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TITLE IX'S TRANS PANIC

DEBORAH L. BRAKE*

- I. THE MORAL PANIC OVER TRANS GIRLS IN SPORTS
 - A. *The Scope and Sweep of the Trans Athlete Bans*
 - B. *“Protect Girls’ Sports”: The Discourse Behind Trans Exclusion*
 - C. *Sport as the Center of the New Trans Panic*
 - II. TITLE IX, SEX SEPARATION, AND THE REGULATION OF TRANSGENDER ATHLETES
 - A. *Revisiting Sex Separation in Sports Under Title IX*
 - B. *Title IX’s Application to Transgender Athletes*
 - III. UNDERMINING THE PROMISE OF TITLE IX
 - A. *The Costs of Biological Determinism*
 - B. *Elevating the Win-at-All-Cost Model of Sport*
 - C. *Remembering the Lessons of Intersectionality*
- CONCLUSION

Sport has long been a site of struggle over competing conceptions of social justice, with no cultural flashpoint more contested than gender. A key site of contention has been the meaning and application of Title IX. With June of 2022 marking the law’s fiftieth anniversary,¹ Title IX has been lauded as the law that launched girls’ and women’s sports from the shadows to their present, more celebrated posture.² As these anniversary tributes often emphasize, female athletic participation has soared to new heights in all levels of sports.³ But Title IX also houses tensions and dilemmas for gender justice that were baked into the law from the beginning. A pragmatic mix of feminisms make up the logic and rationales behind Title IX’s legal framework, some with the potential to transform

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1. Maria Cramer, *How Women’s Sports Teams Got Their Start*, N.Y. TIMES (Apr. 28, 2022), <https://www.nytimes.com/2022/04/28/sports/title-ix-anniversary-womens-sports.html> [<https://perma.cc/M5B9-H5WA>].

2. See WOMEN’S SPORTS FOUND., FIFTY YEARS OF TITLE IX: WE’RE NOT DONE YET 17 (2022).

3. See *id.* at 20; Cramer, *supra* note 1.

conventionally conservative understandings of gender but others that reinforce the salience of those conventional categories along with their limitations.⁴ Title IX's three-part test for equal athletic opportunity, for example, has made sports participation for girls a normal part of growing up, breaking down gender stereotypes and opening new paths to empowerment for girls and women.⁵ By prioritizing participation growth with separate teams for girls and women, instead of merely formally opening up all-male teams to female athletes, Title IX has dramatically increased both the numbers of girls and women who compete in sports and the stature of women's athletics.⁶ But this model has always been rife with dilemmas and costs—as is any legal framework that attempts to address social inequality among groups that are differently situated.⁷ Even as the law created unprecedented opportunities for girls and women to compete in athletics, it participated in constructing the very categories and hierarchies that contribute to the second-class status of girls' and women's sports.⁸ This is because the model of sex-separate sports—and the assertion of a Title IX right to equal treatment to demand equality across separation—implicitly reifies and reinforces the significance of sex as a gatekeeper to opportunity.⁹

Although the downsides of separation have been present from the beginning, the sex-separate structure of sport is now embroiled in a new crisis, as the boundaries of girlhood and womanhood have shifted to accommodate transgender and non-binary identities and reactionary forces have pushed back to reinstate fixed binary categories of male/female. Even as the feminist movement has succeeded in many respects in interrogating the meaning of gender and the boundaries it sets, gender remains a highly salient category in U.S. society.¹⁰ Emotions over gender boundaries and the felt need for clarity in assigning culturally legible gender identities run deep. As Judith Butler has observed, “the moment in which an infant becomes humanized is when the question, ‘is it a boy or girl?’ is

4. See Deborah L. Brake, *Title IX as Pragmatic Feminism*, 55 CLEV. ST. L. REV. 513, 513 (2007).

5. See Deborah L. Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J. L. REFORM 13, 122 (2000) (explaining and defending the three-part test).

6. See WOMEN'S SPORTS FOUND., *supra* note 2, at 8.

7. See DEBORAH L. BRAKE, *GETTING IN THE GAME: TITLE IX AND THE WOMEN'S SPORTS REVOLUTION* 16–17 (2010) (discussing the dilemma of difference that plagues any approach to securing women's equality in sports).

8. See *id.* at 29.

9. *Id.* at 64.

10. See *id.* at 229–30 (discussing the ongoing role feminism plays in deconstructing gender norms via Title IX).

answered.”¹¹ A clear separation of two sexes is particularly crucial for those invested in preserving traditional gender roles.¹² Sport is now a major site where the struggle over these boundaries is taking place and Title IX has become a key weapon in this fight.¹³

As is often the case with civil rights laws that depend upon a fixed construction of a protected class, Title IX advocacy and litigation have set in motion a dialectic of rights enforcement and retrenchment,¹⁴ complicating any linear story of law and social change. The assertion of a right to equal athletic opportunity for women has both a liberatory potential and the potential for capture and appropriation toward gender-reactionary ends. Sex equality rights can be deployed in unanticipated directions and used to smuggle in gender ideologies that are antithetical to feminist understandings of the right.¹⁵ The new trans-exclusion bills that have recently swept through state legislatures overtly draw on the legacy and logic of Title IX to press a right-wing gender agenda, in sport and beyond.¹⁶ The result is a perfect storm for ushering in a new gender panic now playing out in sports.¹⁷

This Article begins by discussing the spate of state legislative efforts to exclude transgender girls from girls' sports and the feminist-sounding discourses behind them that have split the women's sports community.¹⁸ The Article's main contention is that, when viewed against the backdrop of a broader anti-transgender movement,¹⁹ these measures must be understood as a moral panic. The rhetoric behind the panic explicitly draws on the themes of girls' empowerment and Title IX.²⁰ The Article goes on to explain the key features of a moral panic and explores why such a panic has taken hold in sports.²¹

11. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 142 (Linda Nicholson ed., 1999).

12. See BRAKE, *supra* note 7, at 20.

13. *Id.* at 2.

14. See Camille Gear Rich, *Feminism Is Dead, Long Live Feminisms: A Postmodern Take on the Road to Gender Equality*, in *OXFORD HANDBOOK OF FEMINISM & L. IN THE U.S.*, 1, 25–26 (Deborah L. Brake, Martha Chamallas & Verna L. Williams eds.). See also Jessica A. Clarke, *Protected Class Gatekeeping*, 92 *N.Y.U. L. REV.* 101, 112, 167 (2017) (arguing that judicial gatekeeping of the boundaries of protected classes in anti-discrimination statutes thwarts the potential for these laws to advance equality).

15. See, e.g., Clarke, *supra* note 14, at 107 (discussing how courts have denied protection to marginalized groups because they do not fall within an established protected class).

16. See Elizabeth A. Sharrow, *Sports, Transgender Rights and the Bodily Politics of Cisgender Supremacy*, 10 *LAWS* 1, 2 (2021).

17. See *id.* at 17.

18. *Infra* Section I.A.

19. *Infra* Section I.C.

20. See *id.*

21. *Id.*

The Article then steps back and analyzes Title IX's rationales for sex separation in sports.²² This part argues that the trans exclusion movement has seized on one singular rationale for sex-separate athletics—biological sex difference—while ignoring the alternative, less problematic rationales Title IX has embraced.²³ The argument for excluding trans girls distorts and overstates the biological case for sex separation, eliding the nuance and uncertainty surrounding the linkage between male biology and athletic performance.²⁴ At the same time, the trans exclusion movement opportunistically overstates the extent to which Title IX locks in sex-separation as its governing framework.²⁵ Title IX's unstable and contested meaning for transgender inclusion in sex-separate school programs and facilities is also explored.²⁶ In the wake of the Department of Education's seesawing positions during the past three presidential administrations²⁷ and the Supreme Court's groundbreaking 2020 decision recognizing gender identity and sexual orientation discrimination as a species of sex discrimination, Title IX's requirements for accommodating transgender athletes in sport are in flux and unsettled.²⁸

The final section of the Article identifies and elaborates three ways in which the trans exclusion movement undermines Title IX's promise of gender equality in sport. First, it promotes a biological essentialism that is at odds with the logic of Title IX as a sex equality law.²⁹ Policing the binary sex line in sport is a losing proposition for women's athletic equality and is inherently rife with racial and gender bias.³⁰ Second, these trans exclusion legislative efforts are based on a model of sport that places winning above the educational and participatory benefits of sport, again, in tension with the logic of Title IX.³¹ Finally, trans exclusion in sport ignores the lessons of intersectionality by centering a privileged group of cisgender women while further marginalizing women with already-marginalized identities.³² Race maps onto this dividing line because what culturally codes as unfeminine, in bodies and behaviors in girls' and women's sport, is implicitly racialized.³³ The Article concludes with some

22. *Infra* Part II.

23. *Infra* Section II.A.

24. *See id.*

25. *See id.*

26. *See id.*

27. *See* JARED P. COLE, CONG. RSCH. SERV., LSB10531, TITLE IX'S APPLICATION TO TRANSGENDER ATHLETES: RECENT DEVELOPMENTS 2 (2020).

28. *See* *Bostock v. Clayton County*, 140 S. Ct. 1731, 1778 (2020).

29. *See infra* Section III.A.

30. *See id.*

31. *See infra* Section III.B.

32. *See infra* Section III.C.

33. *See id.*

thoughts on how transgender inclusion can be reconciled with Title IX's baseline of sex separation in sports.³⁴ However the particulars of transgender girls' and women's athletic participation are sorted out, supporters of girls' and women's sports should unite in resisting the anti-trans movement's efforts to co-opt Title IX in service of a conservative and exclusionary gender agenda.³⁵

I. THE MORAL PANIC OVER TRANS GIRLS IN SPORTS

A. *The Scope and Sweep of the Trans Athlete Bans*

The biggest crisis facing the United States today is the surge of transgender girls taking over girls' interscholastic sports teams.³⁶ Or so one may think, given the flurry of state legislative activity on this issue in the past two years.³⁷ By November of 2021, bills to exclude transgender girls and women from participating in girls' and women's sports had been introduced in thirty-seven states.³⁸ As of May of 2022, eighteen states had statewide bans blocking transgender girls and women from participating in girls' and women's interscholastic sports.³⁹ And the bills keep coming.⁴⁰ They are not the result of local politics, enraged or anxious parents concerned about their daughters' safety or competitive opportunities.⁴¹ Rather, the bills are the product of national right-wing strategists, having found that this particular issue has traction to elect and empower Republicans in electoral politics.⁴² The main group behind the bills is the Alliance Defending Freedom, a nonprofit advocacy group that describes itself as a defender of religious freedom, traditional marriage, and "the

34. *Infra* Conclusion.

35. *Id.*

36. *See, e.g.,* Adriana Rezal, *States Restricting How Transgender Students Play Sports*, U.S. NEWS & WORLD REP. (Dec. 1, 2021), <https://www.usnews.com/news/best-states/articles/2021-12-01/these-states-restrict-how-transgender-students-participate-in-school-sports> [<https://perma.cc/Q8Y6-9ZD4>].

37. *See id.*

38. *Id.*

39. *See* David W. Chen, *Transgender Athletes Face Bans From Girls' Sports in 10 U.S. States*, N.Y. TIMES (May 24, 2022), <https://www.nytimes.com/article/transgender-athlete-ban.html> [<https://perma.cc/7NY5-4H9E>] (last updated to increase the number to eighteen).

40. For an up-to-date listing of pending bills to exclude trans athletes, *see Legislative Tracker: Youth Sports Bans*, FREEDOM FOR ALL AMERICANS, <https://freedomforallamericans.org/legislative-tracker/student-athletics> [<https://perma.cc/229P-H2YT>] (last visited Nov. 18, 2022). *See also* <https://www.Transathlete.com> for up-to-date information on state legislative actions excluding transgender athletes from participating in sports.

41. *See, e.g.,* Sharrow, *supra* note 16, at 5–7 (discussing the political origins of anti-trans legislation).

42. *See id.* at 7.

sanctity of life,” among other issues.⁴³ The group is designated as a hate group by the Southern Poverty Law Center.⁴⁴

Idaho was the first state to pass such a ban 2020.⁴⁵ Of the states that have followed suit, several have done so over the governor’s veto, including two states (Indiana and Utah) where vetoes by Republican governors were overridden by the state legislature.⁴⁶ Predictably, constitutional challenges to these laws followed soon after their enactment, with early court decisions questioning their constitutionality.⁴⁷ However, this has not stopped state legislatures from continuing to pass nearly identical bans.⁴⁸

For the most part, the trans athlete exclusion bills and newly enacted laws are cut from the same cloth.⁴⁹ They restrict participation in all school-affiliated sports that are designated for girls and women to only those girls whose “biological sex”—the term used in these bills—is female.⁵⁰ This terminology is deliberate; sponsors of these bills eschew the more progressive formulation of “sex assigned at birth” in favor of “biological sex,” which portrays the category of sex as natural and unproblematic.⁵¹ In defining what counts as “female” as biologically fixed at birth, the bills ignore the biological complexity inherent in sex assignment and fuel the cultural myth

43. See Sharrow, *supra* note 16, at 1; see also *About Us: Who We Are*, ALL DEFENDING FREEDOM, <https://adlegal.org/about-us> [<https://perma.cc/52C4-YWSW>] (last visited Nov. 18, 2022).

44. *Why is Alliance Defending Freedom a Hate Group?*, S. POVERTY L. CTR. (Apr. 10, 2020), <https://www.splcenter.org> [<https://perma.cc/4TFT-427Q>].

45. Talya Minsberg, *Boys Are Boys and Girls Are Girls: Idaho Is First State to Bar Some Transgender Athletes*, N.Y. TIMES (Mar. 29, 2021), <https://www.nytimes.com/2020/04/01/sports/transgender-idaho-ban-sports.html> [<https://perma.cc/M6A9-ML6B>].

46. See Mitch Smith, *Indiana Lawmakers Override Transgender Sports Veto*, N.Y. TIMES (May 24, 2022), <https://www.nytimes.com/2022/05/24/us/indiana-legislature-transgender-sports-ban.html> [<https://perma.cc/B2TJ-B6BM>].

47. See, e.g., *Hecox v. Little*, 479 F. Supp. 3d 930, 987–88 (D. Idaho 2020) (granting preliminary injunction blocking the Idaho law from going into effect on the grounds that it likely violates the Equal Protection Clause of the Fourteenth Amendment); *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 357 (S.D.W. Va. 2021) (finding plaintiff likely to succeed on both constitutional and Title IX challenges); cf. *A.M. v. Indianapolis Pub. Schs.*, 2022 WL 2291763 (S.D. Ind. July 26, 2022) (finding plaintiff likely to succeed in Title IX challenge to Indiana’s law excluding trans girls from playing girls’ sports, with no need to decide on the likely success of plaintiff’s constitutional challenge).

48. See Sharrow, *supra* note 16, at 11 (in her analysis of all the legislative bills introduced in 2020 and 2021 that would exclude transgender athletes, Elizabeth Sharrow notes that “many of the bills proposed in multiple, different states include large portions of verbatim text and identical titles.”).

49. Sharrow, *supra* note 16, at 11.

50. *Id.* at 13 (“The collective approach across bills is a categorical definition of ‘sex’ narrowly conflated with sex assigned at birth. The language employed in proposed bills routinely and narrowly focuses on ‘biological sex’ instead of gender identity, and rarely explicitly acknowledges the existence of ‘transgender’ people who identify as such.”).

51. See Jessica Clarke, *Sex Assigned at Birth*, COLUM. L. REV. 10 (forthcoming 2022) (available on SSRN).

that biological sex is something predetermined and objectively discerned.⁵² Importantly, these bills specifically regulate the eligibility only of girls; they do not regulate sports participation by trans boys in girls' sports,⁵³ nor any participants in boys' sports.⁵⁴

While their target is clearly trans girls and non-binary students, these bills have the necessary effect of also, incidentally it seems, barring participation in girls' sports by cisgender boys.⁵⁵ This aspect of the bills has seemingly gone unnoticed, as it is not the focus of the sponsors.⁵⁶ In many cases, barring boys from girls' sports will not alter the status quo because—as explained below—Title IX permits school districts and athletic conferences to restrict athletic teams by sex whenever selection is based on competitive skill or the sport involved is a contact sport.⁵⁷ However, and also discussed further below, Title IX does not mandate such separation, and some states and conferences have taken a more permissive approach when the sport is not otherwise offered to boys.⁵⁸ In such programs, under the new state laws, a male athlete could no longer compete on a girls' field hockey team, for example, even if the school district and athletic conference previously permitted it.⁵⁹ The trans exclusion bills have received virtually no attention for their effect on boys' opportunities,

52. Sharrow, *supra* note 16, at 13 (describing the approach to determining biological sex required by the bills “as objectively determined by anatomy and genetics existing at the time of birth.”). Even with respect to sex assignment at birth, the bills greatly oversimplify the construct of a “biological” sex. See Michele Krech, *To Be a Woman in the World of Sport: Global Regulation of the Gender Binary in Elite Athletics*, 35 BERKELEY J. INT'L L. 262, 269–70 (2017) (explaining that there are “at least 10 indicators of sex and gender” including “chromosomal sex, gonadal sex, foetal hormonal sex, internal morphological sex, external morphological sex, brain sex, sex of assignment and rearing, pubertal hormonal sex, gender identity and role, and procreative sex.”).

53. Hence, these laws do not address whatever unfairness might result from a trans boy, who receives hormone therapy to raise testosterone levels, competing on a girls' team. Exactly such a scenario created a stir in Texas a few years ago. Even then, Texas determined eligibility to compete in both boys' and girls' sports according to the sex listed on a student's birth certificate. As a result, a trans boy had no other option than to compete against girls and won the state's girls' wrestling championship. See Catherine Jean Archibald, *Transgender and Intersex Sports Rights*, 26 VA. J. SOC. POL'Y & L. 246, 256 (2019) (discussing this incident).

54. See Sharrow, *supra* note 16, at 13–14.

55. Although the bills are explicitly trans-exclusionary, Elizabeth Sharrow observes that they do not use the term “transgender,” which she attributes to the politics behind these bills, which seeks to erase trans identity and reinstate gender polarity based on a traditional, biological definition of sex. Sharrow, *supra* note 16, at 11.

56. See Sharrow, *supra* note 16, at 19 (noting the barring of cisgender boys from girls' sports enforces gender order).

57. See BRAKE, *supra* note 7, at 22.

58. See BRAKE, *supra* note 7, at 17.

59. See Sharrow, *supra* note 16, at 14 (providing an example of legislation that bars male athletes from all girls' teams).

as their purpose is to enforce biological purity (or the appearance of it) in who counts as a girl or woman, and not fairness in sport opportunities generally.⁶⁰

One of the most striking things about these laws is their broad scope and sweep in excluding trans girls and women from competition. The focal point of supporters of these bills has been on public schools in the K–12 setting, although some of them also apply to higher education and to private K–12 schools.⁶¹ They all set categorical rules, with no exceptions based on the level of competition, age of competitors, or type of sport.⁶² They apply to all school sports, not just varsity sports, including club, recreational, and intramural sports.⁶³ Many of these laws apply to even to the youngest athletes, well before the onset of puberty.⁶⁴ And all of them apply to all kinds of sports, with no distinctions among sports which might be more or less likely to confer a competitive advantage to a transgender athlete, and with no distinctions among sports in which athletes compete individually, such as track or swimming, and team sports.⁶⁵ Another striking feature of the new trans exclusion laws is their enforcement mechanism, which invites objectors to question a female athlete’s status as a “biological” girl.⁶⁶ Exactly what is being enforced varies somewhat and is not always clear. Some of the new state laws define biological sex as the sex specified on the athlete’s birth certificate at the time of birth.⁶⁷ Others refer to vague criteria for

60. *See id.* at 2 (discussing how anti-trans political actors are motivated by concepts of biological determinism, which is reflected in the anti-trans legislation).

61. Sharrow’s analysis of the bills introduced in state legislatures in 2020 and 2021 found that all of the bills applied to high school sports, one-fifth applied to elementary sports, and just over half applied to college sports. *Id.* at 11.

62. *See id.* at 14.

63. *See id.* at 14.

64. *See id.* at 14–17 (discussing the use of sex-verification procedures in children’s sports at early ages).

65. *See id.* at 14.

66. *See id.* at 16.

