
SHIFTING SCAPEGOATS: LEARNING FROM THE PAST TO NAVIGATE TODAY'S BATTLES FOR TRANSGENDER- INCLUSIVE POLICIES

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*The most conflicted moments in American history may be the times when old social meanings about status are dissolving and new ones are taking their place.*¹

—J.M. Balkin

INTRODUCTION

There is a raging legal and cultural debate about Title IX's protection of LGBTQ students.² At the center of this debate are transgender students seeking to be included in educational programs consistent with their gender identity³ and the school districts that have supported them by adopting trans-inclusive policies.⁴ Those inclusive policies exist in nineteen states that ban discrimination against LGBTQ students and three states that interpret existing prohibitions on sex discrimination to include sexual orientation and/or gender identity.⁵ With regard to sports participation, sixteen states and the District of Columbia have fully inclusive policies that allow transgender athletes in K-12 schools to play

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¹ J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2334 (1997).

² *E.g.*, Tell Me More, *Controversy over Title IX Protecting Transgender Students*, NAT'L PUB. RADIO (May 6, 2014), <https://www.npr.org/2014/05/06/310099267/controversy-over-title-ix-protecting-transgender-students> [<https://perma.cc/922F-GGSB>]; Ayanna Alexander, *New Transgender Protections Put Schools at Heart of Culture War*, BLOOMBERG L. (June 24, 2022, 12:10 PM), <https://news.bloomberglaw.com/social-justice/new-transgender-protections-put-schools-at-heart-of-culture-war> [<https://perma.cc/2BA5-HBCS>].

³ *See, e.g.*, *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1038-39 (2017).

⁴ *Separation and Stigma: Transgender Youth & School Facilities*, MOVEMENT ADVANCEMENT PROJECT & GLSEN (Apr. 2017), <https://www.lgbtmap.org/file/transgender-youth-school.pdf> [<https://perma.cc/B6FQ-3K9F>].

⁵ *Equality Maps: Safe Schools Laws*, MOVEMENT ADVANCEMENT PROJECT (last visited Jan. 4, 2023), https://www.lgbtmap.org/equality-maps/safe_school_laws [<https://perma.cc/C6VP-AJUS>].

on teams consistent with their gender identity without requiring medical interventions.⁶

The proactive adoption of such policies is important on at least three levels. First, they relieve transgender students of the burden of litigating their way to equality and inclusion, thus placing the burden of rectifying inequality where it should be—on school districts, rather than on school-aged children.⁷ The burdens are asymmetrical because “students face a wide array of social costs associated with even raising the issue of equitable resources” and efforts to achieve equality through litigation “often result in social scorn.”⁸ The placement of such burdens on schools instead of students is a positive in and of itself, given the financial and emotional toll of litigation, as well as the often glacial pace of lawsuits. The need for after-the-fact adjudication thus often is eliminated, which is a welcome change from placing the burden of Title IX enforcement on students rather than institutions.

Second, proactive policies harness the expressive power of the law in a way that sends powerful messages about transgender students’ place in schools, namely that they *belong*. The scholarly literature on the law’s expressive function reminds us that the messages that laws send are often as important as the law’s coercive role in adjudicating disputes between particular parties.⁹ The expressive theory of law focuses on how the messages sent by a law may affect social norms.¹⁰ The expressive function of Title IX is particularly powerful given its central role in shifting cultural gender norms and its pop culture status in our collective consciousness; that norm-shaping power often also changes behavior.¹¹ Schools have a unique position in Title IX message-making: because Title IX regulations give schools latitude to make programmatic decisions

⁶ See Shoshana K. Goldberg, *Fair Play: The Importance of Sports Participation for Transgender Youth*, CTR. FOR AM. PROGRESS (Feb. 8, 2021), <https://www.americanprogress.org/article/fair-play/#:~:text=Policies%20that%20are%20fully%20inclusive,%2C%20or%20medical%2Flegal%20transition> [https://perma.cc/LB6Z-KCZ8]. Sixteen states allow transgender students to compete consistent with their gender identity with some restrictions, such as providing proof of hormone therapy. *Id.*

⁷ NANCY HOGSHEAD-MAKAR & ANDREW ZIMBALIST, EQUAL PLAY: TITLE IX AND SOCIAL CHANGE 138 (2007) (hereinafter EQUAL PLAY).

