

TRANSGENDER STUDENT-ATHLETES IN TEXAS SCHOOL DISTRICTS: WHY CAN'T THE UIL GIVE ALL STUDENTS EQUAL PLAYING TIME?

Comment

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* J.D. Candidate, Texas Tech University School of Law, 2017; B.A. International Studies, University of Denver, 2012. This Comment is dedicated to my parents for their constant encouragement and support throughout my law school career, and to my three brothers and sister-in-law for being my comic relief throughout law school and life. I would also like to thank Professor Kyle C. Velte and Kathleen Sprinkle, who provided invaluable guidance in the development of this Comment and who serve as role models in the LGBT community. Finally, I would like to thank Dominice—your story inspired this Comment, and I thank you for your courage.

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I. TRANSITIONING FORWARD

“[W]hile Lawrence confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there.”¹

– Justice Kennedy

In the aftermath of *Obergefell v. Hodges*, the United States Supreme Court’s landmark decision legalizing gay marriage, transgender individuals are using this momentous opportunity to further challenge traditional notions of gender equality and freedom.² Transgender individuals, or those who identify with a gender different than the gender stated on their birth certificate, are historically unaccounted for in civil rights enactments.³ The exclusion of lesbian, gay, bisexual, and transgender (LGBT) people from society’s “normative promise of equality is simply wrong.”⁴ After years of treatment as second-class citizens, transgender individuals are emerging from the fringes of civil rights progress to fight for equal status in society.⁵ In fact, the United States is in the midst of what *Time* magazine calls a “transgender tipping point.”⁶ The struggle for transgender equality is not fueled solely by gender discrimination in the workplace; both federal law and Texas city ordinances promulgate certain protections for transgender employees against discrimination.⁷ Rather, their dissatisfaction is a reaction to an insufficient

1. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

2. Katy Steinmetz, *The Transgender Tipping Point*, TIME (May 29, 2014), <http://time.com/135480/transgender-tipping-point/>.

3. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240–41 (1989) (holding that the prohibition against sex-based discrimination in Title VII of the 1964 Civil Rights Act includes discrimination based on an individual’s failure to meet sex stereotypes); cf. *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (holding that discrimination against a transgender individual is sex discrimination under Title VII of the 1964 Civil Rights Act); Jennifer L. Levi, *Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights*, 7 WM. & MARY J. WOMEN & L. 5, 5 (2000) (observing that courts have generally denied extending protections against discrimination to transgender individuals). See generally Adam Kielich, *Transgender Employment Discrimination in Texas*, KIELICH L. FIRM (Aug. 14, 2013), <http://kielichlawfirm.com/transgender-employment-discrimination-in-texas/> (explaining that transgender individuals did not receive protection against gender stereotyping under the law until the ruling in *Price Waterhouse*).

4. Kyle C. Velte, Visiting Assistant Professor at Tex. Tech Univ. Sch. of Law, *Ramifications of Obergefell v. Hodges: Same-Sex Marriage in America* (Oct. 20, 2015, 12:00 PM).

5. See Steinmetz, *supra* note 2.

6. *Id.*

7. See Jody Serrano, *San Antonio Passes LGBT Non-discrimination Ordinance*, KUT.ORG (Sept. 5, 2013), <http://kut.org/post/san-antonio-passes-lgbt-non-discrimination-ordinance> (explaining that the ordinance adopted in San Antonio aims to prevent discrimination against sexual orientation and gender

implementation of safeguards for transgender youth in schools and, more specifically, for transgender students participating in Texas public school-sponsored sports.⁸ The deficiency in transgender protections is also a result of the various misunderstandings and preconceptions surrounding transgender students, and many schools have yet to effectively address transgender students' inclusion into sports.⁹ Similar shortcomings in state and school policies are widespread, and schools are nationally emerging as the platform for cultural change.¹⁰

While many states have implemented policies protecting a transgender student's choice to play on sports teams according to their gender identity, Texas has not.¹¹ In fact, the University Interscholastic League (UIL) has recently codified its already informal policy of determining any "gender-based eligibility questions" by referring to the student's submitted birth certificate.¹² In an effort to overcome these policies, a few Texas parents and school administrators have made efforts to effectuate an equal

identity). While transgender employees have no protection on the basis of gender identity alone, they are protected against gender stereotyping in the workplace following the ruling in *Price Waterhouse*. *Price Waterhouse*, 490 U.S. at 228–29. Despite such protections, discrimination in the workplace is still widespread. Crosby Burns & Jeff Krehely, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment*, CTR. FOR AM. PROGRESS (June 2, 2011), <https://www.americanprogress.org/issues/lgbt/news/2011/06/02/9872/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment/>. The Williams Institute on Sexual Orientation Law and Public Policy found that 15%–43% of gay people and 90% of transgender individuals have experienced some form of discrimination in the workplace. *Id.*

8. See PAT GRIFFIN & HELEN J. CARROLL, ON THE TEAM: EQUAL OPPORTUNITY FOR TRANSGENDER STUDENT ATHLETES 6 (Oct. 4, 2010), <http://www.nclrights.org/wp-content/uploads/2013/07/TransgenderStudentAthleteReport.pdf> (explaining how high school athletic programs have not adequately addressed the needs of transgender students desiring to play on a high school sports team); TEX. ASS'N OF SCH. BDS., LEGAL ISSUES RELATED TO TRANSGENDER STUDENTS 8 (2015), https://www.tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Students/documents/transgender_students_july15.pdf; Alia Wong, *The K-12 Binary*, ATLANTIC (July 9, 2015), <http://www.theatlantic.com/education/archive/2015/07/the-k-12-binary/398060/> (discussing the severe discrimination transgender and nonconforming children face in public school systems).

9. See GRIFFIN & CARROLL, *supra* note 8 (observing that most coaches do not have adequate training to address the equal inclusion of transgender athletes). A public opinion survey found that three out of every ten people were unable to define *transgender*. Wong, *supra* note 8.

10. See Wong, *supra* note 8.

11. See CAL. EDUC. CODE § 221.5 (West 2002 & Supp. 2016); TEX. ASS'N OF SCH. BDS., *supra* note 8; *K-12 Policies*, TRANS*ATHLETE RESOURCE, <http://www.transathlete.com/#!k-12/c4w2> (last visited Apr. 11, 2016).

12. TEX. ASS'N OF SCH. BDS., *supra* note 8; Corbett Smith, *Advocates Call Texas UIL Birth Certificate Ruling 'Horrible Policy' for Transgender Athletes*, DALL. MORNING NEWS (Feb. 26, 2016, 11:26 AM), <http://educationblog.dallasnews.com/2016/02/texas-superintendents-overwhelming-pass-UIL-amendment-requiring-birth-certificates-in-questions-of-gender.html/>.

inclusion policy into the school system.¹³ Transgender individuals, however, “should not have to blaze new trails to protect existing civil rights.”¹⁴

The quintessential problem with deferring to a student’s birth certificate to determine what team the student should play on is that transgender students do not necessarily identify with the gender stated on their birth certificate; deferring to this document, therefore, ignores their identity altogether.¹⁵

When a school policy refuses to recognize a student’s true gender identity, psychological problems can arise and hinder success in various aspects of the student’s life, especially in the classroom.¹⁶ Transgender students, therefore, should be allowed to “socially transition,” which may provide them immediate relief.¹⁷ A four-year-old transgender girl (a biological male identifying as female) named Dominice, for example, experienced relief after her parents accepted her social transition and allowed her to dress according to her true gender identity.¹⁸ While her birth certificate identifies her as male, Dominice has always preferred playing with dolls and trying on girls clothing.¹⁹ Prior to her transition, Dominice was temperamental, uncommunicative, and uncooperative, refusing to wear boys clothing and throwing objects at her parents when they tried to make her dress in male-gendered clothing.²⁰ These reactions reached a tipping point when Dominice attempted to remove an offensive appendage from her body, which she believed impeded her ability to completely conform to her gender identity.²¹

13. See, e.g., Victor Skinner, *Texas Schools Train Teachers to Accommodate Transgender Students*, EAGNEWS (Sept. 4, 2015), <http://eagnews.org/texas-schools-train-teachers-to-accommodate-transgender-students/> (explaining that two Texas schools are educating their staff on transgender issues and training them on approaches to better accommodate and include transgender students). One parent even traveled to Austin, Texas, to join other LGBT advocates to lobby against House Bill 2801, which would hold schools “liable for damages if they allow transgender students to use restrooms according to the gender with which they identify.” John Wright, *Parents of Transgender Children Fight Bathroom Bills*, TEX. OBSERVER (Apr. 28, 2015, 4:46 PM), <http://www.texasobserver.org/transgender-children-bathroom-bills/>.

14. LAUREN FREDERICO ET AL., N.Y. CIVIL LIBERTIES UNION, *DIGNITY FOR ALL?* 4 (June 2015), http://www.nyclu.org/files/releases/Dignity_for_All_Report.pdf.

15. WOMEN’S SPORTS FOUND., *PARTICIPATION OF TRANSGENDER ATHLETES IN WOMEN’S SPORTS: THE FOUNDATION POSITION 1*, http://www.womenssportsfoundation.org/home/advocate/title-ix-and-issues/title-ix-positions/participation_of_transgender_athletes (follow “Download Now” hyperlink).

16. ASAF ORR ET AL., *SCHOOLS IN TRANSITION: A GUIDE FOR SUPPORTING TRANSGENDER STUDENTS IN K-12 SCHOOLS* 8 (2015), <https://www.genderspectrum.org/staging/wp-content/uploads/2015/08/Schools-in-Transition-2015.pdf>.

17. *Id.* at 9.

18. Amber Stearns, *Trans Athlete: A Girl’s Transition Journey and the Fight for Her Right to Play*, NUVO (July 14, 2015), <http://www.nuvo.net/indianapolis/trans-athlete-a-girls-transition-journey-and-the-fight-for-her-right-to-play/Content?oid=3310717>.

19. *Id.*

20. *Id.*

21. *Id.* The American Psychiatric Association attributes this type of behavior to a disorder known as Gender Identity Disorder (GID). See AM. PSYCHIATRIC ASS’N, *GENDER DYSPHORIA* 1 (2013), <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>. This term, however, will be replaced in the upcoming fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders*

Realizing this behavior was not simply a phase, Dominice's parents discarded all of the male clothing from her closet and allowed her to socially transition to the gender she had identified with since age three.²² Her parents observed an immediate improvement in Dominice's attitude; their "brooding angry shoe-throwing boy transformed into a bright, lively, happy girl."²³ While her father, who coached football and described himself as a "macho man," found the transition difficult, he eventually realized how happy the transition made his daughter.²⁴ The acceptance Dominice received at home, however, was not initially reciprocated at her elementary school, which refused to acknowledge her gender identification change.²⁵ It was not until two years later that the school finally accepted Dominice's social transition.²⁶

While Dominice eventually gained acceptance at her elementary school, her parents worry that this welcoming attitude will not carry over into middle school and high school sports.²⁷ Like the UIL in Texas, Indiana's High School Athletic Association (IHSAA) utilizes a non-inclusive policy.²⁸ The association only permits a student-athlete to participate on a member school's team "of the gender which matches the gender of the student at birth."²⁹ Although Texas is silent on reassignment surgery, the IHSAA requires that students desiring to play a sport under a gender different than the gender stated on their birth certificate undergo reassignment surgery and amend their birth certificate before gaining eligibility.³⁰ These requirements

with the term *Gender Dysphoria*. *Id.* A doctor who diagnoses a transgender individual with the disorder usually experiences "great discomfort regarding [his or her] actual anatomic gender." Krista D. Brown, Comment, *The Transgender Student-Athlete: Is There a Fourteenth Amendment Right to Participate on the Gender-Specific Team of Your Choice?*, 25 MARQ. SPORTS L. REV. 311, 313 (2014). Symptoms accompanying GID include an individual's desire to become the opposite sex, disgust toward his or her own genitals, depression, and anxiety. Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 12–13 (2011).

