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A (Not So) Simple Question: Does Title IX Encompass “Gender”?, 51 J. Marshall L. Rev. 225 (2018)

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A (NOT SO) SIMPLE QUESTION: DOES TITLE IX ENCOMPASS “GENDER”?

J. BRAD REICH*

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I. INTRODUCTION

The United States Department of Justice directs that Title IX sex discrimination includes both harassment based on biological sex and harassment based on failure to conform to gender stereotypes.¹ The website, TitleIX.info, lists five United States Supreme Court cases particularly significant in Title IX’s history.² Three of those five use the term “gender” in their opinions.³ Excellesports.com celebrated Title IX’s 45th anniversary with the article, “Four Title IX Lawsuits that Rocked the World of Women’s Sports.”⁴ Two of

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1. *Equal Access to Education: Forty Years of Title IX* 7, U.S. DEPT OF JUST. (June 23, 2012), www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf.

2. See *Supreme Court Stories*, TITLE IX INFO, www.titleix.info/Faces-of-Title-IX/Meet-the-Faces-of-Title-IX/Supreme-Court-Stories.aspx (last visited Jan. 9, 2018) (referencing *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982); *Grove City College v. Bell*, 465 U.S. 512 (1984); *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992); *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999); and *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005)).

3. *Id.*

4. Adele Jackson-Gibson, *Title IX’s 45th Anniversary: Four Title IX lawsuits*

those four decisions use “gender” in their opinions.⁵ Multiple authors and scholars discuss gender protection under Title IX.⁶ It is quite common to proceed as if Title IX incorporates gender, but this article poses a critical, and likely quite controversial, question: *does* Title IX encompass gender? For purposes of the following discussion, “does” analyzes Title IX’s original text, the evolution of the law, and how courts and administrative agencies interpreted and applied Title IX throughout its history. We will see that Title IX evolved, and continues to evolve, in a piecemeal fashion. However, through it all, Title IX’s breadth, depth, and scope increased, never truly constrained by arguable legislative intent or even actual text. Perhaps that expansion now includes gender. Or perhaps not.

This article has five sections. Section I looks at critical, operational, definitions of “sex” and “gender.” As we shall see, the terms are not synonyms. That distinction is important as section II takes us back to Title IX’s original text. That language prohibited discrimination based on sex, but it remains silent on the issue of gender. Section III then examines how Title IX evolved in terms of depth, breadth, and scope. The most recent expansion brought campus sexual violence procedures under Title IX. That development may be particularly thought provoking as sexual violence, like gender, is not part of Title IX’s text. However, even recognizing this absence, section IV analyzes how Title IX may still encompass gender discrimination. Finally, section V looks at “where we are” in terms of Title IX and gender, including recently created ambiguity and uncertainty.

that rocked the world of women’s sports, EXCELLE SPORTS (Jun. 23, 2017), www.excellesports.com/news/lawsuits-title-ix-womens-sports/.

5. *Id.*

6. See, e.g., Jodi Hudson, *Complying with Title IX of the Education Amendments of 1972: The Never-Ending Race to the Finish Line*, 5 SETON HALL J. SPORTS L. 575, 583 (1995) (stating “[t]he statute [Title IX] sets forth a broad prohibition of gender-based discrimination concerning all programs conducted by educational institutions”); Aaron J. Curtis, *Conformity or Nonconformity? Designing Legal Remedies to Protect Transgender Students from Discrimination*, 53 HARV. J. ON LEGIS. 2, 470 (2016), harvardjol.com/wp-content/uploads/2016/05/HLL201_crop.pdf (stating “recent court cases and OCR policies suggest that [Title IX] also protects [claimants] from discrimination based on gender nonconformity . . .”); see also Erin E. Buzuvis, *“On the Basis of Sex”: Using Title IX to Protect Transgender Students from Discrimination in Education*, 28 WIS. J. L. GENDER & SOC’Y 219, 220-21 (2013) (recognizing that while Title IX does not include gender on its face, “. . . it is still possible to interpret the prohibition on sex discrimination in a number of different ways that would make the law available to transgender plaintiffs . . .”).