67. *See, e.g.,* Stephen Gruber-Miller & Ian Richardson, *Kim Reynolds bans transgender girls from female sports, signing Republican-backed law*, DES MOINES REG. (Mar. 3, 2022), <https://www.desmoinesregister.com/story/news/politics/2022/03/03/trans-transgender-girls-banned-womens-sports-kim-reynolds-lgbtq-iowa-signs-bill/9349887002> [<https://perma.cc/X3PM-MTUS>]; Kyle Morris, *Kentucky lawmakers override governor’s veto of bill banning transgender athletes from girls’ sports*, FOX NEWS (Apr. 13, 2022, 9:10 PM), <https://www.foxnews.com/politics/kentucky-lawmakers-override-governors-veto-of-bill-banning-transgender-athletes-from-girls-sports> [<https://perma.cc/D57T-4TXJ>]; Kim Chandler, *Alabama House approves bill to ban transgender athletes*, ABC NEWS (Mar. 18, 2021, 5:24 PM), <https://abcnews.go.com/Sports/wireStory/alabama-house-approves-bill-ban-transgender-athletes-76540588> [<https://perma.cc/S95V-PRAB>]; Riley Bunch, *Ga. Senate lawmakers pass bill that bans transgender athletes from school sports*,

discerning biological sex or leave it undefined.⁶⁸ Idaho's law, for example, titled the "Fairness in Women's Sports Act," permits challenges to the eligibility of any girl or woman competing in a girls' or women's sport at a school or college in the state, and provides that a dispute over an athlete's sex is to be resolved by "verification" of the student's "biological sex."⁶⁹ In a similar vein, Arkansas's new law permits anyone to contest a female athlete's eligibility, in which case it is up to the contested student to establish her female sex by providing a doctor's statement verifying the student's sex based on the specified markers of anatomy, natural levels of testosterone, and genetic makeup.⁷⁰ Some of the bills even impose criminal penalties on athletes deemed to have misrepresented their sex by attempting to compete on a girls' team.⁷¹

In their sweeping approach to female athletic eligibility, the bills are significantly more exclusionary than many athletic association rules have been.⁷² State interscholastic athletic associations have taken a variety of approaches to gender and eligibility.⁷³ The most lenient have allowed participation based on an athlete's self-identified gender identity.⁷⁴ Other state athletic association rules are more restrictive, requiring medical interventions such as hormone therapy or even surgery—treatments that may not be available to minors.⁷⁵ Some have no policy at all on transgender participation or gender identity, or have a policy that is effectively no policy, leaving

GPB (Feb. 25, 2022, 5:24 PM), <https://www.gpb.org/news/2022/02/24/ga-senate-lawmakers-pass-bill-bans-transgender-athletes-school-sports> [<https://perma.cc/7PTX-GH9Z>].

68. Minsberg, *supra* note 45 (sex of contested athlete resolved by genital exams, genetic testing, and hormone testing).

69. *Id.*

70. Sharrow, *supra* note 16, at 16.

71. *Id.* at 19.

72. *See id.* at 11.

73. *See Gender Affirming and Inclusive Athletics Participation Issue Brief*, GLSEN (Apr. 2022), https://www.glsen.org/sites/default/files/2022-05/GLSEN_Transathlete_Policies_Issue_Brief-04-2022.pdf [<https://perma.cc/5DWU-X3GA>]; EDWARD SCHIAPPA, *THE TRANSGENDER EXIGENCY: DEFINING SEX AND GENDER IN THE 21ST CENTURY* 123 (2022) (identifying five different approaches taken by high school athletic associations toward transgender athletes). Athletic association policies at the K–12 and college level, in addition to Olympic and amateur sports, are continually updated at the Policies link on <https://www.transathlete.com>.

74. *See* Sharrow, *supra* note 16, at 5. *See also* Shayna Medley, *(Mis)Interpreting Title IX: How Opponents of Transgender Equality are Twisting the Meaning of Sex Discrimination in School Sports*, 46 *NYU REV. L. & SOC. CHANGE* 673, 699 (2022) (stating that Connecticut is one of 19 states that allows transgender athletes to participate in sports based on gender identity on a case by case basis without requiring proof of medical transition, and that more permit participation contingent on specified hormone therapy or identification requirements).

75. *See* Sharrow, *supra* note 16, at 5, 16.

eligibility determinations to ad hoc decision-making by administrators and medical authorities.⁷⁶ At the college varsity level, the NCAA adopted guidelines in 2011 recommending that transgender women be permitted to compete on women's teams as long as they have completed at least one calendar year of testosterone-suppression treatment to mitigate whatever athletic advantage might ensue from male-normative testosterone levels.⁷⁷ The NCAA imposed no restrictions on trans men participating on men's teams, and allowed trans men to participate on women's teams as long as they are not taking testosterone supplements.⁷⁸ In adopting these guidelines, the NCAA explained their rationale as neutralizing whatever physiological advantages might otherwise result from having gone through male puberty.⁷⁹ In January of 2022, the NCAA modified its stance on transgender eligibility to phase in a sport-by-sport approach that will align NCAA sports regulation with the evolving requirements for Olympic sports, which vary by sport.⁸⁰ The details of what this will mean for transgender women participating in intercollegiate sports are now very much in flux, as individual sport governing bodies scramble to come up with policies on athlete eligibility for their sport.⁸¹

Concern about testosterone-enhanced performance is an often-cited rationale for excluding trans girls from high school sports too.⁸² However, as noted above, this new crop of state laws and bills is not limited to high school athletes and extends to prepubescent children as well.⁸³ The concern about testosterone advantage is also hard to square with coextensive legislative efforts apart from sports to restrict hormone therapy treatment for trans girls that might suppress any testosterone-related advantage. Arkansas, Arizona, and Alabama have recently enacted draconian measures designed to block gender-affirming care for minors, including puberty blocking

76. Medley, *supra* note 74, at 699. For an analysis of the bureaucratic surveillance and burdens such ad hoc determinations impose on students, see Scott Skinner-Thompson, *Identity by Committee*, 157 HARV. C.R.-C.L. L. REV. 30 (forthcoming 2022). Indeed, these costs are present even in more inclusive policies, which also depend on authoritative recognition of a student's transgender status. *Id.*

77. NCAA OFF. OF INCLUSION, NCAA INCLUSION OF TRANSGENDER ATHLETES 13 (2011). As Elizabeth Sharrow observes, the NCAA guidelines are only mandatory during NCAA championships and leave much discretion to individual member schools for how to parse transgender inclusion the rest of the time. Sharrow, *supra* note 16, at 5.

78. NCAA OFF. OF INCLUSION, *supra* note 77, at 13.

79. *Id.* at 7.

80. See NCAA SPORTS SCI. INST., TRANSGENDER STUDENT-ATHLETE ELIGIBILITY REVIEW PROCEDURES (2022), <https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx> [<https://perma.cc/6PQ9-P54P>].

81. *See id.*

82. NCAA OFF. OF INCLUSION, NCAA INCLUSION OF TRANSGENDER ATHLETES 8 (2011).

83. *See* Sharrow, *supra* note 16, at 14.

treatment and testosterone suppressing therapy for trans girls.⁸⁴ Texas is even initiating child abuse and neglect investigations of the parents of transgender youth receiving gender-affirming medical care.⁸⁵ In such states, treatments that might mitigate the very competitive advantages feared by proponents of these laws have been taken off the table.⁸⁶ Even where permitted by law, hormone therapy may be difficult to access for minors, since parental consent is required for treatment.⁸⁷

The new wave of trans exclusionary legislative restrictions might suggest that there has been a recent influx of trans athletes overtaking girls' sports. No empirical evidence reveals any such trend.⁸⁸ Indeed, lawmakers behind these bills have been unable to document how many trans athletes now participate in sports at all, much less provide evidence or even anecdotes of a threat in their own states.⁸⁹ When Idaho passed its law restricting girls' and women's sports participation to "biological" girls and women, not a single transgender individual was known to have competed in the state at any time.⁹⁰ Only two percent of high school students identify as transgender, and not all of them are trans girls, nor do they all participate in sports.⁹¹ According to the Human Rights Campaign Fund, only twelve percent of transgender girls participate in school sports, compared to over two-thirds of high school students overall who do so.⁹² At the college level, in NCAA sports, there are approximately 200,000 women

84. *See id.* at 9, 16.

85. J. David Goodman & Amanda Morris, *Texas Investigates Parents Over Care for Transgender Youth, Suit Says*, N.Y. TIMES (Mar. 1, 2022), <https://www.nytimes.com/2022/03/01/us/texas-child-abuse-trans-youth.html> [<https://perma.cc/F8MT-M84E>].

86. *Id.*

87. See Federica Vergani, Note, *Why Transgender Children Should Have the Right to Block Their Own Puberty with Court Authorization*, 13 FIU L. REV. 903, 916 (2019).

88. Sharrow, *supra* note 16, at 18.

89. *See id.*

90. Katelyn Burns, *While the country deals with the coronavirus, Idaho state legislatures prioritize banning trans athletes*, VOX (Mar. 17, 2020, 12:30 PM), <https://www.vox.com/identities/2020/3/17/21183305/idaho-legislature-bans-trans-athletes> [<https://perma.cc/LG6S-WF4L>].

91. See Valerie Strauss, *CDC: Nearly 2 percent of high school students identify as transgender—and more than one-third of them attempt suicide*, WASH. POST (Jan. 24, 2019, 6:10 PM), <https://www.washingtonpost.com/education/2019/01/24/cdc-nearly-percent-high-school-students-identify-transgender-more-than-one-third-them-attempt-suicide> [<https://perma.cc/F45L-P63Z>]. The Trevor Project puts the figure at 1.8 percent of high school students identifying as transgender. THE TREVOR PROJECT, NAT'L SURVEY ON LGBTQ YOUTH MENTAL HEALTH (2019), <https://www.thetrevorproject.org/survey-2019/?section=Introduction> [<https://perma.cc/6RXT-EQHJ>].

92. HUM. RTS. CAMPAIGN FOUND., *PLAY TO WIN: IMPROVING THE LIVES OF LGBTQ YOUTH IN SPORTS* 16 (2020), <https://assets2.hrc.org/files/assets/resources/PlayToWin-FINAL.pdf> [<https://perma.cc/KAG3-8PJ9>].

athletes competing in 2021, and only an estimated fifty of them are transgender.⁹³ As these numbers reveal, the trans athlete exclusion bills are a solution in search of a problem. Yet the rhetoric of their supporters posits an existential threat.

B. “Protect Girls’ Sports”: The Discourse Behind Trans Exclusion

Supporters of trans exclusion have managed to gain buy-in by sounding the chords of a pro–Title IX melody: that girls’ athletic opportunities are important and worthy of protection.⁹⁴ Despite subscribing to a very different set of gender politics on other issues, right-wing backers of trans exclusion have managed to appropriate the pro-girl theme of Title IX to their advantage.⁹⁵ This is a dynamic that often bedevils feminist advocacy, when conservative political forces appropriate certain strands of mainstream feminism and turn them into a force for reactionary change.⁹⁶ It is a familiar move, splitting off a culturally resonant, feminist-sounding directive (“protect our girls”) from a more transformative feminist stance opposing fixed gender constructs and gender oppression.⁹⁷ One example of this strategy in recent years is the anti-trans bathroom bills.⁹⁸ These efforts too were buoyed by assertions of protecting girls, although the threat in that instance fixated on sexual assault,⁹⁹ despite the lack of any empirical evidence that cisgender girls were being assaulted by trans girls in bathrooms.¹⁰⁰ But the bathroom bills have not gained the kind of steam in state legislatures that has recently occurred with trans athlete exclusion.¹⁰¹

93. Gillian R. Brassil & Jere Longman, *Who Should Compete in Women’s Sports? There Are Two Almost Irreconcilable Positions*, N.Y. TIMES (Aug. 3, 2021), <https://www.nytimes.com/2020/08/18/sports/transgender-athletes-womens-sports-idaho.html> [<https://perma.cc/M8T6-7HVG>].

94. Sharrow, *supra* note 16, at 17–18.

95. *Id.*

96. See Nancy Fraser, *Feminism, Capitalism, and the Cunning of History*, 56 NEW LEFT REV. 97, 110–11 (2009). Elizabeth Sharrow points out that many of the bills even quote Justice Ginsburg’s language from *United States v. Virginia*, 518 U.S. 515 (1996), acknowledging “inherent differences” between men and women, drawing on a feminist icon to give cover to a regressive gender politics. Sharrow, *supra* note 16, at 14.

97. Sharrow, *supra* note 16, at 18.

98. *Id.*

99. Bathroom bills have been signed into law in Oklahoma and Alabama. See Bryan Lyman, *Alabama passes expanded version of transgender ‘bathroom bill’ that includes LGBTQ discussion ban*, USA TODAY NEWS (Apr. 8, 2022), <https://www.usatoday.com/story/news/nation/2022/04/08/alabama-don-t-say-gay-bill/9510929002> [<https://perma.cc/7BEP-DA54>].

100. See *id.*

101. Bathroom bills have been signed into law in Oklahoma and Alabama. See *id.*; ABC NEWS, *Oklahoma governor signs transgender bathroom bill*, ASSOCIATED PRESS

The rhetoric appealing to Title IX supporters on the trans exclusion issue has not been subtle; proponents of the bills have explicitly drawn upon on the popularity of Title IX to make their case.¹⁰² The threat is described as existential.¹⁰³ For example, a Republican sponsor of Idaho's bill, the first trans-exclusion athletics bill to pass a state legislature, drew upon on her own experience of playing and then coaching women's college basketball.¹⁰⁴ She spoke of the threat in dire terms: "The progress that we, as women, have made over the last 50 years will be for naught and we will be forced to be spectators in our own sports."¹⁰⁵

The fragility of Title IX's gains, and the scarcity of girls' athletic opportunities, is central to making the case for perceiving a threat.¹⁰⁶ Indeed, it is true that even after fifty years of Title IX, significant disparities remain between girls and boys in sport, both in terms of who gets to play and how they are treated.¹⁰⁷ But the politics of these bills are not actually concerned with the underlying scarcity.¹⁰⁸ In Pennsylvania, for example, the sponsors of a trans exclusion bill represent districts that appear to be out of compliance with Title IX, and none of the bill's sponsors are on record as having ever taken any action to strengthen Title IX enforcement or address the inequities in their districts.¹⁰⁹ The trans threat argument not only depends on the reality of scarcity to play up the threat to women's sports, it deflects from the actual source of scarcity, which is the allocation of greater resources and opportunities to men's sports.¹¹⁰

Not just politicians, but some legal scholars too have echoed themes suggesting that trans athletes pose a threat to girls' and

(May 26, 2022, 12:55 PM), <https://abcnews.go.com/US/wireStory/oklahoma-governor-signs-transgender-bathroom-bill-84998910> [<https://perma.cc/57H8-WWLE>].

102. See Brassil & Longman, *supra* note 93.

103. See *id.*

104. *Id.*

105. *Id.*

106. See ELIZABETH TANG, AMY KATZ, LINDA MORRIS, ANNE LIEBERMAN, CHELSEA MUTUAL, SUE KLEIN, BONNIE WASHICK, CHANCE COCHRAN, ASHLAND JOHNSON, ELIZABETH KRISTEN, JENNIFER BECKER, MIMI LUFKIN & ROBERTA RINCON, TITLE IX AT 50: A REPORT BY THE NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION, NAT'L COAL. FOR WOMEN AND GIRLS IN EDUC. 33 (2022) [hereinafter TANG ET AL.].

107. See WOMEN'S SPORTS FOUND., *supra* note 2, at 10; NCAA, NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 86 (2018); TANG ET AL., *supra* note 106, at 33–34; NCAA, TITLE IX 50TH ANNIVERSARY: THE STATE OF WOMEN IN COLLEGE SPORTS 1 (2022).

108. WOMEN'S SPORTS FOUND., *supra* note 2, at 33.

109. Cassie Miller, *Are GOP lawmakers pushing ban on transgender athletes ignoring gender inequities at home districts?*, PENN. CAP. STAR (Sept. 7, 2021, 7:10 AM), <https://www.penncapital-star.com/civil-rights-social-justice/lawmakers-who-sponsored-ban-on-transgender-athletes-find-title-ix-inequities-at-home-districts> [<https://perma.cc/ZP34-LH39>].

110. See WOMEN'S SPORTS FOUND., *supra* note 2, at 46.

women's sports.¹¹¹ The most notable and likely impactful support for restricting transgender girls' and women's participation in girls' and women's sports has come from scholars and commentators known for their support for gender equality in sports.¹¹² Prominent among them, Donna Lopiano, a former president of the Women's Sports Foundation, and Duke Law Professor Dorianne Coleman, have forcefully argued in favor of greater restrictions on transgender girls' and women's competition in women's sports.¹¹³ Working with some former Olympic athletes and other women's sport supporters, they have formed a women's sports policy working group to advocate for crafting exclusions for transgender women on women's teams.¹¹⁴ Although their arguments have focused on more elite levels of competitive sport, while the legislative efforts discussed above are nowhere near so targeted,¹¹⁵ their common ground has lent legitimacy to the pro-Title IX posturing of the broader trans exclusion effort.¹¹⁶ These scholars and advocates have redirected feminist themes in a way that infuses new meanings for strategic effect.¹¹⁷ For example, some in this group have used the term "male dominance" to describe the transgender threat to cisgender girls and women in sport¹¹⁸—a term that dominance feminists advanced decades ago to articulate a theory of sexual subordination of women and to protect women from cisgender men.¹¹⁹ But the term as used in this literature refers to

111. See, e.g., Chris Surprenant, *Accommodating Transgender Athletes*, GEO. J. L. & PUBLIC POL'Y 905 (forthcoming 2022) (posted on SSRN) (positing a trade-off between the individual value of athletic achievement, the societal interest in sports as a meritocratic institution, and justice for transgender persons, but arguing that it is not obvious that the latter interest suffices to justify accommodating trans athletes' participation in sports); Michael E. Rosman, *Gender Identity, Sports, and Affirmative Action: What's Title IX Got to Do with It?*, 53 ST. MARY'S L. J. manuscript at 3–5 (forthcoming 2022) (providing arguments for why Title IX might require, not just permit, sex-separate sports opportunities, but proclaiming agnosticism as to whether Title IX requires or prohibits assignment to sex-separate teams based on gender identity).

112. Doriane Lambelet Coleman, Michael J. Joyner & Donna Lopiano, *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 DUKE J. GENDER L. & POL'Y 69, 82 (2020).

113. Doriane Lambelet Coleman, *Sex and Sport*, 80 L. & CONTEMP. PROB. 63, 66 (2017); Coleman, Joyner & Lopiano, *supra* note 112, at 122.

114. *About Us*, WOMEN'S SPORTS POL'Y WORKING GRP., <https://womenssportspolicy.org/about-us> [<https://perma.cc/B4EH-LLTT>].

115. See Sharrow, *supra* note 16, at 14.

116. See WOMEN'S SPORTS POL'Y WORKING GRP., *supra* note 114.

117. See Doriane Coleman, Martina Navratilova & Sanya Richards-Ross, *Pass the Equality Act, but don't abandon Title IX*, WASH. POST (Apr. 29, 2019), https://www.washingtonpost.com/opinions/pass-the-equality-act-but-don-t-abandon-title-ix/2019/04/29/2dae7e58-65ed-11e9-a1b6-b29b90efa879_story.html [<https://perma.cc/V88V-FVE7>].

118. *Id.*

119. See Andrea Mazingo, *The Intersection of Dominance Feminism and Stalking Laws*, 9 NW. J. L. & POL'Y 335, 337–38 (2014).

the dominance of transgender women over cisgender women, and not from sexual oppression, but athletic competition.¹²⁰ Instead of a theory for understanding structural male privilege, “male dominance” in this rhetoric has taken on a new meaning by subscribing to notions of inherent fragility in girls and women’s bodies.¹²¹ Bodies, not social and institutional structures, are the key site of inequality.¹²²

Whether pitched at elite sport or sport writ large, the case for excluding trans athletes from girls’ and women’s sports rests on three premises.¹²³ First, the girls and women Title IX protects are cisgender.¹²⁴ Second, allocating competitive opportunities among cisgender and transgender girls and women is a zero-sum game under conditions of scarcity.¹²⁵ And finally, it is not the opportunity to participate, but the opportunity to win that necessitates protection from trans girls and women.¹²⁶ Each of these premises reflects a particular position on Title IX’s meaning for gender equality in sport. Together they set the stage for a gender panic now playing out in sport.¹²⁷

C. Sport as the Center of the New Trans Panic

What we are experiencing with the wave of legislative activity seeking to exclude trans girls from sports is a moral panic.¹²⁸ The literature on moral panics describes their goal as “to push the marginalized back to the margins.”¹²⁹ Purveyors of moral panic seek to fundamentally change the terms of engagement well beyond the specific issue at the site of the panic.¹³⁰ The agenda is about the social construction of the group targeted—setting off the group as outside of the community—and not so much the specifics of the issue.¹³¹ The issue is just the vehicle for playing out the moral panic;

120. Coleman, Navratilova & Richards-Ross, *supra* note 117.

121. *See id.*

122. *Id.*

123. *See* WOMEN’S SPORTS FOUND., *supra* note 2, at 56.

