WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 11, 17–21 (7th ed. 2011) [hereinafter WPATH STANDARDS OF CARE].

70. *Id.* at 17.

to delay the onset of puberty.[71] For postpubescent adolescents, a doctor may prescribe cross-gender hormone treatments and in some cases may approve chest reconstruction surgery for trans boys.[72] Importantly, most doctors advise against gender reassignment surgery for patients under eighteen, and most insurers refuse to cover the procedure for minors.[73]

C. The Dilemma of Transgender Athletes

Trans athletes pose a dilemma to the traditional model of interscholastic athletics because the sex-segregated approach is predicated upon the assertion that males and females are biologically different. Males, on average, have objective physical advantages over females.[74] Males have longer arms, bigger and stronger legs, and more muscle fiber.[75] Although no significant physical differences exist between boys and girls prior to puberty, the physical disparities between the sexes become more pronounced once students enter high school.[76] For example, the 2017 Maryland High School Class 4A Track and Field Championship highlights the extent of these sex-based distinctions. In the 100-meter dash, the three fastest girls ran an average time of 12.22 seconds, while the three fastest boys ran an average time of 10.88 seconds.[77] The three top girl long jumpers jumped an average distance of eighteen feet, one inch, compared to an average distance of twenty-one feet, five inches for the top three boys.[78] In both events, every male competitor—except for those disqualified—outperformed every female competitor.[79] Without separate events for each sex, female sprinters and jumpers would not have a realistic opportunity to compete for a state championship.

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71. *Id.* at 18–19.

72. *Id.* at 20–21.

73. *Id.* at 21; *see also* Anemona Hartocollis, *How Young Is Too Young to Seek Gender Reassignment?*, HERALD-TRIBUNE (July 7, 2015), http://health.heraldtribune.com/2015/07/07/how-young-is-too-young-to-seek-gender-reassignment ("While no law prohibits minors from receiving sex-change hormones or even surgery, insurers have generally refused to extend coverage for these procedures to those under 18.").

74. *See* Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC'Y 271, 286 (2013).

75. *Id.*

76. *Id.* at 287.

77. MD. PUB. SECONDARY SCH. ATHLETIC ASS'N, MARYLAND STATE CHAMPIONSHIPS RESULTS 1, 13 (2017), http://www.mpssaa.org/assets/1/6/T_F_4A_Final_Results_17.pdf.

78. *Id.* at 10, 21–22.

79. *Id.* at 1–24.

Erin Buzuvis, a preeminent scholar on transgender athletes, argues that the perceived competitive advantage males have over females is overstated. She notes that the reported physical differences between the sexes reflect averages, not categorical distinctions.[80] Furthermore, skill and talent, which are the most important factors when determining an advantage in sports, are not always related to size and strength.[81] Buzuvis's assertion that not all boys possess physical advantages over all girls is correct, but the categorical distinctions between the sexes are pronounced enough that a policy that fully embraces sex-integrated high school athletics would disenfranchise young women. Some especially talented girls could compete against their male peers, but many girls of average size and strength would be discouraged from participating in athletics. Sex-segregated teams may not be necessary for interscholastic sports that are predominantly skill-based, like bowling or archery, but boys have an undue competitive advantage in most other sports, which privilege body size, speed, and strength.

Before high school athletic associations devise regulations regarding transgender athletes, they must openly acknowledge the inherent biological differences between males and females. A trans girl, who has a male body that regularly produces testosterone, has a physical advantage over a cis girl whose body produces significantly less testosterone.[82] However, when a trans girl receives cross-gender hormone therapy, the treatments greatly reduce any former biological edge.[83] Hormone treatments for MTF trans girls increase body fat, decrease muscle mass, and may even cause a slight loss in height.[84] After only one year of cross-gender hormone therapy, a trans girl will have estrogen and testosterone levels similar to the average cis girl.[85] Yet some physiological differences persist even after a trans girl has undergone hormone therapy. Her "male" skeletal structure—

80. Buzuvis, *supra* note 20, at 35–36.

81. *Id.* at 37–38; *see also* Leong, *supra* note 26, at 36–38 (noting that men have no inherent competitive advantage in sports based primarily on skill like skeet shooting or in extreme endurance sports like ultra-marathons and the Iditarod).

82. *See* Buzuvis, *supra* note 20, at 38.

83. *Id.* at 38–39; *see also* Joanna Harper, *Race Times for Transgender Athletes*, 6 J. SPORTING CULTURES & IDENTITIES 1, 2, 8 (2015) (conducting the first ever study measuring the performance of transgender athletes and finding that for distance runners in masters (over forty years old) track meets, "transgender women run distance races at approximately the same level, for their respective gender, both before and after gender transition").

84. Buzuvis, *supra* note 20, at 39.

85. *Id.*

including basic height, hip structure, arms, hands, legs, and feet—will remain unchanged.[86] A trans girl's comparatively larger stature may be an advantage in sports like basketball and volleyball that favor height and hand size.[87] These differences are less pronounced for a trans girl who began cross-gender hormone therapy as a teenager before her male skeletal structure fully developed. Concerns regarding competitive fairness are especially baseless for MTF trans girls who were placed on hormone blockers before they reached puberty and never developed male secondary sex characteristics. Unlike hormone therapy, there is currently no evidence that suggests gender reassignment surgery has a demonstrable impact on athletic performance.[88]

Obviously, fairness concerns are less of an issue when trans boys with female bodies seek the opportunity to compete against cis boys.[89] Even FTM trans boys who regularly take testosterone treatments enjoy no discernable physical advantage over cis boys.[90] A trans boy who takes testosterone may technically be in violation of a school's doping or anti-drug rules, but a policy granting a medical exception for a student receiving prescribed testosterone treatments—assuming his testosterone levels remain in the typical range for a cis boy—is a commonsense solution.[91]

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86. Maddie Deutsch, *Information on Estrogen Hormone Therapy*, UNIV. OF CAL. S.F., https://transcare.ucsf.edu/article/information-estrogen-hormone-therapy (last visited Feb. 7, 2018) (explaining that any slight loss in height a trans woman may notice after undergoing hormone therapy is not due to skeletal changes but "due to changes in the ligaments and muscles of your feet").

87. *But see* Katelyn Burns, *What Actually Happens when a Trans Athlete Transitions*, VICE SPORTS (May 4, 2017, 9:30 AM), https://sports.vice.com/en_us/article/vv95a4/what-actually-happens-when-a-trans-athlete-transitions (arguing that a trans girl's larger skeletal stature may actually be a disadvantage due to her loss in quickness, as the reduction in testosterone results in a smaller motor powering a larger body). Also, some trans girls are smaller than the average cis girl, and some cis girls are larger than the average cis boy. *See id.* These arguments notwithstanding, athletes with larger bodies tend to enjoy an advantage in physical sports.

88. Buzuvis, *supra* note 20, at 40–41.

89. *See* Clark v. Ariz. Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982) (holding that the Arizona Interscholastic Association had a substantial interest in preventing the decrease of athletic opportunities for females because males have a physiological undue advantage when competing against females).

90. Pilgrim et al., *supra* note 64, at 531.

91. *Id.*

D. Potential Benefits of Athletic Participation for Transgender Students

Roughly 8 million students participate in and enjoy the physical, mental, and academic benefits associated with interscholastic athletics.[92] Playing sports reduces an adolescent's risk of heart disease and obesity, while also establishing a healthy exercise routine that may persist into adulthood.[93] Sports promote mental health, leading to lower rates of depression and anxiety.[94] Student-athletes also tend to have increased rates of school attendance and better grades.[95] Finally, high school athletics instill the values of dedication, teamwork, and sportsmanship.[96]

Transgender students are an especially vulnerable population,[97] and they deserve equal access to the benefits of high school athletics. Trans students may feel marginalized and isolated from their school community, and sports can provide a sense of belonging.[98] When a single-gender team openly accepts a trans player, the student's gender identity is powerfully validated. Matt Dawkins, a trans high school sprinter from New Jersey, sacrificed potential scholarships to run women's college track to participate on the boys' team for his high school.[99] Matt knew that fully living as a male—being "in the bro group"—was more important to his self-worth than being the fastest runner on the track.[100] For many trans students, trans-inclusive policies are a matter of life and death. A staggering forty-one percent of

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92. *High School Sports Participation Increases for 27th Consecutive Year*, NAT'L FED'N OF STATE HIGH SCHOOL ASS'NS (Sept. 12, 2016), https://www.nfhs.org/articles/high-school-sports-participation-increases-for-27th-consecutive-year (noting that 7,868,900 high school students across the United States participated in interscholastic sports during the 2015–2016 school year).

93. Buzuvis, *supra* note 20, at 46 (explaining that studies have found links between physical activities and reduced risk of obesity, diabetes, and heart disease); Skinner-Thompson & Turner, *supra* note 74, at 297 (describing how sports participation develops long-term habits).

94. Skinner-Thompson & Turner, *supra* note 74, at 297.

95. *Id.* at 298.

96. *Id.*

97. Buzuvis, *supra* note 20, at 48; *see also* Johanna Olson-Kennedy, *Mental Health Disparities Among Transgender Youth: Rethinking the Role of Professionals*, 170 JAMA PEDIATRICS 423, 423 (2016) (noting that transgender youth report "[d]ispropotionatley high levels of depression, anxiety, substance use, social isolation, self-harm, and suicidality").

98. Buzuvis, *supra* note 20, at 48–49.

99. *Matt Dawkins' Incredible Journey*, ESPN, http://www.espn.com/video/clip?id=18326395 (last visited Feb. 7, 2018).

100. *Id.*

transgender individuals attempt suicide,[101] but trans youth who have a strong support system are eighty-two percent less likely to self-harm.[102] Nondiscriminatory athletic policies have the potential to quite literally save the lives of trans individuals.

II. CURRENT POLICIES FOR INCORPORATING TRANSGENDER ATHLETES INTO SEX-SEGREGATED SPORTS

This Section details the current trans athlete inclusion policies of different sports governing bodies, focusing on the Olympic model, the college model, and the regulations of various state high school athletic associations.