⁸ *Id.* at 139.

⁹ See Danielle Keats Citron, *Law’s Expressive Value in Combating Cyber Harassment*, 108 MICH. L. REV. 373, 407 (2009) (“Law played an important expressive role in detrialing workplace sexual harassment and domestic violence during the last quarter of the twentieth century.”); Dionne L. Koller, *How the Expressive Power of Title IX Dilutes Its Promise*, 3 HARV. J. SPORTS & ENT. L. 103, 108 (2012) (hereinafter Koller, *Expressive Power*).

¹⁰ Koller, *Expressive Power*, *supra* note 9, at 119.

¹¹ See Dionne L. Koller, *The Obese and the Elite: Using Law to Reclaim School Sports*, 67 OKLA. L. REV. 383, 417 (2015) [hereinafter Koller, *Obese and Elite*] (noting the unique “true pop status” of Title IX) (internal citation omitted); Koller, *Expressive Power*, *supra* note 9, at 120-21 (noting that that a law’s message “may cause individuals to change their behavior by ‘signaling the underlying attitudes of a community or society.’”) (internal citation omitted).

within the framework of those regulations, schools are making and sending Title IX's messages of equality and inclusion.¹² There thus "is no question that Title IX communicates beyond its sanctions."¹³ In sum, when schools proactively adopt trans-inclusive policies, they are communicating a message of belonging and inclusion, rather than one of erasure and marginalization—a message that is lifesaving for transgender students.¹⁴

Third, focusing proactively on prevention is also consistent with the characterization of Title IX as "contractual rather than compulsory" because it conditions schools' receipt of federal funds on their agreement to not discriminate on the basis of sex.¹⁵ That framing posits that Title IX "does not seek to remedy the discrimination an individual faced but instead seeks to prevent the discrimination from ever occurring."¹⁶

However, "[w]hen we aspire to social change, we often meet a great deal of resistance."¹⁷ Opposition to such trans-inclusive policies is common. In 2022, over 300 anti-LGBTQ bills were introduced, sending their own messages that transgender lives are open for contestation, erasure, and exclusion.¹⁸ Eighteen states have passed laws that ban transgender students from participating on sports teams that align with their gender identity; two states bar schools from adopting trans-inclusive policies; and three states ban transgender students from using sex-segregated facilities consistent with their gender identity.¹⁹ Those who support these anti-trans measures often frame their objections in terms of fairness and opportunity—a framing that might seem counterintuitive to LGBTQ-rights supporters. Supporters of anti-trans measures contend that trans-inclusive policies are unfair and discriminatory to *cisgender* students. For example, in the context of school sports, some cisgender girls claim that trans-inclusive policies violate Title IX by taking opportunities away from "real" girls.

¹² Koller, *Expressive Power*, *supra* note 9, at 123. Of course, other actors in the legal system also send Title IX's normative messages, such as courts, presidential administrations, and lawmakers. *Id.* But the on-the-ground, everyday interaction of schools with individuals and their communities gives schools a prominence in the law's expressive output and impact in ways that are arguably unique to Title IX.

¹³ *Id.* at 123.

¹⁴ Sam Ames, *Say More Than Gay: How LGBTQ-Inclusive Education Can Save Lives*, REFINERY29 (July 29, 2022), <https://www.refinery29.com/en-us/2022/07/11068423/lgbt-inclusive-education-benefits> [<https://perma.cc/96AR-8JQF>].

¹⁵ Sarah W. Keller, *Battle of the Sexes: Disagreement about the Definition of Sex in Title IX and the Need to Judicial Review*, 28 VA. J. SOC. POL'Y & L. 135, 148 (2021) (describing Title IX as "a contract between the Federal Government and the fund recipient").