22. Stearns, *supra* note 18. Individuals can gain awareness of their gender identity as young as age two. Buzuvis, *supra* note 21. In fact, adolescence is one of "the most common times for transgender individuals to realize that they are transgender." *Id.*

23. Stearns, *supra* note 18.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. See E-mail from Jason Wille, Media Relations Representative, IHSAA, to Amber Stearns, News Editor, NUVO (Jan. 22, 2016, 11:55 AM) (on file with the IHSAA).

29. *Id.*

30. See *id.* The obstacles a transgender individual must undergo to receive sex reassignment surgery are burdensome and costly. See Jody Marksamer & Dylan Wade, *Recommendations for Transgender Health Care*, TRANSGENDER L. CTR., <http://www.transgenderlaw.org/resources/tlchealth.htm> (last visited Apr. 12, 2016). Many health insurance policies contain transgender exclusion provisions, making it difficult for individuals to receive coverage for transition-related procedures. See *id.* Without this coverage, surgeries can cost anywhere from \$7,000–\$50,000, and phalloplasties (the artificial modifications of a penis) can cost up to \$100,000. *Id.* The World Professional Association for Transgender Health recommends that genital surgery should not take place until (1) the patient reaches the age required to give medical consent and (2) the patient lives consistently for twelve months in the

are a harsh reality for a young child like Dominice, who already endured an incredible amount of adversity just to feel comfortable in her own skin.³¹ While her father admits that he does not care if Dominice plays sports, the freedom to decide should be his daughter's and should not be "based on someone's assumptions or their lack of knowledge about transgender people."³²

This Comment first examines the nation's social climate after *Obergefell* and the holding's potential influence on transgender rights. Next, it illustrates the hardships transgender children face and the negative effects that non-inclusive transgender policies can have on individuals. Part II discusses the public education system's underlying goals and the benefits that athletic participation can have on student-athletes. Additionally, Part II analyzes the veracity of competitive advantage stereotypes, the most cited fear of those who oppose transgender participation in sports. Part III discusses the potential consequences for schools that have policies excluding transgender students from playing on gender-specific teams. Part IV then provides a comparison of various policies within states and associations.

This Comment then shifts to Texas, in Part V, and compares the UIL's recently codified transgender policy with other associations' approaches. Finally, in Part V, the UIL's policy is considered in light of Equal Protection and Title IX implications. Part VI expresses the negative effect that the UIL's birth certificate verification policy will have on transgender students and calls for the codification of a more inclusive policy (which is provided) that would allow transgender students the opportunity to participate on the team of the gender with which they identify.

II. THE LINEUP

A. Expressive Function

The majority in *Obergefell v. Hodges* held that the U.S. Constitution guarantees a fundamental right for same-sex couples to marry.³³ While the decision was monumental, Professor Kyle C. Velte, co-author of an amicus curiae brief for *Obergefell*, believes that the holding was a missed

gender role that is consistent with his or her gender identity. ELI COLEMAN ET AL., STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 177 (7th ed. 2012), http://www.wpath.org/uploaded_files/140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf.

31. Stearns, *supra* note 18.

32. *Id.*

33. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590–91 (2015); see Velte, *supra* note 4.

opportunity.³⁴ The Court simply allowed same-sex couples to “participate in the already-existing fundamental right to marry.”³⁵

Had *Obergefell* created formal equality, the result would have been more encompassing.³⁶ For instance, the Court could have established sexual orientation as a suspect class, thereby expanding protections for LGBT individuals beyond the narrow scope of marital rights.³⁷ This would have sent a moral message to Americans that discrimination against LGBT people is wrong.³⁸ Instead, *Obergefell*’s doctrinal reach is restricted to issues of marital status and certain supplementary issues.³⁹ Additionally, in the aftermath of *Obergefell*, there is still no federal anti-discrimination law or Supreme Court holding that includes gender identity as a protected class.⁴⁰

The silver lining, however, is found in *Obergefell*’s expressive power. Despite its restrictive doctrinal reach, *Obergefell*’s expressive function may independently influence policy and norms.⁴¹ In fact, the message portrayed by a court’s decision may overshadow the consequences of the court’s actual holding.⁴² The expressive power of a court’s holding can be seen as “speaking on behalf of the nation’s basic principles and commitments.”⁴³ For example, in *Obergefell*, Justice Kennedy observed:

34. See Velte, *supra* note 4.

35. Kyle C. Velte, *Obergefell’s Expressive Promise*, 6 HOUS. L. REV.: OFF THE REC. 157, 159 (2015).

36. See Velte, *supra* note 4 (expressing that the Court’s narrow approach to marriage rights was not surprising because courts generally decide issues on the narrowest grounds possible).

37. See *id.* When a court classifies a group as “suspect,” it will strictly scrutinize a law in question to determine whether it is “suitably tailored to serve a compelling state interest.” Kyle C. Velte, *Paths to Protection: A Comparison of Federal Protection Based on Disability and Sexual Orientation*, 6 WM. & MARY J. WOMEN & L. 323, 326 (2000) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985)).

38. See Velte, *supra* note 4.

39. See *id.* In the aftermath of *Obergefell*, one court held that *Obergefell* does not “establish a broad right to be free from sexual orientation discrimination in all contexts.” *Dew v. Edmunds*, No. 1:15-cv-00149-CWD, 2015 WL 5886184, at *1, *10 (D. Idaho Oct. 8, 2015).

40. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (explaining that the Court would not create new fundamental rights for homosexuals), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); see Velte, *supra* note 4. Within a month after the Supreme Court decided *Obergefell*, however, the Legislature introduced the Equality Act, which, if passed, would add sexual orientation and gender identity to groups already protected under the Civil Rights Act of 1964. See Zack Ford, *The Equality Act Could End Legal LGBT Discrimination for Good*, THINK PROGRESS (July 23, 2015, 10:35 AM), <http://thinkprogress.org/lgbt/2015/07/23/3683728/equality-act-introduction/>.

41. See Velte, *supra* note 4. The close attention Americans pay to Supreme Court decisions is indicative of the symbolic impact of its pronouncements. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2028 (1996). In fact, “Prevailing norms, like preferences and beliefs, are not a presocial given but a product of a complex set of social forces, possibly including law.” *Id.* at 2026 (footnote omitted).

42. See Velte, *supra* note 4. Professor Velte explained that when a court utilizes its expressive powers, it moves beyond mandating certain actions to making broader statements about social issues. See *id.*

43. Sunstein, *supra* note 41; see Velte, *supra* note 4.

The marriage laws at issue are in essence unequal: Same-sex couples are denied benefits afforded opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians.⁴⁴

Justice Kennedy's statement arguably transcends *Obergefell*'s doctrinal holding, sending a message that the LGBT community deserves dignity and recognition by the law and that failure to legally recognize the group will cause great harm.⁴⁵ Justice Kennedy's expressive sentiment is essential for future LGBT rights and may have already advanced further rights for the LGBT community.⁴⁶

According to Professor Kyle Velte, *Obergefell* might infuse into society a sense of responsibility and shame, which will likely lead to less discrimination.⁴⁷ In fact, "A large point of the law may be to shift social norms and social meaning."⁴⁸ These "new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions."⁴⁹ If such meanings do evolve as society develops new insights, then "it is a natural progression . . . to see *all* discrimination against LGBT people as wrong."⁵⁰ Ultimately, *Obergefell* could mean future protections for transgender students in school settings.

B. Fundamental Goals of Education

The objective of Texas's public education system is to give *all* students "access to a quality education that enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of [the] state and nation."⁵¹ These broad and democratic values stem from the educational philosophies promoted by many of America's intellectual leaders.⁵² For example, Justice Felix Frankfurter stressed the importance of keeping divisive forces out of the school system and observed that public schools were "[d]esigned to serve as perhaps the

44. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590–91 (2015).

45. See Velte, *supra* note 4.

46. See *id.* Just weeks after *Obergefell*, the city council of Columbus, Ohio, added sexual orientation and gender identity to its human rights ordinance, ultimately replacing its previous discriminatory Religious Freedom Restoration Act. See Hayley Miller, *Columbus Adds Sexual Orientation and Gender Identity to City's Human Rights Ordinance*, HUM. RTS. CAMPAIGN (Sept. 16, 2015), <http://www.hrc.org/blog/entry/columbus-adds-sexual-orientation-and-gender-identity-to-citys-human-rights>.

47. Velte, *supra* note 35, at 161.

48. *Id.* (quoting Sunstein, *supra* note 41, at 2043–44).

49. *Id.* at 163 (quoting *Obergefell*, 135 S. Ct. at 2603).

50. *Id.*

51. TEX. EDUC. CODE ANN. § 4.001 (West 2012); 65 TEX. JUR. 3D *Schools* § 2 (2014).

52. See *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring).

most powerful agency for promoting cohesion among a heterogeneous democratic people.”⁵³

Many of the Founding Fathers geared their endorsements of public education toward helping people become responsible citizens capable of formulating wise political decisions.⁵⁴ For instance, the Founders believed that promoting history instruction enabled students to learn from society’s past mistakes and promoted the development of honesty and compassion among America’s youth.⁵⁵ George Washington stressed the importance of teaching virtue and morality in the school system to enlighten public opinion because he believed that public opinion would influence future policy.⁵⁶ More importantly, Washington believed that an educational institution should bring students together from various backgrounds to encourage tolerance and extinguish notions of prejudice.⁵⁷

In addition to promoting intellectual fitness, Founding Father Benjamin Franklin campaigned for an education system that placed equal emphasis on physical fitness, believing that “exercise invigorates the soul as well as the body.”⁵⁸ These principles were reinforced in the National Education Association’s (NEA) Cardinal Principles of Secondary Education Report (Report) in 1918.⁵⁹ The Report explained that achieving academic skills in the classroom was only half of the education equation.⁶⁰ It listed a number of additional goals—notably, physical activity and civic education—which the NEA deemed necessary to achieve a complete education.⁶¹ In the section devoted to civic duties, the Report stressed that students could only learn democratic habits if schools practiced democratic methods.⁶² Courts have continuously cited language reiterating this concept:

The educational process is a broad and comprehensive concept with a variable and indefinite meaning. It is not limited to classroom attendance but includes innumerable separate components, such as participation in athletic activity and membership in school clubs and social groups, which combine to provide an atmosphere of intellectual and moral advancement.⁶³

53. *Id.* at 216.

54. Rebecca Jacobsen & Richard Rothstein, *The Goals of Education*, ECON. POL’Y INST. (Dec. 4, 2006), http://www.epi.org/publication/webfeatures_viewpoints_education_goals/.

55. *See Id.*; ROCKEFELLER BROS. FUND, INC., *THE PURSUIT OF EXCELLENCE: EDUCATION AND THE FUTURE OF AMERICA* 26 (4th ed. 1958).

56. Jacobsen & Rothstein, *supra* note 54.

57. *See id.*

58. *Id.*

59. *See id.*; HENRY NEUMANN, BUREAU OF EDUC., *CARDINAL PRINCIPLES OF SECONDARY EDUCATION* 5–32 (1918).

60. *See* NEUMANN, *supra* note 59, at 11, 20–21; Jacobsen & Rothstein, *supra* note 54.

61. *See* NEUMANN, *supra* note 59, at 11–15; Jacobsen & Rothstein, *supra* note 54.

62. *See* NEUMANN, *supra* note 59, at 13–15; Jacobsen & Rothstein, *supra* note 54.

63. *Albach v. Odle*, 531 F.2d 983, 985 (10th Cir. 1976); *Tiffany v. Ariz. Interscholastic Ass’n*, 726 P.2d 231, 233 (Ariz. Ct. App. 1986).