A. Olympic Model

The International Olympic Committee (IOC)[103] drafted its first transgender inclusive policy in 2003.[104] Prior to that, the IOC required sex-verification testing for all female athletes.[105] Instead of uncovering cases of gender fraud, sex-verification tests typically resulted in humiliating and unfairly excluding women with intersex conditions.[106] In fact, many athletes only became aware of an intersex condition

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101. JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY, NAT'L CTR. FOR TRANSGENDER EQUAL. AND NAT'L GAY AND LESBIAN TASK FORCE 2 (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

102. Mark L. Hatzenbuehler, *The Influence of State Laws on the Mental Health of Sexual Minority Youth*, 171 JAMA PEDIATRICS 322, 322 (2017) ("Stigma is one of the most frequently hypothesized risk factors for explaining sexual orientation disparities in suicide outcomes."); Brynn Tannehill, *The Truth About Transgender Suicide*, HUFFINGTON POST (Nov. 14, 2015, 4:16 PM), http://www.huffingtonpost.com/brynn-tannehill/the-truth-about-transgend_b_8564834.html.

103. *See* MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION 269–70 (4th ed. 2017) (explaining that the IOC, an international non-governmental not-for-profit organization, is the supreme authority concerning the Olympic Games, but the International Olympic Committee must rely on the agreement of the various international sports federations and National Olympic Committees to enforce its decisions).

104. Buzuvis, *supra* note 20, at 22.

105. *Id.* at 21.

106. Skinner-Thompson & Turner, *supra* note 74, at 289; *see also* GRIFFIN & CARROLL, *supra* note 61, at 9–10 (explaining that people with intersex conditions are born with mixed sexual characteristics). Although minors with intersex conditions deserve recognition, respect, and equal access to interscholastic athletics, it is beyond the scope of this Comment to examine policies concerning how to integrate these adolescents' equitably into the current single-sex framework of high school athletics.

because of the testing.[107] In 2004, the IOC adopted the first modern policy allowing transgender individuals to compete in athletic competitions consistent with their gender identity.[108] The rigid guidelines required that transgender athletes undergo gender reassignment surgery, take cross-gender hormones consistently for two years after surgery, and obtain official government recognition of their altered gender status before they could participate in events consistent with their new gender identity.[109]

In 2015, the IOC revised its policy to better align with contemporary notions of gender. The current modified guidelines, which the IOC recommends international sports federations adopt but does not officially mandate, no longer require gender reassignment surgery.[110] According to the IOC policy, an FTM trans man is "eligible to compete in the male category without restriction"; however, an MTF trans woman can only compete in a women's event after completing hormone therapy.[111] The IOC requires that a trans woman maintain testosterone levels at a suppressed rate "for at least [twelve] months prior to her first competition."[112] Since a trans woman typically needs to take hormones consistently for at least one year before her testosterone levels are sufficiently suppressed, the rule is essentially a two-year requirement.[113]

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107. *See* Leong, *supra* note 26, at 26–27 (detailing the case of eighteen-year-old South African sprinter Caster Semenya, who was publicly embarrassed after a tabloid leaked the results of a sex-verification test that revealed her latent intersex condition).

108. Buzuvis, *supra* note 20, at 21.

109. *Id.* at 22.

110. Chelsea Shrader, Comment, *Uniform Rules: Addressing the Disparate Rules that Deny Student-Athletes the Opportunity to Participate in Sports According to Gender Identity*, 51 U. RICH. L. REV. 637, 659–60 (2017).

111. INT'L OLYMPIC COMM., IOC CONSENSUS MEETING ON SEX REASSIGNMENT AND HYPERANDROGENISM 2 (2015), https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf.

112. *Id.* at 2.

113. *See IOC Rules Transgender Athletes Can Take Part in Olympics Without Surgery*, GUARDIAN (Jan. 24, 2016, 8:04 PM), https://www.theguardian.com/sport/2016/jan/25/ioc-rules-transgender-athletes-can-take-part-in-olympics-without-surgery (explaining that a trans woman may have to undergo hormone therapy for one or two years before the level of male testosterone in her blood falls below the IOC required 10 nanomols per liter threshold).

B. College Athletics Model

In 2011, the National Collegiate Athletic Association (NCAA), a private association of member colleges and universities,[114] adopted a trans-athlete inclusion policy similar to that of the IOC. Before 2011, the NCAA policy stipulated that trans athletes must compete on the single-sex team consistent with their state recognized sex.[115] But because states have varying policies for changing sex identification on birth certificates and driver's licenses, this regulation led to the application of inconsistent standards.[116] The current trans-inclusive NCAA policy establishes different criteria for trans men and trans women.[117] An FTM trans man can compete on a men's team at any point; however, a trans man can only compete on a women's team if he is not undergoing testosterone treatment.[118] An MTF trans woman can compete on the men's team without restriction; however, a trans woman can only compete on a women's team after completing one calendar year of cross-gender hormone therapy.[119] Some trans women may opt to apply for a medical hardship waiver, known as a "medical redshirt," to avoid losing a year of eligibility during the required twelve months of hormone therapy.[120]

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114. *See* MITTEN ET AL., *supra* note 103, at 107, 171 (explaining that NCAA member institutions promulgate extensive rules to maintain academic integrity, amateurism, and competitive fairness to which all voluntary member institutions must abide or risk sanctions); *see also* NCAA v. Tarkanian, 488 U.S. 179, 194–95 (1988) (holding that the NCAA is not a state actor and the NCAA's rules enforcement processes are not subject to constitutional constraints).

115. Buzuvis, *supra* note 20, at 23; Anne L. DeMartini, *Thirty-Five Years after* Richards v. USTA*: The Continued Significance of Transgender Athletes' Participation in Sport*, *in* SPORT AND THE LAW: HISTORICAL AND CULTURAL INTERSECTIONS 111 (Samuel O. Regalado & Sarah K. Fields eds., 2014) (commenting that, before 2011, the NCAA's position on trans student-athletes required athletes to compete according to the gender designated on state identification).

116. *See* Buzuvis, *supra* note 20, at 23–24 ("This patchwork of state laws creates the possibility that an NCAA member institution could—consistent with NCAA policy—field a women's team that includes an athlete from Massachusetts who identifies as female but has not undergone sex reassignment surgery, but not a similarly situated athlete from Rhode Island.").

117. PAT GRIFFIN & HELLEN CARROLL, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 13 (2010), https://docs.wixstatic.com/ugd/2bc3fc_44693cb5d779311cabc005d959e9486d.pdf.

118. *Id.*

119. *Id.*

120. Shrader, *supra* note 110, at 662; *see also Bylaws, Article 14*, NAT'L COLLEGIATE ATHLETIC ASS'N, https://web3.ncaa.org/lsdbi/search/bylawView?id=8900 (last visited Feb. 7, 2018) (stating that the Transgender Female Exception in section 14.2.2.3 of the

C. High School Model

High school athletic associations, comprised of representatives from public and private secondary schools, draft and implement statewide interscholastic athletics regulations.[121] School boards and local officials may also adopt rules that apply to specific school districts.[122] High school athletic associations are considered state actors because these organizations are pervasively "entwined" with the state.[123]

Currently, seven state athletic associations have no recorded guidelines regarding the integration of trans student-athletes, and the state associations that have addressed the issue have drafted widely varying regulations.[124] These varied transgender student-athlete policies have been grouped into three classifications: restrictive, fully inclusive, and partially inclusive.

1. Restrictive policies

Restrictive policies limit trans student-athletes to competing on single-sex sports teams that correspond to their sex assigned at birth. For example, in Alabama, "participation in athletics [is] determined by the gender indicated on the student-athlete's certified certificate of birth."[125] A trans athlete in Alabama is essentially barred from participating on a sports team that aligns with his or her gender identity because altering a birth certificate in Alabama requires an

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bylaws provides that a trans female may be eligible for a two-semester extension if the student-athlete uses testosterone suppression treatment or surgical intervention for two semesters).

121. MITTEN ET AL., *supra* note 103, at 22–23.

122. *Id.* at 23.

123. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298–302 (holding that the Tennessee Secondary School Athletic Association was entwined with the state because eighty-four percent of the Association schools are public, public school officials act as Association representatives, student participation in sports sponsored by the Association satisfy state physical education requirements, and some of the ministerial staff are treated as state employees and receive public pensions). *But see* MITTEN ET AL., *supra* note 103, at 24 (cautioning that the holding in *Brentwood* was fact-specific and "may not be determinative as to all high school athletic associations, given that the history, structure, and activities of high school athletic associations and the degree of public or state involvement differ from state to state").

124. *High School Transgender Athlete Policies*, TRANSATHLETE.COM, https://www.transathlete.com/k-12 (last visited Feb. 7, 2018) (describing the transgender-athlete guidelines for various state high school athletic associations).

125. 2012–13 CASE STUDIES: ALABAMA HIGH SCHOOL ATHLETIC ASSOCIATION (AHSAA) 14 (2012–2013), https://docs.wixstatic.com/ugd/2bc3fc_87536da66cad4d6195ae056a573e67da.pdf.

irreversible "surgical procedure"[126] that doctors advise against for minors. Texas, Mack Beggs's home state, has a similar policy: athletes are restricted to participating on single-sex teams that are consistent with the sex indicated on their birth certificate.[127] Although Texas does not require gender reassignment surgery, the process to alter one's birth certificate in Texas is expensive and time-consuming.[128] Ultimately, birth certificate alteration is granted or withheld at the discretion of an individual judge.[129] For these two states, and others with similar restrictive policies,[130] trans athletes are effectively prevented from playing on single-sex sports teams that match their gender identity.

2. Fully inclusive policies

In stark contrast, fully inclusive policies allow trans student-athletes to participate on single-sex sports teams consistent with their gender identity in virtually all circumstances. For example, in Connecticut, where Andraya Yearwood currently runs track, athletes are "permitted to participate in sex-segregated athletic activities based on their gender identity."[131] Washington state has a similar fully inclusive policy, stipulating that "[a]ll students should have the opportunity to participate in . . . activities in a manner that is consistent with their gender identity, irrespective of the gender listed on a student's

126. ALA. CODE § 22-9A-19(d) (2017).

127. John Wright, *Texas Districts Pass UIL Restriction on Trans Athletes*, OBSERVER (Feb. 25, 2016, 2:49 PM), https://www.texasobserver.org/trans-student-athlete-uil-discrimination.

128. Morgan Shell, Comment, *Transgender Student-Athletes in Texas School Districts: Why Can't the UIL Give All Students Equal Playing Time?*, 48 TEX. TECH L. REV. 1043, 1067, 1069–71 (2016) (explaining how individuals seeking to change their gender may hire a lawyer and file a petition to a judge who has discretion to hear it).