¹⁶ *Id.*

¹⁷ Megan Ryan, *Comments from the Spring 2007 Harvard Journal of Law & Gender Conference*, 31 HARV. J. L. & GENDER 378, 393 (2008).

¹⁸ Ames, *supra* note 14.

¹⁹ *Equality Maps: Safe Schools Laws*, *supra* note 5; *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT (last visited Sept. 5, 2022), https://www.lgbtmap.org/equality-maps/sports_participation_bans [<https://perma.cc/WW9H-M2A9>].

More specifically, they argue that allowing transgender girls to compete on girls' sports teams will shatter the dreams of cisgender girls, "destroy women's sports," and "snag the medals and the college scholarships that rightfully belong to athletes who were assigned female at birth."²⁰ This rhetoric of conflict pits cisgender girls against transgender girls and places Title IX at the fulcrum of the conflict.

I. IT'S LIKE DÉJÀ VU ALL OVER AGAIN²¹

We have been here before. Twenty years ago, schools and some male athletes blamed women and Title IX for cuts in men's sports programs.²² This argument, and the rhetoric that surrounded it, embraced a zero-sum approach to equality and nondiscrimination—providing equal opportunities to women automatically means taking away spots from men.²³ There were cries that Title IX had gone too far by forcing universities to cut men's teams, a narrative that was amplified in the mainstream press.²⁴ Those were also the early days of the internet, which further amplified the narrative that Title IX was imperiling men's sports.²⁵

²⁰ E.g., Bianca Stanescu, *Transgender Athletes Don't Belong in Girls' Sports. Let My Daughter Compete Fairly.*, USA TODAY (June 19, 2020), <https://www.usatoday.com/story/opinion/2020/06/19/transgender-athletes-robbing-girls-chance-win-sports-column/4856486002/> [<https://perma.cc/NUQ7-F483>]; Jonathan Mattise & Kimberlee Kruesi, *Governor: Transgender Athletes Will 'Destroy Women's Sports,'* ASSOCIATED PRESS (Feb. 10, 2021), <https://apnews.com/article/tennessee-judiciary-75aecf3b586e90f590944a54094d394a> [<https://perma.cc/7P5N-LJN3>]; Masha Gessen, *The Movement to Exclude Trans Girls from Sports*, NEW YORKER (Mar. 27, 2021), <https://www.newyorker.com/news/our-columnists/the-movement-to-exclude-trans-girls-from-sports>.

²¹ Scott Stump, *'It's Déjà Vu All over Again': 27 of Yogi Berra's Most Memorable 'Yogiisms'*, TODAY (Sept. 23, 2015, 10:57 AM), <https://www.today.com/news/its-deja-vu-all-over-again-27-yogi-berras-most-t45781> [<https://perma.cc/VC3Z-5VQV>] (quoting Yogi Berra's famous sayings).

²² See EQUAL PLAY, *supra* note 7, at 184 ("Title IX was inevitably blamed when men's teams were dropped from a school's sports offerings, even if those cuts included women's teams."). See also Ronnie Wade Robertson, *Tilting at Windmills: The Relationship Between Men's Non-Revenue Sports and Women's Sports*, 76 MISS. L.J. 297, 299 (2006) (noting that "proponents of men's and women's sports spend their energy and resources fighting each other for a shrinking piece of the athletic financial pie instead of working together to focus on eliminating true barriers to the expansion of intercollegiate-athletic opportunities for both men and women"); Andrew Stolbach, *We All Want to Play*, WASH. POST (July 3, 2002) (contending that "deserving male athletes are losing the opportunity to play or even to attend college"), <https://www.washingtonpost.com/archive/opinions/2002/07/03/we-all-want-to-play/5678b23f-0fee-47e1-9d2b-4751ec57ee25/>.

²³ Lexie Kuznick & Megan Ryan, *Changing Social Norms? Title IX and Legal Activism: Comments from the Spring 2007 Harvard Journal of Law & Gender Conference*, 31 HARV. J. L. & GENDER 367, 370-71 (2008).