124. *See id.*

125. *Id.*

126. *Id.*

127. *See* Christopher Pepin-Neff & Aaron Cohen, *President Trump’s Transgender Moral Panic*, 42 POL’Y STUD. 1, 4 (2021).

128. For a primer on moral panics and their foundational theorizing in sociology, see Erich Goode & Nachman Ben-Yehuda, *Moral Panics: Culture, Politics, and Social Construction*, 20 ANN. REV. SOC. 149, 155–56 (1994).

129. Pepin-Neff & Cohen, *supra* note 127, at 1.

130. David Garland, *On the Concept of Moral Panic*, 4 CRIME, MEDIA, CULTURE: AN INT’L J. 9, 11 (2008) (arguing that a moral panic combines a moral social reaction with the idea that the specific targeted issue is symptomatic of a broader malaise).

131. *See* Pepin-Neff & Cohen, *supra* note 127, at 5.

it is used strategically, as a symptom of a deeper moral threat to traditional social values.¹³²

A key feature of a moral panic is the disproportionality of the sought-after response, which imposes a hefty penalty on a marginalized group, compared to the dearth of empirical evidence for the perceived social problem.¹³³ The high emotional pitch of the discourse is another distinguishing feature that separates a moral panic from a mere policy dispute.¹³⁴ Anger is generated as a way to achieve some degree of consensus that the targeted group poses a threat to the community.¹³⁵ The emotional urgency fueled by the panic is used to break through the incrementalism of normal politics and bypass engagement with the nuances of policy disagreement.¹³⁶ The Satanic panic in the 1980s, in which a fury over lurid claims of ritualistic abuse of animals, women, and children fueled a movement touting the urgency of restoring traditional Christian values, is one example of such a panic.¹³⁷ Another is the intermittent panic from the 1970s forward over pedophilia and conspiracies to cover it up, often used to mobilize suspicion against gay men and perceived threats to family values.¹³⁸

In the panic over trans athletes, the threat posed by transgender youth to conventional understandings of sex and gender has merged with the moral imperative to “protect girls” in sports.¹³⁹ Sport is not so much the true object of the panic as the lever to construct transgenderism as deviant and to restore traditional understandings of sex and gender.¹⁴⁰ Sport is staged as the playing field for a broader contest over the boundaries of who counts as a girl, and how to define the boundaries of insiders and outsiders within the community.¹⁴¹

The timing of the present panic coincides with a broader backlash against LGBTQ equality and an assault on many of the feminist

132. Garland, *supra* note 130, at 15–16.

133. See Goode & Ben-Yehuda, *supra* note 128, at 156.

134. Jock Young, *Moral Panic: Its Origins in Resistance, Resentment and the Translation of Fantasy into Reality*, 49 BRIT. J. CRIMINOLOGY 4, 4 (2009).

135. See KARIN WAHL-JORGENSEN, A NETWORKED SELF AND PLATFORMS, STORIES, CONNECTIONS 81–82 (Zizi Papcharissi ed., 2018).

136. See Young, *supra* note 134, at 13–14.

137. Goode & Ben-Yehuda, *supra* note 128, at 166.

138. *Id.* at 162.

139. See Sharrow, *supra* note 16, at 18.

140. See Pepin-Neff & Cohen, *supra* note 127, at 4 (“[T]he problem is not the perceived offence taking place itself, but the group itself, and therefore the over-reaction is meant to send a message to the media, the public, and the group about where cultural values lie.”). The moral panic literature uses the term “deviance” to indicate social groups that have low power and are subjected to stigma and negative perceptions by higher-power social groups. See *id.*

141. See *id.* at 6.

gains wrought by the women's movement since the 1960s and 70s.¹⁴² Transgender individuals are a predictable target for such a broader gender panic.¹⁴³ The very existence of transgender and non-binary individuals poses a threat to the traditional (fixed, binary, hierarchical) gender order.¹⁴⁴ As a group, transgender women, men, and non-binary persons hold a precarious position in American law and culture.¹⁴⁵ Hard-fought legal gains in recent years have brought transgender rights into the spotlight and to the forefront of America's culture wars.¹⁴⁶ In recent years, a growing recognition of transgender rights has prompted fierce resistance by gender conservatives seeing a threat to natural order of men's and women's roles in society.¹⁴⁷ For example, opposition to trans inclusion and gender diversity has been central to Christian nationalists who subscribe to beliefs in a natural order in which sex and gender are aligned, fixed, binary, and deterministic of appropriate roles in the family and society.¹⁴⁸ The current push to ban trans girls from sport is a key part of this broader mobilization.¹⁴⁹ There is no daylight between the trans athlete exclusion laws now sweeping state legislatures and the provocative question a Republican Senator posed to then-Judge Ketanji Brown Jackson, "[c]an you provide a definition for the word 'woman'?"¹⁵⁰ While centered on sport, the panic over trans athletes has its sights set on a more sweeping rollback of gender norms untethered to sport.¹⁵¹

The current focus on trans athletes builds on a series of recent measures directed at stigmatizing and marginalizing the transgender

142. Young, *supra* note 134, at 7–8.

143. *Cf. id.* at 14 (“[T]he trigger groups are not chosen by accident; the anger is not a misapprehension. For the group or event chosen as a focus of moral panic is closely related to the source of anxiety.”).

144. Laurel Westbrook & Kristen Schilt, *Doing Gender, Determining Gender: Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System*, 28 GENDER & SOC’Y 22, 52 (2014).

145. *See id.* at 37.

146. *Id.* at 43.

147. *See id.* (discussing reactionary opposition to transgender rights as a “gender panic” fueled by fears of a “genderless society” and that the goal is “to obliterate the distinction between men and women.”).

148. Daniel D. Miller, *Queer Panic: An Interpretation of Christian Nationalist Opposition to the Trans and Gender Nonconforming Community*, 50 BULL. FOR STUDY OF RELIGION 104, 104–05 (2021). *See also* Amy L. Stone, *Gender Panics about Transgender Children in Religious Right Discourse*, 15 J. LGBT YOUTH 1, 5–6 (2018) (analyzing the religious right’s targeted campaigns against transgender youth).

149. Westbrook & Schilt, *supra* note 144, at 42–43.

150. *See* Michael Conklin, *Grandstanding or Gotcha?: Asking Ketanji Brown Jackson “Can You Provide a Definition of the Word ‘Woman?’”* 1 (Apr. 2, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4074186 [<https://perma.cc/GK8K-GAGQ>].

151. *See* Westbrook & Schilt, *supra* note 144, at 47.

community.¹⁵² Soon after taking office, President Trump instigated a moral panic around transgender military service personnel by portraying them as a burden on military readiness (based on the ruse that they were only there to try to get government-funded medical care to pay for gender transition) and a threat to national security.¹⁵³ Since that opening move, transgender youth have been targeted outside of sport, including through bills that would require child protective services to investigate parents for providing their trans children with gender-affirming medical care.¹⁵⁴ Such measures have not had as much success in state legislatures as the bills excluding trans athletes, but they were signed into law in several states.¹⁵⁵ And in Florida, the so-called “Don’t Say Gay” bill was passed by the state legislature and signed into law by Governor DeSantis.¹⁵⁶ At the federal level, the Trump Administration’s Department of Education and Department of Justice withdrew their prior guidance protecting transgender students from discrimination under Title IX, in response to hyped up controversy over restroom usage by transgender students.¹⁵⁷ Among the mix of its anti-transgender measures, the Trump Administration also rolled back anti-discrimination protections in health care for transgender patients and restricted transgender medical care in federal prisons.¹⁵⁸

The panic over trans athletes comes at a time when right-wing activism is capitalizing on new opportunities for retrenchment on constitutional rights such as abortion and same-sex marriage,¹⁵⁹ and shoring up robust religious freedom rights which can serve as bulwarks against expansive rights relating to gender and sexuality,

152. See Margot Sanger-Katz & Noah Weiland, *Trump Administration Erases Transgender Civil Rights Protections in Health Care*, N.Y. TIMES (Sept. 28, 2021), <https://www.nytimes.com/2020/06/12/us/politics/trump-transgender-rights.html> [<https://perma.cc/U7SZ-3RZB>].

153. Pepin-Neff & Cohen, *supra* note 127, at 2.

154. See Goodman & Morris, *supra* note 85.

155. See Emily Bazelon, *A Medical Frontier: Doctors Who Provide Gender-Affirming Care Are Split on How to Evaluate Teens*, N.Y. TIMES (June 15, 2022), <https://www.nytimes.com/2022/06/15/briefing/transgender-care-experts-divide.html> [<https://perma.cc/X282-C5E7>] (noting the laws passed in Alabama, Arkansas, and Arizona).

156. See Patricia Mazzei, *DeSantis Signs Florida Bill That Opponents Call ‘Don’t Say Gay’*, N.Y. TIMES (Mar. 28, 2022), <https://www.nytimes.com/2022/03/28/us/desantis-florida-don-t-say-gay-bill.html> [<https://perma.cc/UVB6-XPPC>]. Cf. Pepin-Neff & Cohen, *supra* note 127, at 7 (“[M]oral panics are not generated by mistake. They can serve as a model of governance by invalidating the identity of the [sic] group after group to advance policy after policy.”).

157. Sandra Battle & T.E. Wheeler, II, *Dear Colleague Letter*, U.S. DEPT OF JUST. & U.S. DEPT OF EDUC. (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> [<https://perma.cc/3QTL-JW9B>].

158. See Sanger-Katz & Weiland, *supra* note 152.

159. See Mazzei, *supra* note 156.

such as access to contraception and LGBTQ equality.¹⁶⁰ The trans athlete bills are a way to press forward an agenda for more conservative interpretations of gender equality on a range of issues.¹⁶¹ The trans panic in sports must be understood against the backdrop of this broader gender agenda.

Though bigger than sports, it is no coincidence that the center of the anti-transgender storm is now located in sport.¹⁶² One reason why sport is ripe for a gender panic is that the legal framework governing athletic eligibility in interscholastic sports is largely decentralized and can be altered at the local level.¹⁶³ Unlike many controversial issues involving gender and sexuality—such as same-sex marriage, which would require a constitutional amendment or the Supreme Court to overrule its precedent,¹⁶⁴ or the meaning of sex discrimination in employment, which would now require Congressional action or Supreme Court reversal of precedent¹⁶⁵—the rules for athletic eligibility are set by state law, state athletic conferences, or, where they have discretion, individual school districts.¹⁶⁶ Although Title IX, at the federal level, sets an outer limit on how this is done,¹⁶⁷ Title IX's meaning for transgender athletes is unsettled, leaving room for local rules to fill in the gaps and create test cases.¹⁶⁸ And because local school districts and interscholastic conferences are governed by state law,¹⁶⁹ the structure of sport governance makes state legislatures—many of which are solidly conservative—a key policy arena for changing the rules of athletic eligibility.¹⁷⁰ This has created conditions ripe for policy interventions by state legislatures in conservative states, leading to a snowball effect of bills excluding trans girls from girls' sports.¹⁷¹

Sport is also a fruitful site for a moral panic because of how Title IX has elevated the status of girls' and women's sports.¹⁷²

160. See Sharrow, *supra* note 16, at 10.

161. *Id.* (discussing the right-wing gender politics behind the trans athlete bills).

162. *Id.* at 2.

163. See Pepin-Neff & Cohen, *supra* note 127, at 6 (explaining that a low policy threshold gives moral entrepreneurs an opening to turn a moral panic into policy action).

164. See Sharrow, *supra* note 16, at 10.

165. See *Bostock*, 140 S. Ct. at 1738.

166. See Sharrow, *supra* note 16, at 5.

167. See E. J. STAUROWSKY, N. WATANABE, J. COOPER, C. COOKY, N. LOUGH, A. PAULE-KOBA, J. PHARR, S. WILLIAMS, S. CUMMINGS, K. ISSOKSON-SILVER & M. SNYDER, WOMEN'S SPORTS FOUND., CHASING EQUITY: THE TRIUMPHS, CHALLENGES, AND OPPORTUNITIES IN SPORTS FOR GIRLS AND WOMEN 1, 44 (2020) [hereinafter STAUROWSKY ET AL.].

168. See Sharrow, *supra* note 16, at 7, 14.

169. *Id.* at 5.

170. See *id.*

171. *Id.* at 9.

172. See *id.* at 3.

Proponents of excluding trans athletes have been able to marshal some of their strength from supporters of Title IX.¹⁷³ The literature on moral panics uses the term “moral entrepreneurs” to describe the policy actors who capitalize on the cultural conditions of the moment to create the panic.¹⁷⁴ Moral entrepreneurs are most successful when they “have the ability to tap into the language and interests of diverse groups to create a common frame of reference, or a unifying social construction or vision, that bridges previous difference.”¹⁷⁵ This is where the popularity of Title IX and women’s sports comes in. The movement to restore traditional gender mores—defining sex and gender as fixed and not fluid—has found common ground with the moral imperative to protect girls’ sports, so that both moral postures share a common perception of trans girls as a threat.¹⁷⁶ The very progress Title IX has made in expanding support for girls’ sports created the opportunity for a broader groundswell than the traditional gender mores base could have garnered on its own.¹⁷⁷ In this sense, the very success of Title IX, combined with the fragility of those gains, have made sport a successful staging ground for a transgender panic.¹⁷⁸

This is not the first time the women’s rights community has split over the inclusion of trans women.¹⁷⁹ At earlier times in the women’s movement, controversies arose over whether transgender women should be permitted to join women’s support groups and consciousness-raising circles.¹⁸⁰ While some in the women’s community welcomed their participation,¹⁸¹ others objected that trans women, raised with the social privileges of masculinity, would threaten the safe spaces of women-only groups.¹⁸² Although fiercely fought at the time, these conflicts largely faded into the background of feminist politics and did not materialize into a broader, mainstream movement to exclude transgender women from women-only spaces.¹⁸³

173. *Id.* at 7.

174. See Young, *supra* note 134, at 13; ANNE SCHNEIDER & HELEN INGRAM, SOC. CONSTR. AND PUB. POL’Y 10 (2005).

175. SCHNEIDER & INGRAM, *supra* note 174, at 10–11.

176. See Sharrow, *supra* note 16, at 17.

177. *Id.* at 17, 18.

178. *Id.*

179. See Elvia R. Arriola, *Law and the Gendered Politics of Identity: Who Owns the Label “Lesbian”?*, 8 HASTINGS WOMEN’S L. J. 1, 2, 12 n. 36 (1997) (discussing a controversy over the inclusion of a transwoman in a mostly lesbian women-only support group for survivors of sexual assault and incest, and noting a controversy over the inclusion of trans women at a women’s music festival).

180. *Id.*

181. *Id.* at 2.

182. *Id.*

183. See Katelyn Burns, *The rise of anti-trans “radical” feminists, explained*, VOX

Sport is a rare area of sex-separation where there is—thanks largely to Title IX—something valuable reserved to girls and women worth preserving. Although the battles over entry to feminist consciousness groups may have felt high stakes at the time, there was little status or material gains to be won or lost, and not much concern in popular culture over preserving the benefits of women-only groups for anyone.¹⁸⁴ More recently, restrooms have been a site of controversy over who belongs in sex-separate spaces.¹⁸⁵ There, a panic over trans inclusion gained some traction, but has not reached the apex of the panic in sports.¹⁸⁶ Calls to restrict women's restrooms to cisgender girls did not win over girls' and women's equity advocates.¹⁸⁷

Sport is the sweet spot in part because of the success of Title IX in raising the prominence and cultural capital of women's sports.¹⁸⁸ Title IX has resulted in gains to women's sports that are both significant and tenuous.¹⁸⁹ Participation opportunities have grown exponentially since Title IX was enacted.¹⁹⁰ Yet, when resources tighten or conditions worsen, girls' and women's sports are still the most vulnerable to cuts.¹⁹¹ And even though girls' and women's sports have benefited immensely in treatment and resources since Title IX was enacted, deep disparities remain.¹⁹² It is this combination of progress and ongoing scarcity that has made the alleged threat posed by trans girls in sports palpable enough to draw supporters even from some in the women's sports community.¹⁹³

(Sept. 5, 2019, 11:57 AM), <http://vox.com/identities/2019/9/5/20840101/terfs-radical-feminists-gender-critical> [<https://perma.cc/5HXS-7EHC>].

184. *See id.*

185. STAUROWSKY ET AL., *supra* note 167, at 20.

186. *See* Lyman, *supra* note 99 (describing the only two states to pass trans-exclusionary bathroom bills).

187. *See* Westbrook & Schilt, *supra* note 144, at 53.

188. *See* STAUROWSKY ET AL., *supra* note 167, at 43.

189. *See id.*

190. *See id.*

191. *See* Erin Buzuvis, Sarah Litwin & Warren K. Zola, *Sport Is for Everyone: A Legal Roadmap for Transgender Participation in Sport*, 31 J. LEGAL ASPECTS SPORT 212, 225–26 (2021). *Cf.* Ali Bowes, Lucy Lomax & Jessica Piasecki, *A Losing Battle? Women's Sport Pre- and Post-Covid-19*, 21 EUR. SPORT MGMT. Q. 443, 455 (2021) (discussing results of surveys showing great concern that women's sports will be hurt by COVID-related austerity in resources).

192. *See* STAUROWSKY ET AL., *supra* note 167, at 8.

193. *Cf.* Luke Armitage, *Explaining Backlash to Trans and Non-Binary Genders in the Context of UK Gender Recognition Act Reform*, J. INT'L NETWORK FOR SEXUAL ETHICS & POL., SPECIAL ISSUE, 11, 20 (2020) (explaining that the scarcity and precarity of women's rights and resources makes the perceived threat posed by trans women much greater than that presented by trans men, since cisgender men are socially dominant and privileged in resources).

The Title IX movement hoists a broad umbrella that covers many strands of feminism.¹⁹⁴ It encompasses the transformative potential of women's sport to change the cultural meaning of girlhood and upend the constraints of gender roles,¹⁹⁵ as well as a more instrumental interest in opening up sport as a path to privilege for individual girls and women.¹⁹⁶ The feminisms within Title IX are an eclectic bunch.¹⁹⁷ And some interests in support of women's sports are not identifiably feminist at all, such as harnessing and marketing "girl power" for economic gain and commodifying a saleable image of women's athleticism that taps into new markets.¹⁹⁸ When the trans panic arrived, the movement for girls' equality in sports was ripe for a split.

The role that Title IX has played in this illustrates the inherent risks of deploying a sex discrimination law to advance gender equality. Feminist legal scholar Laura Rosenbury, writing about postmodern feminism, elaborates these risks when she warns:

[A]ny feminist law reform necessarily participates in the construction of gender, perpetuating a system in which gender is necessary to qualify as human. That system in turn harms those individuals with unintelligible genders and channels other individuals into intelligible genders, limiting the range of possible gender performances.¹⁹⁹

The success of the trans exclusion movement has capitalized on the cultural tendency to regard transgender youth as—to use Rosenbury's term—"unintelligible" in their gender, and hence outside of Title IX's protection of athletic opportunities belonging to "women."²⁰⁰

At its core, Title IX provides a set of legal tools to advance equality for girls and women in sports, setting up a comparative analysis between men's and women's sports. In doing so, both the law and the legal actors who rely on it necessarily participate in the construction of gender.²⁰¹ Lines of inclusion and exclusion (who are women, and what are the boundaries of women's sports?) are embedded in the legal framework.²⁰² There has always been both promise and peril in

194. *Cf.* STAUROWSKY ET AL., *supra* note 167, at 43.

195. *See id.*

196. *See id.* at 7.

197. *See id.*

198. *Id.* at 14.