129. *Id.* at 1070.

130. *See, e.g.*, IND. HIGH SCH. ATHLETIC ASS'N, INC., BY-LAWS & ARTICLES OF INCORPORATION 229 (2017) (requiring student-athletes to participate based on their birth gender); LA. HIGH SCH. ATHLETIC ASS'N, LHSAA GENDER EQUITY POSITION STATEMENT 164 (2017) (requiring student-athletes to compete based on the gender on their birth certificate); Matt Comer, *New High School Athletics Gender Rule May Cause Discrimination*, QNOTES (May 8, 2014), https://goqnotes.com/29224/new-high-school-athletics-gender-rule-may-cause-discrimination (last visited Feb. 7, 2018) (explaining the North Carolina High School Athletic Association's new rule that denotes gender based on the student's birth certificate).

131. CONN. SAFE SCHOOL COAL., GUIDELINES FOR CONNECTICUT SCHOOLS TO COMPLY WITH GENDER IDENTITY AND EXPRESSION NON-DISCRIMINATION LAWS 9, https://docs.wixstatic.com/ugd/2bc3fc_906b9d9cbfa6c81a4ffd5f11e4eef3ce.pdf (last visited Feb. 7, 2018).

records."[132] However, in Washington, a student-athlete's gender identity is subject to a "bona fide" requirement.[133] If a competing school were to challenge the authenticity of an athlete's trans status, a board of officials would review the claim to assess whether the individual's trans identity is sincerely held.[134]

3. Partially inclusive policies

Finally, some state high school athletic associations have implemented partially inclusive policies that, in some circumstances, require trans student-athletes to undergo medical intervention before competing on a team consistent with their gender identity. For example, the Idaho High School Athletic Association follows the current NCAA guidelines by allowing an FTM trans athlete to participate on a boys' team at any time, but an MTF trans athlete must undergo a full year of hormone therapy before she can compete on a girls' team.[135]

Similarly, Ohio has a regulation that requires an MTF trans girl to complete one year of hormone therapy before competing against cis girls; however, Ohio grants exceptions on a case-by-case basis.[136] An MTF trans girl receiving no medical intervention may play on an all-girl team if she can

> demonstrate to the Commissioner's Office by way of sound medical evidence that the transgender female student athlete does not possess physical (bone structure, muscle mass, testosterone,

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132. WASH. INTERSCHOLASTIC ACTIVITIES ASS'N, 2017–18 OFFICIAL HANDBOOK 32 (2017), http://www.wiaa.com/conDocs/Con1629/2017-18%20HANDBOOK%20Web.pdf.

133. *Id.*

134. *Id.*

135. The Idaho High School Athletic Association adopted a Transgender Student Participation Policy, which provides:

> A. A female-to-male transgender student athlete who is taking a medically prescribed hormone treatment under a physicians['] care for the purposes of gender transition may participate only on a boys['] team.
>
> B. A male-to-female transgender student athlete who is not taking hormone treatment related to gender transition may participate only on a boys['] team.
>
> C. A male-to-female transgender student athlete who is taking medically prescribed hormone treatment under a physicians['] care for the purposes of gender transition may participate on a boys['] team at any time, but must complete one year of hormone treatment related to the gender transition before competing on a girls['] team.

IDAHO HIGH SCHOOL ACTIVITIES ASS'N, BOARD OF DIRECTORS MEETING 3 (2013), https://docs.wixstatic.com/ugd/2bc3fc_abe99582bf754cb799b7da48b6981646.pdf.

136. OHIO HIGH SCHOOL ATHLETIC ASS'N, TRANSGENDER POLICY 2–3 (2014), https://docs.wixstatic.com/ugd/2bc3fc_10cff228b57342ccb91e4913253d8234.pdf [hereinafter OHIO POLICY].

> hormonal, etc.) or physiological advantages over genetic females of the same age group.[137]

Ohio also stipulates that trans boys receiving hormone treatment must undergo regular medical testing to ensure their testosterone level is within a range typical for "an adolescent genetic boy."[138]

Because high school athletic associations across states have adopted inconsistent trans student-athlete policies, these governing bodies are vulnerable to potential lawsuits. Both trans athletes, who are barred from participation due to restrictive policies, and cis athletes, who are put in competition against trans athletes due to inclusive policies, could pursue litigation.

II. LEGAL FRAMEWORK

A trans plaintiff challenging a discriminatory high school athletic policy will likely rely on both the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments Act.[139] This Section explains how courts are likely to navigate each of these challenges. Section III.A provides the legal framework and level of judicial scrutiny courts use to decide Equal Protection Clause claims involving (1) fundamental rights, (2) suspect classifications, (3) quasi-suspect classifications, and (4) non-suspect classifications. Section III.B explores whether Title IX's prohibition against sex-based discrimination includes discrimination on the basis of gender identity and whether trans plaintiffs may bring a successful Title IX claim based on a theory of sex-stereotyping discrimination. Section III.B.3 discusses how courts have addressed the sex-stereotyping question in the context of public school bathrooms and locker rooms.

A. Equal Protection Clause Jurisprudence

The Fourteenth Amendment's Equal Protection Clause prohibits states from enacting laws that treat its residents differently for reasons

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137. *Id.* at 3.

138. *Id.*; *see also* Charlize Veritas, *Men vs. Women—Hormones—A Transgender Perspective*, HUFFINGTON POST (Feb. 18, 2016, 8:51 AM), https://www.huffingtonpost.com/charlize-veritas/men-vs-women-hormones-a-t_b_9234380.html (explaining that the testosterone level for a typical cis male under nineteen years of age ranges from 240–950 nanograms per deciliter, and the testosterone level for a typical cis female ranges from 8–60 nanograms per deciliter).

139. *See infra* Sections III.A–B.

that do not further a legitimate government purpose.[140] When assessing a potential equal protection violation, a court must first determine the appropriate level of judicial scrutiny: strict scrutiny,[141] intermediate scrutiny,[142] or rational basis review.[143] Courts subject government policies to heightened judicial scrutiny when those policies infringe upon fundamental rights or rely on suspect classifications.[144]

1. Substantive due process and fundamental rights

The Supreme Court has recognized that the "liberty" interests protected by the Due Process Clause of the Fourteenth Amendment[145] extend beyond the rights clearly delineated in the Bill of Rights or the practices of states at the time of adoption.[146] Through the substantive due process principle, the Court has recognized that the Constitution protects a number of fundamental rights, including the right to privacy concerning consensual sexual activity,[147] the right to marriage,[148] and the right to reproductive autonomy.[149]

When a state restricts an individual's access to a fundamental right, the policy must withstand strict scrutiny, meaning the government action must serve a compelling purpose and be the least restrictive means of doing so.[150] Access to interscholastic sports, however, is not a constitutionally recognized fundamental right.[151] In fact, the

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140. The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

141. *See infra* Section III.A.2.

142. *See infra* Section III.A.3.

143. *See infra* Section III.A.4.

144. *See infra* Sections III.A.1–3.

145. The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

146. *Id.*; *see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848 (1992) (explaining that the protections provided in the Bill of Rights extend to any restraints on freedom).

147. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (invalidating a Texas law criminalizing consensual homosexual conduct).

148. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015) (ruling that state laws prohibiting same-sex marriage are unconstitutional); Loving v. Virginia, 388 U.S. 1, 12 (1967) (striking down state anti-miscegenation laws prohibiting interracial marriage).

149. *See* Eisenstadt v. Baird, 405 U.S. 438, 453–55 (1972) (invalidating a Massachusetts statute prohibiting the distribution of contraceptives to unmarried individuals).

150. *See* San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 16–17 (1973).

151. *See, e.g.*, Walsh v. La. High Sch. Athletic Ass'n, 616 F.2d 152, 159–60 (5th Cir. 1980) (explaining that a student's interest in playing interscholastic sports "amounts to a mere expectation rather than a constitutionally protected claim of entitlement"

Supreme Court has consistently held that even access to public education generally is not considered a fundamental right.[152]

2. Suspect classifications and strict scrutiny

When no fundamental right is at stake, a court then analyzes whether the government policy discriminates against a suspect class.[153] Because government policies that discriminate on the basis of race or national origin typically reflect prejudice, such suspect classifications need to withstand strict scrutiny review.[154] Namely, a court will uphold a racially discriminatory law only if the law is "suitably tailored to serve a compelling state interest."[155] Because "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification,"[156] even affirmative action policies benefiting minorities must withstand strict scrutiny. In *Gratz v. Bollinger*,[157] the Supreme Court struck down the University of Michigan's undergraduate admissions policy that automatically awarded twenty points toward admission to minority applicants, holding that such a policy "is not narrowly tailored to achieve the [state's] interest in educational diversity."[158] Strict scrutiny review is so exacting that most laws subjected to this standard fail, leading Justice Marshall to quip that conventional strict scrutiny review is "strict in theory, but fatal in fact."[159]

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and is not protected by due process); Kulovitz v. Ill. High Sch. Ass'n, 462 F. Supp. 875, 877 (N.D. Ill. 1978) ("Participation in interscholastic athletics is not a constitutionally protected civil right.").

152. *Rodriquez*, 411 U.S. at 35 ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."); *see also* Plyler v. Doe, 457 U.S. 202, 221, 230 (1982) (cautioning that "[p]ublic education is not a 'right' granted to individuals by the Constitution," even though the Court found a Texas statute excluding undocumented immigrant children from attending public schools unconstitutional).

153. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (listing race, alienage, and national origin as suspect classifications vulnerable to pernicious discrimination).

154. *Id.*

155. *Id.*

156. Fullilove v. Klutznick, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting).

157. 539 U.S. 244 (2003).

158. *Id.* at 270. *But see* Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2207, 2214 (2016) (holding that the University of Texas's undergraduate affirmative action policy withstands strict scrutiny review because a student's race is only a "factor of a factor of a factor" when admissions officers evaluate applicants).

159. *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring). *Contra* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (dispelling "the notion that strict scrutiny is 'strict in theory, but fatal in fact'").