The Report reflects many of Horace Mann's suggestions as well. Mann, the secretary of the Massachusetts Board of Education, determined, after visiting schools in Prussia, that academics alone would not ensure democratic values.⁶⁴ He observed that Prussian students, while literate, supported autocracy.⁶⁵ Mann warned that to avoid literacy going to misuse, schools must "develop students' morality: justice and fair dealing, . . . tolerance and respect for others, habits of cooperation, . . . along with endurance and physical strength."⁶⁶ Schools in a democracy, he insisted, should ensure that children are (1) working together, (2) learning to be fair and tolerant, (3) sympathetic to those suffering, and (4) offended by injustices around them.⁶⁷

These century-old educational commitments to diversity and athletic fitness support an inclusion of a transgender-friendly policy in the public school system and, specifically, into school athletic programs.⁶⁸ Furthering such educational principles in an atmosphere that excludes a "highly visible" minority cannot achieve these goals.⁶⁹ In fact, the UIL's policy will promote the antithesis of what a century of educational leaders have strived to promote: tolerance, democracy, and cooperation.⁷⁰ By adopting policies that include transgender students in every aspect of the school system, however, Texas can further not only its mission of giving *all* students access to public education but also the nation's long-established commitment to creating inclusive educational environments for students.⁷¹

C. The Benefits of Athletic Participation: How It Fits into America's Educational Mission

Physical education and fitness are two of the principles encompassed within America's educational goals.⁷² More specifically, schools implement extracurricular activities because they believe participation in athletics advances values consistent with their academic mission.⁷³ Even the American legal system recognizes that athletic participation plays an integral

64. Jacobsen & Rothstein, *supra* note 54.

65. *Id.*

66. *Id.*; Richard Rothstein, *Real Accountability: The Historic Role of the NEA in Defining the True Missions of Public Education*, VA. EDUC. ASS'N, <http://www.veanea.org/home/1485.htm> (last visited Apr. 12, 2016).

67. Jacobsen & Rothstein, *supra* note 54.

68. *See Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, 127 HARV. L. REV. 1722, 1727–28 (2014).

69. *Id.* at 1728; Rothstein, *supra* note 66.

70. *See Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, *supra* note 68, at 1728.

71. *See* 65 TEX. JUR. 3D *Schools* § 2 (2014).

72. *See* Jacobsen & Rothstein, *supra* note 54.

73. Buzuvis, *supra* note 21, at 43.

part in a school's educational mission.⁷⁴ Supreme Court Justice Byron White, for example, observed:

Sports and other forms of vigorous physical activity provide educational experience which cannot be duplicated in the classroom. They are an uncompromising laboratory in which we must think and act quickly and efficiently under pressure and then force us to meet our own inadequacies face-to-face and to do something about them, as nothing else does. . . . Sports resemble life in capsule form and the participant quickly learns that his performance depends upon the development of strength, stamina, self-discipline and a sure and steady judgment.⁷⁵

Sports teach life skills and promote teamwork, self-esteem, and diversity.⁷⁶ The increasing popularity and benefits of athletic participation further justify its crucial role in education.⁷⁷ Additionally, longitudinal studies on youth sports show that students who participate in sports exhibit higher grades, greater self-esteem, greater attachment to school and family, stronger relationships, and greater participation in volunteer work than students who do not play sports.⁷⁸ Participation in sports provides these benefits by allowing students to navigate different social dynamics within the team—including interactions with peers and adults.⁷⁹

Studies also suggest that playing sports can safeguard against the risk of suicide in youth. Athletic participation can improve mood and decrease many forms of depression because it protects students from social isolation.⁸⁰ Additionally, research suggests that time spent outside of the classroom—a byproduct of athletic participation—may increase attention levels inside the classroom.⁸¹ Likewise, exercise correlates with “short-term relaxation, accompanied by improved concentration, enhanced creativity and memory, improved mood, and enhanced problem-solving abilities.”⁸² The

74. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 289 (2001); Ray Yasser & Matthew Block, *Upon Further Review: Recognizing Procedural Due Process Rights for Suspended High School Athletes*, 26 ENT. & SPORTS L., Fall 2008, at 1, 23.

75. Yasser & Block, *supra* note 74, at 31 (quoting John M. Barron et al., *The Effects of High School Athletic Participation on Education and Labor Market Outcomes*, 82 REV. ECON. & STAT. 409, 409 (2010)).

76. Buzuvis, *supra* note 21, at 43.

77. See Yasser & Block, *supra* note 74, at 22–23. Today over 7.5 million students participate in high school sports. NAT'L FED'N OF STATE HIGH SCH. ASS'NS, 2014–2015 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY 55, http://www.nfhs.org/ParticipationStatics/PDF/2014-15_Participation_Survey_Results.pdf.

78. KATHI E. HANNA, TRUE SPORT: WHAT WE STAND TO LOSE IN OUR OBSESSION TO WIN 31–32 (2012), http://www.truesport.org/library/documents/about/true_sport_report/True-Sport-Report.pdf.

79. *Id.* at 32.

80. *Id.*

81. *Id.* at 34.

82. *Id.*

development of these positive traits is indispensable to a student's long-term success in life.

Further, athletes gravitate toward college enrollment and enjoy enhanced adult earnings. This tendency is likely attributable to athletics' emphasis on hard work, preparation, persistence, and competition—characteristics that can carry over into careers after high school.⁸³ In fact, some universities have observed that the competitive nature of sports mirrors the business world.⁸⁴ Finally, student-athletes must maintain certain academic standards to remain eligible and must participate in rigorous practice to develop their skills; therefore, preparation, organization, and responsible study habits are positive byproducts of sports participation.⁸⁵ Transgender students who are denied the right to play on a team because of their gender identity miss out on the opportunity to develop these positive attributes.

D. *Benching Competitive Advantage Myths*

Stereotypes and myths surrounding transgender individuals form the basis of discriminatory regulations in interscholastic athletic policies throughout the country. The challenging nature and evolving understanding of gender identity facilitate stereotypes and impede the formation of policies based on accurate and reliable information.⁸⁶

The most common stereotype held by those who oppose a policy allowing a transgender student, most notably a male-to-female student, to play on a team of his or her gender identity is that it will give the student a competitive advantage over other non-transgender teammates.⁸⁷ While these fears are more visible at the collegiate and professional level, they infiltrate middle school and high school programs as well.⁸⁸

Distinguishing between the different levels of play when implementing policy is necessary because “sports at school are motivated by different principles and goals than sports at the top levels.”⁸⁹ For example, the value underlying a professional sports program like the Olympics is “competitive perfection.”⁹⁰ A more stringent and non-inclusive policy, therefore, may be

83. *See id.* at 23.

84. VARDA BURSTYN, *THE RITES OF MEN: MANHOOD, POLITICS, AND THE CULTURE OF SPORT* 72 (1999). Walter Camp, a famous Yale football coach, explained, “Football has come to be recognized as the best school for instilling into the young man those attributes which business desires and demands.” *Id.*; Buzuvis, *supra* note 21, at 45.

85. *See* Yasser & Block, *supra* note 74, at 32.

86. *See generally* GRIFFIN & CARROLL, *supra* note 8, at 11.

87. *Id.* at 14; *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, *supra* note 68, at 1737.

88. *See Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, *supra* note 68, at 1737.

89. *Id.* at 1741.

90. *See id.* at 1738.

justified.⁹¹ At an interscholastic level, however, the underlying goal is academic.⁹² “[T]eamwork, self-knowledge, self-esteem, and citizenship” motivate athletic programs in a school setting.⁹³ These holistic educational values trump any goals of perfect competition.⁹⁴ Athletic programs at an interscholastic level have a responsibility “to look beyond the value of competition to promote broader educational goals of participation, inclusion, and equal opportunity.”⁹⁵ After all, the public education system guarantees these opportunities to students.⁹⁶

In addition to the conflicting goals between professional and interscholastic sports programs, adolescents present a wider range of physical characteristics than professional athletes. Student-athletes in middle and high school develop physically, cognitively, and emotionally at different rates, and the natural variation in ability, strength, and size between natal (the sex a person is assigned at birth) female and male students is expected.⁹⁷ Similar variations are present when a transgender female plays on a girls team.⁹⁸ The assumption, therefore, that a male-to-female transgender adolescent would have more of a competitive advantage or disadvantage than those that already naturally exist among adolescents is unfounded.⁹⁹ Certain adolescents who have undergone puberty will naturally have longer bones and more muscle mass from higher levels of testosterone.¹⁰⁰ Preventing a transgender girl from playing on a girls team because the student has higher levels of testosterone when another non-transgender girl with equal levels of testosterone is allowed to play on that team is unfair and conflicts with society’s educational goals of participation, inclusion, and equal opportunity.

Alternatively, the physical variations that exist among adolescents may be a product of differing environmental factors rather than biological ones. Some researchers acknowledge, for instance, that skills such as throwing, catching, and motor grip strength are as much a product of a child’s

91. *See id.* at 1737.

92. *See id.* at 1741.

93. *Id.* (quoting Buzuvis, *supra* note 21, at 44).

94. *Id.*

95. GRIFFIN & CARROLL, *supra* note 8, at 12.

96. *Id.* at 13; *see Boyd v. Bd. of Dirs.*, 612 F. Supp. 86, 93 (E.D. Ark. 1985) (holding that a student has a property interest in participating in interscholastic athletics).

97. *See* GRIFFIN & CARROLL, *supra* note 8, at 13. One court, which struck down a provision prohibiting females from playing on a boys soccer team because of safety precautions, recognized that the “range of differences among individuals in both sexes is greater than the average difference between the sexes.” *Hoover v. Meiklejohn*, 430 F. Supp. 164, 166 (D. Colo. 1977).

98. GRIFFIN & CARROLL, *supra* note 8, at 15. In fact, Dr. Nick Gorton, a medical legal consultant for Trans Health Care, stated that “[t]ransgender student athletes fall within the spectrum of physical traits found in athletes of their transitioned gender, allowing them to compete fairly and equitably.” *Id.* at 16.

99. *Id.* A survey conducted to analyze competitive advantages between transitioned individuals and physically born men and women revealed no scientific conclusion that transitioned athletes compete at an advantage or disadvantage. *Id.* at 14, 16.

100. *Id.* at 15.

environment as they are of his or her biological pool.¹⁰¹ Science does not conclusively show that a natal male has an innate athletic advantage over a natal female or, conversely, that a natal female will necessarily be at a disadvantage when compared to a natal male.¹⁰² Even assuming that a transitioned female has higher levels of testosterone or that a transitioned male has higher levels of estrogen than his or her teammates, the natural variance of muscle size and body fat among natal women and natal men is already present and expected.¹⁰³

The same reasoning applies to policies based on safety concerns. Early programs prohibited girls from integrating onto boys-only teams by claiming that girls' participation in sports alongside boys subjected girls to physical injury.¹⁰⁴ But this safety rationale is, like competitive advantage, based on broad generalizations about the physical characteristics of boys and girls.¹⁰⁵ Courts, likewise, generally reject this rationale because "ostensible concerns about safety are not promoted when stronger, larger girls are excluded and weaker, smaller boys are allowed to play."¹⁰⁶ One court explained that both boys and girls risk injury in sports play.¹⁰⁷ The risk of injury to a smaller boy, however, is not used to restrict him from participating on a team.¹⁰⁸ An argument, therefore, that one gender is stronger and thus, more likely to injure another gender that is generally weaker cannot justify a policy excluding a transgender athlete from playing on the team of his or her gender identity.

Similar to the unfounded fears surrounding competitive advantage and safety, concerns that boys will abuse an inclusive policy and pretend to be transgender to gain an advantage is equally unfounded.¹⁰⁹ In fact, no such fraudulent activity has been reported in forty years of sex verification procedures.¹¹⁰ Rather, sex verification procedures "have been misused to humiliate and unfairly exclude women with intersex conditions."¹¹¹

Most significantly, some advocates of a non-inclusive policy believe that a transgender student's claim of identifying as another gender is not

101. See Buzuvis, *supra* note 21, at 37. In one study, second grade boys and girls threw at equal speeds with their non-dominant arms. *Id.* at 37–38. This suggests that practice, rather than "innate biological traits, produced boys' superior speed in dominant-arm throws." *Id.* at 37.