II. SEX V. GENDER

*Historically, the terms “sex” and “gender” have been used interchangeably, but, in modern society, their meanings are becoming increasingly distinct.*⁷

A. What is Sex?

“In general terms, ‘sex’ refers to the biological differences between male and female”⁸ Many likely think of the human sex continuum as simply binary,⁹ meaning humans are either “male” or “female.”¹⁰ This assumption is understandable when human sex is defined solely by potential reproductive contributions because, when analyzed in such manner, there are only two sexes: the female, capable of producing large gametes (ovules), and the male, able to produce small gametes (spermatozoa).¹¹ These relatively simplistic definitions, based on “gonadic criterion,”¹² fail to consider additional criterion making the discussion more nuanced.

Humans are born with 23 pairs of chromosomes.¹³ Of those, the X and Y chromosomes determine sex.¹⁴ This is “genetic sex.”¹⁵ The male has XY chromosomes and the female has XX.¹⁶ In actuality, human chromosomes may create multiple sexes.¹⁷

7. Tim Newman, *Sex and Gender: What’s the Difference?*, MEDICAL NEWS TODAY, (Feb. 7, 2018), www.medicalnewstoday.com/articles/232363.php.

8. *Id.*

9. Meaning comprised of only two parts. See, e.g. *Binary*, MERRIAM-WEBSTER, www.merriam-webster.com/dictionary/binary (last visited Apr. 10, 2018). See also *Binary*, COLLINS DICTIONARY, www.collinsdictionary.com/us/dictionary/english/binary (last visited Apr. 10, 2018).

10. John Skalko, *Why There are Only Two Sexes*, THE WITHERSPOON INSTITUTE, (June 5, 2017), www.thepublicdiscourse.com/2017/06/19389/.

11. Phillippe Testard-Vailant, *How Many Sexes are There?*, CNRS (Aug. 1, 2017), news.cnrs.fr/articles/how-many-sexes-are-there.

12. Gonadic criterion are based on reproductive glands. *Id.*

13. *Gender and Genetics*, WHO, www.who.int/genomics/gender/en/index1.html (last visited Apr. 10, 2018).

14. *Id.*; see also Regina Bailey, *Sex Cells Anatomy and Production*, THOUGHTCO., (Nov. 7, 2017), www.thoughtco.com/sex-cells-meaning-373386:

Male sperm cells in humans and other mammals are heterogametic and contain one of two types of sex chromosomes. They contain either an X chromosome or a Y chromosome. Female egg cells, however, contain only the X sex chromosome and are therefore homogametic. The sperm cell determines the sex of an individual. If a sperm cell containing an X chromosome fertilizes an egg, the resulting zygote will be XX or female. If the sperm cell contains a Y chromosome, then the resulting zygote will be XY or male. *Id.*

15. Testard-Vailant, *supra* note 11.

16. See Bailey, *supra* note 14.

17. See Anne Fausto-Sterling, *The Five Sexes: Why Male and Female are Not*

Chromosomal “pairings” include:

X – Roughly 1 in 2,000 to 1 in 5,000 people

XX – Most common form of female

XXY – Roughly 1 in 500 to 1 in 1,000 people

XY – Most common form of male

XYY – Roughly 1 out of 1,000 people

XXXY – Roughly 1 in 18,000 to 1 in 50,000 births¹⁸

Both gonadic criterion and chromosomal pairings define human “sex,” but these are not the only definitions of human sex,¹⁹ nor do they define gender.²⁰

Enough, THE SCIENCES (1993), chnm.gmu.edu/courses/ncc375/5sexes.html; see also Joshua Kennon, *The Six Most Common Biological Sexes in Humans*, JOSHUA KENNON: THOUGHTS ON BUSINESS, POLITICS, AND LIFE (June 7, 2013), www.joshuakennon.com/the-six-common-biological-sexes-in-humans/.

18. *Id.*; see also WHO, *supra* note 13.