3. Quasi-suspect classifications and intermediate scrutiny

Statutes that discriminate on the basis of sex, a "quasi-suspect" classification, need to withstand a slightly less stringent intermediate scrutiny review.[160] To survive intermediate scrutiny, a sex classification "must serve important governmental objectives and must be substantially related to achievement of those objectives."[161] The Supreme Court has held that a statute is invalid if the objective of the statute "reflects archaic and stereotypic notions" about sex.[162] If the objective of the legislation is to "protect" women because they are presumed "innately inferior" to men, "the objective itself is illegitimate."[163] In *United States v. Virginia*,[164] the Supreme Court held that the Equal Protection Clause precluded the Virginia Military Institute (VMI), a public military college, from refusing to admit women.[165] Virginia argued that if women were admitted, VMI would need to modify its rigorous curriculum because most women would not thrive in an "adversative" environment.[166] The Court, however, rejected this overbroad generalization, concluding that such notions are "self-fulfilling prophecies."[167] Similarly, in *Mississippi University for Women v. Hogan*,[168] the Court ruled in favor of a man seeking admission to a women's professional nursing school.[169] The Court held that the school's admission policy is impermissible because it "lends credibility to the old view that women, not men, should become nurses."[170]

Sex-discriminatory policies are valid, though, when sex classification is "not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances."[171] In *Michael M. v. Superior Court of Sonoma County*,[172] the Supreme Court upheld a California statutory rape law that holds only males criminally liable for

160. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).
161. *Id.*
162. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).
163. *Id.* (citing Frontiero v. Richardson, 411 U.S. 677, 684–85 (1973) (plurality opinion)).
164. 518 U.S. 515 (1996).
165. *Id.* at 519.
166. *Id.* at 542–43.
167. *Id.*
168. 458 U.S. 718 (1982).
169. *Id.* at 722–23.
170. *Id.* at 730.
171. Michael M. v. Super. Ct. of Sonoma Cty., 450 U.S. 462, 469 (1981).
172. 450 U.S. 462 (1981).

engaging in sex with a minor.[173] The Court reasoned that because the consequences of teenage pregnancy essentially fall only on girls, the state was justified in passing a statutory rape law that punishes only men, "who, by nature, suffer[] few of the consequences of [their] conduct."[174] The holding in *Michael M.* established that the Equal Protection Clause does not require courts to disregard the "physiological differences between men and women."[175]

Besides prohibiting direct sex-based discrimination, the Equal Protection Clause also prohibits discrimination based on gender stereotype.[176] A state regulation that punishes individuals because they fail to conform to typical gender norms must also withstand intermediate scrutiny.[177] Trans plaintiffs have successfully relied on a sex-stereotyping theory to challenge discriminatory policies. For example, in *Glenn v. Brumby*,[178] Glenn, an MTF trans woman, successfully sued her boss Brumby for wrongful termination when Brumby fired her after she began to outwardly transition from a man to a woman.[179] The Eleventh Circuit held that Brumby's termination of Glenn from her position at the Georgia General Assembly's Office of Legislative Counsel constituted impermissible sex-based discrimination under the Fourteenth Amendment because it was based on Glenn's failure to conform to traditional gender roles.[180] Furthermore, the court added in dicta that Brumby's decision to terminate Glenn may have been upheld under rational basis review, but the action did not withstand intermediate scrutiny.[181] In certain circumstances, trans discrimination *is* sex discrimination and necessarily must be subjected to heightened review.[182]

4. Non-suspect classifications and rational basis review

Finally, when a government classification is neither suspect nor quasi-suspect, the classification merely needs to be "rationally related

173. *Id.* at 475–76.
174. *Id.* at 473.
175. *Id.* at 481 (Stewart, J., concurring).
176. Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
177. *Brumby*, 663 F.3d at 1315–16.
178. 663 F.3d 1312 (11th Cir. 2011).
179. *Id.* at 1314–15, 1321.
180. *Id.* at 1321.
181. *Id.*
182. *Id.* at 1317.

to a legitimate state interest."[183] Under rational basis review, a regulation is valid as long as the court can conceive of any legitimate purpose for enacting it.[184] In *Williamson v. Lee Optical of Oklahoma, Inc.*,[185] an illustrative example of judicial deference to lawmakers under rational basis review, the Court upheld an Oklahoma law that made it illegal for anyone other than a licensed optometrist to fit eyeglass lenses.[186] The law negatively affected unlicensed opticians who were prohibited from performing the relatively simple process of grinding lenses to fit eyeglass frames.[187] The Court reasoned that even though the regulation harms opticians and may exact a "needless, wasteful requirement in many cases," the law survives rational basis review because it could conceivably encourage people to have more frequent eye examinations, which is rationally related to the legitimate state interest of public health and welfare.[188]

However, if the court believes that a classification is "born of animosity toward the class of persons affected," a policy that implicates neither a suspect classification nor a fundamental right may be ruled constitutionally invalid.[189] Legal scholars have referred to this slightly more exacting standard as "rational basis with bite."[190] For example, in *Romer v. Evans*,[191] the Court struck down an amendment to the Colorado Constitution that prohibited municipalities from passing laws that would protect individuals from discrimination based on sexual orientation.[192] The amendment effectively repealed the ordinances of several Colorado cities, which banned discrimination based on sexual orientation in housing, employment, education, public accommodations, and health and welfare services.[193] The Court found that the immense harm the amendment inflicted on the gay

183. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

184. *See* Williamson v. Lee Optical Inc., 348 U.S. 483, 487–88 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

185. 348 U.S. 483 (1955).

186. *Id.* at 491.

187. *Id.* at 486.

188. *Id.* at 487.

189. Romer v. Evans, 517 U.S. 620, 634 (1996).

190. *See, e.g.*, Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 779–80 (1987).

191. 517 U.S. 620 (1996).

192. *Id.* at 635–36.

193. *Id.* at 623–24.

community outweighed any legitimate state interest.[194] Similarly, in *United States Department of Agriculture v. Moreno*,[195] the Court struck down a provision of the Food Stamp Act that denied food stamps to households of unrelated persons.[196] The legislative history suggested Congress passed the provision in an effort to prevent "hippie communes" from participating in the food stamp program.[197] The Court stated in no uncertain terms that a "desire to harm a politically unpopular group cannot constitute a *legitimate* government interest."[198] Thus, even under rational basis review, a policy that is primarily motivated by animus will not pass constitutional muster.

B. Title IX Jurisprudence

Along with an Equal Protection Claim, a trans plaintiff challenging the legality of a restrictive athletic policy will likely bring a claim under Title IX. Section III.B.1 explains how the executive branch has failed to provide consistence guidance on whether discrimination on the basis of gender identity violates Title IX's prohibition against sex-based discrimination; Section III.B.2 details how some trans plaintiffs have found Title IX relief through a sex-stereotyping theory of gender discrimination; and Section III.B.3 discusses the outcome of similar sex-stereotyping arguments in cases about trans restrictive bathroom and locker room policies.

1. The executive branch's interpretation of "on the basis of sex" in Title IX

Title IX prevents discrimination "on the basis of sex" in educational institutions that receive federal funds.[199] Determining the meaning of "on the basis of sex" in Title IX will be central to any impending Title IX challenge to transgender student-athlete policies.[200] The executive branch has given inconsistent guidance for interpreting "on the basis of sex" over the past two years.[201] In its first attempt at issuing

194. *Id.* at 635.
195. 413 U.S. 528 (1973).
196. *Id.* at 534–35.
197. *Id.* at 534.
198. *Id.*
199. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88 (2012).
200. *Id.* § 1681(a).
201. *See generally* G.G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 719 (4th Cir. 2016), *rev'd*, 137 S. Ct. 1239 (2016) (explaining that *Auer* deference "requires that an agency's interpretation of its own ambiguous regulation be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute"). In reversing the Fourth Circuit, the Supreme Court issued a one-sentence opinion: "Judgment

guidance, on May 13, 2016, President Barack Obama's administration issued a Dear Colleague Letter[202] informing public schools that, for the purposes of Title IX, sex discrimination encompasses discrimination based on gender identity: "When a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity."[203] The letter also directly mentioned how a school should integrate trans students into athletics:

> A school may not . . . adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (i.e., the same gender identity) . . . [but] Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research based medical knowledge . . . .[204]

Although the letter was largely a victory for transgender students, the guidance still allowed a school to prevent trans student-athletes from participating on single-sex teams that align with their gender identity if the prohibition was based on "sound, current, and research-based medical knowledge."[205] In a footnote in the Dear Colleague Letter, the Obama administration applauded the NCAA's only partially inclusive trans student-athlete policy, noting that NCAA officials "consulted with medical experts, athletics officials, affected students, and a consensus report entitled, *On the Team: Equal Opportunity for Transgender Student Athletes*" to write its guidelines.[206]

Yet any hope trans activists may have had that the executive branch's progressive interpretation of "sex" in Title IX could be weaponized to

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vacated, and case remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017." 137 S. Ct. at 1239.

202. Emma Brown, *U.S. Senator: Education Dept. Overstepped Authority on Sexual Assault Complaints*, WASH. POST (Jan. 7, 2016), https://www.washingtonpost.com/news/education/wp/2016/01/07/u-s-senator-education-department-overstepped-authority-on-sexual-assault-complaints (noting that Dear Colleague Letters are considered administrative guidance, which agencies promulgate to clarify regulations that already exist, and are not new regulations which require soliciting and responding to public input).

203. U.S. Dep't of Education & U.S. Dep't of Justice, "*Dear Colleague" Letter: Transgender Students* (May 13, 2016), https://www.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

204. *Id.*

205. *Id.*

206. *Id.* at n.18. *But see* GRIFFIN & CARROLL, *supra* note 61, at 24–31 (distinguishing in their *On the Team* report between high school and collegiate athletics by recommending a partially inclusive model for colleges but a fully inclusive model for high schools).

invalidate trans-discriminatory policies was dashed when President Donald J. Trump rolled back the guidance of his predecessor. On February 22, 2017, the Trump administration released its own Dear Colleague Letter making the following statement: "[Transgender access to sex-segregated facilities and activities] is an issue best solved at the state and local level. Schools, communities, and families can find—and in many cases have found—solutions that protect all students."[207] The Trump administration's Dear Colleague Letter further declared that the Department of Education and Department of Justice have decided to "withdraw and rescind" the Obama administration's former guidance on trans student inclusion.[208]

Without clear guidance from the executive branch regarding whether trans discrimination constitutes sex-based discrimination, trans plaintiffs will likely turn to a theory of discrimination based on sex stereotyping.