199. Laura Rosenbury, POSTMODERN FEMINIST LEGAL THEORY, in RSCH. HANDBOOK ON FEMINIST JURIS. 1, 8 (Robin West & Cynthia Grant Bowman eds., 2019).

200. *Cf.* Clarke, *supra* note 14, at 110.

201. *See, e.g.,* Suzanne Sangree, *Title IX and the Contact Sports Exception: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 446 (2000).

202. *See* BRAKE, *supra* note 7, at 20.

this legal framework. Indeed, one of Title IX's strengths as an equality law with teeth has been that it does not adhere to the typical gender-blind approach to sex discrimination.²⁰³ Unlike Title VII, which prohibits sex discrimination in employment and promises a gender-blind opportunity structure,²⁰⁴ Title IX takes a gender-conscious approach to monitoring equal opportunity in sport.²⁰⁵ That approach has much to be said for it: it is responsible for the growth of sports participation opportunities to the great benefit of girls and women.²⁰⁶ But it simultaneously constructs and reinforces the categories of woman/man and the salience of a male/female binary.²⁰⁷

The following section demonstrates how the trans panic has capitalized on one rationale for sex separation under Title IX while ignoring alternative rationales that are less convenient for the trans exclusion agenda. Understanding Title IX's relationship to transgender inclusion requires revisiting the rationale behind the law's allowance of sex-separation in athletics.

II. TITLE IX, SEX SEPARATION, AND THE REGULATION OF TRANSGENDER ATHLETES

The case for excluding transgender girls from girls' sports relies on a particular understanding of how and why Title IX regulates sex-separate athletics programs. This understanding is, at best, partial. It misrepresents both the scope and justifications for Title IX's application to sex separation in sports. This section traces the history and rationales behind Title IX's position on sex separation in athletics and argues that the trans exclusion movement has seized on one—and the most problematic—of the possible rationales for permitting sex separation in sports. When disaggregated, the various rationales for sex-separation have very different implications for trans inclusion.

A. *Revisiting Sex Separation in Sports Under Title IX*

The trans exclusion movement begins from the premise that sex separation is not only permissible, but a core, mandatory component

203. *See id.* at 19–20.

204. *See id.* at 19.

205. *See id.* at 20.

206. *See, e.g.,* Betsey Stevenson, *Title IX and the Evolution of High School Sports*, 25 CONTEMP. ECON. POL'Y 486, 490 (2007).

207. *See* Cheryl Cooky & Shari L. Dworkin, *Policing the Boundaries of Sex: A Critical Examination of Gender Verification and the Caster Semenya Controversy*, 50 J. SEX RSCH. 106–07 (2013) (critiquing the assumption of the “level playing field” in sex verification policies).

of Title IX.²⁰⁸ In fact, Title IX's relationship to sex separation is much more nuanced and contingent than proponents of trans exclusion acknowledge.

Contrary to the views of proponents of state legislative efforts to exclude trans girls from girls' sports, Title IX does not actually require separate athletic offerings for girls in any sport or at any level of competition.²⁰⁹ The statute itself says nothing about athletics and there was virtually no legislative history in the record on the subject when Congress passed Title IX.²¹⁰ The controversy over how Title IX should regulate athletics surfaced soon after the statute's enactment, when the NCAA and the major college athletic conferences objected that applying the law to athletics could cut into the resources devoted to football and other major men's sports.²¹¹ This push-back soon led to a proposed amendment by Senator Tower to exempt revenue-raising sports from the Title IX equation.²¹² The Tower amendment never gained enough votes to pass and was replaced with a substitute amendment by Senator Javitts that delegated the big questions about how Title IX applies to sports to the federal agency responsible for enforcing Title IX—initially the former Department of Health, Education and Welfare (HEW), which was succeeded by the Department of Education.²¹³ The Javitts Amendment passed, directing the agency to issue Title IX regulations taking into account the nature of particular sports.²¹⁴ The agency complied, issuing regulations that included coverage of athletics in 1974, which went into effect in 1975.²¹⁵

In developing the regulations, HEW initially considered whether to impose a gender-blind nondiscrimination model on athletics that would mirror what nondiscrimination means for employment.²¹⁶ The agency shied away from this position, however, based on the rationale that merely opening up existing teams to girls and women for try-outs would do little to develop meaningful opportunities for girls and women in competitive sports.²¹⁷ However, the agency did not,

208. See BRAKE, *supra* note 7, at 55–56.

209. See *id.* at 22.

210. Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL'Y 51, 53–54 n.11 (1996) (citing the two comments).

211. See *id.* at 54 (detailing this history).

212. *Id.*

213. *Id.*

214. *Id.* at 55.

215. See *id.* at 55–56 (detailing the history of the regulations); 34 C.F.R. § 106.1-82 (1975) (codifying athletics regulations).

216. BRAKE, *supra* note 7, at 19–20.

217. See *id.* at 21–22.

from that skepticism of gender-blind equality in sports, move all the way to requiring separate teams for girls and women.²¹⁸ Instead, the regulations take a permissive, not mandatory, stance toward sex separation: schools are not required to offer sports separate by sex, but they may do so if selection is based on competitive skill or the sport involved is a contact sport.²¹⁹ In taking this intermediate approach, the agency gave its endorsement to sex-separate competitive athletics programs, but did not require them.²²⁰

Indeed, after permitting sex-separate teams where selection is competitive or where the sport is a contact sport, the regulation goes on to require departures from sex separation in certain instances where a team in a particular sport is offered only to members of one sex and athletic opportunities for the excluded sex have “previously been limited,” as long as the sport is not a contact sport.²²¹ This provision has given girls the right to try out for boys’ teams in non-contact sports that are not offered to girls.²²² It has been less successful for boys seeking to compete on a girls’ team.²²³ The hurdle for boys in using this try-out right has been the difficulty of showing that boys have experienced limited opportunities in sports.²²⁴ Even for girls, the right to try out is limited by the contact sports exception, which has been scathingly and consistently criticized since its adoption.²²⁵ Despite its staying power (this part of the Title IX regulation has not been revisited or altered since its adoption in 1975),²²⁶ the contact sports exemption has not interfered with the constitutional rights of girls to compete with boys in contact sports as guaranteed under the Equal Protection Clause, which has provided a more robust set of crossover rights than Title IX.²²⁷ Although it remains embedded in the Title IX regulations, the very unpopularity of the contact sports exemption, and its failure to be replicated in equal protection rights, reflects the weakness of the rationale that girls are inherently too weak and fragile to participate in rough competition with boys. And yet, this presumption of inherent female

218. *See id.* at 22.

219. 34 C.F.R. § 106.41(b) (1980).

220. BRAKE, *supra* note 7, at 22.

221. § 106.41(b).

222. *See* BRAKE, *supra* note 7, at 22.

223. *Id.* at 57.

224. *See* Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168, 175 (1993) (male plaintiff suing school for right to try out for girls’ field hockey team).

225. *See, e.g.*, Sangree, *supra* note 201, at 382, 383–84, 388.

226. *See id.* at 387–88.

227. *See* BRAKE, *supra* note 7, at 49 (discussing equal protection cases in which girls succeeded in gaining the right to try out for boys’ sports teams not offered to girls).

fragility is the very rationale at the heart of the case for excluding transgender girls from girls' teams.²²⁸

The case for excluding trans girls from girls' sports rests on the same premise as the contact sports exception, that the rationale for separating sport by sex is based on biological difference and that girls are the inherently weaker sex.²²⁹ For example, Alabama's trans exclusion law explicitly references biological difference as the reason for maintaining sex-separation in athletics: "[b]ecause of the physical differences between biological males and biological females, having separate athletic teams based on the athletes' biological sex reduces the chance of injury to biological female athletes and promotes sex equality."²³⁰ Under the logic of these laws, the reason athletics are offered separately by sex is due to "inherent physical differences" that disadvantage girls across the board in competition with boys.²³¹

The biological justification for allowing sex-separate sports has always been problematic.²³² It rests on an oversimplified and exaggerated understanding of how biology and sex map onto athletic performance.²³³ The science of sex difference continues to be contested and unsettled, and does not actually support such strong claims of inherent biological advantages of males over female in sport.²³⁴ The role of testosterone, in particular, in predicting athletic performance is often overstated, relying on science that is either misinterpreted or exaggerated, more folklore than evidence-based.²³⁵ Biomedical and bioethics scholars Katrina Karkazis and Rebecca Jordan-Young use the term "T talk" to capture the direct and indirect claims and

228. See Sharrow, *supra* note 16, at 14.

229. See *id.*

230. Ala. Code § 16-1-52(5). See also H.B. 3, 112th Gen. Assemb., 1st Reg. Sess. (Tenn. 2021) (citing male biological athletic superiority as the rationale behind restricting girls' teams to biologically female athletes).

231. See, e.g., Caleb Trotter, *Approaching 50 Years: Title IX's "Competitive Skill" Exception to the Prohibition on Single-Sex Sports*, 10 MISS. SPORTS L. REV. 153, 177 (2021) (describing the reason for sex separation in athletics as based in biology, and the "inherent physical differences" that give boys an athletic advantage over girls).

232. See *id.* at 153–54.

233. See Sharrow, *supra* note 16, at 15 n.51 (reviewing the scientific literature on sex difference and stating that the peer-reviewed science finds that there is much more that we do not know than that we do know about sex differences in athleticism from hormones or other puberty related physiology).

234. See Rebecca M. Jordan-Young & Katrina Karkazis, *4 Myths About Testosterone*, *Scientific American*, SCI. AM. (June 18, 2019), <https://blogs.scientificamerican.com/observations/4-myths-about-testosterone> [<https://perma.cc/HC3S-ZJBG>].

235. See Katrina Karkazis & Rebecca M. Jordan-Young, *The Powers of Testosterone: Obscuring Race and Regional Bias in the Regulation of Women Athletes*, 30 FEMINIST FORMATIONS 1, 8 (2018); Katrina Karkazis & Rebecca M. Jordan-Young, *The Myth of Testosterone*, N.Y. TIMES (May 3, 2019), <https://www.nytimes.com/2019/05/03/opinion/testosterone-caster-semenya.html> [<https://perma.cc/HPY5-S79Y>].

associations that have turned the material substance of testosterone into a cultural symbol.²³⁶ T-talk codes testosterone as “male” even though it is naturally occurring in both men and women, is highly variable among individuals of both sexes, and is required for a broad range of human functions having nothing to do with reproductive functions or sex differences.²³⁷ And yet, higher than “normal” testosterone is only framed as problematic and unfair when it occurs in women; men with higher naturally occurring levels of testosterone are not viewed as holding an unfair advantage in competition with other men.²³⁸ Research into the athletic performance-enhancing effects of testosterone actually reveals a highly murky relationship between testosterone and athleticism, calling into question claims that high testosterone levels translate into better athletic performance.²³⁹ Nor does the evidence show that transgender girls or women have any inherent athletic advantage over cisgender girls and women.²⁴⁰

The biological rationale for sex separation also strips away the mediating influence of the structure and design of sport and the rules of competition that translate into whatever competitive advantage male athletes enjoy.²⁴¹ Under this logic, sex is presumed to determine athletic performance inexorably and innately.²⁴² This logic is flawed. Even assuming there exists some biological basis for sex difference in physical ability, it is the structure and culture of sport that turn such differences into competitive advantages and disadvantages.²⁴³ The biological justification obscures how sport itself is constructed rather than a product of nature.²⁴⁴ Physiological difference need not translate into competitive disparities; if it does, it is only through the design of particular sports, the mediating

236. Karkazis & Jordan-Young, *supra* note 235, at 7.

237. *Id.* at 7, 14.

238. See Cooky & Dworkin, *supra* note 207, at 108.

239. See CORDELIA FINE, TESTOSTERONE REX: MYTHS OF SEX, SCIENCE, AND SOCIETY 138 (2017); REBECCA JORDAN-YOUNG & KATRINA KARKAZIS, TESTOSTERONE: AN UNAUTHORIZED BIOGRAPHY 176–79 (2019); see also Jordan Buckwald, *Outrunning Bias: Unmasking the Justifications for Excluding Non-Binary Athletes in Elite Sport*, 44 HARV. J. L. & GENDER 1, 27–30 (2021) (reviewing the evidence linking testosterone to enhanced athletic performance and finding it lacking).

240. Bethany Alice Jones, Jon Arcelus, Walter Pierre Bouman & Emma Haycraft, *Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies*, 47 SPORTS MED. 701, 714 (2017); Buckwald, *supra* note 239, at 28–32.

241. See Buckwald, *supra* note 239, at 36–37.

242. See *id.*

243. See *id.*

244. See Bruce Kidd, *Sports and Masculinity*, 16 SPORT IN SOC'Y: CULTURES, COM., MEDIA, POL. 553, 558–59 (2013) (disputing the innateness and naturalness of male superiority in athletics and arguing that sport, power, and athleticism are all socially constructed and not the product of nature or biology).

forces of coaching, rules of play, practice time and training, and competitive opportunities.²⁴⁵

As sport and gender scholar Mary Jo Kane has explained, centering biological difference as the rationale for sex separation has created a paradigm in which “sport” is defined by the qualities in which men are believed to have a physical advantage.²⁴⁶ What counts as “sport” is conflated with the argument for men’s biological superiority.²⁴⁷ As Kane explains:

[T]he apparent natural superiority of the male athlete rests upon how athleticism is defined. Superior athletic performance is constructed in ways that privilege certain physical attributes where, on the average, men have an advantage over women. Sports that require muscle mass, strength, and explosive speed are significantly more prestigious in this society than sports that emphasize aesthetic grace and beauty. The overwhelming popularity of football compared to that of gymnastics illustrates the bias of our culture in favor of such traits. However, if superior athleticism was defined as the ability to do a back flip on a balance beam, females would be considered the superior athletes.²⁴⁸

Grounding the rationale for sex separation in sports on biological difference locks in a paradigm of sport that centers those sports in which muscle mass, power, speed, and strength are most highly prized.²⁴⁹ Sports that do not fit that paradigm—those that rely on strategy, tactical maneuvering, aesthetics, and a mix of different abilities—are pushed to the margins.²⁵⁰ Law professor and legal scholar Erin Buzuvis has posited that certain sports, using high school golf as an example, could be offered on a mixed-gender basis without reducing girls’ participation opportunities or compromising girls’ sporting experiences.²⁵¹ But proponents of excluding trans girls from girls’ sports pay no attention to differences between sports or to how a purported biological sex difference in athletic ability might vary by type of sport.²⁵² For example, women have been on an equal

245. See Buckwald, *supra* note 239, at 36–37.

246. Mary Jo Kane, *Media Coverage of the Post Title IX Female Athlete: A Feminist Analysis of Sport, Gender, and Power*, 3 DUKE GENDER L. & POL’Y 95, 96 (1996).

247. *Id.* at 97.

248. *Id.*

249. *Id.*

250. See *id.*

251. See Erin E. Buzuvis, *Att’y Gen. v. MIAA at Forty Years: A Critical Examination of Gender Segregation in High School Athletics in Massachusetts*, 25 TEX. J. C.L. & C.R. 1, 25–27 (2019) (arguing for expanding the menu of high school sports that offer “gender-free” options to include sports, such as golf, in which genders can productively compete together).

252. See *id.* at 23.

playing field, or even advantaged, in sports such as rock climbing, surfing, fencing, shooting, and ultra-distance competition in swimming, running, and biking.²⁵³ The rules of sport also matter in how biology translates into athletic performance, but are ignored by proponents of trans exclusion. Apart from sex, other physical and biological differences matter more in athletic ability for many sports.²⁵⁴ Height, weight, body type, and strength tests might be used to ensure fair play and neutralize competitive advantages between athletes, much like rules about weight class do in wrestling or swing handicaps in golf.

The biological justification reinforces the salience of sex as a singular ground of advantage on an otherwise equal playing field.²⁵⁵ But the otherwise equal playing field is a myth. There are many differences, physiological as well as social, that produce inequalities in athletic ability, all of which (except for sex) are tolerated.²⁵⁶ Myriad advantages, including with respect to coaching, training, nutrition, leisure and rest time, and athletic experience and opportunity, are submerged in the focus on sex-based advantage and never register as unfair.²⁵⁷ Other types of physiological advantages too, besides sex, that relate to body type, “performance enhancing genes,” and diagnosable conditions responsible for extraordinary height, limb length, and oxygen capacity are left unregulated in the structure of athletics competition.²⁵⁸

With its attendant complications and tensions, biological difference was never the only or the best justification for allowing separate athletic programs for girls and women.²⁵⁹ Sport and gender scholars have posited that it is the suppressed opportunities and support for girls and women in sports, rather than biological sex difference, that better explains the need for a sex-separate structure in sports.²⁶⁰ Feminist philosopher Iris Marion Young located the inhibition of female athleticism in the culture of femininity in which girls are socialized to move their bodies through the world in a constrained fashion, taking up little space, and with the impression

253. Cramer, *supra* note 1.

254. Trotter, *supra* note 231, at 165–66.

255. *See* Cooky & Dworkin, *supra* note 207, at 106–07.

256. *See id.*

257. Krech, *supra* note 52, at 265 (“[R]eliance on binary sex classification as the fundamental means of ensuring fairness in sport glosses over the fact that innumerable other natural and environmental factors contribute to each athlete’s relative advantages and disadvantages—from height and lung capacity to coaching and training facilities—none of which are used as a formal basis for separate categories of competition.”).

258. *See* Cooky & Dworkin, *supra* note 207, at 107.

259. *See id.*

260. *Id.* at 109.

of exerting little effort.²⁶¹ Even when girls are at face value encouraged to participate in sports, they receive mixed messages about how they should look and move that continue to inhibit their athleticism.²⁶² The theory behind Title IX leans heavily on the role of social construction in developing athletic interests and abilities.²⁶³ The framers of the Title IX regulations were acutely aware that, given the historic and continuing denial of equal training and support, female athletes would benefit from their own spaces in sport to develop their athletic talents.²⁶⁴ This rationale did not depend on the assertion of innate biological difference between the sexes, but rather on the historic and societal reality that girls and women have not had the benefit of anywhere near the same opportunities as boys and men to develop their athleticism.²⁶⁵ This justification for sex-separation, like the determination to build a regulatory model on the allowance of sex separate athletic programming, is one meant to be reevaluated as conditions, interests, and abilities change.²⁶⁶

Closely related to the disadvantages girls and women have faced in developing their athletic abilities is the rationale that, due to socialization and sport culture, mixed gender sports might not be as empowering for girls and women as separate programs.²⁶⁷ Similar to the case for women-only discussion groups, the concern was that male players might hog the playing field, refusing to fully engage with women as teammates or opponents, creating negative sport experiences that would further suppress girls' and women's interests and abilities.²⁶⁸ Some research on mixed gender teams backs up this

261. Iris Marion Young, *Throwing Like a Girl: A Phenomenology of Feminine Body Comportment Motility and Spatiality*, 3 HUM. STUD. 137, 149–50 (1980).

262. DAYNA B. DANIELS, POLYGENDERED AND PONYTAILED: THE DILEMMA OF FEMININITY AND THE FEMALE ATHLETE 17 (2009) (citing sport and gender sociologist Michael Messner).

263. See Cheryl Cooky, "Girls Just Aren't Interested": *The Social Construction of Interest in Girls' Sport*, 52 SOCIO. PERSP. 259, 260 (2009).

264. See A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71417–18 (Dec. 11, 1979) (codified at 45 C.F.R. pt. 86) (discussing how girls' and women's athletic interests have been historically suppressed and the restricted opportunities they have received for coaching and resources).

265. Erin Buzuvis, *Title IX: Separate but Equal for Girls and Women in Athletics*, in OXFORD HANDBOOK OF FEMINISM & L. IN THE U.S., *supra* note 14, at 11 (explaining that some supporters of sex separation emphasized the structural inequalities that have deprived girls and women from fully developing their athletic talents, such that lumping girls and women into competition with male athletes would exacerbate an already unequal playing field).

266. See *id.* at 23.

267. See Nikai Salcido, *Empowering young women to coach and organize can create opportunities for them, their communities*, ASU NEWS (Apr. 8, 2021), <https://news.asu.edu/20210408-solutions-all-female-sport-groups-create-space-empowerment-and-belonging> [<https://perma.cc/D8UW-YMDV>].