19. While it is beyond the scope of this subsection, there is also “intersex.” “Intersex is a socially constructed category that reflects real biological variation.” See *What is intersex?*, ISNA, www.isna.org/faq/what_is_intersex (last visited Apr. 12, 2018). “‘Intersex’ is a general term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn’t seem to fit the typical definitions of female or male.” *Id.*

20. See Testard-Vailant, *supra* note 11. Although even that author uses “gender” as a synonym for “sex”:

However, this gonadic criterion (based upon reproductive glands) is not the only factor on which the definition of biological gender rests. We must also consider genetic sex (based on X and Y chromosomes), anatomical (based on the appearance of the genitalia), hormonal gender (based on the predominant hormones), and so on. Moreover, “each sexual parameter can have variants,” explains Éric Vilain, of the Epigenetics, Data & Politics Laboratory. For example, “XX/XY mosaics” are individuals with gonads comprising both ovaries and testicles. *Id.*

B. What is Gender?

*Gender refers to the socially constructed characteristics of women and men – such as norms, roles and relationships of and between groups of women and men. It varies from society to society and can be changed.*²¹ – World Health Organization

As seen in the prior subsection human sex is more complicated than simply male and female, but human gender is almost mystifying because it does not exist, at least in any measurable manner, at all.²² Gender is often categorized as a “social construct”²³ and the term “gender” has no uniform, legal definition.²⁴

A social construct is a societal stereotype or shortcut; it is a term or category created by a society, or a part of a society, and then established through practice.²⁵ As a social construct, the meaning of gender varies across cultures and over time.²⁶ Historically, in the United States, two genders exist: masculine and feminine.²⁷ Those terms reflected behaviors or characteristics society deemed “appropriate” for a male or female.²⁸ While gender is how a society describes or identifies an individual, it is also how individuals

21. *Gender*, WHO, www.who.int/gender-equity-rights/understanding/gender-definition/en/ (last visited Apr. 10, 2018).

22. Or, perhaps sex and gender are both largely uncharted. See Emily Q. Shults, *Sharply Drawn Lines: An Examination of Title IX, Intersex, and Transgender*, 12 *CARDOZO J.L. & GENDER* 337, 342 (2005) (“ . . . theoretical discourse has not yet managed a satisfactory account of all the nuances and distinctions that the terms ‘sex’ and ‘gender’ require”).

23. See, e.g., Zuleyka Zevallos, *Sociology of Gender*, *THE OTHER SOCIOLOGIST* (Nov. 28, 2014), othersociologist.com/sociology-of-gender/ (stating “[g]ender, like all social identities, is socially constructed”).

24. See *What is Gender?*, *THE LAW DICTIONARY*, thelawdictionary.org/gender/ (last visited Apr. 10, 2018):

What is GENDER? Defined differences between men and women based on culturally and socially constructed mores, politics, and affairs. Time and location rise to a variety of local definitions. Contrasts to what is defined as the biological sex of a living creature.

25. See *Social Construct*, *DICTIONARY.COM*, www.dictionary.com/browse/social-construct (last visited Apr. 10, 2018) (defining “social construct” as “a social mechanism, phenomenon, or category created and developed by society; a perception of an individual, group, or idea that is ‘constructed’ through cultural or social practice.”).

26. WHO, *supra* note 13.

27. William Cummings, *When Asked Their Sex, Some are Going with Option ‘X’*, *USA TODAY* (June 21, 2017), www.usatoday.com/story/news/2017/06/21/third-gender-option-non-binary/359260001/ (stating slightly differently, “America has slowly begun to acknowledge that for many people, gender is not easily defined as either male or female.”).

28. See Zevallos, *supra* note 23 (stating “[g]ender involves social norms, attitudes and activities that society deems more appropriate for one sex over another.”).

describe or identify themselves.²⁹ This latter piece is known as “gender identity.”³⁰

Gender identity is key to understanding gender discussion. As explained by one author, “Gender identity is an extremely personal part of who we are, and how we perceive and express ourselves in the world. It is a separate issue entirely from sex, our biological makeup; or sexual orientation, who we are attracted to.”³¹