²⁴ EQUAL PLAY, *supra* note 7, at 181. See also Koller, *Obese and Elite*, *supra* note 11, at 415-16.

²⁵ EQUAL PLAY, *supra* note 7, at 182.

This rhetoric pitted cisgender men against cisgender women to fight for athletic opportunity.²⁶ It was a narrative of conflict, one that framed Title IX as a law under which cisgender women were winners and cisgender men were losers.²⁷ It emphasized the sacrifices that men would need to make—which were described as unfair and discriminatory—and “allowed the anger of Title IX critics to overwhelm ardent calls for women’s equality.”²⁸ This narrative of “men versus women” became a central part of the legal *and* cultural milieu that blamed Title IX and women for lost opportunities and lost resources (such as facilities)²⁹ for male athletes. Because *legal* decisions consistently rejected these arguments, the real challenge for Title IX supporters was debunking these narratives on a *cultural* level. That challenge was met: while there is still work to be done for cisgender girls and women, and the work of culture change was not always easy, “schools largely achieved that cultural shift.”³⁰

One reason for this culture-shifting success likely is that schools are uniquely situated among institutions to achieve such change:

When schools first tried to say that they simply found the world as is, with girls not wanting to participate in sports at the rate boys did, the [U.S. Department of Education] pushed back. In response, schools became creative at expanding and cultivating interest in sports among girls and women. The social change around girls in sports resulted in large part from a charge to schools to cultivate that change, taking concrete steps that would have the effect of changing cultural dynamics. The colleges faced cultural resistance to change and allegations that they were going too far in redesigning athletic programs and opportunities But they demonstrated a powerful ability to transform the culture and expectations of equality in sports participation.³¹

As noted, today’s opponents of trans-inclusive policies harness an eerily similar rhetoric that Title IX has gone too far and that its application to

²⁶ Kuznick & Ryan, *supra* note 23, at 370; Koller, *Expressive Power*, *supra* note 9, at 125-26.

²⁷ See Ryan, *supra* note 17, at 405 (2008) (“The problem is that the increasing focus on football and men’s basketball at universities has meant that women’s sports and Olympic-type men’s sports are pitted against each other to fight over the remaining opportunities.”); Koller, *Expressive Power*, *supra* note 9, at 126 (recounting “efforts by male sports advocates that argued Title IX would unfairly shift resources from male sports programs to women’s programs”); Julie B. Lane, *Women Are a Problem: Title IX Narratives in the New York Times and the Washington Post, 1974-1975*, 6 COMM’N & SPORT 25, 28 (2018) (noting that “[m]edia coverage over the past four decades consistently has drawn attention to conflict engendered by Title IX” and that “adversarial language” in some of that coverage “help[s] to perpetuate the idea that men have lost something to which they have a rightful claim”).

²⁸ Lane, *supra* note 27, at 36.

²⁹ EQUAL PLAY, *supra* note 7, at 41-42.

³⁰ *Id.*

³¹ Katharine Silbaugh, *Reactive to Proactive: Title IX’s Unrealized Capacity to Prevent Campus Sexual Assault*, 95 B.U. L. REV. 1049, 1074-75 (2015).

transgender students is unfair and discriminatory to cisgender students. Set within this historical context, we can see today's objections to trans-inclusive interpretations of Title IX are echoes of past cultural and legal contestation. What twenty years ago was framed as cisgender women taking opportunities away from cisgender men is framed today as transgender girls taking opportunities away from cisgender girls.

II. LEARNING FROM THE PAST TO IMPROVE THE FUTURE

What might we learn from these twenty-year-old legal and cultural battles and the successful culture shift vis-à-vis cisgender girls? I propose that this history holds important insights about how LGBTQ advocates and LGBTQ-supportive schools might weather today's legal and cultural storms.

The success enjoyed in pushing back against the scapegoating of cisgender women twenty years ago was the result of the work of various institutions and constituencies, including Congress, the courts, the executive branch, schools, and activists.