268. See NICOLE ZARRETT, CHERYL COOKY & PHILIP VELIZ, WOMEN'S SPORTS FOUND., COACHING THROUGH A GENDER LENS: MAXIMIZING GIRLS' PLAY AND POTENTIAL 1, 7 (2019).

prediction.²⁶⁹ For example, in soccer, boys do not pass as readily to girls; and in softball, boys field balls outside their zones, not trusting that the girl on the team will handle the play as well.²⁷⁰ Such experiences have a self-reinforcing stereotype effect, as girls and women learn to play more defensively and timidly in response to being marginalized and sidelined on the field.²⁷¹ Despite the post–Title IX cultural change in embracing girls' sports, female athletes continue to confront bias in mixed-gender settings.²⁷² One survey found that about a third of girls surveyed reported being made fun of by boys or harassed while practicing their sport.²⁷³ Separate sports can be defended, apart from any assumptions about biological difference, as a safe space for girls and women to develop as athletes free from such negative experiences.²⁷⁴

Separate sports for women were also supported—in hindsight, too idealistically—as a way to allow women to design sports for themselves and offset the ways in which girls and women in sport have been marginalized by male privilege.²⁷⁵ Supporters of keeping women's sports separate wanted a place where women could flourish as individuals and as athletes and where sport would be a source of growth and empowerment, allowing women's sports to develop differently from men's sports.²⁷⁶ Under this rationale, it was not biology that necessitated separation, but the desire to avoid the mistakes of men's athletics: the win-at-all-cost, corrupt, commercial model of sport, replete with gambling, corruption, and exploitation of athletes.²⁷⁷ The hope was that women would develop a better model of sport, one with more of an educational and participatory valence.²⁷⁸

A more cynical view by some feminist sport historians is that the reason for separating men's and women's sport was not about

269. *See id.*

270. *See* Ajay Smith, *Should girls be able to play on boys' teams? The positives and potential pitfalls for girls in mixed soccer*, PLAYER DEV. PROJECT (2022), <https://playerdevelopmentproject.com/qa-should-girls-play-in-boys-teams> [<https://perma.cc/SB74-Q6PR>]; *see also* EILEEN McDONAGH & LAURA PAPPANO, *PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS* 104 (2008).

271. *See* Daniel Smith & Sarah Martiny, *Stereotype Threat in Sport: Recommendations for Applied Practice and Research*, 32 *SPORT PSYCH.* 311, 312–13 (2018); *see also* Sian L. Beilock & Allen R. McConnell, *Stereotype Threat and Sport: Can Athletic Performance Be Threatened?*, 26 *J. SPORT & EXERCISE PSYCH.* 597, 598 (2004).

272. *See* ZARRETT, COOKY & VELIZ, *supra* note 268, at 7.

273. *Id.* at 5.

274. *See id.* at 8.

275. *See* McDONAGH & PAPPANO, *supra* note 270, at 192.

276. *See* SUSAN K. CAHN, *COMING ON STRONG: GENDER AND SEXUALITY IN TWENTIETH-CENTURY WOMEN'S SPORT* 6 (Univ. of Ill. Press, 2d ed. 2015).

277. Cramer, *supra* note 1.

278. *See id.*

protecting or benefiting women at all, but to preserve the masculinizing function of sport and its status-enhancing effects for men.²⁷⁹ As some feminist sport historians see it, women's sports were created to protect men from the social costs of competition with women.²⁸⁰ History holds numerous examples where the men's sports world reacted badly to situations in which a woman beat a man in a high profile athletic competition.²⁸¹ The history of the exclusion of women from Olympic sports aligns with this theory: when the International Athletic Federation finally permitted women to compete in the Olympics, it created separate competitions, by one account, in order to protect men's sports from being downgraded and feminized by women's participation.²⁸²

With a mix of justifications, Title IX's allowance of separate women's and girls' teams was always understood as a pragmatic compromise,²⁸³ and supporters of women's sports well understood that this compromise came with notable downsides.²⁸⁴ Sex separation set up a two-tier structure of sport in which girls and women would face stigma and inequality as second-tier athletes, while the men's programs enjoyed greater resources and prestige.²⁸⁵ Particularly if the separation was understood to denote women's innate athletic inferiority—the crux of the biological justification—the very fact of separation would reinforce women's second-class athletic status.²⁸⁶

These downsides are particularly pronounced where the biological rationale for sex separation is used to exclude not just boys but transgender girls from girls' sports.²⁸⁷ The argument that opening girls' sports to all athletes who identify as girls would unfairly prejudice cisgender girls sends an even more powerful message of innate,

279. *Id.*

280. *Id.* (quoting Sheree Bekker, a lecturer on sport and health at Bath University).

281. *See id.* (noting several historic examples of women outperforming men in elite sports, including in 1931 when 17-year-old Jackie Mitchell, a woman, struck out Babe Ruth and Lou Gehrig in an exhibition game).

282. Michele Krech, *The Misplaced Burdens of "Gender Equality" in Caster Semenya v. IAAF: The Court of Arbitration for Sport Attempts Human Rights Adjudication*, 19 INT'L SPORTS L. REV. 66, 69 (2019) (arguing that the actual reason for creating separate women's competitions in the Olympics was not to protect women's opportunities from men's competitive advantage, but "to monopolise the prestige and economic value of international athletics competition, in the face of rivalry from women's sport organisations.").

283. *See, e.g.,* ZARRETT, COOKY & VELIZ, *supra* note 268, at 7.

284. *See* Elizabeth A. Sharrow, *Sex Segregation as Policy Problem: A Gendered Policy Paradox*, 9 POL., GRPS., AND IDENTITIES 258, 264 (2021).

285. *See id.* at 260; *see also* MCDONAGH & PAPPANO, *supra* note 270, at 172; Nancy Leong, *Against Women's Sports*, 95 WASH. U. L. REV. 1, 16 (2018).

286. *See* Buzuvis, *supra* note 265, manuscript at 5–6; *see also* MCDONAGH & PAPPANO, *supra* note 270, at 40; Leong, *supra* note 285, at 16; B. Glenn George, *Fifty/Fifty: Ending Sex Segregation in School Sports*, 63 OHIO ST. L. J. 1107, 1149 (2002).

287. Sharrow, *supra* note 284, at 260.

biological female inferiority than sex separation from boys. The notion that even a tiny number of trans girls is enough to undermine the competitive opportunity of cisgender girls speaks volumes about how fragile their athleticism must be. The biological justification for separating boys and girls posits that mixed-gender teams with competition for selection could push girls to the margins, as an influx of boys came to dominate a team.²⁸⁸ Extending this logic to trans girls greatly amplifies the message of innate female inferiority.²⁸⁹

Cognizant of the costs of a sex-separate model of sports, supporters of Title IX's compromise believed it was ultimately justified by the upside of separate teams: maximizing the numbers of opportunities for girls and women to participate in sports.²⁹⁰ The thinking was that if girls had to compete with boys for sports opportunities, fewer girls would participate (whether because of differences in athletic ability, fewer opportunities for skills-development, the disempowering culture of mixed-gender sport, or some mix of these reasons).²⁹¹ Allowing separate sports for girls and women enabled Title IX to develop legal standards that would place pressure on schools to expand their girls' and women's sports programs to keep pace with, and support, their growing levels of interest and ability.²⁹² Title IX's influential three-part test, developed by the OCR as a measure for nondiscrimination in accommodating men's and women's athletic interest and ability, does exactly that.²⁹³ Using men's and women's enrollment as a baseline, the test encourages schools to either match participation opportunities for women to women's share of enrollment, demonstrate continuing growth in opportunities for women (the under-represented sex), or show that the existing athletic offerings already fully and effectively accommodate the interests and abilities of women.²⁹⁴ Without sex-separate athletic programs, that test would not have been developed, and mere formally gender neutral selection criteria for sports teams might have sufficed as the measure for Title IX compliance.²⁹⁵ Sex-blind try-out rights alone likely would not have produced the extraordinary growth in girls'

288. *See id.* at 265.

289. *Id.*

290. *See* BRAKE, *supra* note 7, at 20; *see also* CAHN, *supra* note 276 (contending that sports emphasizing speed or strength, such as track and basketball, would have very few girls and women in varsity competition if the teams were mixed-gender and required competition for team selection).

291. *See id.*

292. *See* OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., *Intercollegiate Athletics Policy: Three-Part Test—Part Three* (June 29, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/title9-qa-20100420.html> [<https://perma.cc/W9C5-2K4X>].

293. *Id.*

294. *Id.*

295. *See* BRAKE, *supra* note 7, at 20.

and women's sports that has occurred post–Title IX.²⁹⁶ A major upside of separation, then, is that Title IX law developed substantive measures of nondiscrimination that place pressure on schools to expand the number of girls and women actually participating in sports.²⁹⁷

In evaluating this upside, focusing on what is at stake in excluding transgender girls specifically, as distinct from separating girls and boys generally, leads to a very different calculus. Structuring teams for girls and women based on gender identity would not appreciably diminish the numbers of participation opportunities for cisgender girls and women nor undercut the workability of the three-part test.²⁹⁸ Moreover, the rationale for maximizing girls' and women's athletic participation fully extends to transgender girls and women.²⁹⁹ Not only are the benefits of sports no less important for transgender girls and women, but the sociological and cultural benefits of broad-based participation are particularly salient for transgender girls and women.³⁰⁰ Expanding girls' and women's sports participation has the potential to upend gender stereotypes and ease the constraints of gender roles.³⁰¹ As legal scholar Kimberly Yuracko has argued, the goal of the three-part test in expanding women's sports participation is best justified under what she calls a "perfectionist" rationale that values women's athletic participation in order to change or perfect the social order.³⁰² Under this view, the goal of increasing women's athletic participation promotes cultural transformation by expanding who is considered an athlete and expanding the cultural understanding of what it means to be a woman.³⁰³ Neither the absolute number of opportunities available to girls and women, nor the culturally transformative potential of women's sports, are compromised by the inclusion of trans girls and women in girls' and women's sports.³⁰⁴

There is a long-standing tension in the justifications for sex separation in sport that coexists alongside the ongoing dilemma of how to approach girls' and women's equality in sports.³⁰⁵ The current trans panic has exploited these tensions by seizing on the most problematic of the justifications for sex separation, biological difference,

296. See George, *supra* note 286, at 1142.

297. See OFF. FOR CIV. RTS., *supra* note 292.

298. See Sharrow, *supra* note 284, at 260.

299. See BRAKE, *supra* note 7, at 20.

300. See *id.*

301. Sharrow, *supra* note 284, at 270.

302. Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. UNIV. L. REV. 731, 737 (2003).

303. See *id.*

304. See *id.* at 791.

305. Sharrow, *supra* note 284, at 260.

and using it to advance a trans exclusionary agenda.³⁰⁶ In this moment of gender panic, Title IX supporters should recall that the biological justification for sex separation was never a singular rationale, and it was always the most problematic of the possible justifications for separate girls' and women's athletic programs.³⁰⁷ The next section considers Title IX's meaning for transgender inclusion specifically, an issue that is unsettled and hotly contested.

B. Title IX's Application to Transgender Athletes

No single issue in Title IX has whipsawed between extremes more than the Department of Education's position on the law's applicability to transgender students.³⁰⁸ The official position on this issue taken by the Office for Civil Rights of the Department of Education (OCR) has changed three times over the course of the past three Administrations.³⁰⁹ Far from being politically unaccountable, OCR is highly attuned to shifts in the national political constituencies represented by Presidential administrations.³¹⁰ Particularly when OCR issues guidance interpreting the Title IX regulations, and does not go through notice and comment rule-making, the ease of changing positions makes the agency very quick to reflect the politics of a new Administration, even if it means a wholesale reversal of positions.³¹¹ In a span of just over five years, the agency has vacillated between construing Title IX to prohibit discrimination based on gender identity, including on school sports teams, to prohibiting schools from allowing transgender girls to compete on girls' teams, and back again, albeit with the details in this last round remaining to be spelled out in a forthcoming formal rule-making process.³¹²

In the Obama Administration, late in President Obama's second term, OCR for the first time issued official guidance interpreting Title IX to require schools to treat students according to their gender identity for school-related purposes.³¹³ With respect to athletics

306. See Chase Strangio & Gabriel Arkles, *Four Myths About Trans Athletes, Debunked*, ACLU NEWS & COMMENT. (Apr. 30, 2020), <https://www.aclu.org/news/lgbtq-rights/four-myths-about-trans-athletes-debunked> [https://perma.cc/N2J7-K6JK].

307. See Leong, *supra* note 285, at 16.

308. See COLE, *supra* note 27, at 2.

309. *Id.*

310. See Samuel R. Bagentos, *This Is What Democracy Looks Like: Title IX and the Legitimacy of the Administrative State*, 118 MICH. L. REV. 1053, 1056 (2020).

311. *Id.*

312. See *id.*

313. Catherine E. Lhamon & Vanita Gupta, *Dear Colleague Letter: Transgender Students*, U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC. (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [https://perma.cc/68P9-25LP].

specifically, the guidance instructed schools that they may not “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) or others’ discomfort with transgender students.”³¹⁴ While OCR stopped short of prescribing a categorical rule requiring schools to respect a student’s stated gender identity for purposes of athletic eligibility, and allowed “age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students’ participation on the competitive fairness or physical safety of the sport,” the Obama-era OCR guidance foreclosed the categorical exclusion of transgender athletes from the team that corresponds to their gender identity.³¹⁵ A related contemporaneous document titled “Examples of Policies and Emerging Practices for Supporting Transgender Students” included examples of approved policies that either accepted gender identity conclusively or deferred to medical professionals with training in gender identity and advocacy for transgender students.³¹⁶

The Obama position did not last long.³¹⁷ The legality of the guidance was soon challenged for failing to go through public notice and comment and for alleged inconsistency with Title IX.³¹⁸ A federal district court in Texas agreed and issued a nationwide preliminary injunction enjoining the guidance in a lawsuit brought by eleven states with Republican governors, including Texas.³¹⁹ The case was soon rendered moot when the incoming Trump Administration rescinded the guidance, initially leaving questions about participation by transgender students in school athletics up to individual states, athletic associations, and school districts.³²⁰

The Trump Administration position soon evolved to take a less agnostic stance.³²¹ The opportunity for hardening the Administration’s position came in a test case that was first filed as a complaint with OCR brought by three cisgender track and field girls challenging the Connecticut Interscholastic Athletic Conference (CIAC) policy of allowing transgender athletes to compete on teams aligned with

314. *Id.*

315. *Id.*

316. U.S. DEPT OF EDUC., EXAMPLES OF POLICIES AND EMERGING PRACTICES FOR SUPPORTING TRANSGENDER STUDENTS (2016), <https://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf> [<https://perma.cc/KQ7H-QQKV>].

317. *See Texas v. United States*, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016).

318. *Id.* at 815.

319. *Id.* at 836.

320. Battle & Wheeler, II, *supra* note 157.

321. *See* Timothy C. J. Blanchard, *Letter of Impending Enforcement Action*, U.S. DEPT OF EDUC. (May 15, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01201004-a1.pdf> [<https://perma.cc/MG7H-K8M7>].

their gender identity.³²² The complainants claimed that this policy had permitted two transgender track and field athletes to compete and win medals in the state high school track championship meet, allegedly denying them an equal playing field to compete.³²³ The transgender girls targeted by the complaint were Black—a fact not mentioned in the complaint, but consistent with the history of racially disproportionate scrutiny of Black women’s legitimacy as female athletes.³²⁴ Represented by the Alliance Defending Freedom, the group behind the trans exclusion bills, the complainants filed with OCR in August of 2019.³²⁵ On May 15, 2020, the Trump Administration’s OCR issued a letter of finding agreeing with the complainants and determining that the CIAC policy discriminated against “women” in violation of Title IX.³²⁶ Meanwhile, the OCR complainants filed a parallel lawsuit in federal court in February of 2020.³²⁷ Ironically, shortly after filing suit, one of the cisgender girls challenging the rule won a state title in the indoor track championship meet in competition against one of the transgender girls targeted in the complaint; but that did not stop the plaintiffs from alleging unfair competition.³²⁸ The Trump Administration weighed in with an amicus curiae brief siding with the plaintiffs.³²⁹ In the waning days of the Trump Administration, while the lawsuit was pending, OCR issued a memorandum directing schools to determine eligibility for sex-separate opportunities and facilities, including athletics, based on a student’s “biological sex” and not transgender status or gender identity.³³⁰

When the Biden Administration took the reins, OCR reversed positions again.³³¹ The Biden Administration quickly halted OCR’s enforcement proceedings against the Connecticut school district for

322. *Soule v. Conn. Ass’n of Schs., Inc.*, No. 3:20-cv-00201, 2021 WL 1617206, at *2 (D. Conn. Apr. 25, 2021).

323. *Id.* at *7.

324. Sharrow, *supra* note 16, at 3 (noting that the targeted transgender girls in the Connecticut case were Black and arguing that “constructions of transgender identity are inherently racialized”).

325. *Soule*, 2021 WL 1617206, at *1.

326. Blanchard, *supra* note 321.

327. *Soule*, 2021 WL 1617206, at *1.

328. *See Teen Beats Transgender Competitor Amid Sports Participation Lawsuit*, NBC CONN. (Feb. 14, 2020, 11:35 PM), <https://www.nbcconnecticut.com/news/local/teen-involved-in-lawsuit-to-block-transgender-athletes-beats-competitor-targeted-in-case/2223944> [<https://perma.cc/32AU-VZTA>].

329. Brief for Defendants at 2, *Soule v. Conn. Ass’n of Schs.*, No. 3:20-cv-00201, 2021 WL 1617206 (D. Conn. Apr. 25, 2021).

330. Reed D. Rubinstein, *Memorandum for Kimberly M. Richey Acting Assistant Secretary of the Office for Civil Rights*, U.S. DEP’T OF EDUC. (Jan. 8, 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf> [<https://perma.cc/J4CB-8DLN>].

331. Title IX of the Education Amendments of 1972, 87 Fed. Reg. 41390 at 41531 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

allegedly violating Title IX by permitting transgender girls to compete in girls' track and changed the Administration's position in the pending litigation to support the CIAC policy.³³² In June of 2021, the new Administration issued a Notice of Interpretation officially reversing course on Title IX's applicability to transgender students.³³³ Following the Supreme Court's Title VII decision in *Bostock v. Clayton County*,³³⁴ OCR issued an interpretation stating that, like Title VII, Title IX's ban on sex discrimination encompasses discrimination based on gender identity and sexual orientation.³³⁵ Following the logic of *Bostock*, OCR explained, it did not need to take a position on the meaning of "sex" under Title IX, since even a traditional understanding of sex as based on "reproductive biology" would lead to the same result.³³⁶ Discriminating against a student for being transgender, OCR reasoned, treats an individual student differently than if the student had been assigned a different sex classification at birth, and therefore discriminates because of the student's sex.³³⁷ With OCR's position a moving target, however, this last OCR interpretation may not receive much deference in the courts.³³⁸

The case law has only just begun to grapple with the relationship between Title IX and transgender discrimination in sports.³³⁹ The most trans-exclusive position on Title IX, that the law requires sex separation according to "biological sex" rather than gender identity, has only been heard by one court to date.³⁴⁰ In the case against the CIAC policy brought by the parents of cisgender girls competing in high school track, the federal district court in Connecticut denied the plaintiffs' requested relief enjoining enforcement of the CIAC policy.³⁴¹ The court dismissed the claim as moot after the two transgender girls competing in track and field, whose participation was opposed by the plaintiffs, graduated.³⁴² The court observed that the plaintiffs failed to point to any transgender girls likely to compete against them in interscholastic track events in future events.³⁴³ The

332. *Id.*

333. *Id.*

334. 140 S. Ct. at 1754.

335. Enforcement of Title IX of the Education Amendments of 1972, 86 Fed. Reg. 32637, 32637 (proposed June 22, 2021) (to be codified at 34 C.F.R. ch. 1).

336. *Id.* at 32637–38 n.1.

337. *Id.* at 32638.

338. COLE, *supra* note 27, at 2.

339. See Christopher M. Pardo & Katherine P. Sandberg, *Transgender Students and Sports: Title IX Compliance*, AM. BAR ASS'N (Apr. 5, 2022), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2022/march-april/transgender-students-and-sports-title-ix-compliance [<https://perma.cc/3CMM-JZSF>].

340. *Soule*, 2021 WL 1617206, at *1.

341. *Id.* at *5.