Gender identity may be tied to gender dysphoria, gender transition, and gender expression. Gender dysphoria is defined as “. . . [the] distress caused when a person’s assigned birth gender is not the same as the one with which they identify,”³² gender transition is “[t]he process by which some people strive to more closely align their internal knowledge of gender with its outward appearance,”³³ and gender expression is “. . . the [e]xternal appearance of one’s gender identity . . .”³⁴ Gender identity is “One’s innermost concept of self as male, female, a blend of both or neither . . .”³⁵ and current gender identity definitions include, but are not limited to, the following:

Agender: A term for people whose gender identity and expression does not align with man, woman, or any other gender. A similar term used by some is gender-neutral.³⁶

29. *Id.*

Gender is more fluid – it may or may not depend upon biological traits. More specifically, it is a concept that describes how societies determine and manage sex categories; the cultural meanings attached to men and women’s roles; and how individuals understand their identities including, but not limited to, being a man, woman, transgender, intersex, gender queer and other gender positions. Gender involves social norms, attitudes and activities that society deems more appropriate for one sex over another. *Id.*

30. See Sam Killermann, *Comprehensive List of LBGTQ+ Vocabulary Definitions*, IT’S PRONOUNCED METROSEXUAL, (Jan. 7, 2013), itspronouncedmetrosexual.com/2013/01/a-comprehensive-list-of-lgbtq-term-definitions/ (stating “gender identity – *noun*: the internal perception of an one’s gender, and how they label themselves . . .”).

31. Cydney Adams, *The Gender Identity Terms You Need to Know*, CBS INTERACTIVE INC. (Mar. 24, 2017), www.cbsnews.com/news/transgender-gender-identity-terms-glossary/.

32. See *Sexual Orientation and Gender Identity Definitions*, HUMAN RIGHTS CAMPAIGN, www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions (last visited Apr. 10, 2018).

33. *Id.*

34. *Id.*

35. *Id.*

36. Adams, *supra* note 31.

Androgynous: Identifying and/or presenting as neither distinguishably masculine nor feminine.³⁷

Bigender: Someone whose gender identity encompasses both man and woman. Some may feel that one side or the other is stronger, but both sides are present.³⁸

Cisgender: A term used to describe someone whose gender identity aligns with the sex assigned to them at birth.³⁹

Gender fluid: A person who does not identify with a single fixed gender, and expresses a fluid or unfixed gender identity. One’s expression of identity is likely to shift and change depending on context.⁴⁰

Gender non-conforming: A broad term referring to people who do not behave in a way that conforms to the traditional expectations of their gender, or whose gender expression does not fit neatly into a category.⁴¹

Genderqueer: A term for people who reject notions of static categories of gender and embrace a fluidity of gender identity and often, though not always, sexual orientation. People who identify as genderqueer may see themselves as being both male and female, neither male nor female or as falling completely outside these categories.⁴²

Non-binary: Any gender that falls outside of the binary system of male/female or man/woman.⁴³

Queer: An umbrella term people often use to express fluid identities and orientations.⁴⁴

As seen above, gender is not limited to masculine and feminine and gender is not biologically measurable. When we recognize these facts two conclusions are irrefutable. First, the number of potential genders is infinite. Second, “sex” and “gender” are not one and the same.⁴⁵ The latter distinction is critical as “[m]any courts, including

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Adams, *supra* note 31.

43. *Id.*

44. *Id.*

45. See Anne-Maree Nobelius, *What is the Difference Between Sex and*

the Supreme Court, appear to have used ‘sex’ and ‘gender’ synonymously.”⁴⁶

III. TITLE IX: THE ORIGINAL TEXT

Title IX became law more than 45 years ago and it reflected a then binary sex worldview. While it prohibited discrimination based on “sex,” it really recognized just two sexes (male and female), and intended to legally protect only one (female). As the Department of Justice concisely explains, “Congress passed Title IX in response to the marked educational inequalities women faced prior to the 1970s.”⁴⁷

Representative Edith Green and Senator Birch Bayh sponsored Title IX,⁴⁸ but recorded legislative history is quite limited.⁴⁹ In 1972, Senator Bayh formally proposed an amendment

Gender?, MONASH UNIVERSITY (June 23, 2004), www.med.monash.edu.au/gendermed/sexandgender.html:

Sex = male and female

Gender = masculine and feminine

So in essence:

Sex refers to biological differences; chromosomes, hormonal profiles, internal and external sex organs.