102. See *id.* at 38.

103. See *id.* at 39.

104. *Id.* at 7–8.

105. See generally GRIFFIN & CARROLL, *supra* note 8, at 13.

106. Buzuvis, *supra* note 21, at 7–8.

107. See *Darrin v. Gould*, 540 P.2d 882, 891 (Wash. 1975) (en banc).

108. See *id.* at 892.

109. See *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, *supra* note 68, at 1742; Ellen Huet, *New State Law Opens Doors for Transgender Students*, SFGATE (Aug. 12, 2013, 11:07 PM), <http://www.sfgate.com/news/article/New-state-law-opens-doors-for-transgender-students-4726696.php>.

110. GRIFFIN & CARROLL, *supra* note 8, at 17.

111. *Id.*

“real.”¹¹² The decision to align one’s external gender with one’s internal gender identity, however, is deep-seated and authentic.¹¹³ The decision is difficult and made only for compelling reasons.¹¹⁴ In the case of Dominice, the three-year-old transgender girl described earlier, she actually attempted to remove her own penis because her external genitalia did not align with her internal sense of gender.¹¹⁵ Gender is a core aspect of a person’s identity and, for many, a social and psychological necessity.¹¹⁶ Even if a school has to sacrifice “*perfect* competition” to allow transgender students to fully participate, the losses “pale in comparison to the benefits arising from the educational values of teamwork, community, and a stronger sense of self.”¹¹⁷

III. ZONE DEFENSE: PROTECTIONS FOR TRANSGENDER STUDENT-ATHLETES

A. The Fourteenth Amendment: MVP for a Transgender Student’s Legal Protection

Without legal safeguards against highly sex-segregated athletic programs, transgender student-athletes may avoid participation in sports, which would deprive them of the beneficial opportunities that playing can provide.

A source of protection for transgender student-athletes may stem from the Fourteenth Amendment. This constitutional guarantee provides that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹¹⁸ Essentially, the Equal Protection Clause of the Fourteenth Amendment protects similarly situated individuals or groups from unequal treatment.¹¹⁹

Courts determine whether a practice deprives a group or class of its Fourteenth Amendment rights by applying a three-tiered analytical review to the law in question.¹²⁰ The rational basis review, for instance, is the most deferential standard of review, and courts will presume the law in question is

112. *Id.* at 14.

113. *Id.* at 13–15.

114. *Id.* at 15. One professor of gender and women’s studies, who transitioned over twenty years ago, described the feeling of associating with a gender different than how she felt as “being locked in a dark room with [her] eyes and ears cut off and [her] tongue cut out and not being able to connect [her] own inner experience with an outer world.” Steinmetz, *supra* note 2.

115. Stearns, *supra* note 18.

116. GRIFFIN & CARROLL, *supra* note 8, at 15.

117. *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, *supra* note 68, at 1741–42.

118. U.S. CONST. amend. XIV, § 1.

119. Velte, *supra* note 37, at 325.

120. *See* Brown, *supra* note 21, at 318.

constitutional if it is “rationally related to a legitimate state interest.”¹²¹ A law reviewed under this lens will usually pass constitutional muster.¹²² A court will apply intermediate or heightened scrutiny, a less deferential standard of review, when the law implicates a quasi-suspect class.¹²³ To pass this review standard, the court must hold that the law is “substantially related to a sufficiently important governmental interest.”¹²⁴ Finally, courts will apply a strict scrutiny review when the law implicates a fundamental right or when the court deems a classification suspect.¹²⁵ To survive strict scrutiny, the court must conclude that the classification is “tailored to serve a compelling state interest.”¹²⁶ Laws reviewed under this standard, however, are generally rejected, and courts sparingly create new fundamental rights and infrequently create new quasi-suspect classes.¹²⁷

It is unclear what level of scrutiny a court would apply to a school policy prohibiting a transgender student from participating on a team in accordance with his or her gender identity.¹²⁸ While precedent suggests that the Supreme Court would apply a rational basis review to LGBT legislation, *Obergefell* demonstrates a potential shift in the manner in which society and courts view the LGBT community.¹²⁹ The holding demonstrates that the Court *is* willing to reject certain traditionally held beliefs and overturn precedent.¹³⁰ Additionally, as explained earlier, the expressive function of Justice Kennedy’s holding arguably transcends its doctrinal holding, suggesting that not only do gays and lesbians have rights and dignities beyond marriage, but

121. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439–43 (1985). While courts have historically used a rational basis review to uphold discriminatory legislation against the LGBT community, the Court in *Romer v. Evans*, 517 U.S. 620, 632 (1996), struck down discriminatory legislation despite using a rational basis review. Velte, *supra* note 37, at 361.

122. See Velte, *supra* note 37, at 327.

123. *Id.* at 325–26. In fact, the Court in *Craig v. Boren*, 429 U.S. 190, 210 (1976), first used intermediate scrutiny to strike down an Oklahoma law on the grounds that it was discriminatory towards one gender.

124. *Cleburne*, 473 U.S. at 441; see Velte, *supra* note 37.

125. Velte, *supra* note 37.

126. *Id.*; *Cleburne*, 473 U.S. at 440. The last quasi-suspect classification created was illegitimacy in 1976. See *Mathews v. Lucas*, 427 U.S. 495, 505–06 (1976).

127. See *Cleburne*, 473 U.S. at 442; Velte, *supra* note 37, at 327.

128. See *Brown*, *supra* note 21, at 318.

129. See *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977) (explaining that because transsexuals were not a suspect class, the court only needed to apply rational basis review to the discriminatory legislation), *overruled by Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). See generally Velte, *supra* note 35, 161–62.

130. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (granting constitutional protection for same-sex marriage); *Statement Calling for Constitutional Resistance to Obergefell v. Hodges*, AM. PRINCIPLES PROJECT (Oct. 8, 2015), <https://americanprinciplesproject.org/founding-principles/statement-calling-for-constitutional-resistance-to-obergefell-v-hodges>. Alternatively, the court in *Glenn v. Brumby* explained that although an employee experiencing discrimination for failing to conform to a gender stereotype was a protected class, transgender individuals were not. *Glenn v. Brumby*, 663 F.3d 1312, 1315 (11th Cir. 2011). A court may be more inclined to apply heightened scrutiny to transgender discrimination in schools on the basis of “one’s failure to conform to stereotypes associated with one’s biological sex.” *Buzavis*, *supra* note 21, at 31; see Velte, *supra* note 37, at 325.

more broadly, the law should equally recognize the rights of the LGBT community.¹³¹ Justice Kennedy observed:

If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.¹³²

Justice Kennedy's statement conveys a message that constitutional change is expected and that "LGBT people can, and should, 'invoke rights once denied' such as inclusion in antidiscrimination laws."¹³³ Specifically, the LGBT community should call for the use of a heightened standard of review or strict scrutiny review when analyzing transgender legislation.

Certain factors weigh into courts' determination of when a group deserves a heightened level of scrutiny, including whether the group (1) has historically faced discrimination, (2) has political power, (3) has immutable characteristics, and (4) has defining characteristics beyond their control that do not relate to their ability to contribute to society.¹³⁴ Based on these factors, courts could arguably analyze athletic program policies that treat transgender individuals differently than other students under a heightened level of scrutiny.¹³⁵ In fact, some scholars propose that the Court's decision in *Lawrence v. Texas* indicates its readiness to apply a heightened standard of review to regulations distinguishing between individuals based on LGBT classifications.¹³⁶

I. Facing Discrimination

A person's gender identity—similar to race, alienage, and national origin—has no relevance to the individual's ability to contribute to society.¹³⁷ Treating a group of people differently based on this attribute, therefore, is likely motivated by prejudice and unguided preconceptions about transgender individuals.¹³⁸

131. See Velte, *supra* note 4.

132. *Obergefell*, 135 S. Ct. at 2602.

133. Velte, *supra* note 35, at 162 (quoting *Obergefell*, 135 S. Ct. at 2602).

134. See Velte, *supra* note 37.

135. See Buzuvis, *supra* note 21, at 31 (considering the similarities between transgender individuals and suspect classifications that already receive a heightened standard of scrutiny).

136. See *Lawrence v. Texas*, 539 U.S. 558 (2003). See generally *Obergefell*, 135 S. Ct. at 2588–89; Velte, *supra* note 35, at 165. *Lawrence* struck down a Texas statute criminalizing sodomy between same-sex partners and broadened "the rights to personal autonomy, privacy and respect for [people's] choices, free of state interference." CAL. CMTY. PROP. L. *Same Sex Marriage* § 2:47, Westlaw (database updated May 2015); see Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny*, 17 DUKE J. GENDER L. & POL'Y 385, 387 (2010).

137. Powers, *supra* note 136, at 389.

138. *Id.*

Transgender prejudices have led to decades of LGBT discrimination in society and the workplace. Many jurisdictions, for example, fail to provide transgender individuals protections against employers who fire (or a landlord who evicts) a LGBT individual based on sexual orientation.¹³⁹ LGBT individuals have also historically been targets of hate crimes and have high rates of suicide.¹⁴⁰ A study conducted by the National Center for Transgender Equality and the National Gay and Lesbian Task Force found that transgender individuals experience double the rate of unemployment and live at high rates of poverty.¹⁴¹ The overwhelming history of discrimination against transgender people alone should convince courts to analyze transgender legislation under a heightened standard of review or classify transgender individuals as a separate protected class.¹⁴²

2. Immutability

A second factor courts weigh into their decision is the immutability of a group's defining characteristic, which is generally established by whether the trait in question is an "accident of birth" or, stated differently, a trait determined at birth.¹⁴³ One factor that courts focus on when denying homosexuals a suspect classification is whether the discrimination is based on the behavioral aspect of the group, which is not deemed an accident of birth.¹⁴⁴ Although gender is "notably a discrete biological category" for constitutional protection purposes, transgender individuals diagnosed with Gender Identity Disorder (GID), which is now defined as Gender Dysphoria according to the Diagnostic and Statistical Manual of Mental Disorders

139. See Velte, *supra* note 37, at 347.

140. See Brown, *supra* note 21, at 318; *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, *supra* note 68 (explaining that 25%–35% of transgender students commit suicide and at least 45% of transgender students attempt suicide). Transgender students may also experience higher rates of victimization in secondary schools because their gender expression makes them a more visible target. JOSEPH G. KOSCIW ET AL., *THE 2013 NATIONAL SCHOOL CLIMATE SURVEY 90* (2013), https://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report_0.pdf.

141. NAT'L CTR. FOR TRANSGENDER EQUAL. & THE NAT'L GAY & LESBIAN TASK FORCE, *NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2* (2009), http://www.thetaskforce.org/static_html/downloads/release_materials/tf_enda_fact_sheet.pdf (explaining that from a survey conducted of 6,450 transgender people, 13% of the respondents were unemployed and 26% lost their jobs because they were transgender).

142. Diana Elkind, Comment, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 904 (2007).

143. *Id.* at 917; Brown, *supra* note 21, at 319.

144. See *Lawrence v. Texas*, 539 U.S. 558, 571 (2003); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (explaining that while African-Americans and women exhibit immutable characteristics, homosexuality is behavioral); Elkind, *supra* note 142, at 901.

(DSM-5), do not belong to a group because of their behavior.¹⁴⁵ They identify as transgender because of a “physical or psychological immutable trait that is associated with [Gender Dysphoria].”¹⁴⁶ While Gender Dysphoria is treatable, it is a physiological disorder that is considered inherited or unchangeable.¹⁴⁷ This classification designates “transgenderism” as an immutable trait for individuals diagnosed with Gender Dysphoria.¹⁴⁸ According to the World Professional Association for Transgender Health, however, not all transgender individuals experience Gender Dysphoria.¹⁴⁹ Establishing this factor, therefore, may prove difficult for individuals without the disorder.