342. *Id.*

343. *Id.*

court also rejected the plaintiffs' requests for injunctive relief revising the CIAC records to excise the finish times of the two transgender girls, which would have moved up the placement of the athletes who finished behind them, and for monetary relief.³⁴⁴ Because the court decided the case on justiciability grounds and lack of sufficient notice of a violation to support the damages claim, the court had no occasion to reach the CIAC's argument that Title IX guarantees only an equal opportunity to participate, and not a right to win or to compete against only cisgender athletes.³⁴⁵

Courts have yet to decide whether Title IX affirmatively requires schools to accept an athlete's gender identity as the relevant criteria for participating on a girls' sports team.³⁴⁶ But there is reason to believe that a categorical rule restricting transgender participants by assigned sex at birth would violate the statute's ban on sex discrimination.³⁴⁷ The few cases that have issued rulings on these sweeping new restrictions have involved claims under Title IX and the Constitution.³⁴⁸ So far, plaintiffs have succeeded in obtaining preliminary injunctions enjoining such laws, with the courts finding their challenges likely to succeed on the merits.³⁴⁹ The Idaho law excluding transgender girls from girls' sports was preliminarily enjoined by a federal district court on the grounds that the plaintiffs were likely to succeed on the merits.³⁵⁰ The Idaho statute was challenged by two plaintiffs, a transgender woman and intercollegiate athlete taking testosterone suppressants, and a cisgender girl competing in high school sports who argued that the law put her, but not high school boys, at risk of invasive sex testing and gender surveillance.³⁵¹ Siding with the plaintiffs, the court reasoned that restricting participation in women's sports based on "biological sex" likely denied them equal protection.³⁵² The new law discriminates against

344. *Id.* at *6–*7, *8.

345. *Id.* at *1.

346. *Soule*, 2021 WL 1617206, at *1.

347. See Michael J. Lenzi, Comment, *The Trans Athlete Dilemma: A Constitutional Analysis of High School Transgender Student-Athlete Policies*, 67 AM. U. L. REV. 841, 867 (2018).

348. See *Hecox*, 479 F. Supp. 3d at 930 (constitutional challenge); *B.P.J.*, 550 F. Supp. 3d at 347 (Title IX and constitutional claims); and *cf. A.M.*, 2022 WL 2291763 (S.D. Ind. July 26, 2022) (Title IX and constitutional claims).

349. See *Hecox*, 479 F. Supp. 3d at 988. See also *B.P.J.*, 550 F. Supp. 3d at 347 (Title IX and constitutional claims); *cf. A.M.* at 2022 WL 2291763 (Title IX and constitutional claims).

350. *Id.* at 987–88.

351. Blake Jones, *Freeze on Idaho's transgender athlete ban faces new challenges*, ID. EDUC. NEWS (Nov. 24, 2021), <https://www.idahoednews.org/school-policy/freeze-on-idahos-transgender-athlete-ban-faces-new-challenges> [<https://perma.cc/4CCC-LEVN>].

352. *Hecox*, 479 F. Supp. 3d at 987.

transgender women specifically, the court reasoned, and subjects all women participating in sports to invasive sex verification procedures that do not apply to men's sports.³⁵³ The court's reasoning is equally applicable to Title IX.³⁵⁴ Another federal district court issued a preliminary injunction enjoining West Virginia's similar ban, and also found a likelihood of success on the merits.³⁵⁵ The plaintiff in that case was an 11-year-old transgender girl, a track and field athlete, undergoing puberty-blocking medical treatment.³⁵⁶ The court ruled that, as applied to her, the West Virginia law likely violated her equal protection and Title IX rights.³⁵⁷

There is more case law on the rights of transgender students to be treated according to their gender identity in the context of school policies regulating sex-separate restrooms.³⁵⁸ Most of the courts that have heard these challenges, and especially the most recent decisions, have upheld the right of transgender students to use the facility that aligns with their gender identity, striking down school policies that rely on more restrictive definitions of sex, such as the designation on a student's birth certificate.³⁵⁹ Courts have also rejected arguments that Title IX forbids schools from permitting restroom access based on gender identity.³⁶⁰ In a case brought by parents of cisgender girls in Pennsylvania, the plaintiffs argued that the school's policy of permitting transgender girls to use the girls'

353. *Id.* at 944.

354. *See B.P.J.*, 550 F. Supp. 3d at 356–57.

355. *Id.* at 356, 57.

356. *Id.* at 351.

357. *Id.* at 356. As this Article was nearing publication, another federal district court issued a preliminary injunction enjoining its state's law excluding transgender girls from girls' sports; the court found the plaintiff's challenge likely to succeed under Title IX, and so had no need to reach the merits of the equal protection claim. *See A.M.*, 2022 WL 2291763 (S.D. Ind. July 26, 2022).

358. *See, e.g., Grimm v. Gloucester County School Board*, ACLU COURT CASES (Oct. 6, 2021), <https://www.aclu.org/cases/grimm-v-gloucester-county-school-board> [<https://perma.cc/56XD-AYBW>].

359. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 613 (4th Cir. 2020) (holding school discriminated on the basis of sex when it prohibited transgender boy from using the boys' restroom); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1049 (7th Cir. 2017) (school district policy refusing to allow student to use the sex-designated restroom aligned with their gender identity punishes students for gender nonconformity in violation of Title IX); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 293 (W.D. Pa. 2017); *Bd. of Educ. of Highland Loc. Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 854 (S.D. Ohio 2016); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 712 (D. Md. 2018); *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553, 572 (Minn. Ct. App. 2020); *A.H. v. Minersville Area Sch. Dist.*, 408 F. Supp. 3d 536, 557 (M.D. Pa. 2019) (allowing all students except transgender student to use restroom matching their gender identity constitutes unlawful sex discrimination).

360. *See Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 521 (3d Cir. 2018).

restroom created a sexually hostile environment for their daughters.³⁶¹ The Third Circuit ruled against the plaintiffs, finding the school district's policy consistent with Title IX.³⁶² A similar challenge to a gender inclusive school restroom policy was decided the same way by the Ninth Circuit.³⁶³

Not all courts have agreed on the restroom cases, however.³⁶⁴ A couple early challenges to restrictive restroom policies were decided against transgender plaintiffs, with courts upholding the exclusionary policies against Title IX and constitutional challenges.³⁶⁵ In addition, the Eleventh Circuit may be poised to overturn a panel decision interpreting Title IX to protect access to sex-segregated restroom facilities on the basis of gender identity.³⁶⁶ That court recently vacated the panel decision in favor of the transgender plaintiff and granted the school board's request for a rehearing by the full court.³⁶⁷

The wild card now in Title IX litigation on transgender rights is the Supreme Court's 2020 decision in *Bostock v. Clayton County*.³⁶⁸ The Biden Administration has interpreted the Court's rationale in the *Bostock* decision to extend to Title IX's prohibition on sex discrimination, so that it too encompasses discrimination based on gender identity.³⁶⁹ However, it stopped short of explaining what *Bostock* means for transgender students' participation in sex-separate school sports.³⁷⁰ In June of 2022, the Department of Education announced its intention to engage in formal rule-making to address Title IX's obligations toward transgender students seeking to participate in sex-separate sports on the basis of their gender identity.³⁷¹

361. *Id.* at 533.

362. *Id.*

363. *Parents for Priv. v. Barr*, 949 F.3d 1210, 1217 (9th Cir. 2020) (rejecting Title IX challenge brought by parents of cisgender girls to school's trans inclusive restroom policy).

364. *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 661 (W.D. Pa. 2015).

365. *See id.* at 678 (university policy excluding transgender man from the men's locker room did not discriminate on the basis of sex in violation of Title IX); *Carcano v. McCrory*, 203 F. Supp. 3d 615, 654 (M.D.N.C. 2016) (upholding school's policy on sex-segregated restroom assignment based on sex as indicated on student birth certificates as a rational proxy for the privacy interests that justify segregating restrooms by sex).

366. *See Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1292 (11th Cir. 2020), vacated and superseded by 3 F.4d 1299 (11th Cir. 2021), reh'g en banc granted, 9 F.4d 1369 (11th Cir. 2021).

367. *Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4d 1299, 1304 (11th Cir. 2021); *Adams v. Sch. Bd. of St. Johns Cnty.*, 9 F.4d 1369, 1372 (11th Cir. 2021).

368. *Bostock*, 140 S. Ct. at 1754.

369. Enforcement of Title IX of the Education Amendments of 1972, 86 Fed. Reg. at 32637.

370. *See id.* at 32639.

371. Title IX of the Education Amendments of 1972, 87 Fed. Reg. 41390, 41538 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

Although the Department did not preview the specifics of its position, it did emphasize the important educational benefits at stake for all students and discussed the harm to transgender students from non-recognition of their gender identity.³⁷² In his dissenting opinion in *Bostock*, Justice Alito assumed that the Court's decision would grant transgender students the right to participate on sex-separate teams on the basis of gender identity, a result he warned against in ominous language.³⁷³

The Court's move in *Bostock* to embrace gender identity discrimination under a statutory ban on sex discrimination likely bodes well for Title IX's protection of transgender inclusion in sex-separate sports.³⁷⁴ However, *Bostock* alone is not sufficient to reach this destination. How expansively future decisions interpret *Bostock* depends on whether the logic of nondiscrimination encompasses claims for gender identity recognition.³⁷⁵ The big question is whether courts will decide to respect gender identity as relevant to the treatment of otherwise similarly situated persons—the key issue now in contention under the new trans exclusion laws.³⁷⁶ If “biological sex” is the only relevant criterion, a court that accepts this view might find that a transgender girl who is excluded from girls' sports is being treated the same as other students assigned to teams based on their “biological sex” (e.g., male students).³⁷⁷ Getting past this logic requires recognizing gender identity as the relevant point of comparison—that is, that a transgender girl excluded from girls' sports is being treated worse than other similarly situated girls whose gender identity (when aligned with their “biological sex”) is being respected.³⁷⁸ Reaching this result requires accepting gender identity as relevant in the analysis of whether similarly situated people are being treated worse because of their sex.³⁷⁹ Because the *Bostock* dispute arose in the different context of penalizing a transgender employee in an otherwise sex-neutral employment setting, as a precedent, it does not automatically determine how a statutory ban

372. *Id.* at 41537.

373. *Bostock*, 140 S. Ct. at 1779–80 (Alito, J., dissenting) (describing the issue of transgender inclusion in sex-separate sports based on gender identity as one that “threatens to undermine one of [Title IX's] major achievements, giving young women an equal opportunity to participate in sports.”).

374. *See* COLE, *supra* note 27, at 2.

375. For a discussion of *Bostock*'s application to Title IX and athletics, see Medley, *supra* note 74, at 716.

376. *See* Joseph Brucker, *Beyond Bostock: Title IX Protections for Transgender Athletes*, 29 JEFFREY S. MOORAD SPORTS L. J. 327, 350–51 (2022).

377. *See id.* at 343.

378. *See* Medley, *supra* note 74, at 710.

379. *See id.* at 708.

on sex discrimination applies to sex-separate sports.³⁸⁰ This dispute over *Bostock's* meaning goes to the heart of the issue in the new trans exclusion bills, i.e., whether gender identity or sex assigned at birth is the relevant criterion for purposes of sex-separate opportunities.³⁸¹ *Bostock's* “but for sex” (leaving “sex” conventionally defined) formalism does not explicitly speak to this question.³⁸² Title IX may well support gender identity recognition, but it will take more than *Bostock* alone to get there.³⁸³

Supplementing *Bostock's* formalism with an appreciation for how gender stereotyping supports transgender discrimination would go farther to press Title IX to protect transgender students' access to sex-separate spaces according to gender identity.³⁸⁴ Refusing to acknowledge transgender students' gender identity, while respecting the gender identity of cisgender girls, reflects gender-normative views that penalize what is seen as a departure from gender expectations that are set by assigned sex at birth.³⁸⁵ That the high personal costs of exclusion from sport are tolerated for transgender youth speaks to the lingering deep-seated antipathy toward gender-nonconformity.³⁸⁶ These costs are tolerated only because of conventional gender norms that insist that an individual's gender identity match the cultural expectations set by that individual's assigned sex at birth.³⁸⁷ This understanding of how sex stereotyping relates to transgender exclusion is consistent with Title IX's recognition that the statute's ban on sex discrimination extends to gender stereotyping.³⁸⁸

Another Title IX angle for protecting transgender inclusion in sports is the regulation's creation of a right to try out for a separate-sex team from which the athlete has been excluded.³⁸⁹ Admittedly,

380. Brucker, *supra* note 376, at 339.

381. *See id.* at 327–29.

382. *See Bostock*, 140 S. Ct. at 1739, 1742.

383. For an argument that *Bostock* requires permitting transgender girls access to girls' sports based on their gender identity, see Medley, *supra* note 74, at 673. While I do not disagree on the merits, I am less sanguine about the inability of the federal courts, especially as currently composed, to distinguish *Bostock's* rationale from the issue of transgender inclusion in sex-separate sports.

384. *See* Stephanie Bornstein, *Degendering the Law Through Stereotype Theory*, in OXFORD HANDBOOK OF FEMINISM & L. IN THE U.S., *supra* note 14, at 14 (discussing *Bostock's* implications for sex stereotyping).

385. Sharrow, *supra* note 16, at 17.

386. *Id.*

387. *See, e.g.*, Erin E. Buzuvis, “As Who They Really Are”: *Expanding Opportunities for Transgender Athletes to Participate in Youth and Scholastic Sports*, 34 L. & INEQ. 341, 357 (2016) (arguing that sport policies forbidding participation in sex-separate sport according to gender identity violate Title IX because they penalize students for gender nonconformity and rely on sex stereotypes).

388. *Id.*

389. 45 C.F.R. § 86.41(b) (2022).

this try out right as codified in the Title IX regulation was originally conceived for cisgender athletes who were excluded from a team restricted to members of the other sex.³⁹⁰ But the language and overarching purpose of the right should extend to transgender athletes who are excluded from the team that aligns with their gender identity. The anti-trans bills now being passed by state legislatures define transgender girls as “boys” for purposes of sports separation.³⁹¹ Under the terms of these laws, transgender girls are being excluded because of their “sex,” as defined by the trans exclusionary laws.³⁹² If excluded from the girls’ team, transgender girls will lack access to a team in that sport, since participating on a team designated for boys is not an option for most transgender girls.³⁹³ The purpose of the try-out right in the Title IX regulation is to provide a path for inclusion where an individual athlete is locked out of a particular sport by sex-separation, a purpose that fits the situation created by the new trans exclusion laws.³⁹⁴ It is also the case that transgender girls in such a situation have had their athletic opportunities limited—another requirement of the right protected in the regulation—since discrimination against transgender athletes and the refusal to recognize their gender identity is both historic and continuing in its exclusionary impact in sports.³⁹⁵ Using the Title IX regulation’s try out right like this is not as elegant as interpreting the statute’s ban on sex discrimination to require recognition and respect for gender identity, but it may nevertheless chart a path forward for challenging these restrictive state bans.³⁹⁶

Regardless of how the courts ultimately interpret Title IX in relation to transgender athletes, the Title IX advocacy movement should recognize that the current trans panic undercuts the long-term agenda of gender equality for all girls and women, both in sport and beyond. The next section elaborates three ways in which excluding trans girls and women from women’s sports is antithetical to Title IX.

390. *See Bostock*, 140 S. Ct. at 1739.

391. Samantha Riedel, *Here’s All the Anti-Trans Legislation That Moved Forward This Week*, THEM (Mar. 10, 2022), <https://www.them.us/story/don't-say-gay-bill-anti-lgbtq-legislation-florida-idaho> [<https://perma.cc/U2WH-Q4ZC>].

392. *Id.*

393. *See Buzuvis, Litwin & Zola*, *supra* note 191, at 219, 220.

394. *See id.* at 217.

395. Sharrow, *supra* note 16, at 21.

396. Admittedly, as it stands, the contact sports exception would limit the try-out right in the regulation to non-contact sports, but this exception—which has been extensively criticized since its inception—may well be unconstitutional, if challenged. *See, e.g., Sangree*, *supra* note 201, at 382–84.

III. UNDERMINING THE PROMISE OF TITLE IX

Far from protecting Title IX's gains, the movement to exclude transgender girls from girls' sports undermines the law's transformative potential in three ways. First, the case for trans exclusion rests on a biological determinism that has historically and continues to hurt women's equality in general and women's prospects for equal athletic opportunity in particular.³⁹⁷ Second, the logic of trans exclusion reinforces an implicitly male model of sport that elevates winning above all else, at the expense of a more participatory, educational model of sport that better supports Title IX's applicability to sports.³⁹⁸ This too, has long-term costs to the cause of gender equality in sports.³⁹⁹ Finally, barring trans girls from girls' sports privileges an exclusionary understanding of the category of "woman" that defies the lessons of intersectionality.⁴⁰⁰ Feminism has had to absorb some difficult lessons about the importance of building an inclusive movement that resists the tendency to center the most privileged members of the group within that movement.⁴⁰¹ Rather than scapegoating trans girls and women—a distraction from the deep structures of inequality that continue to privilege cisgender males—supporters of women's equality should unite against the forces gathering to ensconce traditional and conventional understandings of gender, both within and outside of sports. These forces are now poised to undo decades of feminist gains and are enlisting advocates for girls' and women's sports to do their bidding.⁴⁰²

A. *The Costs of Biological Determinism*

The case for excluding trans athletes is based on a binary biological understanding of sex that links maleness with innate athletic superiority.⁴⁰³ This is the very ideology at the root of much sex discrimination throughout society, including in sports, where it underpins the history of excluding girls and women from sports altogether.⁴⁰⁴

397. *Infra* Section III.A.

398. *Infra* Section III.B.

399. See Dionne Koller, *Not Just One of the Boys: A Post-Feminist Critique of Title IX's Vision for Gender Equity in Sports*, 91 CONN. L. REV. 401, 452 (2010).

400. *Infra* Section III.C.

401. See Michelle Goldberg, *What Is a Woman? The dispute between radical feminism and transgenderism.*, NEW YORKER (July 28, 2014), <https://www.newyorker.com/magazine/2014/08/04/woman-2> [<https://perma.cc/3K6V-GDE9>].

402. See Sharrow, *supra* note 16, at 1, 2.

403. *See id.*

404. See Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and*

Women were long protected out of sports due to beliefs about the frailty of “the fairer sex” and a purported threat to women’s fertility.⁴⁰⁵ Although no longer used to stop women from playing sports, the biological difference rationale still contributes to the second-class status of girls’ and women’s sports.⁴⁰⁶ For example, the belief that women are naturally inferior to men in sports competition fuels resistance to providing equal resources and scholarship opportunities to female intercollegiate athletes.⁴⁰⁷ If men’s sports are “better” then it is hard to resist the logic that they deserve more resources.⁴⁰⁸ The rationale that male athletic excellence draws bigger crowds and more lucrative markets is behind many of the ongoing and pronounced inequalities in facilities and scheduling for girls’ sports.⁴⁰⁹ Notwithstanding Title IX’s legal framework, which promises overall equal treatment for girls’ and women’s athletic programs compared to their male counterparts,⁴¹⁰ ongoing disparities remain and have even accelerated during the COVID-19 pandemic.⁴¹¹

Biological determinism is also behind the long-standing resistance to Title IX’s mandate of equal participation opportunities for girls and women.⁴¹² Under the three-part test developed by the Department of Education and consistently applied in the courts, the standard for equal athletic opportunity asks, as a baseline measure of compliance, whether the educational institution has provided women with athletic opportunities that are substantially proportionate to

the Military, 83 MINN. L. REV. 305, 366 (1998) (explaining that cultural insistence on gender polarity and a male/female binary is at the heart of women’s oppression in society, including in the military).

405. See SUSAN CAHN, *COMING ON STRONG: GENDER AND SEXUALITY IN TWENTIETH CENTURY WOMEN’S SPORT* 4 (1994); see also DANIELS, *supra* note 262, at 39 (pointing out that the protective rationale was always race and class-specific, protecting white middle and upper-class women’s health, reproductive capacity, and social status from the physical hazards of sports, and not women of color or women from lower socio-economic backgrounds).

406. See DANIELS, *supra* note 262, at 7 (describing the belief that men are biologically superior athletes as the favored argument against women’s equality in sports). Hence, the insult of insinuating that a male athlete plays like a girl retains force. See Young, *supra* note 261, at 138.