Gender describes the characteristics that a society or culture delineates as masculine or feminine.

So while your sex as male or female is a biological fact that is the same in any `culture, what that sex means in terms of your gender role...can be quite different cross culturally. *Id.*

Or, in a more light-hearted manner, see Jillian T. Weiss, *Schroer v. Billington: What Does it Mean for Transgender Employees?*, THE BILERICO PROJECT (Sept. 21, 2008), bilerico.lgbtqnation.com/2008/09/schroer_v_billington_what_does_it_mean_f.php (stating “Now just wait a minute! Hold the phone! I hear all of the academic gender theory people groaning - but sex and gender are different! Sex is between the legs and gender is between the ears!”).

46. *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 343 fn. 1 (7th Cir. 2017).

47. U.S. DEPT OF JUST., *supra* note 1, at 2.

48. *Id.*

49. See Steven Seth Rhine, *A Review and Analysis of Title IX of the Education Amendments of 1972*, THE UNIVERSITY OF GEORGIA (Dec. 2005), getd.galib.uga.edu/public/rhine_steven_s_200512_edd/rhine_steven_s_200512_edd.pdf.

The legislative history of Title IX comes from Congressional testimony in committees and dialogue between members of Congress. Congress included no committee report with the final bill.... Because Title IX was first introduced as a floor amendment, its legislative history is unusually sparse. *Id.* at 13.

to the Educational Amendments of 1971⁵⁰ and the Supreme Court is clear that his remarks are “. . . an authoritative guide to the statute’s construction.”⁵¹ Senator Bayh proffered the amendment to combat “the continuation of corrosive and unjustified discrimination against women in the American educational system,”⁵² and to:

[P]rovide for the women of America something that is rightfully theirs – an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.⁵³

Eventually the proposal became Title IX of the Educational Amendments of 1972 (“Title IX”)⁵⁴ and President Nixon signed that act into law on June 23, 1972.⁵⁵ Once enacted, Title IX administration fell to the then existing Department of Health, Education, and Welfare (“HEW”) and HEW’s Office of Civil Rights (“OCR”) was, and still remains, the administrative sub-agency primarily responsible for Title IX enforcement.⁵⁶

It is important to understand that Title IX’s original text does

50. *Title IX Legal Manual*, U.S. DEP’T OF JUST., www.justice.gov/crt/title-ix (last visited Apr. 11, 2018).

51. *North Haven*, 456 U.S. at 527.

52. 118 Cong. Rec. 5803 (1972).

53. *Id.*

54. *Title IX of the Education Amendments of 1972*, U.S. DEP’T OF JUST., www.justice.gov/crt/title-ix-education-amendments-1972 (last visited Apr. 10, 2018).

55. Gerhard Peters and John T. Woolley, *Richard Nixon, Statement on Signing the Education Amendments of 1972 (1972)*, THE AMERICAN PRESIDENCY PROJECT, www.presidency.ucsb.edu/ws/?pid=3473 (last visited Apr. 10, 2018).

56. See *Title IX and Sex Discrimination*, U.S. DEP’T OF EDUCATION, www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last visited Apr. 10, 2018):

OCR’s Enforcement of Title IX

OCR vigorously enforces Title IX to ensure that institutions that receive federal financial assistance from ED comply with the law. OCR evaluates, investigates, and resolves complaints alleging sex discrimination. OCR also conducts proactive investigations, called compliance reviews, to examine potential systemic violations based on sources of information other than complaints.

In addition to its enforcement activities, OCR provides technical assistance and information and guidance to schools, universities and other agencies to assist them in voluntarily complying with the law. *Id.*

Other governmental agencies have promulgated Title IX regulations. See TITLE IX INFO, *supra* note 2 (stating “in 1980 HEW split into two departments, the Department of Education and the Department of Health and Human Services and each new agency adopted the regulations. Two other federal agencies, the Department of Agriculture and the Department of Energy, also published Title IX rules around that same time.”).

not use the term gender, ever.⁵⁷ Title IX specifically and unquestionably prohibits discrimination based on sex,⁵⁸ however sex and gender are not synonymous.⁵⁹ This seems to end any argument that Title IX encompasses gender. However, as we will see in the next section, Title IX's parameters have not been limited by legislative intent or existing text.