2. Title IX protections against sex stereotyping discrimination

Even if courts are reluctant to interpret "sex" in Title IX to mean gender identity, the statute still protects transgender individuals from certain forms of gender-based discrimination. Similar to the Equal Protection Clause jurisprudence,[209] transgender students are protected under Title IX because schools may not discriminate against an individual based on his or her failure to conform to sex stereotypes.[210] In *Miles v. New York University*,[211] the U.S. District Court for the Southern District of New York held that Jennifer Miles, a trans woman, could sue under Title IX for sexual harassment even though she is biologically male.[212] The court emphasized that Title IX "does not

207. Press Release, U.S. Dep't Educ., U.S. Secretary of Education Betsy DeVos Issues Statement on New Title IX Guidance (Feb. 22, 2017), https://www.ed.gov/news/press-releases/us-secretary-education-betsy-devos-issues-statement-new-title-ix-guidance; *see also* U.S. Dep't of Education & U.S. Dep't of Justice, *"Dear Colleague" Letter* (Feb. 22, 2017) [hereinafter Trump Dear Colleague Letter], https://www.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx (stating that the U.S. Department of Education and the U.S. Department of Justice "believe that . . . there must be due regard for the primary role of the States and local school districts in establishing educational policy").

208. Trump Dear Colleague Letter, *supra* note 207.

209. *See supra* Section III.A.3 (discussing how the Equal Protection Clause prohibits discrimination based on sex stereotypes).

210. *See generally* Pratt v. Indian River Cent. Sch. Dist., 803 F. Supp. 2d 135, 151–52 (N.D.N.Y. 2011) (asserting that a male student who was harassed due to his perceived sexual orientation had a valid Title IX claim under a sex-stereotyping theory).

211. 979 F. Supp. 248 (S.D.N.Y. 1997).

212. *Id.* at 249–50.

[permit] expressing disapproval of conduct involved in the transformation from one gender to another."[213] Again, in certain situations trans discrimination is sex discrimination.[214]

When assessing Title IX claims, courts often rely on Title VII jurisprudence.[215] Title VII protects employees from sex-based employment discrimination.[216] Like Title IX and the Equal Protection Clause, Title VII applies to individuals who are discriminated against because they do not conform to stereotypical gender roles.[217] In the landmark Supreme Court case *Price Waterhouse v. Hopkins*,[218] a woman was impermissibly denied a promotion because she acted too "macho."[219] Her superiors told her she needed to walk, talk, and dress more "femininely" to rise through the corporate ranks.[220] In *Price Waterhouse*, the Court stated that sex stereotyping is a form of sex-based discrimination: "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . ."[221]

In *Smith v. City of Salem*,[222] the Sixth Circuit relied on the sex-stereotyping theory established in *Price Waterhouse* to provide Title VII relief to a transgender firefighter who was terminated after she outwardly transitioned from a man to a woman.[223] The court held that Smith had a valid claim under Title VII when her employer discriminated against her because her appearance and mannerisms failed to conform to masculine sex stereotypes.[224]

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213. *Id.* at 249.

214. *See supra* Section III.A.3 (explaining that the Equal Protection Clause prohibits discrimination against trans individuals based on a sex-stereotyping theory).

215. *See* Murray v. N.Y. Univ. Coll. of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995) ("[I]n a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII.").

216. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2012) (stating that it is an "unlawful employment practice" if an employer discriminates against employees based on an employee's sex).

217. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

218. 490 U.S. 228 (1989).

219. *Id.* at 233, 235.

220. *Id.* at 235.

221. *Id.* at 251–53.

222. 378 F.3d 566 (6th Cir. 2004).

223. *Id.* at 572.

224. *Id.* at 575 ("[A] label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."). Throughout the opinion, the court used masculine pronouns to refer

Trans individuals challenging a restrictive athletic policy will likely argue that, like the plaintiffs in *Miles* and *Smith*, they were discriminated against due to their failure to conform to traditional gender norms.

3. Title IX and transgender student bathroom and locker room access

Because no court has ruled directly on whether a restrictive trans student-athlete policy violates Title IX, courts will likely turn to recent cases regarding trans students' access to bathroom and locker room facilities for guidance. These access cases have turned on whether the court views a restrictive bathroom policy as discriminating against transgender students based on their failure to conform to sex stereotypes.[225] The distinction is important because it determines the level of scrutiny a court will apply: courts consider sex stereotyping to be a form of sex discrimination, and any sex-discriminatory policy must withstand intermediate review.[226]

Federal courts have split on whether the cases concerning trans access should be decided under intermediate scrutiny or rational basis review. In *Johnston v. University of Pittsburgh*,[227] the U.S. District Court for the Western District of Pennsylvania held that a university policy that prohibited a trans man from using campus locker rooms designated for males was not discriminatory under Title IX.[228] The court noted that when a trans student uses a locker room designated for the opposite biological sex, that student's action "does not constitute a mere failure to conform to sex stereotypes."[229] The court reasoned that impermissible sex stereotyping occurs when a plaintiff is discriminated against because his or her behavior deviates from the expected behavior of someone of the plaintiff's sex.[230] A policy that prevents a trans man from using the university's men's locker room,

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to Smith, a transgender woman, and identified Smith as being "biologically and by birth a male." *Id.* at 568.

225. *Compare* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017) (holding that trans-restrictive bathroom policies are unconstitutional based on a theory of sex stereotyping), *with* Johnston v. Univ. of Pitt., 97 F. Supp. 3d 657, 680 (W.D. Pa. 2015) (finding that trans-restrictive locker room policies do not reflect sex stereotyping).

226. *See* Glenn v. Brumby, 663 F.3d 1312, 1321 (11th Cir. 2011) (granting a transgender employee relief under intermediate scrutiny rather than rational basis review); *supra* Section III.B.2 (discussing sex stereotyping).

227. 97 F. Supp. 3d 657 (W.D. Pa. 2015).

228. *Id.* at 661, 682.

229. *Id.* at 681 (quoting Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224 (10th Cir. 2007)).

230. *Id.* at 680.

conversely, is not based on "behaviors, mannerisms, and appearances."[231] The restriction is based on a person's genitals, not how a person outwardly looks, dresses, or acts.[232] Accordingly, the court concluded the restrictive locker room policy was not sex-based discrimination under a sex-stereotyping theory, and the policy only needs to withstand rational basis review.[233]

The court further held that the locker room policy was constitutionally valid because universities may rationally prevent trans men from using the men's locker room facility to further the legitimate objective of protecting student privacy.[234]

In 2017, the Seventh Circuit came to the opposite conclusion in *Whitaker v. Kenosha*.[235] In *Whitaker*, the court found that a restrictive high school bathroom policy "punishe[d]" transgender students for their "gender nonconformance."[236] The court, relying on the Sixth Circuit's decision in *Smith v. City of Salem*, reasoned that "the School District treats transgender students like [Whitaker], who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently."[237] Because this was an instance of sex discrimination based on a sex-stereotyping theory, the court subjected the school's bathroom policy to a heightened level of intermediate scrutiny.[238] The court conceded that ensuring student privacy is an important state objective, but it held that the practice of preventing a trans boy from using the boys' restroom is not substantially related to achieving that goal.[239]

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231. *Id.*

232. *Id.* at 681.

233. *Id.* at 668.

234. *See id.* at 678 (explaining that students need access to facilities which exclude individuals of the opposite biological sex "to perform certain private activities and bodily functions").

235. 858 F.3d 1034, 1051 (7th Cir. 2017).

236. *Id.* at 1049.

237. *Id.* at 1048, 1051 (relying on the Sixth Circuit's decision in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004)). *But see infra* Section IV.C (arguing that the Seventh Circuit misapplied *Smith*'s reasoning in *Whitaker* and that restrictive bathroom policies do not discriminate against trans students based on their gender nonconformity).

238. 858 F.3d at 1051.

239. *Id.* at 1051, 1054.

IV. TRANSGENDER ATHLETE POLICIES ONLY NEED TO WITHSTAND RATIONAL BASIS REVIEW

This Section argues that high school athletic association regulations, which classify students by their sex assigned at birth rather than their gender identity, only need to withstand rational basis review.

Section IV.A explains that participation in interscholastic sports is not a fundamental right, so a state actor can deny a student access to athletics without establishing a compelling reason. Section IV.B argues that transgender identity is not a suspect classification requiring heightened judicial scrutiny. There are significant biological differences between males and females, and, in certain circumstances, a state actor may justifiably classify people by genetic markers of sex rather than gender identity. Finally, Section IV.C argues that trans-restrictive athletic policies do not punish trans individuals for failing to conform to expected gender stereotypes—a type of discrimination that would need to withstand intermediate scrutiny. Instead, restrictive athletic policies treat trans individuals differently from cis individuals due to their hormone profiles.

But, even under rational basis review, a court could invalidate a trans-restrictive athletic policy that is based primarily on animus toward trans people.

A. Transgender Students Do Not Have a Fundamental Right to Participate in Interscholastic Athletics

A state policy that restricts access to a fundamental right must be subject to exacting strict scrutiny, but courts will not adopt this standard of review because participation in high school sports is a privilege, not a right.[240] A trans student challenging a restrictive athletic policy under a substantive due process claim will likely fail.[241]

B. Transgender Identity Is Likely Not a Suspect Classification

Likewise, a plaintiff challenging a trans-restrictive athletic policy under a suspect classification theory will likely fail. Equal Protection Clause jurisprudence suggests that trans identity is not a suspect or quasi-suspect classification that requires heightened judicial review.[242]

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240. *See supra* Section III.A.1.

241. *See id.* (explaining that even access to public schooling is not a fundamental right guaranteed by the Constitution).

242. *See supra* Section III.A.3; *see also Whitaker*, 858 F.3d at 1051 (noting that the court did not need to determine whether transgender status warrants heightened scrutiny).