3. *Minority and Political Role*

Third, the minimal number of states that have protections for transgender individuals as well as the group’s small percentage of the population reinforces the group’s status as a minority and its subordinate political position in society.¹⁵⁰ As Justice Marshall stated, the “political powerlessness of a group . . . [is indicative of] a social and cultural isolation that gives the majority little reason to respect or be concerned with that group’s interests and needs.”¹⁵¹ Because most non-LGBT legislators cannot identify with being LGBT, the group’s interests lack representation and, ultimately, political power.¹⁵²

4. *Potential for Change*

Although courts have not yet deemed LGBT individuals a suspect class, the expressive function of *Obergefell* demonstrates that change is expected and necessary to preserve America’s traditional values of dignity and

145. Elkind, *supra* note 142, at 901; AM. PSYCHIATRIC ASS’N, *supra* note 21. A diagnosis of Gender Dysphoria requires the presence of a “marked difference between the individual’s expressed/experienced gender and the gender others would assign him or her.” AM. PSYCHIATRIC ASS’N, *supra* note 21.

146. Elkind, *supra* note 142, at 901.

147. *Id.* at 902.

148. *Id.*

149. COLEMAN ET AL., *supra* note 30, at 169.

150. See GARY J. GATES, THE WILLIAMS INST., HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 1, 6 (2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf> (explaining that there are nearly 700,000 transgender individuals in the United States); Powers, *supra* note 136, at 389; *Maps of State Laws and Policies: Statewide Employment Laws & Policies*, HUM. RTS. CAMPAIGN, http://www.hrc.org/state_maps (last visited Apr. 13, 2016) (observing that only nineteen states, not including Texas, have laws prohibiting discrimination based on sexual orientation and gender identity). Additionally, considering the low percentage of transgender people that make up the United States population, most non-transgender legislators do not likely have immediate family members who identify with the group. See Powers, *supra* note 136, at 390.

151. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 472 n.24 (1985) (Marshall, J., dissenting).

152. See Powers, *supra* note 136, at 390.

liberty.¹⁵³ While *Obergefell* might be seen as a missed opportunity for achieving formal equality, it can equally be seen as holding tremendous expressive power capable of influencing state legislatures, Congress, and LGBT individuals alike to push for legally recognized dignity and liberty.¹⁵⁴

Although judicial interpretations of the Constitution have not specifically considered whether academic institutions must include transgender athletes in their sports programs based on their gender identity, courts have applied a heightened standard of review to policies excluding individuals of one sex from teams of another.¹⁵⁵ Similarly, courts have historically given deference to high school athletic associations' decisions regarding athletic eligibility.¹⁵⁶ Courts have also held that athletic programs have a legitimate interest in student health and safety, and maintaining competitive equity.¹⁵⁷ Educational institutions use these justifications to deny transgender students the opportunity to participate on gender-specific teams.¹⁵⁸

Categorically excluding transgender students, however, from playing on a gender-specific sports team because of health, safety, and competitive inequality concerns is not substantially related to a legitimate state interest. The court in *Force v. Pierce City R-VI School District*, for instance, held that a school could not deny a female athlete the opportunity to try out for a male football team because of a "blanket rule" that was based on the generalizations of a particular gender.¹⁵⁹ The court recognized that these exclusion concerns were unfounded and that schools should instead make conclusions on a case-by-case analysis.¹⁶⁰ Analogously, stereotypes and bias should not be the basis of excluding transgender students from playing on a gender-specific team.¹⁶¹ Any association basing its policy on these assumptions may violate the Equal Protection Clause of the Fourteenth Amendment.¹⁶²

153. See Velte, *supra* note 4.

154. See *id.*

155. Buzuvis, *supra* note 21, at 30.

156. See Brown, *supra* note 21, at 323.

157. See *id.* at 323–24.

158. See *id.* at 324; Corbett Smith, *UIL Enters Gender Politics Debate with Proposed Birth Certificate Requirement*, SPORTSDAY HS (Oct. 19, 2015), <http://sportsday.dallasnews.com/high-school/high-schools/2015/10/19/birth-certificate-requirement-uil-set-wade-contentious-debate-gender-politics>.

159. *Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020, 1028–29 (W.D. Mo. 1983).

160. See *id.* The court reasoned that "some 13 year old females could safely play eighth grade football in mixed sex competition, and some 13 year old males could not." *Id.* at 1029.

161. See Buzuvis, *supra* note 21, at 35.

162. See Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC'Y 271, 274–75 (2013); Brown, *supra* note 21, at 324–25.

B. Title IX

An athletic association's non-inclusive policy regarding the participation of transgender students may also be subject to a Title IX challenge.¹⁶³ Title IX, part of the Education Amendments of 1972, provides,

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient [of federal funds], and no recipient shall provide any such athletics separately on such basis.¹⁶⁴

In April 2014, the Department of Education made clear in a "Dear Colleague" letter to school administrators that Title IX includes transgender students.¹⁶⁵ While the regulation allows athletic programs to operate separate teams for each sex, it explains that students cannot be denied the equal opportunity to participate on a team based on their sex.¹⁶⁶

Title IX can, however, exclude students of a certain gender from a contact sport on the basis of safety.¹⁶⁷ Courts have allowed such exclusions on the belief that boys may physically dominate a girls team or that boys could injure a girl participating on a boys team.¹⁶⁸ There is no precedent, however, determining whether Title IX protects a middle or high school transgender student-athlete who wishes to play on a gender-specific athletic team.¹⁶⁹ Courts have only acknowledged that denying a student the opportunity to play on a team because of general assumptions about their gender-specific athletic abilities is discriminatory.¹⁷⁰ This same reasoning should be applied to policies that allow schools to deny transgender students the opportunity to play on a gender-specific team.

163. Jill Pilgrim et al., *Far from the Finish Line: Transsexualism and Athletic Competition*, 13 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 495, 540 (2003).

164. 34 C.F.R. § 106.41(a) (2016).

165. Richard J. Hunter, Jr. & Taylor E. Brown, *Transgender Athlete Rights Under Title IX and NCAA Policy: Inadequacy and Unevenness of the Treatment Demands Equal Protection and at Least Intermediate Scrutiny Analysis*, 5 *INT'L J. SPORTS STUD.* 752, 755 (2015), <https://www.ijssjournal.com/fulltext/paper-11012016121830.pdf>.

166. Skinner-Thompson & Turner, *supra* note 162, at 274.

167. 1 RONNA GREFF SCHNEIDER, *EDUCATION LAW* § 4:10, Westlaw (database updated Mar. 2016).

168. *Id.*

169. Hunter, Jr. & Brown, *supra* note 165.

170. *See Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020, 1024 (W.D. Mo. 1983).

IV. AWAY GAME: A COMPARISON OF OTHER STATE POLICIES

Policies regarding transgender participation in athletics can be described on a spectrum ranging from least to most inclusive.¹⁷¹ A transgender student's fate is ultimately left in the hands of the state in which he or she lives.¹⁷²

A. California

The most sweeping and protective mechanism for transgender student-athletes is found in California's statutory Assembly Bill 1266 (AB 1266). California Interscholastic Federation (CIF) initially instituted a bylaw allowing transgender student-athletes to play on a team according to their gender identity on the condition that a panel confirm each student's claim—the verification policy, however, was too difficult to regulate consistently.¹⁷³ California ultimately adopted AB 1266, stating, "A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, . . . irrespective of the gender listed on the pupil's records."¹⁷⁴ CIF also clarified that hormone therapy (and more importantly, surgery) for transgender student-athletes was unnecessary because "medical professionals advised that most students are too young and underdeveloped for hormone therapy."¹⁷⁵ Additionally, reports in *Pediatrics*, a medical journal, warned that sex-changing treatments for children under eighteen raise ethical issues.¹⁷⁶ Some experts even advise against treating these children with puberty-blocking hormones altogether until they reach the age of eighteen.¹⁷⁷

171. Erin E. Buzuvis, *Including Transgender Athletes in Sex-Segregated Sport*, in GENDER IDENTITY IN SPORT: ESSAYS FROM ACTIVISTS, COACHES, AND SCHOLARS 23, 29 (George B. Cunningham ed., 2012), <http://www.digitalcommons.law.wne.edu/cgi/viewcontent.cgi?article=1248&context=facschol>.

172. See Pat Griffin, *Developing Policies for Transgender Students on High School Teams*, NAT'L FED'N ST. HIGH SCH. ASS'NS (Sept. 8, 2015), <https://www.nfhs.org/articles/developing-policies-for-transgender-students-on-high-school-teams/>.

173. See *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, *supra* note 68, at 1740.

174. CAL. EDUC. CODE § 221.5(f) (West Supp. 2016).

175. Huet, *supra* note 109.

176. Associated Press, *Sex-Change Treatment for Kids on the Rise*, CBS NEWS (Feb. 20, 2012, 8:12 AM), <http://www.cbsnews.com/news/sex-change-treatment-for-kids-on-the-rise/>.

Some kids may get a psychiatric diagnosis when they are just hugely uncomfortable with narrowly defined gender roles; or some may be gay and are coerced into treatment by parents more comfortable with a sex change than having a homosexual child, said Dr. Margaret Moon, who teaches at the Johns Hopkins Berman Institute of Bioethics.

Id.

177. *Id.* Guidelines from the Endocrine Society recommend that doctors refrain from giving prepubescent children hormone treatments. See Wylie C. Hembree et al., *Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline*, 94 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3132, 3132–33 (2009), <http://press.endocrine.org/doi/full/10.1210/>

California's AB 1266 aligns with the broad educational values that founded public education.¹⁷⁸ While opponents argue that the law will enable students to take advantage of this access to play on sports teams of the opposite sex, the concern has no basis—the Los Angeles Unified School District (LAUSD) (serving more than 600,000 students) has successfully maintained a nearly identical policy for more than fifteen years.¹⁷⁹ Unfounded apprehensions and discomfort, therefore, should not be a valid basis for a discriminatory policy.

B. Washington

Similar to California, Washington does not require that a transgender student undergo any medical treatment to play on the team of the gender with which the student identifies.¹⁸⁰ While Washington's provisions are not codified, its athletic association implemented a regulatory provision allowing transgender students to participate on a sports team “in a manner that is consistent with their gender identity, irrespective of the gender listed on [the] student's records.”¹⁸¹ Should any questions arise about a student's asserted gender, the Washington Interscholastic Activities Association (WIAA) exercises a mechanism to determine whether a student's asserted gender is “bona fide.”¹⁸² The WIAA requires a review committee to consider documents, including written statements from the student and parents, and statements from the student's healthcare provider, affirming the student's gender identification.¹⁸³ By adopting inclusive policies that are well-informed and that allow transgender students to participate according to their affirmed gender identity, schools can remain consistent with the overarching educational values of equity and fairness.

jc.2009-0345. Once children reach puberty, however, the guidelines endorse puberty-blocking medication until they reach sixteen, then lifelong sex-changing hormones. *Id.*

178. See *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, *supra* note 68, at 1741–42.

179. Press Release, Nat'l Ctr. for Lesbian Rights, Bill Supporting Transgender Students Goes to Senate Floor (June 12, 2013), <http://www.nclrights.org/press-room/press-release/bill-supporting-transgender-students-goes-to-the-senate-floor/>. LAUSD's policy, which bans discrimination based on gender identity, is welcomed by students and supported by parents. *Id.* The policy recognizes the value of diversity, which enriches the lives of the students. *See id.*

180. See generally WASH. INTERSCHOLASTIC ACTIVITIES ASS'N, HANDBOOK 2015–16 § 18.15.0 (2015), <http://www.wiaa.com/ConDocs/Con1544/Handbook%20201516.pdf> (explaining that the WIAA “allows participation for all students regardless of their gender identity or expression”).

181. *Id.*; Buzuvis, *supra* note 171; Buzuvis, *supra* note 21, at 25.

182. Buzuvis, *supra* note 171; Buzuvis, *supra* note 21, at 25.

183. Buzuvis, *supra* note 171; Buzuvis, *supra* note 21, at 25–26. The eligibility committee convened only one time, which resulted in certifying a transgender male student's eligibility for a boys basketball team. Buzuvis, *supra* note 21, at 26.