407. See Barbara Osborne, *Failing to Fund Fairly: Title IX Athletics Scholarship Compliance*, 6 TENN. J. RACE, GENDER & SOC. JUST. 83, 84 (2017) (providing an overview of Title IX’s regulatory framework for measuring compliance in the area of athletic scholarships and a discussion of ongoing gaps in compliance).

408. See Alan Blinder, *Report: N.C.A.A. Prioritized Men’s Basketball “Over Everything Else,”* N.Y. TIMES (Aug. 3, 2021), <https://www.nytimes.com/2021/08/03/sports/ncaabasketball/ncaa-gender-equity-investigation.html> [<https://perma.cc/3C4H-TUNN>].

409. See *id.*

410. STAUROWSKY ET AL., *supra* note 167, at 43.

411. Blinder, *supra* note 408.

412. See Joshua A. Senne, *Examination of Gender Equity and Female Participation in Sport*, U.S. SPORTS ACAD. (Feb. 26, 2016).

women's enrollment.⁴¹³ If not, the institution must demonstrate either a history of continuing program expansion for women or that the athletic program already fully and effectively accommodates the athletic interests and abilities of their women students through the program's existing offerings.⁴¹⁴ Opponents of the three-part test have pressed the narrative of biological determinism, that men are naturally superior athletes and so are more deserving of athletic opportunities.⁴¹⁵ During the George W. Bush Administration, when a commission was formed to explore a possible roll back of the three-part test to replace it with something less "preferential" to women, opponents of the three-part test pressed this narrative explicitly.⁴¹⁶ During town hall-style hearings on the proposed roll back, one critic of the three-part test put it bluntly, stating, "[p]articipation in those opportunities is driven by interests, and our society does not tell males what they should and shouldn't say about sports. Their biology tells them that."⁴¹⁷

The biological determinism behind transgender exclusion also undermines the anti-stereotyping principle that should be central to Title IX's promise. By endorsing a fixed biological account of sex as a gatekeeper to girls' sports, trans exclusion requires a problematic policing of the gender boundary in sports. This anti-trans policing maps onto a history of long-standing sex policing in sports that is invasive and hurtful to the individuals rendered suspect.⁴¹⁸ It also promotes gender ideologies that are harmful to all girls and women who play competitive sports. The sorry history of sex-verification in Olympic sports is emblematic of the gender suspicion fueled by trans exclusion.⁴¹⁹ Women who perform well in elite sports have long raised suspicions about whether they are "real" women, triggering sex-verification tests supposedly designed to assure their legitimacy as bona fide women.⁴²⁰ Sex verification testing is the logical extension of biological essentialism.⁴²¹ If maleness is biologically linked

413. See, e.g., *Cohen v. Brown Univ.*, 101 F.3d 155, 166 (1st Cir. 1996) (explaining and applying the three-part test).

414. *Id.*

415. See Senne, *supra* note 412.

416. See Thersa A. Walton & Michelle T. Helstein, *Triumph of Backlash: Wrestling Community and the "Problem" of Title IX*, 25 SOCIO. OF SPORT J. 369 (2008); Michael A. Messner & Nancy M. Solomon, *Social Justice and Men's Interests*, 31 J. SPORT & SOC. ISSUES 162, 165–66 (2007).

417. Messner & Solomon, *supra* note 416, at 171 (quoting Kimberly Schuld, formerly of the Ind. Women's Forum, an organization opposed to Title IX).

418. See Sharrow, *supra* note 284, at 264–65.

419. Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, N.Y. TIMES MAG. (June 28, 2016), <https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html> [<https://perma.cc/ZC7X-TPGR>].

420. See *id.*

421. See Brenna M. Moreno, "Woman Enough" to Win? An Analysis of Sex Testing in College Athletics, 15 ST. LOUIS U. HEALTH L. & POL'Y, 509, 528 (2022).

to athletic superiority, then unexpectedly strong athletic performances by girls and women render them biologically suspect.⁴²² In an earlier era, this cultural message was so strong that an athletically oriented girl was called a “tomboy,” signaling the loss of femininity that follows when a girl is good at sports.⁴²³ The message that femininity and athleticism are oppositional has also been a key driver of the homophobia that has historically targeted girls and women who excel in sports.⁴²⁴ The conflict that biological determinism posits between femininity and athleticism gives rise to what sport sociology scholars call the “female apologetic” in sports, a well-documented phenomenon in which “athletic women are asked to overcompensate for their so-called masculine behavior such as . . . being physically strong and powerful” by performing their gender to portray a hetero-femininity.⁴²⁵

Because sex, gender, and sexual orientation are all conflated in American culture, the policing of the sex boundary in sport has always been, and inevitably is, rife with gender bias, heterosexism, and stereotyping.⁴²⁶ Only women’s sports require gatekeeping under the logic of biological determinism; men’s sports are free from surveillance, since athletes who are not “biologically male” would pose no threat to cisgender males’ presumptive athletic superiority.⁴²⁷ But because maleness and athleticism are conflated in U.S. culture—as explicitly revealed in the biological determinism of the anti-trans movement—for a girl to be “unnaturally” good at sport renders her sex suspect.⁴²⁸ Even before the current trans panic took off during the last two years, girls have had their sex interrogated for being perceived as unconventional or nonconforming in their femininity.⁴²⁹ In 2017, three girls with short hair who played club soccer on a

422. Sharrow, *supra* note 284, at 270.

423. DANIELS, *supra* note 262, at 3–5, 38–39 (discussing how the tomboy label polices girls’ femininity, sport interests, and sexuality).

424. See Natalie Adams, Alison Schmitke & Amy Franklin, *Tomboys, Dykes, and Girly Girls: Interrogating the Subjectivities of Adolescent Female Athletes*, 33 *WOMEN’S STUD. Q.* 17, 21 (2005).

425. Kane, *supra* note 246, at 121. Nearly two decades after elaborating this principle, Kane and her colleagues found that media portrayals of elite women athletes continue to overemphasize femininity and heterosexuality at the expense of athletic competence, with the consequence of trivializing women’s sports. See Mary Jo Kane, Nicole M. LaVoi & Janet S. Fink, *Exploring Elite Female Athletes’ Interpretations of Sport Media Images: A Window into the Construction of Social Identity and “Selling Sex” in Women’s Sports*, 1 *COMM’N & SPORT* 269, 271 (2013).

426. For a foundational piece on the conflation, see Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 *CAL. L. REV.* 1, 4 (1995).

427. See Sharrow, *supra* note 284, at 260.

428. See Krech, *supra* note 52, at 274.

429. *Id.* at 275.

U–11 (under age 11) team were accused of being boys by parents of their opponents.⁴³⁰ According to observers who supported the girls, their short hair, combined with their tough physicality in the game, prompted complaints by parents seeking to disqualify the team from competition for allowing “boys” to play.⁴³¹ These were cisgender girls, but their high level of athleticism combined with short hair was enough to render their girlhood suspect.⁴³² This kind of heightened sex-surveillance is a burden that falls only on the participants in girls’ sports, with the potential to punish girls and deter them from playing sports.⁴³³

Not just gender stereotyping but racial stereotypes too are embedded in how sex is interrogated in sports.⁴³⁴ The bodies of girls and women of color have always been at risk in the sex-policing of sport.⁴³⁵ What culturally codes as feminine and ladylike has always had a racial valence; an idealized white femininity sets the standard by which feminine gender conformity is measured.⁴³⁶ Women of color are doubly penalized for perceived departures from this standard.⁴³⁷ One need not look far for examples, nor far back.⁴³⁸ The Williams sisters may now be (if at times grudgingly) acknowledged for their unparalleled achievements in tennis,⁴³⁹ but are nonetheless subject to racist insults.⁴⁴⁰ Serena Williams has been the focus of hyper-scrutiny

430. Cindy Boren, *Three girls’ soccer players cut their hair short. Now they’re accused of being boys*, WASH. POST (Aug. 8, 2017, 11:50 AM), <https://www.washingtonpost.com/news/early-lead/wp/2017/08/08/what-happens-with-three-girls-soccer-players-cut-their-hair-short-theyre-accused-of-being-boys> [<https://perma.cc/AA6U-UGZL>].

431. *Id.*

432. *See id.*

433. Buzuvis, Litwin & Zola, *supra* note 191, at 235 (“Being subject to a sex dispute is itself a burden. The process creates a means for bullying girls perceived as less feminine or unpopular and dissuades them from participating in sports.”).

434. *See* Krech, *supra* note 282, at 70.

435. Karkazis & Jordan-Young, *supra* note 235, at 6 (tracing the regulation of testosterone in women’s international competition to racialized judgments about sex atypicality embedded in Western colonialism).

436. Elizabeth R. Cole & Alyssa N. Zucker, *Black and White Women’s Perspectives on Femininity*, 13 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 1, 1 (2007).

437. *See* Krech, *supra* note 282, at 70.

438. Brooke Newman, *The long history behind the racist attacks on Serena Williams*, WASH. POST (Sept. 11, 2018, 12:18 PM), <https://www.washingtonpost.com/outlook/2018/09/11/long-history-behind-racist-attacks-serena-williams> [<https://perma.cc/8JK5-DLFJ>].

439. The gratuitous slighting comment made by acclaimed director Jane Campion (who incorrectly quipped that Venus and Serena never had to compete against men)—likely unintentional and followed by a quick apology—speaks volumes about the depths of cultural resistance to recognizing African-American women in sports. *See* Jon Blistein, *Jane Campion Apologizes to Venus and Serena Williams: ‘I Made a Thoughtless Comment’*, ROLLING STONE (Mar. 14, 2022), <https://www.rollingstone.com/tv-movies/tv-movie-news/jane-campion-probably-shouldnt-have-said-anything-about-venus-and-serena-williams-1320834> [<https://perma.cc/99TR-YSQZ>].

440. *See* Newman, *supra* note 438.

for what is depicted as unladylike behavior.⁴⁴¹ After a televised incident in which Williams threw her racket after a referee's call, a cartoon ran depicting an enraged and hideous figure of an oversized Williams, with grotesquely exaggerated features, stomping on her racket while a demure, pony-tailed, conventionally attractive white female opponent calmly looks on; the referee says to the opponent, "[c]an you just let her win?"⁴⁴² But even such racist cartoon images are outdone by explicit statements from detractors accusing Williams of having been born male.⁴⁴³ These claims (which have also been launched against Michele Obama) might be dismissed as trifling folly if they did not speak to such a deep entwinement of racist and sexist cultural constraints on Black women's femininity.⁴⁴⁴

Given the intersection of race and gender stereotypes in what culturally codes as feminine, girls and women of color are predictably more likely to be targeted for challenges to their sex classification.⁴⁴⁵ Challenges to female athletes in Olympic sports have certainly tracked this pattern.⁴⁴⁶ Even before the highly publicized controversy over Caster Semenya, Indian sprinter Dutee Chand was singled out for medical scrutiny based on concerns expressed by other female athletes and coaches that she had a "masculine' physique" and questionable "stride and musculature."⁴⁴⁷ After initially being excluded from international women's track competition, Chand successfully appealed the ruling.⁴⁴⁸

The latest development in the high-profile controversy involving the sex testing of South African Caster Semenya is the decision by the Court of Arbitration for Sport (CAS) to uphold the International Association of Athletics Foundation (IAAF) ruling excluding Semenya from women's international track competition.⁴⁴⁹ The IAAF regulation in

441. Gordon Mason, Opinion, *Monson: Is Serena a Victim? Sexism in Tennis? Here's an idea: Look past the skirts and the shorts, and apply the rules equally*, SALT LAKE TRIB. (Sep. 10, 2018, 9:31 PM), <https://www.sltrib.com/sports/2018/09/10/monson-is-serena-victim> [<https://perma.cc/D4KX-ZQQW>].

442. Newman, *supra* note 438.

443. Alan Dawson, *How Serena Williams responds to accusations that she 'was born a guy'*, BUS. INSIDER (May 31, 2018, 11:43 AM), <https://www.businessinsider.com/serena-williams-responds-to-accusations-she-was-born-a-man-2018-5> [<https://perma.cc/JDC7-E8UX>].

444. See Cole & Zucker, *supra* note 436, at 2.2.

445. See Krech, *supra* note 282, at 70.

446. Lindsey P. Pieper, Opinion, *They qualified for the Olympics. Then they had to prove their sex.*, WASH. POST (Feb. 22, 2018, 6:00 AM), <https://www.washingtonpost.com/news/made-by-history/wp/2018/02/22/first-they-qualified-for-the-olympics-then-they-had-to-prove-their-sex> [<https://perma.cc/9L9E-GGWA>].

447. Krech, *supra* note 52, at 272.

448. The Court of Sport Appeals agreed that the IAAF regulations lacked sufficient scientific basis but gave the IAAF two years to provide additional scientific evidence justifying the regulatory exclusion with regard to hyperandrogenism. *Id.* at 275–76.

449. See Krech, *supra* note 282, at 67.

question bars women from competition if they have “differences of sexual development,” an umbrella term that includes the condition known as hypoandrogenism, in which high levels of testosterone combine with androgen sensitivity—the condition used to disqualify Semenya.⁴⁵⁰ Sex verification in Olympic sport has a fraught history; it was originally enforced through “naked parades” used to verify female athletes’ sex.⁴⁵¹ Even today, sex verification in international competition has resulted in a demonstrated racial pattern of enforcement in which female athletes of color are disproportionately subject to suspicion and sex-testing.⁴⁵²

It is important to recognize that the singling out of athletes’ sex as an unwavering line in a battle to protect cisgender girls’ chances to win is a response to the cultural salience of sex rather than biology.⁴⁵³ Fair competition has never been about equalizing all physiological differences among contestants.⁴⁵⁴ There are over 200 genetic differences other than sex that affect athletic ability, none of which is subject to scrutiny for an athlete’s eligibility or triggers disqualification.⁴⁵⁵ Nor have sport leaders, much less lawmakers, sought to neutralize such “unearned” benefits as socio-economic inequalities in competitive training and coaching.⁴⁵⁶ As girls’ sport has become more desirable as a path to college and beyond, costly talent development at the club and private level has become increasingly important to compete at the high school varsity level, and all the more so in college.⁴⁵⁷ Yet none of these competitive advantages are now under scrutiny.

450. *Id.* at 66–67.

451. *Id.* at 69.

452. *Id.* at 70 (stating that “the IAAF’s female eligibility regulations have almost exclusively affected women of colour from the Global South”); Krech, *supra* note 52, at 286–87 (explaining that the “reasonable suspicion” standard for sex-testing athletic eligibility in international women’s competition incorporates “intersecting sexist and racist stereotypes” “that are culturally and historically specific, and often privilege white, middle-class, and Western standards of female beauty.”).

453. See Jack Turban, *Trans Girls Belong on Girls’ Sports Teams*, SCI. AM. (Mar. 16, 2021), <https://www.scientificamerican.com/article/trans-girls-belong-on-girls-sports-teams> [<https://perma.cc/44WW-ZP2G>].

454. Joanna L. Grossman & Saraswati Rathod, *Trashing the Playing Field: State Legislators Misguided Move to Ban Transgender Women and Girls from Competing in Women’s Sports*, JUSTIA: VERDICT (Apr. 27, 2021), <https://verdict.justia.com/2021/04/27/trashing-the-playing-field-state-legislators-misguided-move-to-ban-transgender-women-and-girls-from-competing-in-womens-sports> [<https://perma.cc/V6HB-J3LH>].

455. *Id.* (noting genetic variations in “height, blood flow, muscle mass, pain threshold, and respiratory and cardiac functions,” and giving examples of athletes who have benefited from such variations and been lauded for their success).

456. *Id.*

457. Sean Gregory, *How Kid’s Sports Became a \$15 Billion Industry*, TIME (Aug. 24, 2017, 6:45 AM), <https://time.com/4913687/how-kids-sports-became-15-billion-industry> [<https://perma.cc/RL6G-QNT5>].

The new transgender exclusion bills trade on and exacerbate the salience of sex as a marker of athletic ability, and in ways that create deep tensions with the logic of Title IX and undermine its promise of gender equality.⁴⁵⁸ The trans threat narrative amplifies the biological imperative that maleness and musculature are naturally paired, and that elite athleticism renders female athletes sexually suspect.⁴⁵⁹ This cultural understanding sets up a conflict between femininity and athleticism that Title IX has long sought to resist.⁴⁶⁰ Behind the sweeping anti-trans bans is the narrative that male physiology is superior across the board, at every age, in every sport, and at every level of competition.⁴⁶¹ This is the very ideology that perpetuates ongoing inequality between men's and women's sports.⁴⁶²

B. Elevating the Win-at-All-Cost Model of Sport

The case for excluding trans girls from girls' sports rests on a model of sport that is antithetical to Title IX.⁴⁶³ The law's very applicability to school athletics depends on the premise that school athletic programs are an educational opportunity, first and foremost, valued for their educational benefits.⁴⁶⁴ Title IX is not a free-standing ban on sex discrimination, it applies only to education programs receiving federal funds.⁴⁶⁵ Athletics is covered by Title IX because it is an education program.⁴⁶⁶ Competition and developing the drive to win may be part of why sport has educational value, but sport loses its educational valence if winning is the only thing that matters.⁴⁶⁷ However, the trans threat narrative is predicated on precisely that premise: that winning is everything.⁴⁶⁸ The argument for excluding trans girls is not that cisgender girls and women would otherwise be shut out of opportunities to participate in sports.⁴⁶⁹ But preserving girls' opportunities to participate in athletics is the core

458. See Sharrow *supra* note 16, at 13–14; STAUROWSKY ET AL., *supra* note 167, at 43.

459. See Sharrow, *supra* note 16, at 14–15.

460. See STAUROWSKY ET AL., *supra* note 167, at 43.

461. See Sharrow *supra* note 16, at 14–15.

462. See *id.*

463. See Grossman & Rathod, *supra* note 454.

464. Koller, *supra* note 399, at 408.

465. *Id.*

466. *Id.* at 408–09.

467. See Erin E. Buzuvis, *Athletic Compensation for Women Too? Title IX Implications of Northwestern and O'Bannon*, 41 J. COLL. & UNIV. L. 297, 306 (2015).

468. See BRAKE, *supra* note 7.

469. See Shayna Medley & Galen Sherwin, *Banning Trans Girls from School Sports Is Neither Feminist nor Legal*, ACLU (Aug. 29, 2022), <https://www.aclu.org/blog/lgbtq-rights/transgender-rights/banning-trans-girls-school-sports-neither-feminist-nor-legal> [<https://perma.cc/CXN8-RS53>].

justification for separating girls and boys in sports.⁴⁷⁰ As discussed above, a key part of the rationale for Title IX's legal framework is that gender integrated teams, where athletes are selected competitively on a gender-blind basis, risks restricting girls to token levels in sports as boys take over gender-inclusive teams. Notably, this logic does not support excluding trans girls from teams.⁴⁷¹ While boys make up roughly half the student population, there are very few trans girls competing for spots on girls' teams.⁴⁷² Instead, the argument for excluding trans girls from girls' teams is that cisgender girls will not be able to beat them, a prediction based on the assumption that trans girls are biologically superior athletes.⁴⁷³ In this equation, the chance of cisgender girls winning is valued more highly than the opportunities for trans girls to participate in athletics whatsoever.⁴⁷⁴

Placing winning above the other values of sport has never been a good foundation for Title IX. Title IX scholars have criticized the hyper-competitive model of sport characteristic of men's athletics and have argued for developing a more participatory model that could serve as a healthier and more beneficial structure for all athletes.⁴⁷⁵ The case for equality for girls' and women's sports has been built on the importance of fully extending the benefits of sports to girls and women.⁴⁷⁶ These benefits do not depend on being recognized as the best athlete.⁴⁷⁷ Research and government reports continue to document the many benefits of youth sports participation, which include development of leadership skills, teamwork, and self-confidence—all benefits that do not depend on winning.⁴⁷⁸ Indeed, much of the public case for gender equality in sport has been built on selling the benefits of sports for girls, and not just a chance to win for winning's sake.⁴⁷⁹ The famous Nike campaign of the 1990s struck this chord in detailing the research on the educational and health benefits of expanding athletic participation for girls, after the tagline, “[i]f you let me play sports.”⁴⁸⁰ The benefits of sport, which extend to academics, mental and physical health, and social relationships, are particularly

470. See Koller, *supra* note 399, at 402.

471. See Turban, *supra* note 453.

472. See *id.*

473. See BRAKE, *supra* note 7, at 29.

474. See, e.g., Turban, *supra* note 453.

475. See Koller, *supra* note 399, at 424–26.

476. *Id.* at 408.