Currently, there is no U.S. Supreme Court case categorizing trans individuals as a suspect class,[243] and the Court has been hesitant to acknowledge new suspect classifications.[244] If the Court were to tackle this issue, it would need to address the following considerations: (1) whether trans identity is based on immutable characteristics; (2) whether the trans community has the ability to protect itself through the political process; (3) whether trans people have historically been discriminated against; and (4) whether discrimination against trans individuals likely reflects prejudice rather than purpose.[245]

The immutability of trans identity is complicated. Many activists argue that trans individuals diagnosed with Gender Identity Disorder (GID)—currently classified as Gender Dysphoria—have a "psychological disorder that is considered inherited or unchangeable."[246] Yet WPATH resists classifying "transgenderism" as a medical disorder.[247] By rejecting a medical diagnosis, WPATH's position suggests internal conceptions of gender are fluid, not fixed.[248] Ironically, debunking the myth of strict gender binaries may have weakened the argument that trans individuals deserve a protected legal status.

Likewise, the question of political power is not clear cut. Inarguably, trans people lack representation in high-ranking government positions,[249] and conservative politicians have frequently tried to gin up

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243. *See generally* Obergefell v. Hodges, 135 S. Ct. 2584, 2598–99 (2015) (invalidating a law prohibiting same-sex marriage under a theory that the right to marry is fundamental under the Due Process Clause). Although *Obergefell* affirmed the dignity of lesbian, gay, bisexual, and trans (LGBT) individuals, the Supreme Court did not recognize sexual orientation or transgender status as a suspect classification. *Id.*

244. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 445–46 (1985) (refusing to recognize the mentally disabled as a quasi-suspect class).

245. Shell, *supra* note 128, at 1059.

246. *Id.* at 1060–61.

247. *See* WPATH STANDARDS OF CARE, *supra* note 69, at 4 (7th ed. 2011) (insisting that transgender identity is a matter of diversity, not pathology).

248. *Id.* at 2, 5 (explaining that standards of care must be "flexible" to meet the specific needs of the individual and reaffirming that treatment for gender dysphoria varies based on the person's needs).

249. *See* Antonio Olivo, *Danica Roem of Virginia to Be First Openly Transgender Person Elected, Seated in a U.S. Statehouse*, WASH. POST (Nov. 8, 2017), https://www.washingtonpost.com/local/virginia-politics/danica-roem-will-be-vas-first-openly-transgender-elected-official-after-unseating-conservative-robert-g-marshall-in-house-race/2017/11/07/d534bdde-c0af-11e7-959c-fe2b598d8c00_story.html (reporting that Danica Roem, who was elected to the Virginia House of Delegates on November 7, 2017, will be "the first openly transgendered person elected to and seated in a U.S. state legislature").

political support from their base by attacking the trans community. For example, in a contentious debate surrounding a trans-restrictive bathroom law in Houston, Texas, Republican operatives released inflammatory television ads implying that trans women are sex offenders and pose a danger to children.[250] Significantly, these trans-phobic tactics have been met with swift and powerful political resistance. Former Republican governor of North Carolina Pat McCrory lost his re-election campaign in 2016 largely due to his public defense of a trans-restrictive bathroom law.[251] In July 2017, President Trump attempted a similar political gambit, tweeting that he would ban trans people from serving "in any capacity in the U.S. Military."[252] A Trump administration official posited that the announcement forces Senate Democrats in Rust Belt states who are up for re-election in 2018 "to make their opposition to this a key plank of their campaigns."[253] President Trump may think targeting trans individuals is an easy way to flip Democratic seats in the Senate, but the fate of former Governor Pat McCrory shows he may be underestimating the political clout of trans-rights activists.[254]

The case for historical discrimination against trans individuals, though, is fairly straightforward. Trans people have routinely been the victims of harassment and hate crimes, causing disproportionally high rates of suicide among the trans population.[255] Many states lack legal protections for trans workers, and trans people are twice as likely to be unemployed and live in poverty.[256] Fifty-three percent of trans individuals also report being discriminated against or disrespected in

250. Aaron Blake, *"It Will Be Fun to Watch [Democrats] Have to Defend This": Why Trump's Transgender Military Ban Should Frighten GOP*, WASH. POST (July 26, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/07/26/why-trumps-decision-to-ban-transgender-people-from-the-military-should-frighten-republicans.

251. *Id.*

252. *Id.*

253. *Id.*

254. Four district courts issued rulings blocking President Trump's ban—decisions upheld by both the D.C. Circuit and the Fourth Circuit Court of Appeals—and the Trump administration has decided not to pursue a Supreme Court challenge. As of January 1, 2018, trans people are authorized to enlist and serve openly in all branches of the U.S. military. *See U.S. Military to Accept Transgender Recruits on Monday: Pentagon*, REUTERS (Dec. 29, 2017, 2:18 PM), https://www.reuters.com/article/us-usa-military-transgender/u-s-military-to-accept-transgender-recruits-on-monday-pentagon-idUSKBN1EN1LV.

255. Shell, *supra* note 128, at 1060.

256. *Id.*

places of public accommodation like hotels, restaurants, buses, airports, and government agencies.[257]

Ultimately, the case for categorizing trans individuals as a suspect class and granting the group protected status will turn on the fourth point in the analysis: whether a government actor would likely have a plausible reason to classify people by their sex assigned at birth rather than their gender identity. Equal Protection Clause case law suggests that a government actor might have a legitimate purpose for doing so. In *Michael M.*, which concerned the California statuary rape law that only punished men, the Court acknowledged that statutes are valid when gender classification is "not invidious, but rather reflects the reality that men and women are not always similarly situated."[258] True biological differences exist between males and females, and accordingly, the government is justified in treating the sexes differently in certain situations.[259] Because a government actor may have an important reason to classify individuals according to biological sex, logically, a government actor may also have a legitimate reason to classify individuals according to biological markers of sex—like hormone profiles and sex organs—rather than an individual's internal sense of gender. Thus, a court is not likely to consider transgender identity a suspect classification.

C. Transgender Athlete Restrictions Do Not Discriminate Against Trans Students Based on Sex Stereotypes

Even if transgender individuals are not considered a suspect class, a trans-restrictive athletic policy would still need to withstand a heightened level of intermediate scrutiny if the court determines the policy discriminates against trans students based on their gender nonconformity. The bathroom and locker room cases show that courts are divided on this issue. *Johnston* held that trans-restrictive bathroom policies do not reflect sex-serotyping discrimination, and *Whitaker* held the exact opposite.[260]

The *Whitaker* court, however, was wrong: trans-restrictive bathroom policies do not punish trans people for failing to conform to typical gender norms. In W*hitaker*, the court based its holding on a

257. Grant, *supra* note 101, at 5.

258. Michael M. v. Super. Ct. of Sonoma Cty., 450 U.S. 464, 469 (1981).

259. *See id.* at 472–73 (holding that a law that punishes boys but not girls for engaging in sex with a minor is justified because girls, due to their biology, suffer the possible consequence of pregnancy and boys do not).

260. *See supra* Section III.B.3.

misapplication of the Sixth Circuit's reasoning in *Smith*.[261] In *Smith*, the court presupposed that the MTF trans plaintiff was still biologically a man.[262] After she transitioned, her dress and mannerisms no longer conformed to the behavior of a traditional man.[263] To find gender discrimination through a sex-stereotyping theory, the court ironically needed to view the trans plaintiff as an effeminate man rather than an actual woman.[264] For this reason, the court used male pronouns to refer to Smith throughout the opinion.[265] Discrimination based on sex-stereotyping would therefore only occur if an FTM trans boy was denied access to the *girls'* restroom or locker room at his high school because he did not outwardly look, dress, or behave as a typical girl.

Impermissible stereotypes need to be premised on behaviors, not inherent biological traits. The *Whitaker* court essentially took the position that the bathroom policy restricting trans students was impermissible because the school district was relying on the "stereotype" that a boy needs to have male genitalia to be considered a boy, and a girl needs to have female genitalia to be considered a girl. This interpretation stretches the understanding of stereotype so far that classifications relying on any biologically based sex differences could be deemed invalid. A government policy creating separate bathroom facilities for men and women needs to withstand intermediate scrutiny and substantially further an important government objective. But a government policy that classifies trans individuals by their sex assigned at birth rather than their gender identity only needs to be rationally related to a legitimate government purpose.

Yet, even under rational basis review, a policy based on animus is void. Although the *Johnston* court was correct in concluding that restrictive bathroom policies do not discriminate against trans students based on sex-serotypes,[266] the court was wrong to hold such policies constitutionally valid. A restrictive bathroom policy is neither

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261. *See* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1048–49 (7th Cir. 2017) (analyzing *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) and explaining that the discrimination Smith, the transgender firefighter, faced would not have occurred "but for the victim's sex").

262. *See* 378 F.3d at 568 (referring to Smith as "biologically and by birth a male").

263. *See id.* at 574 (noting Smith's "contra-gender behavior").

264. *Id.* at 572.

265. *See Whitaker*, 858 F.3d at 1048 n.5 ("We will use the masculine pronoun to refer to the *Smith* plaintiff for the purpose of clarity, as this is how the Sixth Circuit referred to the *Smith* plaintiff throughout its opinion.").

266. Johnston v. Univ. of Pitt., 97 F. Supp. 3d 657, 681–82 (W.D. Pa. 2015).

rationally related to safety concerns nor privacy concerns. No evidence suggests that a trans boy using the boys' bathroom creates a safety risk for the trans student or his cis peers.[267] If school administrators were to seriously address the concern that students sharing a bathroom with classmates of the opposite biological sex is unsafe because such an arrangement would trigger dangerous sexual responses, they would need to exclude gay students from shared bathrooms, as well.[268]

Privacy concerns are likewise irrational. Individuals have a right to bodily privacy such that "his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex";[269] however, common sense dictates that people use the bathroom discreetly, and students concerned with privacy—trans and cis alike—can use a stall to prevent others from seeing them exposed.[270] Privacy concerns are especially suspect considering modern-day high school students rarely, if ever, use bathroom or locker room facilities in a manner in which their genitals are visible to others. Finally, schools that have implemented trans inclusive bathroom and locker room policies have not been inundated with student complaints about privacy violations.[271]

Instead of promoting safety or privacy objectives, these policies stigmatize trans students, causing them severe psychological distress.[272] Similar to the amendment to the Colorado Constitution at issue in *Romer*, trans-restrictive bathroom policies inflict "immediate, continuing, and real injuries [on trans students] that outrun and belie any legitimate justifications that may be claimed."[273] School boards may proffer any number of flimsy rationales, but the true motivation seems to be animosity toward trans individuals. Accordingly, under "rational basis with bite," policies that prohibit trans people from using

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267. *See* G.G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 719 (4th Cir. 2016), *rev'd*, 137 S. Ct. 1239 (2016) (noting that school boards are often vague about precisely whom these policies endanger).