C. Idaho

Conversely, discriminatory provisions like those in Idaho completely prohibit a male-to-female transgender student from playing on a girls team until the student completes one year of hormone treatment.¹⁸⁴ Any student planning to take, or who is in the process of taking, hormone treatments must submit a request to the administration to participate on the gender-specific sports team.¹⁸⁵ The Executive Director will then determine whether the student is eligible to play.¹⁸⁶ In essence, unless a transgender student undergoes hormone treatment, the student is prohibited from participating on the team with which he or she identifies.¹⁸⁷ Because participation in interscholastic athletics is time-sensitive, a policy requiring a student to undergo a year of hormone treatment will prevent the student from receiving four years of athletic competition, a right expected by non-transgender students.¹⁸⁸

D. Ohio

A similar provision in Ohio requires that a transgender student receive one year of hormone treatment before the association deems the student eligible to play.¹⁸⁹ Alternatively, the student may demonstrate to the Commissioner's Office that she does not possess any physical advantage (bone structure, muscle mass, testosterone, etc.) over genetic females on the team.¹⁹⁰ On the other hand, a transgender male taking medically prescribed hormone treatments like testosterone may participate on a boys team, but the student is required to undergo regular hormone level checks by the administration.¹⁹¹ Both requirements are founded upon fears of competitive advantage and fears that teams could cheat by having boys participate on girls teams.¹⁹²

184. IDAHO HIGH SCH. ACTIVITIES ASS'N, RULES AND REGULATIONS 2015–2016 87 (2015), <http://www.idhsaa.org/manage/articlefiles/56-15-16%20Rules%20and%20Regs.pdf>.

185. *Id.*

186. *Id.*

187. *See id.* According to a CNN Money report, hormone treatment therapy can cost around \$30 per month. Blake Ellis, *Transgender and Struggling to Pay Medical Costs*, CNN MONEY (Aug. 22, 2013, 5:40 PM), <http://money.cnn.com/2013/08/22/pf/transgender-medical-costs/>.

188. *See Boyd v. Bd. of Dirs.*, 612 F. Supp. 86, 93 (E.D. Ark. 1985) (ruling that participation in interscholastic athletics is a property interest); Buzuvis, *supra* note 171, at 27; Telephone Interview with Katie Sprinkle, Att'y, Law Office of Katie Sprinkle (Jan. 13, 2015).

189. OHIO HIGH SCH. ATHLETIC ASS'N, TRANSGENDER POLICY 2–3 (2014), <http://www.ohsaa.org/eligibility/TransgenderPolicy.pdf>.

190. *Id.*

191. *Id.*

192. Christina Henagen Peer, *Caution Suggested for Schools When Dealing with Issues Involving Transgender Students*, WALTER HAVERFIELD LLP (2015), http://www.walterhav.com/pubs/Caution_Suggested_for_Schools_When_Dealing_with_Issues_Involving_Transgender_Students.htm (last visited Apr. 13, 2016).

E. Texas and the UIL

While an increasing number of athletic associations have promulgated policies regarding transgender participation on athletic teams, many states have yet to address such inclusion.¹⁹³ States without any express policies leave administrators and coaches with the daunting task of choosing how to interpret “sex” in the context of a sex-specific team.¹⁹⁴ Leaving complex and evolving issues of transgenderism to the determination of school administrators, who likely lack the necessary training and resources to make an informed policy, is problematic.¹⁹⁵ In such instances, coaches may narrowly interpret sex (in regards to a sex-specific team) to include only those students assigned that sex at birth, which ultimately impedes a transgender student’s ability to play on the team of his or her perceived gender.¹⁹⁶ When sports associations fail to codify transgender policies, they place the burden on the student to self-advocate and risk public humiliation and rejection to obtain the rights automatically extended to non-transgender athletes.¹⁹⁷

While superintendents of member districts have at least voted to codify a policy, it is non-inclusive, despite the increasing focus nationwide on transgender-inclusive policies.¹⁹⁸ Effective August 1, 2016, Texas will officially join the group of states with the most restrictive policies in the nation.¹⁹⁹ Such a provision will make participation in athletics an arduous task for any transgender student wishing to play on a team according to his or her gender identity.²⁰⁰ These students will soon face the daunting task of amending their birth certificate, which, in Texas, is often an expensive procedure that entails obtaining a court order.²⁰¹

193. See Buzuvis, *supra* note 171, at 25; Buzuvis, *supra* note 21, at 28–29.

194. Buzuvis, *supra* note 171, at 25.

195. See generally *id.* at 28–29 (explaining that implementing transgender policies in advance prevents institutions that lack the resources to accommodate transgender students from making ill-advised decisions that could potentially harm transgender students and result in unfair outcomes).

196. *Id.*

197. *Id.* at 26.

198. UNIV. INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES, SUBCHAPTER J; NONDISCRIMINATION IN UIL CONTESTS § 360 (2015), <http://www.uiltexas.org/files/constitution/uil-ccr-subchapter-j-l.pdf>; Smith, *supra* note 12; John Wright, *Texas Rule Would Effectively Bar Transgender Youth and Teens from Playing Sports*, NEW CIV. RTS. MOVEMENT (Oct. 21, 2015, 5:31 PM), http://www.thenewcivilrightsmovement.com/johnwright/texas_moves_to_bar_trans_youth_from_playing_sports.

199. Smith, *supra* note 12; Smith, *supra* note 158.

200. See Wright, *supra* note 198.

201. *Id.*

V. HOME GAME

A. *The UIL's Birth Certificate Verification Policy*

The public school system's core values of inclusion and equal opportunity require that states and school administrators adopt policies geared toward these goals.²⁰² The UIL's policy of "categorizing transgender student athletes by their birth certificates" will hurt participation and inclusion.²⁰³ "The key feature of being transgender is having a psychological identification as a man or a woman that differs from the person's sex at birth."²⁰⁴ Requiring transgender students to play on a team according to their gender marker ignores reality altogether.²⁰⁵

Gender identity is a core characteristic of a person's identity.²⁰⁶ A policy forcing a transgender female to play on, for instance, a boys team sends a message to society that the student is not a "real" girl.²⁰⁷ This message is devastating for an adolescent whose transition is as much a social necessity as it is a psychological one.²⁰⁸

A state and its athletic association should develop policies that are clear and reasonable, and that lay out criteria based on up-to-date medical knowledge. A policy that strictly looks to the student's birth certificate to determine what team he or she may play on is not based on current medical knowledge and, more specifically, does not follow the objectives of Texas's education system, which are to give *all* students "access to a quality education that enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of [the] state and nation."²⁰⁹ A birth certificate verification policy also limits a transgender student's ability to fully participate in the social and educational opportunities of the state.²¹⁰ As stated in the NEA Report, achieving academic skills in the classroom is only half of the equation.²¹¹ To obtain a complete education, students must participate in physical activity as

202. GRIFFIN & CARROLL, *supra* note 8, at 10.

203. Smith, *supra* note 158 (quoting Chris Mosler, founder of TransAthlete.com, an advocacy group). Athletic associations in fifteen states, including the District of Columbia, maintain transgender-inclusive policies that allow transgender students to play on the team according to their gender identity. *See id.*

204. GRIFFIN & CARROLL, *supra* note 8, at 9.

205. *See id.* Schools should understand and respect a transgender individual's identification as man or woman. *Id.* at 11. Additionally, athletic leaders should seek guidance from medical research and experts to avoid allowing misconceptions and stereotypes to guide policy decisions. *Id.*

206. *Id.* at 15.

207. *Id.* at 14.

208. *Id.* at 15.

209. TEX. EDUC. CODE ANN. § 4.001 (West 2012). *See generally* 65 Tex. JUR. 3D *Schools* § 2 (2014).

210. *See* 65 TEX. JUR. 3D *Schools* § 2.

211. *See* NEUMANN, *supra* note 59, at 11, 20–21.

well.²¹² Participation in extracurricular activities advances these educational commitments.²¹³

Policymakers must keep in mind that athletic programs have a responsibility beyond that of professional sports programs.²¹⁴ While implementing restrictive requirements like hormone treatment at a collegiate or professional level may be appropriate, these requirements at an interscholastic level miss the reasons why sports programs exist at academic institutions in the first place.²¹⁵

Birth certificate verification policies are based upon ideas of competitive advantage, which are not scientifically conclusive.²¹⁶ A member at the UIL's Legislative Council meeting stated that his sole interest behind the proposed bylaw was to ensure fair and equitable competition.²¹⁷ A policy founded solely upon this premise is misguided.²¹⁸ After all, both middle and high school students develop physically and cognitively at different rates.²¹⁹ They display a broad range of physical variation, notably within a single sex.²²⁰ Despite society's tendency to separate prepubescent males and females, there is no physical reason to do so because there is no specific height or weight discrepancy between the two groups from infancy to puberty.²²¹ Alternatively, while the average height of a postpubescent male is greater than that of a postpubescent female, many females are still taller than many males.²²² The same findings are true for postpubescent upper-body strength; on average, males have more upper-body strength, but there are many females who score higher on these physical characterization tests.²²³ These statistics are a reminder that "gender and sex differences are based on averages and that there is great variability (and similarity) beyond the basic mean differences between the sexes" at both prepubescent and postpubescent stages of development.²²⁴ The UIL's birth certificate verification policy will maintain a procedure that is based on unfounded stereotypes and deny part of its student population the education-system components enjoyed by the rest of the students.

The UIL's policy will, in effect, bar transgender youth from playing sports in the Texas public school system because few transgender students

212. *See id.* at 11–15.

213. *See Buzuvis, supra* note 21, at 43.

214. GRIFFIN & CARROLL, *supra* note 8, at 12.

215. *See id.* at 13.

216. *See supra* Part II.D.

217. Smith, *supra* note 158.

218. GRIFFIN & CARROLL, *supra* note 8, at 11, 14–15.

219. *Id.* at 13.

220. *Id.* at 6.

221. ROBIN S. VEALEY & MELISSA A. CHASE, *BEST PRACTICE FOR YOUTH SPORT: SCIENCE AND STRATEGIES FOR POSITIVE ATHLETE EXPERIENCE* 281 (2016).

222. *See generally id.* at 282.

223. *See id.*

224. *Id.*

amend gender markers on their birth certificates, a process that is expensive, time-consuming, and has only recently become available.²²⁵ While name changes are relatively easy to obtain, “gender-marker changes are granted at the discretion of individual judges.”²²⁶ Katie Sprinkle, an attorney for transgender rights in Dallas, observed that only a handful of judges in Texas have agreed to hear petitions for gender-marker changes.²²⁷ Texas’s Health and Safety Code is silent on the procedure, and many judges refuse to issue gender-marker changes, pointing to the absence of express language in the statute authorizing them to issue the change.²²⁸ Similarly, judges who agree to hear these petitions simply replicate the name change procedure in the Texas Family Code.²²⁹

Chapter 45 of Texas’s Family Code states, “An adult *may* file a petition requesting a change of name in the county of the adult’s place of residence.”²³⁰ Judges unwilling to hear petitions for gender-marker changes strictly construe this statute to mean that an individual can only receive a name change, and ultimately a gender-marker change, in the county in which he or she resides.²³¹ Transgender students living in districts with judges unwilling to hear such petitions will, therefore, have no way of obtaining a gender-marker change without traveling to another district with participating judges.²³² The process is an arduous and unnecessary one for a middle school or high school transgender student.