477. Buzuvis, Litwin & Zola, *supra* note 191, at 223.

478. *Id.* at 223 (discussing a 2019 report on youth sports by the Department of Health and Human Services); Koller, *supra* note 399, at 413–14 (discussing research documenting the many benefits of sports participation).

479. See Koller, *supra* note 399, at 413–15.

480. See BRAKE, *supra* note 7, at 180–81 (discussing the Nike advertising campaign, “[i]f you let me play sports”).

important for transgender youth, who face a high risk of mental health issues;⁴⁸¹ trans athletes also stand to benefit from the message of belonging that can reduce stigma and negative stereotyping.⁴⁸²

The trans threat narrative presumes that athletic participation is a zero-sum game in which less athletically talented athletes—cisgender girls—see their chances to win diminished by the presence of athletically superior trans girls.⁴⁸³ It is based on a highly individualistic view of sports, presuming that a trans girl's success inexorably diminishes the success of cisgender girls.⁴⁸⁴ Instead of seeing a more talented girl on the team as an asset who can advance the team's prospects, sharpen the skills of her fellow teammates, and strengthen the quality of the sport overall, the trans exclusion narrative frames trans girls as a threat.⁴⁸⁵ There is an inescapable anti-transgender bias behind this judgment. It is the exact opposite logic that courts applied when, in the early case law, talented athletic (presumptively, cisgender) girls sought the right under Title IX to play on the boys' team instead of the corresponding girls' team in a particular sport.⁴⁸⁶ In calibrating Title IX's response to such challenges, courts highlighted the potential talent drain to girls' sports if the most talented girls left the girls' team for the boys' team.⁴⁸⁷ In denying the claims of these talented girls, courts found that losing the most talented female athletes to boys' teams would hinder the potential for girls' sports to fully develop to their potential.⁴⁸⁸ In this scenario, an unusually athletically talented girl was viewed as an asset, not a threat, to the girls' team.⁴⁸⁹ But in the trans exclusion rationale, the presence of an extra-talented trans athlete is seen as undercutting cisgender girls' chances of being the best on the team.⁴⁹⁰ Not only does the trans exclusion logic contradict the case law

481. See, e.g., Turban, *supra* note 453.

482. Archibald, *supra* note 53, at 260; Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WISC. J. L. GENDER & SOC'Y 271, 297–99 (2013) (discussing the educational, social, and health benefits at stake for transgender students in having full access to school sports opportunities that align with their gender identity).

483. See, e.g., Turban, *supra* note 453.

484. See, e.g., Abigail Shrier, *Joe Biden's First Day Began the End of Girls' Sports*, WALL ST. J. (Aug. 29, 2022, 1:44 PM), <https://www.wsj.com/articles/joe-bidens-first-day-began-the-end-of-girls-sports-11611341066> [<https://perma.cc/QVN4-E53S>].

485. See *id.*

486. See BRAKE, *supra* note 7, at 23–26 (discussing the case law resolving girls' challenges to being excluded from trying out for and competing on boys' teams in sports that have a girls' team).

487. *Id.* (discussing courts' reasoning denying girls' claims seeking a right to play on the boys' team rather than the girls' team in a particular sport).

488. See *id.* at 24.

489. *Id.*

490. See, e.g., Turban, *supra* note 453.

denying girls the right to play on a boys' team in a sport that is offered to girls,⁴⁹¹ it is inconsistent with the theory behind Title IX and the three-part test.⁴⁹² That theory holds that sport opportunities should be distributed not based on intrinsic merit, as a reward for athletic talent, but rather as “tools” for teaching the teamwork, self-discipline, leadership, and character development that sports can impart.⁴⁹³

The case for excluding trans girls reinforces a model of sport that feminists have long criticized.⁴⁹⁴ The emphasis on winning above all is what underlies the commercialization of sports, which has occurred at a high cost to the men who play elite college sports.⁴⁹⁵ The excesses of this model—including coaching abuses and de-emphasizing athletes' education—make the case for reforming rather than replicating this model for women.⁴⁹⁶ It is this model, in which athletic coaches earn more than college presidents and face pressures to do whatever it takes to have the winning record that will maximize revenue production, that has brought the college sports world to its current crisis.⁴⁹⁷ When women physical educators sought to maintain control of women's sports—ultimately a losing battle—it was precisely to avoid the commercialization of sports that placed winning above the welfare and education of athletes.⁴⁹⁸ This is why the Association of Intercollegiate Athletics for Women (AIAW) attempted—unsuccessfully in the end—to resist the NCAA's takeover of women's sports, because it wanted to develop and preserve a model of sport that prioritized distributing the benefits of sport participation more broadly.⁴⁹⁹ The lessons of this history have been lost on those who would deny the benefits of sport to trans girls in order to maximize cisgender girls' chances of winning.⁵⁰⁰

The logic of the winner-take-all model of sport is what drives the continuing disparities between men's and women's sports.⁵⁰¹ It is

491. See BRAKE, *supra* note 7, at 23–26.

492. See *id.* at 69.

493. See Yuracko, *supra* note 302, at 777–78.

494. See Medley & Sherwin, *supra* note 469.

495. See Buzuvis, *supra* note 467, at 299.

496. See Koller, *supra* note 399, at 433, 434 (discussing the costs to athletes' education and academics resulting from the commercial model of sports).

497. See Tan Boston, *As California Goes, So Goes the Nation: A Title IX Analysis of the Fair Pay to Play Act*, 17 STAN. J. C.R. & C.L. 1, 4, 23 (2021) (discussing the controversy over “pay to play”—compensating intercollegiate athletes for their time and effort spent playing college sports—and its implications for Title IX).

498. See BRAKE, *supra* note 7, at 23.

499. YING WUSHANLEY, PLAYING NICE AND LOSING: THE STRUGGLE FOR CONTROL OF WOMEN'S INTERCOLLEGIATE ATHLETICS, 1960–2000 18 (2004); Susan Birrell, *Separatism as an Issue in Women's Sports*, 8 ARENA REV. 21, 23 (1987).

500. See, e.g., Turban, *supra* note 453.

501. Blinder, *supra* note 408.

this logic that links athletic revenue to wins (television audiences love winners) and justifies funneling higher resources to the most winning, highest revenue-raising men's programs.⁵⁰² This commercial win-at-all-cost model of sport has never worked well for women's sports or advanced the case for gender equality.⁵⁰³ For Title IX to have staying power requires accepting athletics as primarily an educational opportunity. Part of the educational value of sport is, to be sure, competition, but not because winning is everything—rather, because of what competition teaches.⁵⁰⁴ Framing trans athletes as a threat to the winning potential of cisgender girls endorses a model of sport that is antithetical to the values underlying Title IX.⁵⁰⁵ As importantly, it diverts the focus away from the real threat to girls' and women's sports: the outsized resources allocated to men's sports.⁵⁰⁶ That some of those men's programs win and bring in money has long been used as a justification for the disparities and challenges facing women in sport.⁵⁰⁷

C. Remembering the Lessons of Intersectionality

In settling on the meaning of Title IX for transgender girls who play sports, we must not lose sight of one of the most important insights from feminist legal theory in the past four decades: that the subjects of feminist law reform must be understood intersectionally

502. *See id.* (discussing the reasons behind the massive disparities in the NCAA men's and women's basketball tournaments). On the messaging and significance of greater media attention to men's sports, see Cheryl Cooky, Michael Messner & R.H. Hextrum, *Women Play Sport, But Not on TV: A Longitudinal Study of Televised News Media*, 1 COMMUN & SPORT 203, 206–07 (2013) (explaining how the marginalization of women's sports in broadcasting constructs, rather than just reflects, interest in women's sports and the conflation of athleticism with masculinity).

503. *See* Cooky, Messner & Hextrum, *supra* note 502, at 205.

504. Kirk O. Hanson & Matt Savage, *What Role Does Ethics Play in Sports?*, MARKKULA CTR. FOR APPLIED ETHICS AT SANTA CLARA UNIV. (Aug. 29, 2022), <https://www.scu.edu/ethics/focus-areas/more-focus-areas/resources/what-role-does-ethics-play-in-sports> [<https://perma.cc/CEN6-ZM86>].

505. Eddie Pells, *Title IX's next battle: The rights of transgender athletes*, AP NEWS (June 19, 2022), <https://apnews.com/article/title-ix-transgender-athletes-rights-9adfe49a8e07f66f07b5e2302bb94730> [<https://perma.cc/KP54-W83R>].

506. *See The real threat to women's sports isn't transgender athletes—it's underfunding and lack of resources*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/the-real-threat-to-womens-sports-isnt-transgender-athletes-its-underfunding-and-lack-of-resources> [<https://perma.cc/3P23-NPFY>] (last visited Nov. 18, 2022).

507. Andrew Zimbalist, *Female Athletes Are Undervalued, In Both Money and Media Terms*, FORBES (Apr. 10, 2019, 7:00 AM), <https://www.forbes.com/sites/andrewzimbalist/2019/04/10/female-athletes-are-undervalued-in-both-money-and-media-terms/?sh=73757e2c13ed> [<https://perma.cc/7FYK-QFMF>].

and inclusively.⁵⁰⁸ A convincing rationale for continuing the baseline of sex separation in sports must broaden the cultural space for all girls and women in sport and avoid the error of centering the most privileged among them in the analysis. The trans exclusion movement, by reifying the biological difference rationale for separation, replicates the errors of essentialism and marginalization that have long compromised feminist law reform and coalition-building.⁵⁰⁹

Intersectionality began as a challenge to the centering of privileged white women and the marginalization of Black women in feminist thought and action.⁵¹⁰ Subsequent theorizing has extended this insight to other axes of privilege, including sexuality and gender identity.⁵¹¹ As with race, class, and sexuality, there is a centering of cisgender girls and women that takes place in much feminist analysis of gender inequality.⁵¹² It has stubbornly persisted even as challenges to essentialist understandings of sex and gender, and the movement for transgender recognition, have gained ground.⁵¹³

The history of the feminist movement is fraught with embedded assumptions about the category of “woman.” In recent years, some who identify as radical feminists have sought—more so through their use of social media than in academic writings—to define transgender women as outside the category.⁵¹⁴ These moves to exclude transgender girls and women from recognition reveal a troubling lack of empathy and an “other[ing]” of persons who are among those most marginalized by cultural assumptions about sex

508. *Intersectional feminism: what it means and why it matters right now*, UNWOMEN (July 1, 2020), <https://www.unwomen.org/en/news/stories/2020/6/explainer-intersectional-feminism-what-it-means-and-why-it-matters> [<https://perma.cc/JF2L-2BRB>].

509. Jane Wong, *The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond*, 5 WM. & MARY J. WOMEN & L. 273, 281–84 (1999).

510. I. India Thusi, *Feminist Scripts for Punishment*, 134 HARV. L. REV. 2449, 2449–50, 2464 (2021) (reviewing AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION* (2020)).

511. Leah R. Warner & Stephanie A. Shields, *The Intersections of Sexuality, Gender, and Race: Identity Research at the Crossroads*, SPRINGER 803, 804–05 (2013).

512. See, e.g., *5 Things to Know to Make Your Feminism Trans-Inclusive*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/5-things-to-know-to-make-your-feminism-trans-inclusive> [<https://perma.cc/PE3B-JG7E>] (last visited Nov. 18, 2022).

513. See *id.*

514. See, e.g., Kathleen Stock, *Why self-identification should not legally make you a woman*, THE CONVERSATION (Oct. 1, 2018, 9:16 AM), <https://theconversation.com/why-self-identification-should-not-legally-make-you-a-woman-103372> [<https://perma.cc/ZF6N-7YKD>] (contending that recognizing transgender women as women for purposes of legal identity and inclusion in women-only spaces “poses unacceptable harm to the original occupants of the category ‘woman.’”); Tim R. Johnston, *Sheila Jeffreys, Gender Hurts: A Feminist Analysis of the Politics of Transgenderism*, HYPATIA REVS. ONLINE (2014) (reviewing and criticizing Jeffreys’ book, which disputes the identities of transgender women as women).

and gender.⁵¹⁵ It is the cultural unintelligibility of gender divergence from ascribed sex that creates the conditions for this lack of empathy.⁵¹⁶ Only if transgender girls matter less than cisgender girls would it make sense to trade off their participation in sports altogether in order to maximize cisgender girls' chances of winning. Lowering the stores of empathy for those at the margins of feminism's beneficiaries has been the bane of feminist politics and has never been a good long-term strategy for advancing and maintaining feminist gains.⁵¹⁷

The anti-trans movement has taken advantage of these fractures and of feminism's own failure to critically examine its exclusivity in theorizing "women's" issues.⁵¹⁸ It is in feminism's best interest to heal these fissures.⁵¹⁹ Calling for more dialogue between the feminist and transgender movements, critical race feminist Angela Harris has pointed out that both movements share a common need for anti-essentialism in approaching identity politics.⁵²⁰ Harris persuasively contends that activists in both movements can learn from each other that "it is possible to acknowledge the heterogeneity of identity while still challenging subordination in politically potent ways."⁵²¹ Feminism today should not make the mistakes of yesteryear, as when early ERA advocates eschewed lesbian participation in pro-ERA politics.⁵²²

In keeping with this lesson, it is also important to acknowledge how race privilege influences policing the "sex" of girls and women in sports.⁵²³ The anti-trans movement reinforces a racially specific and culturally privileged version of femininity that aligns with whiteness in U.S. sporting culture.⁵²⁴ The femininity of girls and women athletes—already suspect for being athletic—is more culturally legible for white girls and women than it is for girls and women of

515. HUM. RTS. CAMPAIGN, *supra* note 512.

516. Armitage, *supra* note 193, at 18.

517. *See id.* at 20.

518. Angela P. Harris, *Review*, 36 WOMEN'S STUD. Q. 315, 318 (2008) (reviewing TRANSGENDER RIGHTS (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006) & JULIA SERANO, WHIPPING GIRL: A TRANSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY (2007)).

519. *Id.*

520. *Id.* at 316.

521. *Id.*

522. Mary Bernstein, *Identities and Politics: Toward a Historical Understanding of the Lesbian and Gay Movement*, SOC. SCIENCE HIST. 531, 539–40 (2002); COLUM. L. SCH., *The Equal Rights Amendment and the Equality Act: Two Equality Measures Explained*, CTR. FOR GENDER & SEX. L. (2021).

523. Harris, *supra* note 518, at 316.

524. *See* Sharrow, *supra* note 16, at 3.

color.⁵²⁵ The new trans exclusion laws invite questioning of athletes' femininity,⁵²⁶ and race inevitably maps onto who is targeted for being suspect.⁵²⁷ Racial stereotypes about the "natural" dominance of Black athletes, and particularly Black male athletes, contribute to this cultural dissonance about how to understand Black female athleticism.⁵²⁸ As Elizabeth Sharrow has observed, such stereotypes help explain why the only real-world examples pointed to by supporters of these bills are the two Black transgender girls whose participation in high school track and field precipitated the legal challenge to the gender-inclusive eligibility policy in Connecticut.⁵²⁹

Rejecting trans exclusion in sport is not just best for trans girls, it is best for all girls who play sports. The threat narrative reinforces an understanding of who counts as a girl that is problematic on its own terms and is in tension with Title IX.⁵³⁰ At its best, Title IX has expanded the cultural meaning of what it means to be a girl, of femininity, and of who is considered an athlete.⁵³¹ By expanding the cultural understanding of both girlhood and of athleticism, Title IX has brought recognition and celebration to women as athletes.⁵³² The resulting societal changes have been profound; they have moved the needle on the cultural scripts and gender roles open to girls and women in sport and beyond.⁵³³

Supporters of girls' and women's sports should heed the call of feminist legal scholar Camille Gear Rich, who has argued for a "strategic essentialism" to continually interrogate who is included and who is excluded by feminism's "women."⁵³⁴ As Rich recognizes, "the construct of woman is contingent, temporary, and used to surface issues."⁵³⁵ This kind of issue-surfacing is now endemic in right-wing politics, and is at the heart of the movement to exclude trans girls from sports.

525. *Id.*

526. See Chase Strangio & Gabriel Arkles, *Four Myths About Trans Athletes, Debunked*, ACLU (Apr. 30, 2020), <https://www.aclu.org/news/lgbtq-rights/four-myths-about-trans-athletes-debunked> [<https://perma.cc/UR7N-VUKA>].

527. Sharrow, *supra* note 16, at 3.

528. See, e.g., Turban, *supra* note 453.

529. Sharrow, *supra* note 16, at 3, 18.

530. See, e.g., Turban, *supra* note 453.

531. See Sarah Pruitt, *How Title IX Transformed Women's Sports*, HISTORY (June 23, 2022), <https://www.history.com/news/title-nine-womens-sports> [<https://perma.cc/3UN3-3C9B>].

532. Shanna McCarriston, *Title IX 50th Anniversary: What is Title IX, how it became law and how it changed athletics forever*, CBS SPORTS (Mar. 4, 2022, 6:37 PM), <https://www.cbssports.com/general/news/title-ix-50th-anniversary-what-is-title-ix-how-it-be-came-law-and-how-it-changed-athletics-forever> [<https://perma.cc/Y8YG-P3GC>].

533. See *id.*

534. Rich, *supra* note 14, manuscript at 25, 26 (on file with author).

535. *Id.*, manuscript at 31.

CONCLUSION

The move to exclude transgender girls from girls' sports has appropriated certain strands of Title IX's feminism in service of a reactionary gender agenda. Using the mantra of protecting girls' and women's sports, the trans exclusion movement has succeeded in appealing to some supporters of Title IX. This is hardly the first-time feminist-sounding discourses have been appropriated and turned by reactionary forces.⁵³⁶ But it is one of the more successful instances of repurposing a feminist theme. As this Article has shown, however, the logic and rationales of Title IX do not actually support the biological essentialism on which the case for trans exclusion rests.

As someone who has defended Title IX's pragmatic compromise on sex separation as the default in sports—albeit tentatively and contingently⁵³⁷—I have been deeply troubled by the distortions of Title IX's position and justifications on sex separation that have fueled the trans exclusion movement. Sex as the boundary for separation has always worked better in the logic of Title IX when sex is understood as a social category, and not primarily a biological one. The strong view of biological essentialism taken by supporters of these laws, that female athletes are inherently inferior by virtue of their biology, has no place in Title IX discourse. Nor are proponents of trans exclusion laws correct that preserving sex separation in sports requires the exclusion of transgender athletes. The boundary separating sport by sex has always been porous, more like Swiss cheese than a concrete barrier. If sex separation in sport can accommodate try-out rights to mixed-gender competition, and even a stronger set of such rights than presently recognized,⁵³⁸ then accommodating transgender girls in girls' sports hardly necessitates the end of girls' and women's sports. Title IX's stance on sex separation has always been a pragmatic one, not an all or nothing hard and fast rule.

Fundamentally, the guiding light in setting more nuanced rules for Title IX's treatment of athletic eligibility—a process soon to be taken up by the Department of Education—should be that these are educational opportunities, first and foremost, which must be available to all students. Maximizing cisgender girls' chances of winning should not be the overriding objective—and certainly not when it

536. Burns, *supra* note 183.

537. Even while defending separation as the baseline, I have advocated for stronger crossover integration rights to mixed-gender play, both for boys seeking to play on girls' teams in sports not offered to boys, and by girls seeking to crossover and play on boys' teams even in sports that are offered to boys. See BRAKE, *supra* note 7, at 63–66.

538. *See id.*

conflicts with the chances for transgender girls to participate in sports at all. In my view, the educational focus on sport in schools means that the default should be one of inclusion based on gender identity. Any departures from this baseline should bear a high burden of justification, specific to the particular sport, level of competition, the scientific evidence for more particular eligibility requirements (such as medical treatment), and the circumstances of the individuals affected.

The very logic of trans exclusion is antithetical to Title IX's core values. At various times, in various events, superstar athletes emerge who set records and dominate a sport. These individuals are usually lauded, even if—for a time—they diminish the chances for competitors to grab the spotlight. We tolerate—even celebrate—this when the stars are cisgender girls or women, or (more commonly) boys and men. Why, when the star in an event is a trans girl or trans woman, does their accomplishment become a threat? Supporters of trans exclusion should not be allowed to hide behind Title IX.