268. *See id.* at 723–24 n.11 (dismissing the dissent's theory that potentially dangerous sexual responses justify prohibiting trans students from using bathrooms consistent with their gender identity).

269. *Id.* at 734.

270. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1052 (7th Cir. 2017).

271. *Id.* at 1055.

272. *Id.* at 1045.

273. Romer v. Evans, 517 U.S. 620, 635 (1996).

bathroom facilities consistent with their gender identity should be deemed unconstitutional.[274]

Although trans athlete regulations will similarly need to withstand rational basis review, the merits of such a potential legal challenge are not the same. Athletic policies serve a purpose different from bathroom policies, and as such, they require a different set of legal considerations.

V. ANALYZING THE MERITS OF POTENTIAL LEGAL CHALLENGES TO STATE TRANSGENDER STUDENT-ATHLETE POLICIES

A. Potential Arguments for Imposing Transgender Restrictions

If a court were to hear a case challenging a high school trans student-athlete policy, the case would likely turn on four main considerations: (1) whether the individual challenging the policy is an MTF trans girl or an FTM trans boy; (2) whether the single-sex team in question is currently designated as all-girl or all-boy; (3) the physical characteristics of the specific trans student challenging the policy; and (4) whether that plaintiff is likely to enjoy a real or perceived competitive advantage.[275] Schools defending restrictive trans athlete policies will likely lean on the same arguments school administrators use to defend legal challenges to sex-segregated interscholastic sports more generally.

1. Preserve athletic opportunities for girls

School officials may contend that restricting trans athletes from participating on sports teams consistent with their gender identity is necessary to preserve opportunities for cis girls.[276] This argument is unpersuasive. Allowing trans girls to compete against cis girls will not undermine Title IX's purpose of providing athletic opportunities for females. Courts are divided over whether allowing boys to play on girls' teams would substantially limit athletic opportunities for girls,[277] but since

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274. *See id.* at 632 (finding the amendment's "sheer breadth . . . so discontinuous with the reasons offered for it that . . . it lacks a rational relationship to legitimate state interests").

275. Pilgrim et al., *supra* note 64, at 528.

276. *See* Clark v. Ariz. Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982) (asserting that if boys were permitted to play on the girls' volleyball team, "athletic opportunities for women would be diminished").

277. *Compare* Attorney General v. Mass. Interscholastic Athletic Ass'n, 393 N.E.2d 284, 294 (Mass. 1979) (holding that fears of athletically superior boys "swamping" girls' teams if a male plaintiff is permitted to play softball were irrational), *with* B.C. v. Bd. of Educ., 531 A.2d 1059, 1066 (N.J. Super. Ct. App. Div. 1987) (holding that allowing the

relatively few adolescents identify as trans,[278] there is no reason to think that trans girls will take substantial athletic opportunities away from cis girls.

2. Shield boys from potential stigma

Some officials may defend an athletic policy that prohibits a trans boy from playing on a boys' team as a means of protecting cis boys from the stigma of losing to a perceived "girl." Courts have roundly rejected similar arguments used to prevent cis girls from competing against boys.[279] Simply put, the law cannot give legal effect to private prejudice.[280]

3. Safeguard against gender fraud

Schools may also argue that policies based on strict sex binaries are necessary to prevent potential gender fraud. Conceivably, a cis boy could fake a trans identity to exploit trans-friendly policies and compete against less-athletic girls. This line of reasoning is entirely unsubstantiated. Over its forty-year history of sex-verification testing, the IOC found zero instances of gender fraud.[281] Arguments about gender fraud profoundly misunderstand the concept of gender identity. The desire to transition is authentic,[282] and any belief that a cis boy would subject himself to anti-trans prejudice to gain a

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male plaintiff to play on the girls' field hockey team would "deny[] females the right to have equality of athletic opportunities with their male counterparts").

278. *See* JODY L. HERMAN ET AL., AGE OF INDIVIDUALS WHO IDENTIFY AS TRANSGENDER IN THE UNITED STATES 2 (2017) (estimating that only 0.7% of American youth ages thirteen to seventeen, or about 150,000 individuals, would identify as transgender if asked).

279. *See* Adams v. Baker, 919 F. Supp. 1496, 1504 (D. Kan. 1996) ("[I]t is not the duty of the school to shield students from every situation which they may find objectionable or embarrassing due to their own prejudices.").

280. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 434 (1984) (holding that the potential harms related to the social stigmatization of growing up in a mixed-race family are impermissible grounds upon which to base a decision in a child custody hearing).

281. NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 8 (2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf; Skinner-Thompson & Turner, *supra* note 74, at 289; *see also* Vanessa Heggie, *Sex Testing and the Olympics: Myths, Rumours and Confirmation Bias*, GUARDIAN (Aug. 2, 2012, 10:21 AM), https://www.theguardian.com/science/the-h-word/2012/aug/02/sex-testing-olympics-myths-rumours-confirmation-bias (discussing confirmation bias and how suspicions of gender fraud often are proven inaccurate).

282. GRIFFIN & CARROLL, *supra* note 61, at 15 ("Gender identity is a core aspect of a person's identity, and it is just as deep seated, authentic, and real for a transgender person as for others . . . . For many transgender people, gender transition is a psychological and social necessity.").

competitive edge is not based on any credible evidence.[283] Furthermore, if gender fraud is an actual concern, school officials could adequately address the problem by including a clause requiring that a student-athlete's gender identity be sincerely held.[284] If a competitor were to challenge the authenticity of a student's trans status, the trans-athlete would simply need to provide evidence that his or her gender identity has been consistently asserted in a uniform matter.

4. Prevent injury

Schools will also likely attempt to justify restrictive trans-athlete policies by citing concerns over student safety. No legitimate safety concern justifies preventing trans boys from playing on boys' teams. Courts, like the Supreme Court of Washington in *Darrin*, typically permit cis girls to play against boys.[285] Some girls are physically strong enough to compete against boys,[286] and the female plaintiffs in these cases are making a deliberate decision to take on the risk of injury.[287] Similarly, a trans boy who has a biologically female body is making an informed choice to assume the risk of competing against his male peers. Since schools do not bar small, injury-prone cis boys from competing over safety concerns,[288] there is no justifiable reason for schools to bar trans boys.

However, cis girls may have legitimate safety concerns when required to compete against trans girls in contact sports. A trans girl may be bigger and stronger than her cis competitors, which could pose a potential risk of injury in sports like wrestling, boxing, or mixed-martial arts.[289] Weight classes may offset this danger slightly, but a state

283. Skinner-Thompson & Turner, *supra* note 74, at 288.

284. *Id.* at 289.

285. Darrin v. Gould, 540 P.2d 882, 893 (Wash. 1975) (permitting the Darrin sisters to try-out for the boys' high school football team).

286. *See id.* at 892 ("There is no finding that what may be true of the majority of girls is true in the case of the Darrin girls . . . or girls like them.").

287. *See, e.g.*, B.C. v. Bd. of Educ., 531 A.2d 1059, 1066 (N.J. Super. Ct. App. Div. 1987) ("[W]hen a girl tries out for a boys' team, she and her parents go in 'with their eyes open.'").

288. *See Darrin*, 540 P.2d at 892 (relying on this reasoning to reject the proposition that safety concerns necessitate prohibiting all girls from trying-out for football).

289. *See, e.g.*, Ben Popper, *Fighting Fallon Fox: The Controversial Science of Transgender Athletes in Combat Sports*, VERGE (Mar. 21, 2013), https://www.theverge.com/2013/3/21/4131174/fallon-fox-mma-science-transgender-fighting-athletes (detailing the controversy over Fallon Fox, an MTF transgender mixed martial arts fighter, who some critics argue poses a safety risk to her female competitors).

may have a legitimate safety concern that justifies rules preventing trans girls from competing against cis girls in these high-contact sports.[290]

5. Promote competitive fairness

Finally, schools will likely argue that restrictive trans-athlete policies are necessary to maintain a fair playing field. This argument is unconvincing when deployed to prevent trans boys from playing on boys' teams. If anything, a trans boy is at a disadvantage competing against naturally larger and stronger cis boys. But a state may have a legitimate interest in monitoring trans boys currently undergoing hormone treatment to ensure that their testosterone levels do not exceed the typical limit.

State athletic associations may have legitimate fairness concerns that justify rules preventing trans girls from participating on all-girl teams. Due to natural size and strength advantages, trans girls could unfairly dominate their cis girl competition. In *B.C. v. Board of Education*, the New Jersey appellate court held that average physiological differences between biological males and biological females justified a rule prohibiting a boy from joining the girls' field hockey team.[291] Unlike the previous circumstance where an FTM trans boy is actively choosing to subject himself to a possible competitive disadvantage, cis girls did not choose to compete against opponents with male bodies.[292] However, the potential social benefits trans girls receive by playing on girls' teams could outweigh these concerns.[293] Regardless, requiring trans girls to undergo hormone therapy to reduce natural hormonal advantages may adequately address concerns over fair play, especially considering the trans girls in question would have necessarily begun hormone treatments before their "male" skeletal structures fully developed.[294]

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290. *Contra* Leong, *supra* note 26, at 41 (arguing that girls may enjoy some physical advantages when wrestling against boys in their weight class, such as increased flexibility and lower center of gravity).

291. B.C. v. Bd. of Educ., 531 A.2d 1059, 1065 (N.J. Super. Ct. App. Div. 1987).

292. *See id.* at 1066 (explaining that these girls are put in an unfair position because "they must either compete against [biological] boys or forfeit the game").

293. Skinner-Thompson & Turner, *supra* note 74, at 298–99 (describing the potential psychological harm inflicted on trans students who are forced to participate in single-sex activities inconsistent with their gender identity).

294. *See* GRIFFIN & CARROLL, *supra* note 61, at 16 (clarifying that any competitive advantage a trans girl may have as a result of prior testosterone levels "dissipate[s] after about one year of estrogen therapy").

B. Likely Results of Legal Challenges to State Transgender Student-Athlete Policies

Throughout the country, high school athletic associations have implemented disparate regulations regarding the inclusion of trans athletes on single-sex sports teams: (1) restrictive policies require trans students to compete on teams corresponding to their sex in virtually all circumstances; (2) fully inclusive policies allow trans students to compete on teams consistent with their gender identity; and (3) partially inclusive policies permit trans boys to play on boys' teams without restriction but require trans girls to undergo specific medical interventions before playing on girls' teams.