In the early years, schools and the Department of Education ("DOE") had to do the work of shifting both the culture on campuses and the "understanding of how students relate to one another,"³² relying on Title IX to do that work. In particular, the DOE "leveraged Title IX to make these massive shifts . . . in the restructuring of college sports, successfully calling on schools to create culture of equality if one did not already exist."³³ In addition, the DOE rejected schools' argument that disparities in sports programs were permissible because cisgender girls simply did not have an interest in sports; this forced schools to create a culture of involvement and equality.³⁴

Part of this culture shift involved Congress consistently supporting DOE regulations and "repeatedly rejecting efforts by male sports advocates that argued Title IX would unfairly shift resources from male sports programs to women's programs."³⁵ In addition, Congress repeatedly rejected attempts to exempt men's basketball and football from Title IX coverage.³⁶

Courts also played a role in this culture shift by consistently rejecting these kinds of zero-sum, unfairness arguments made by male athletes in Title IX cases.³⁷ In contrast, in cases filed by women athletes seeking to remedy disparities in resources such as facilities, courts recognized that such unequal facilities sent a message that women were second-class citizens.³⁸ Recognizing

³² Kelsey Scarlett & Lexi Weyrick, *Transforming the Focus: An Intersectional Lens in School Response to Sex Discrimination*, 57 CAL. W. L. REV. 391, 431 (2021).

³³ *Id.* at 428.

³⁴ Silbaugh, *supra* note 31, at 1074.

³⁵ Koller, *Expressive Power*, *supra* note 9, at 125-26.

³⁶ *Id.* at 126.

³⁷ *Id.* at 127.

³⁸ *Id.* at 127-28.

this kind of dignitary harm resulting from Title IX violations did important, large-scale norm-shifting work.

Last, but certainly not least, activists worked tirelessly to shift the cultural narrative and legal landscape. Here, history teaches an important lesson: the composition of courts, Congress, and the executive branch may change, and with those changes come changes in Title IX's legal and expressive landscape. But pro-women and pro-LGBTQ Title IX activism is a constant. Such activism is within control of individuals and advocacy groups, regardless of which way the political winds are blowing.

As more transgender students are fully included in sex-segregated education spaces and programs, social norms permissive of anti-trans rhetoric and actions likely will fade and be replaced by social norms that reject such anti-trans stances.³⁹ Thus, proactive school policy functions on two levels—on a compliance-assuring legal level and on a normative, culture-shifting level. When transgender students are treated like first-class citizens along with their cisgender classmates, Title IX requirements are met and the school sends a normative message of belonging, not just to transgender students but to *all* students.

While some cisgender students and their parents might resist these legal and the normative moves,⁴⁰ such resistance is part-and-parcel of social movements and the march toward equality. Title IX's legal and normative work over the past five decades "has steadily eroded the stigma that formerly attached to women's participation in sports and shifted the dynamic, so that an ever greater stigma attaches to institutions and individuals who discriminate against women athletes, at least with respect to participation."⁴¹ A similar result may adhere if schools, advocates, courts, Congress, and the executive branch continue to focus on proactive, pre-dispute, trans-inclusive policy enactment.⁴²

³⁹ See *id.* at 131 ("Title IX therefore has carried important moral weight that convinced people that the existing norms for sports participation which excluded women were wrong and deserved to be replaced"; the fact that Title IX held such normative promise for cisgender girls suggests it holds the same promise for transgender athletes); *id.* at 147 ("Title IX's ability to shape norms and affect individual attitudes towards sports participation is significant because the sheer popularity of the law and its place in our culture make it a substantial symbol that resonates far beyond its legal sanctions.").

⁴⁰ See, e.g., *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 390-91 (E.D. Penn. 2017) (suit by cisgender students alleging that school district's trans-inclusive policy violated Title IX and their privacy rights under the Fourteenth Amendment); *Parents for Privacy v. Barr*, 949 F.3d 1210, 1220, 1239-40 (9th Cir. 2020) (rejecting claims by cisgender students alleging that school district's trans-inclusive policy violated Title IX and their privacy rights under the Fourteenth Amendment).