Like the Family Code, Texas’s Health and Safety Code does not have an express gender-marker provision.²³³ Section 192.011 of the Code merely states that individuals may amend their birth certificates to update incorrect information relating to the person’s sex, color, or race.²³⁴ According to the National Center for Transgender Equality, however, Texas’s Vital Statistics

225. Mark Reagan, *Trans People Can Now Get Amended Birth Certificates in Texas*, SAN ANTONIO CURRENT (Jan. 12, 2016, 1:38 PM), www.sacurrent.com/Blogs/archives/2016/01/12/trans-people-can-now-get-amended-birth-certificates-in-texas (explaining that United States District Judge Orlando Garcia recently ordered Ken Paxton, Texas’s Attorney General, and the Bureau of Vital Statistics to update their policy for issuing amended birth certificates to transgender persons); Wright, *supra* note 198. While it is possible to pursue a gender-marker change without an attorney, a source from Lambda Legal in Dallas, Texas, highly recommended hiring a lawyer. John Wright, *Mark of Change in Dallas Courts*, DALLASVOICE (Feb. 11, 2010, 7:38 PM), <http://www.dallasvoice.com/mark-of-change-in-dallas-courts-1020407.html>.

226. Wright, *supra* note 225.

227. Telephone Interview with Katie Sprinkle, *supra* note 188.

228. *See id.*; TEX. HEALTH & SAFETY CODE ANN. § 192.011 (West 2012).

229. Telephone Interview with Katie Sprinkle, *supra* note 188. Sprinkle observed that out of the 254 counties in Texas, she is only aware of a small percentage of judges that will agree to hear petitions for gender-marker changes. *Id.*

230. TEX. FAM. CODE ANN. § 45.101 (West 2012) (emphasis added).

231. *See* Telephone Interview with Katie Sprinkle, *supra* note 188.

232. *See id.*

233. *See* TEX. HEALTH & SAFETY CODE § 192.011.

234. *See id.*

Unit will issue an individual a new birth certificate pursuant to an order from the court.²³⁵

Receiving a court order for a gender-marker change is a complex and intricate process. A therapist must first screen the individual to ensure that he or she has an authentic and persistent need to transition.²³⁶ Once the therapist believes that the person is qualified, the therapist will write the patient what Sprinkle called a “hormone letter,” which is a recommendation that the transgender individual begin hormone treatment.²³⁷ The individual must then have a physician prescribe him or her the necessary hormone treatment to begin transitioning.²³⁸ Sprinkle explained that she waits long enough for her client’s physical effects to fully take form before petitioning the court for a gender-marker change.²³⁹ According to the World Professional Association for Transgender Health, complete physical changes, whether feminine or masculine, can take up to two years.²⁴⁰ Sprinkle explained that this time frame is especially problematic for student-athletes who have only a limited opportunity to compete in high school athletics.²⁴¹

More problematic is that the UIL’s proposed policy will, in essence, require a transgender student to undergo hormone treatment to participate on an athletic team.²⁴² Hormone enhancing drugs, however, are banned by the UIL.²⁴³ Obtaining a gender-marker change, therefore, is a Catch-22—transgender students must amend their birth certificate prior to acquiring eligibility to play on the athletic team of their perceived gender, but they must take hormone treatments to obtain a gender-marker change, which the UIL prohibits.²⁴⁴ The association’s policy will essentially bar a transgender student from playing on a sports team in any of the UIL’s member school districts.

235. *Id.*; *ID Documents Center*, NAT’L CTR. FOR TRANSGENDER EQUALITY, <http://www.transequality.org/documents/state/texas> (last updated Feb. 1, 2016). Sprinkle estimated that a name and gender change could cost anywhere from \$1,000–\$3,000. Telephone Interview with Katie Sprinkle, *supra* note 188.

236. Telephone Interview with Katie Sprinkle, *supra* note 188.

237. *Id.*

238. *Id.*

239. *Id.* This is in part because hormone treatment carries risks of adverse reactions and in part because some individuals who begin treatment decide they do not like the mental and physical transition. *Id.*; COLEMAN ET AL., *supra* note 30, at 188.

240. COLEMAN ET AL., *supra* note 30, at 188.

241. Telephone Interview with Katie Sprinkle, *supra* note 188.

242. *Id.*

243. See UNIV. INTERSCHOLASTIC LEAGUE, UIL ANABOLIC STEROID TESTING QUESTIONS AND ANSWERS (2011), <http://www.uiltexas.org/files/health/steroid-testing-qa.pdf> (describing the various steroids banned by the UIL).

244. Telephone Interview with Katie Sprinkle, *supra* note 188.

B. Which Policies Deserve Playing Time

Idaho's and Ohio's policies requiring a transgender student to undergo a year of hormone treatment prior to playing are unnecessary for K–12 students. These non-inclusive policies are based on the same misconceptions as Texas's policy: competitive advantage.²⁴⁵ The vast anatomical and physiological variations within each sex are great, and the effects of cross-sex hormone administration, specifically within an athlete population, are still speculative.²⁴⁶ Additionally, some protocols depend on the individual's age and psychological readiness to transition.²⁴⁷ For youths who have yet to reach puberty, the World Professional Association for Transgender Health advises that transitioning should consist solely of permitting the child to “dress, live, and function socially consistently with the child's gender identity.”²⁴⁸ Even if the student reaches puberty, access to transition-related care is often difficult to obtain due to high costs and lack of insurance coverage.²⁴⁹ Most importantly, pursuing hormonal treatment is personal, and the decision should be made between students and their physicians, free of any influence from their schools.²⁵⁰

By comparison, California's antidiscrimination statute, AB 1266, which provides that a transgender student may participate on a sports team according to his or her identity irrespective of the gender stated on the student's records, is fair and encompassing.²⁵¹ The statute is commendable because it is a statewide law rather than a regulation implemented by the state's athletic association.²⁵² By implementing a bright-line, statewide law, California can better regulate compliance.²⁵³ Additionally, the statute is mutually beneficial—it allows schools to uphold their educational commitment to creating environments in which all students can thrive, and it gives transgender students a chance to feel normal and accepted among their

245. See generally GRIFFIN & CARROLL, *supra* note 8, at 13 (explaining that competitive advantage is the most often cited overgeneralization for restricting the participation of transgender students in athletic competition).

246. BRENDA WAGMAN, INCLUDING TRANSITIONING AND TRANSITIONED ATHLETES IN SPORT: ISSUES, FACTS AND PERSPECTIVES 13, 15 (2009), http://www.caaws.ca/e/wp-content/uploads/2013/02/Wagman_discussion_paper_THE_FINAL.pdf.

247. GRIFFIN & CARROLL, *supra* note 8, at 13.

248. *Id.* at 14; see COLEMAN ET AL., *supra* note 30, at 176.

249. ORR ET AL., *supra* note 16, at 28.

250. *Id.*

251. See CAL. EDUC. CODE § 221.5 (West 2002 & Supp. 2016); *California's Assembly Bill 1266 for Transgender Student Rights Signed by Governor Jerry Brown*, HUFFPOST QUEER VOICES (Feb. 2, 2016, 4:26 PM), http://www.huffingtonpost.com/2013/08/12/california-transgender-students-bill-_n_3745337.html.

252. See CAL. EDUC. CODE § 221.5; *California's Assembly Bill 1266 for Transgender Student Rights Signed By Governor Jerry Brown*, *supra* note 251.

253. *CA Governor Brown Signs Historic Transgender Students Bill into Law*, TRANSGENDER L. CTR., <http://transgenderlawcenter.org/archives/8756> (last visited Apr. 13, 2016).

peers.²⁵⁴ By allowing transgender students to feel equal and by giving them the opportunity to place their focus and energy on actual athletic competition, schools can increase their LGBT students' chances of excelling in the classroom and ultimately in future careers.²⁵⁵

Unlike Washington, which has a review committee to determine whether a student's gender is "bona fide," California has expressed that this verification policy is too difficult to regulate consistently and only subjects the student to further humiliation and publicity.²⁵⁶

While schools should preserve the medical privacy of transgender students, implementing a mechanism similar to Washington's, addressing any case that raises actual questions regarding a student's true identity, may be an appropriate compromise to associations unwilling to implement an all-inclusive policy like California's AB 1266.²⁵⁷ While these safeguards are appropriate for high school policies, they cannot be assumed appropriate for younger age groups.²⁵⁸ The WIAA expressed that its policy is "working as planned."²⁵⁹ In fact, one comprehensive report claims Washington's policy is the best working policy to date and "is consistent with contemporary medical knowledge and practice and with the principles of inclusion and non-discrimination."²⁶⁰ By adopting an inclusive policy similar to the WIAA or California's AB 1266, transgender students can enjoy equal access to the benefits provided by the public education system.²⁶¹ Associations that adopt a policy giving transgender students anything less than equal access to athletic participation may risk costly litigation and may violate students' constitutional rights.

C. Equal Protection Defense

The UIL's birth certificate verification policy may implicate the Fourteenth Amendment of the United States Constitution.²⁶² Although historically courts have reviewed school athletic policies under rational basis review, the current national trend catalyzes a movement toward an increase

254. GRIFFIN & CARROLL, *supra* note 8, at 17.

255. *See id.* at 18; Yasser & Block, *supra* note 74, at 32. Studies show that transgender students face bullying and harassment, which can increase their feelings of isolation. GRIFFIN & CARROLL, *supra* note 8, at 19. This isolation can lead to depression and low self-esteem. *Id.* An athletic association that denies transgender students the opportunity to participate in athletics because of their self-perceived gender "reinforces and affirms their social status as outsiders or misfits who deserve the hostility they experience from peers." *Id.*

256. Buzuvis, *supra* note 171; *see* Buzuvis, *supra* note 21, at 25; *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, *supra* note 68, at 1740.

257. GRIFFIN & CARROLL, *supra* note 8, at 22–23.

258. *Id.* at 24.

259. *Id.* at 26.

260. *Id.*

261. *Id.* at 18.

262. *See* U.S. CONST. amend. XIV.

in LGBT rights and legislation.²⁶³ The expressive function of *Obergefell*, likewise, is likely to influence more transgender-friendly legislation.²⁶⁴

In light of this recent trend and considering the LGBT community's history of discrimination, a court could review a birth certificate verification policy under heightened scrutiny. Transgender students are "discrete and insular minorities," a term defined as "people who have been historically discriminated against . . . and have immutable characteristics."²⁶⁵ The history of discrimination against the group and the immutability of a transgender individual diagnosed with Gender Dysphoria should give rise to a court's heightened standard of review, which would require the UIL to show that its policy is *substantially* related to an important objective.²⁶⁶

A policy based on preventing competitive advantage, however, is not substantially related to an important objective, which one UIL Legislative Council member stated is to ensure fairness.²⁶⁷ This reasoning is not medically conclusive and does not provide transgender students with equal treatment under the law.²⁶⁸

If courts apply a heightened level of scrutiny to the UIL's new policy, Texas schools and the UIL could potentially face an equal protection challenge for treating similarly situated students differently.²⁶⁹ As Justice Kennedy explained in *Romer v. Evans*, it is not within our constitutional tradition to enact laws that identify people by a single trait and then deny them protection across the board.²⁷⁰

D. Title IX Returns to the Game

Title IX specifically restricts discrimination against transgender students in public athletic programs.²⁷¹ Despite this broad grant of protection, few legislative bodies have determined how this protection would apply in the context of a transgender student playing on a team specific to the student's

263. See Velte, *supra* note 4; Wright, *supra* note 198. The Court in *Price Waterhouse* held that "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (alteration in original) (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978)), *superseded by statute*, Civil Rights Act of 1991, tit. 1, § 107(a), 105 Stat. 1075 (codified at 42 U.S.C. § 2000e-2(m)), *as recognized in* *Burrage v. United States*, 134 S. Ct. 881 (2014).

264. See Velte, *supra* note 4.

265. Brown, *supra* note 21, at 318.

266. Hunter, Jr. & Brown, *supra* note 165; see Buzuvis, *supra* note 21, at 31; Brown, *supra* note 21, at 318.

267. See Smith, *supra* note 158. See generally Brown, *supra* note 21, at 325.

268. See *supra* Part II.D.

269. See Brown, *supra* note 21, at 322.

270. *Romer v. Evans*, 517 U.S. 620, 633 (1996).