This Section analyzes the merits of potential legal challenges to each approach. First, restrictive policies are unconstitutional because requiring FTM trans boys to play on girls' teams is not rationally related to ensuring student safety and contributes to competitive inequity. Furthermore, trans girls who have received hormone treatments for more than a year enjoy no significant competitive advantage over cis girls, and a policy that restricts these trans athletes to the boys' team reflects impermissible animus toward trans students. Second, fully inclusive policies are constitutionally valid because this approach is rationally related to creating a welcoming school culture for trans students, which is a legitimate state object. Third, partially inclusive policies are also constitutionally valid because the typical trans girl who has not received any medical intervention could have a size and strength advantage over cis girls, and restricting her to the boys' team is rationally related to promoting player safety and ensuring fair play.

1. Restrictive policies

Restrictive policies, like those implemented in Alabama and Texas, are constitutionally invalid. As previously stated, a trans student-athlete policy must withstand rational basis review to comply with the Equal Protection Clause of the Fourteenth Amendment and Title IX.[295] To be valid, the discriminatory policy must be rationally related to a legitimate government purpose,[296] but rules that force trans athletes to compete on single-sex teams based on their sex assigned at birth in virtually all circumstances fail even this minimal requirement.

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295. *See supra* Part IV.

296. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440–42 (1985) (holding that the City of Cleburne had no rational reason to deny a permit that would enable Cleburne Living Center to operate a group home for the mentally disabled).

Preventing FTM trans boys from playing on boys' teams serves no rational purpose. Because trans boys are willing to assume the potential risk of competing against other boys, concerns over safety are unfounded. Likewise, concerns over potential stigma cis boys may face losing to a trans boy are irrelevant because the law cannot give legal effect to such prejudice.[297] Finally, concerns over fair play are patently illogical. In fact, as Mack Beggs's undefeated wrestling season makes clear, a policy requiring trans boys to play on girls' teams undermines notions of fair play and potentially harms female athletes. Federal courts have routinely permitted girls to play on boys' football and wrestling teams,[298] so there is no valid reason a trans boy should not enjoy that same right. Even for sports like soccer, which a school typically offers teams for each gender, relegating a trans boy to the girls' team regardless of his ability level is unconstitutional. As the *Pennsylvania Interscholastic Athletic Ass'n* court explained, such a policy denies a trans boy the right to compete at a high level "solely because of [his biological] sex."[299] Just as VMI's male-only admissions policy was based on overbroad generalizations about women, trans-restrictive athletic policies are grounded on fixed notions about the capabilities of adolescents born with female bodies.[300]

Restrictive policies are also invalid because requiring MTF trans girls to alter their birth certificates to participate on all-girl teams is unconstitutionally overinclusive. In *Moreno*, the Supreme Court explained that some classifications are so imprecise that the classification "is wholly without any rational basis."[301] Although trans girls may have physiological advantages over their cis peers, trans girls who have received hormone treatments for over a year enjoy no significant competitive advantage.[302] Any policy discriminating against

297. *See supra* Section V.A.2.

298. *See* Saint v. Neb. Sch. Activities Ass'n, 684 F. Supp. 626, 629 (D. Neb. 1988) (wrestling); Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1031 (W.D. Mo. 1983) (football).

299. *See* Pennsylvania v. Pa. Interscholastic Athletic Ass'n, 334 A.2d 839, 842 (Pa. Commw. Ct. 1975).

300. *See* United States v. Virginia, 518 U.S. 515, 542–45 (1996) (striking down the Virginia Military Institute's admissions policy because Virginia's justification for excluding all women did not meet the "exceedingly persuasive" standard necessary for sex-based classifications).

301. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 538 (1973) (holding that denial of government benefits to hippies in particular is unconstitutional).

302. *See* GRIFFIN & CARROLL, *supra* note 61, at 16; *see also supra* Section I.C.

trans girls who are undergoing hormone therapy likely reflects the type of impermissible animus the Supreme Court prohibits.[303]

2. Fully inclusive policies

Fully inclusive policies, like those found in Connecticut and Washington state, that permit all trans student-athletes to participate on teams consistent with their gender identity are legally valid. Ensuring that trans students feel welcome participating in interscholastic athletics is a legitimate state objective, and fully inclusive policies are rationally related to pursuing that goal. A constitutional challenge by a cis girl who was denied a spot on a competitive team or by a girl from an opposing school who would compete against a trans girl would likely fail. High school athletic associations have a legitimate reason to sacrifice "perfect competition" in the service of greater inclusion.[304] If the sport in question is a contact sport, a female plaintiff may plausibly argue that a fully inclusive policy puts her in danger because it forces her to spar against an opponent with a male body; however, a court would still likely find the policy rationally related to achieving legitimate educational objectives.

3. Partially inclusive policies

Finally, partially inclusive policies, like those implemented in Idaho and Ohio, are constitutionally valid. The justification for allowing FTM trans boys to compete against cis boys is thoroughly addressed in Section V.B.1. Under rational basis review, a policy that requires an MTF trans girl to undergo hormone therapy for one year before competing against other girls would likely survive constitutional scrutiny.

Affected trans girls are not completely denied access to athletics; they simply are limited to the boys' team. Even though many doctors assert that treating a trans girl as female in some situations but not others is detrimental to her health and well-being,[305] state officials may rationally weigh the concerns of her cis opponents more heavily. After reading about a trans athlete like Andraya Yearwood besting her cis

303. *See* Romer v. Evans, 517 U.S. 620, 632 (1996) (reasoning that a policy with motives "inexplicable by anything but animus toward the class it affects" will fail rational basis review).

304. Shell, *supra* note 128, at 1057.

305. *See* Skinner-Thompson & Turner, *supra* note 74, at 298 ("Not allowing [trans girls] to play on sports teams consistent with their gender identity will only increase feelings of isolation and despair.").

competitors at the Connecticut championship track meet, athletic association representatives from other states may reasonably respond by implementing rules that prevent trans girls who have received no medical intervention from participating on all-girl teams. Ensuring competitive fairness and reducing the potential risk of injury are legitimate state objectives,[306] and requiring that trans girls undergo one year of hormone therapy before playing on girls' teams is rationally related to pursuing those goals. Courts have upheld discriminatory athletic policies that promote fair play and safety in the past.[307] A partially inclusive policy is reasonably aligned with Title IX's purpose—preserving the integrity of female athletics.[308]

Even if the policy can withstand a facial challenge, a particular trans girl who is of comparable size and ability level to her cis girl peers may successfully challenge the regulation as applied to her.[309] To prevent this, high school athletic associations with partially inclusive policies should include an exception similar to the one in Ohio that permits a trans girl who has not received any medical intervention to play on the girls' team provided she can demonstrate that she possesses no physical advantage and poses no undue safety risk to cis girls.[310]

CONCLUSION

Although both fully inclusive and partially inclusive policies are consistent with the Constitution and Title IX, athletic policy decision makers should deeply consider which values they want to promote. State officials need to balance concerns over fair competition and safety with acknowledging the dignity and well-being of trans students.

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306. *See* Sandison v. Mich. High Sch. Athletic Ass'n, 64 F.3d 1026, 1035 (6th Cir. 1995).

307. *See id.* at 1034–35 (holding that school policy prohibiting nineteen-year-old students from playing high school sports is rationally related to reducing competitive advantage and protecting younger athletes from harm). *But see* Dennin v. Conn. Interscholastic Athletic Conference, Inc., 913 F. Supp. 663, 669 (D. Conn. 1996), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996) (holding that, despite state age restriction, a nineteen-year-old student with Down Syndrome could participate on the swim team in which he was the slowest swimmer).

308. *See supra* Section I.A.

309. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985) (upholding in general a zoning ordinance that requires a special use permit for homes for the mentally disabled but invaliding the ordinance as applied to the Featherstone home because the residents of that particular facility did not threaten a legitimate interest of the city).

310. OHIO POLICY, *supra* note 136, at 3.

A policy that requires a trans girl to undergo hormone therapy for a year before competing against other girls might unduly burden a student who cannot afford expensive hormone treatments.[311] Such a policy might also pressure a trans girl to pursue medical intervention that she might not otherwise desire.[312] Partially inclusive athletic policies will prevent a trans girl who decides not to undergo hormone therapy, either because of prohibitive costs or a wish to maintain her natural hormonal levels, from making a full social transition if she is barred from playing on female sports teams. The full social transition is integral to a trans individual's emotional health.[313] Furthermore, a rule that bars trans girls who have not undergone hormone treatment from playing on girls' teams may effectively "out" a trans student to her classmates.

The NCAA model is constitutional, but a more trans-friendly approach might be a better fit for secondary schools. High school athletic associations need to decide whether preventing athletes like Yearwood from winning girls' state championships is worth the emotional toll placed on trans girls who are prohibited from playing sports with their female classmates. After losing the 100-meter dash to Yearwood, Kate Hall, a junior who had won the event the previous year, was noticeably disappointed.[314] As Hall fought back tears, she told a reporter, "I can't really say what I want to say, but there's not much I can do about it . . . . You can't blame anyone . . . . From what I know [Yearwood] is really nice and that's all that matters. She's not rude and obnoxious."[315] Hall, through her grace and composure in defeat, proves that, although at times painful, fully inclusive policies are necessary to affirm the dignity of trans adolescents. This issue is bigger than one athlete or one track meet. Interscholastic sports should be in service of larger educational goals, and there is no more important lesson than teaching young people that their trans classmates deserve the opportunity to fully live their truth, including playing sports consistent with their gender identity.

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311. Shell, *supra* note 128, at 1072; *see also* Leena Nahata et al., *Gender-Affirming Pharmacological Interventions for Youth with Gender Dysphoria: When Treatment Guidelines Are Not Enough*, 41 ANNALS PHARMACOTHERAPY 1023, 1028 (2017) (explaining that insurance plans often do not cover puberty blocking hormone treatments for adolescents with gender dysphoria and the out-of-pocket expense for these medications can range from $4,000 to $25,000 per year).

312. Shell, *supra* note 128, at 1072.

313. *See* Skinner-Thompson & Turner, *supra* note 74, at 298.

314. Jacobs, *supra* note 10.

315. *Id.*