⁴¹ Koller, *Expressive Power*, *supra* note 9, at 129.

⁴² Not all of those actors need to be on the same page to successfully change norms and avoid an overreliance on after-the-fact adjudication. As noted above, changes in courts, Congress, and the presidency sometimes create a pendulum-like effect on Title IX's application to LGBTQ students. But activists are a constant and thus play an indispensable role in the success of Title IX, both legally and culturally.

Title IX thus has “important moral weight”⁴³ that has accomplished the transformative expressive and cultural work to “convince[] people that the existing norms for sports participation which excluded [cisgender] women were wrong and deserved to be replaced.”⁴⁴ Similarly, school districts’ adoption of trans-inclusive policies likely will signal the same kind of normative commitments and perhaps create “approval patterns”⁴⁵ that move the LGBTQ needle toward equality in educational settings and beyond.

CONCLUSION

After-the-fact enforcement of Title IX rights to remedy harms limits the reach and impact of Title IX by narrowing our collective vision of what should be on the Title IX civil rights agenda.⁴⁶ This dynamic creates risks, among them an inability or reluctance to engage in forward-looking prevention. Proactive policies aimed at prevention and at creating a norm of gender diversity, equity, inclusion, and belonging hold the potential to engender culture shifts, which in turn can aid in preventing harms in the first instance.

Professor Deborah Brake has contended that “legal interventions alone rarely, if ever, succeed in shifting social norms; legal strategies are most effective where social norms are already in flux.”⁴⁷ Today, social norms regarding gender identity (as well as sexual orientation) are decidedly in flux, thus making this cultural and political moment ripe for such policy interventions to accomplish important normative and expressive work. Moreover, schools lay down normative boundaries that guide students. A school district’s policy that mandates full inclusion of transgender students establishes and then perpetuates such inclusive and respectful conduct. The norm-defining power of schools extends through post-secondary education, reinforcing both norms and the bounds of acceptable behavior.⁴⁸ Through these trans-inclusive policies, schools have the power to prescribe social norms of inclusion vis-à-vis transgender students while at the same time ensuring compliance with Title IX.⁴⁹

⁴³ Koller, *Expressive Power*, *supra* note 9, at 131.

⁴⁴ *Id.* See also *id.* at 147 (“Law causes individuals to update their understandings of behavior that will gain community approval or disapproval.”).

⁴⁵ *Id.* at 150.

⁴⁶ Koller, *Obese and Elite*, *supra* note 11, at 419.

⁴⁷ Deborah L. Brake, *Lessons from the Gender Equality Movement: Using Title IX to Foster Inclusive Masculinities in Men’s Sport*, 34 L. & INEQ. 285, 310 (2016).

⁴⁸ Athena Katsampes, *A Rape by Any Other Name? The Problem with Defining Acts of Protection Deception and the University as a Solution*, 24 VA. J. SOC. POL’Y & L. 157, 185-87 (2017).

⁴⁹ See Scarlett & Weyrick, *supra* note 32, at 429 (arguing that “centering marginalized identities in prevention and education efforts surrounding sexual misconduct on campuses ensures that institutions are accountable to all students within their community; thus, enabling schools to foster a community based in consent that is inclusive of the nuanced experiences of all students”).

Proactive, pre-litigation trans-inclusive policies—whether it be in sports, the use of sex-segregated facilities, or requiring the use of proper names and pronouns—are an example of how “equality law can break down barriers and allow new norms and forms of social coordination to flourish among actors freed from constraints of sex discrimination.”⁵⁰

Drawing parallels between the scapegoating of cisgender women in the past and the scapegoating of transgender girls today makes legible recurring rhetorical patterns and legal practices. Once our eyes are open to those parallels, we can learn from the success of the past to propel today’s Title IX battles toward a pro-equality, pro-inclusion resolution.

⁵⁰ Reva B. Siegel, *Pregnancy as a Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination*, 59 WM. & MARY L. REV. 969, 996 (2018).