271. See Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Colleague, Office for Civil Rights 1 (Oct. 26, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

gender identity.²⁷² The Department of Education's (DOE) Dear Colleague Letter, however, explains that Title IX protections extend to transgender students.²⁷³ The letter clearly states that schools have a "legal obligation to protect transgender students from discrimination."²⁷⁴

A similar issue, although decided in the context of professional sports, should serve as an illustration of a student-athlete's legal right to compete.²⁷⁵ In *Richards v. United States Tennis Association*, Renee Richards, previously a male tennis player, applied to participate in the Women's U.S. Open after her transition.²⁷⁶ After she refused to take a test to determine her gender, the organization prohibited her from playing.²⁷⁷ The trial court held that a sex discrimination statute in New York, like Title IX, protected a transgender athlete's right to play on a sex-segregated team according to the individual's gender identity.²⁷⁸

Since *Richards*, the dialogue has "shifted from the applicability of sex verification testing to the possibility of sex discrimination claims for disparate and unequal treatment of athletes."²⁷⁹ While precedent concerning the discrimination of transgender students on the basis of gender identity is scant, the DOE's firm position on the issue, as well as the adoption of inclusive transgender policies by athletic associations across the United States, suggests that transgender student-athletes have protections already in place against policies excluding them from playing on the team of their perceived identity.²⁸⁰

VI. PRACTICE MAKES PERFECT: CREATING POLICIES TO SUCCEED

When Thomas Jefferson proposed a public school system in Virginia, he expressed that education should teach citizens "to observe with intelligence and faithfulness all the social relations under which he shall be placed."²⁸¹ To remain true to these values, the UIL must create a policy that

272. Hunter, Jr. & Brown, *supra* note 165.

273. Letter from Russlynn Ali, *supra* note 271, at 8.

274. Evie Blad, *Transgender Youth Protected by Title IX, Updated Guidance Says*, EDUC. WEEK (Apr. 29, 2014, 3:57 PM), http://blogs.edweek.org/edweek/rulesforengagement/2014/04/transgender_youth_protected_by_title_ix_updated_guidance_says.html.

275. See Hunter, Jr. & Brown, *supra* note 165; Shawn M. Crincoli, *You Can Only Race if You Can't Win? The Curious Cases of Oscar Pistorius & Caster Semenya*, 12 TEX. REV. ENT. & SPORTS L. 133, 175 (2011).

276. See *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S.2d 267, 268 (N.Y. App. Div. 1977).

277. See *id.* at 268–69.

278. See *id.* at 272–73; 34 C.F.R. § 106.41(a) (2016).

279. Hunter, Jr. & Brown, *supra* note 165 (quoting Jennifer V. Sinisi, *Gender Non-conformity as a Foundation for Sex Discrimination: Why Title IX May Be an Appropriate Remedy for the NCAA's Transgender Student-Athletes*, 19 VILL. SPORTS & ENT. L.J. 343, 359 (2012)).

280. See Buzuvis, *supra* note 21, at 28, 34; Letter from Russlynn Ali, *supra* note 271, at 8. See generally *supra* Part IV.

281. ROY J. HONEYWELL, *THE EDUCATIONAL WORK OF THOMAS JEFFERSON* 250 (Harv. Univ. Press 1931).

treats transgender student-athletes equally to their peers.²⁸² A policy that excludes transgender students from participating on the athletic team of their true gender identity is the antithesis of equal treatment and discards America's core principles of diversity, inclusion, and academic achievement.²⁸³

A. Creating a Policy with Equal Playing Grounds

To develop a workable solution, policymakers should keep in mind that the scholastic setting, unlike the collegiate or professional setting, is not based on ideas of perfect competition.²⁸⁴ Rather, athletic participation is included in academic curricula because the benefits of playing sports are important to an adolescent's educational development.²⁸⁵ Even courts recognize that the educational process is made up of innumerable, separate components and that athletics are necessary for intellectual and moral advancement.²⁸⁶ To implement a policy forcing transgender students to defer to the gender stated on their birth certificate is essentially stripping them of these essential components of education.²⁸⁷

Policymakers should develop regulations affecting transgender participation in athletics that are based on sound medical knowledge and current scientific understanding, not on unsupported generalizations about a group.²⁸⁸ Specifically, they should understand the great variations among adolescent athletes in strength, size, musculature, and ability that are already naturally present with one gender.²⁸⁹ More specifically, they should understand that perfect competition is not the end goal in middle school and high school sports.

While the UIL's Legislative Council first proposed to codify their informal birth certificate verification policy, the association ultimately forwent the vote and instead placed the issue on a referendum ballot, passing

282. See generally *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, *supra* note 68, at 1745.

283. See *id.* See generally GRIFFIN & CARROLL, *supra* note 8, at 11, 21.

284. See *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, *supra* note 68, at 1741–42.

285. See generally NEUMANN, *supra* note 59, at 20–21; Jacobsen & Rothstein, *supra* note 54.

286. See generally *Boyd v. Bd. of Dirs.*, 612 F. Supp. 86, 93 (E.D. Ark. 1985) (ruling that a student's participation in interscholastic athletics was a property interest protected by the Fourteenth Amendment); *Tiffany v. Ariz. Interscholastic Ass'n*, 726 P.2d 231, 234 (Ariz. Ct. App. 1986) (explaining that the educational process has many variables, which include athletics, and is not limited to the classroom).

287. See generally *Fla. High Sch. Activities Ass'n v. Bryant*, 313 So. 2d 57, 57 (Fla. Dist. Ct. App. 1975) (accepting the trial court's finding that athletics was vital to the student's life and "provid[ed] impetus of his general scholastic and social development").

288. See GRIFFIN & CARROLL, *supra* note 8, at 11, 21.

289. See *supra* Part II.D.

the decision to superintendents of member districts who recently affirmed the non-inclusive policy.²⁹⁰

The UIL itself should have taken the initiative to codify a policy rather than deferring the decision to superintendents, who may not have the adequate training and educational resources to make informed decisions on transgender issues.²⁹¹

The UIL should have instead taken the lead and set an overarching goal to create an atmosphere that identifies diversity as a strength, not as a crutch. Creating a transgender-friendly climate by specifically including gender identity or expression in its non-discrimination policy would help achieve this goal.²⁹² It would, in effect, demonstrate a commitment to fair play and inclusion and give student-leaders a more tangible opportunity to fulfill that mandate.²⁹³ Implementing particular core values into its handbook may offer the UIL as well as coaches and administrators further guidance to accurately and responsibly address gender-specific issues and questions regarding athletic participation.²⁹⁴ These core values include (1) recognizing the value of athletic participation for *all* students, (2) encouraging participation in athletics for *all* students, (3) providing a space for transgender students to thrive, and (4) basing decisions in sound medical findings.²⁹⁵ The following policy recommendation to the UIL is similar to the WIAA's current policy for transgender participation in athletics.²⁹⁶

B. Model Policy

1. Incorporate a protective mechanism to ensure that transgender claims are bona fide.
2. Adopt and codify a policy that permits transgender students to participate on an athletic team according to their gender identity, irrespective of the gender listed on their birth certificate, and regardless of whether they have received hormone treatment.
 - a. A transgender student wishing to participate on an athletic team should notify the school and athletic association that they wish to play on a team of a gender different than the gender stated on the student's birth certificate.

290. See Smith, *supra* note 158.

291. See generally GRIFFIN & CARROLL, *supra* note 8, at 7, 21–23 (explaining that adopting policies in advance gives schools an opportunity to educate themselves on how to best accommodate transgender students, and adopting consistent policies avoids potential obstacles that could arise in competition with other school districts).

292. GRIFFIN & CARROL, *supra* note 8, at 26.

293. *Id.*

294. See WASH. INTERSCHOLASTIC ACTIVITIES ASS'N, *supra* note 180; GRIFFIN & CARROLL, *supra* note 8, at 23.

295. See WASH. INTERSCHOLASTIC ACTIVITIES ASS'N, *supra* note 180.

296. See *id.*

- b. Once the athletic director approves the student's eligibility, it will last the duration of the student's enrollment at the school.
- c. If any concerns or questions arise regarding the appropriateness of a student's claim, a review committee may make a determination as to whether a student's self-perceived gender is "bona fide." The review committee should be comprised of at least three of the following individuals:
 1. A physician with experience in gender identity health care
 2. A psychiatrist or psychologist
 3. A school administrator from a non-appealing school
 4. A UIL staff member
 5. An advocate familiar with gender identity issues
- d. A student is eligible to participate on the team of his or her perceived gender regardless of whether the student has undergone medical or hormone treatments.²⁹⁷

This policy is most consistent with principles of inclusion and non-discrimination. It aligns with the current national sentiment regarding transgender rights and with current medical knowledge.²⁹⁸ Although an all-inclusive policy, like California's AB 1266, proves successful, the WIAA's policy incorporates a protective mechanism to ensure that transgender claims are bona fide and is arguably the best currently working model.²⁹⁹ While fears that natal boys will take advantage of an inclusive policy are unfounded, including a review committee into the policy will, nevertheless, provide individuals an avenue to address such questions and concerns should they arise.³⁰⁰ Others also apprehend that an appeals committee may not ensure complete impartiality. The Executive Director of the WIAA, however, expressed that the policy was successful in its implementation.³⁰¹

Finally, allowing transgender students to participate, regardless of hormone treatment intake, is practical; regulating hormone levels at a middle school or high school level would be unfair and complicated, and would not align with the public education system's underlying goals.

297. *See id.*

298. GRIFFIN & CARROL, *supra* note 8, at 26. Athletic organizations in at least fifteen states maintain policies that allow transgender students to participate on athletic teams according to their self-perceived gender. Smith, *supra* note 158.

299. *See* GRIFFIN & CARROLL, *supra* note 8, at 26; WASH. INTERSCHOLASTIC ACTIVITIES ASS'N, *supra* note 180.

300. *See generally* GRIFFIN & CARROLL, *supra* note 8, at 26 (explaining that "student athletes, teammates, coaches, athletic directors, parents, and the state association" are satisfied with the success of the WIAA's gender policy); *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, *supra* note 68, at 1742.

301. *See* GRIFFIN & CARROLL, *supra* note 8, at 30; Telephone Interview with Katie Sprinkle, *supra* note 188.

The UIL should take steps *forward* and adopt a policy like the WIAA, which grants transgender students equal treatment in athletic participation.³⁰² The UIL's birth certificate verification policy will, instead, amount to a "step backward for Texas while the rest of the nation [transitions] forward."³⁰³

VII. THE FINISH LINE

Justice Kennedy's opinion in *Obergefell* sent a message to the nation that the LGBT community deserves recognition and equal protection within the law.³⁰⁴ Despite this developing understanding, the UIL has adopted a non-inclusive transgender policy.³⁰⁵

Because transgender students do not necessarily identify with the gender marker stated on their birth certificate, a birth certificate verification policy will essentially deny transgender student-athletes the right to participate—a right afforded to non-transgender student-athletes. Even if a transgender student desires to amend his or her birth certificate, the procedure is expensive, tedious, and essentially requires a student to undergo hormone treatment.

The UIL's policy not only has potential Title IX and Fourteenth Amendment implications, it fails to further Texas's mission: to give all students access to the essential components of public education.³⁰⁶

Because current research has not conclusively proven that adolescent transgender athletes enjoy an advantage over non-transgender athletes, a policy based on this assumption cannot be justified. More importantly, such a policy ignores the fact that the goal of sports participation in a school setting is not perfect competition; it is teamwork, diversity, cooperation, and self-esteem. Associations should focus on promoting these characteristics, not erecting barriers that prevent transgender athletes from enjoying the benefits of athletic competition.

302. See 65 TEX. JUR. 3D *Schools* § 2 (2014); Wright, *supra* note 198.

303. Wright, *supra* note 198.

304. See *supra* Part II.A.

305. See *supra* Part V.A.

306. See TEX. EDUC. CODE ANN. § 4.001 (West 2012); *supra* Part V.C–D.