IV. TITLE IX'S EXPANSION

*Civil Rights — guarantees of equal social opportunities and equal protection under the law, regardless of race, religion, or other personal characteristics.*⁶⁰

Civil rights laws arise from legislative and judicial responses to vital societal issues.⁶¹ In many ways, Title IX epitomizes civil

57. U.S. DEPT OF JUST., *supra* note 56; *see also* Angela J. Hattery, *They Play Like Girls: Race and Gender (In)equity in NCAA Sports*, 2 WAKE FOREST J. L. & POL'Y 247, 253 (2012):

It is suspected that this lack of attention to the complexities of race and gender was simply emblematic of the times; prior to the development of critical race theory (in the field of law) and race, class, and gender theory (in the social sciences and humanities), neither feminist nor race scholars had developed a complex understanding of the interlocking nature of the systems of oppression. *Id.*

58. 20 U.S.C. § 1681(a) (2002); *see also* Cannon v. Univ. of Chicago, 441 U.S. 677, 704 (1979).

59. *See* sources cited, *supra* note 46 and accompanying text; *see also* Buzuvis, *supra* note 6, at 229:

In most early decisions involving transgender plaintiffs, courts reasoned that Congress meant for "sex" to mean biological sex, separate and apart from the sex (or more accurately, gender) one experiences oneself to be, an interpretation that resulted in courts denying Title VII protection to transgender plaintiffs. *Id.*

60. Rebecca Hamlin, *Civil Rights*, ENCYCLOPEDIA BRITANNICA INC., www.britannica.com/topic/civil-rights (last visited Apr. 10, 2018).

61. *Id.* (discussing American civil rights issues such as race, sex, national origin, and sexual orientation); *see also* *Impact of the Civil Rights Laws*, U.S. DEPT. OF EDUCATION, (Jan. 1999), www2.ed.gov/about/offices/list/ocr/impact.html (explaining civil rights responses to issues in education).

rights⁶² in being both societally important⁶³ and an evolving product of its time.⁶⁴ Today's Title IX is far more comprehensive than the law originally enacted. This expansion occurred in three steps. First, Title IX was not limited to higher education, but applied to all levels of education. I discuss this as increased "depth." Second, Congress amended Title IX to include athletic opportunities offered by educational entities receiving federal funds. I term this expanded "breadth." Third, and, most recently, Title IX was applied to sexual violence proceedings in educational institutions. I refer to this as greater "scope." The following subsections proceed in that order.

A. Title IX's Increased Depth: Title IX Prohibits Sexual Discrimination at All Levels of Education

Title IX was modeled after Title VI of the Civil Rights Act of 1964 ("Title VI").⁶⁵ Title VI prohibited race-based discrimination in

62. See, e.g., *What are Civil Rights?*, FINDLAW.COM, civilrights.findlaw.com/civil-rights-overview/what-are-civil-rights.html (last visited Apr. 10, 2018) (stating "[t]raditionally, the concept of civil rights has revolved around the basic right to be free from unequal treatment based on certain protected characteristics (race, gender, disability, etc.) . . ."). See also *Civil Rights*, LEGAL INFORMATION INSTITUTE, www.law.cornell.edu/wex/civil_rights (last visited Apr. 10, 2018):

A civil right is an enforceable right or privilege, which if interfered with by another gives rise to an action for injury. Examples of civil rights are freedom of speech, press, and assembly; the right to vote; freedom from involuntary servitude; and the right to equality in public places. Discrimination occurs when the civil rights of an individual are denied or interfered with because of their membership in a particular group or class. Various jurisdictions have enacted statutes to prevent discrimination based on a person's race, sex, religion, age, previous condition of servitude, physical limitation, national origin, and in some instances sexual orientation. *Id.*

63. See, e.g., Jay Larson, *All Sports are Not Created Equal: College Football and a Proposal to Amend the Title IX Proportionality Prong*, 88 MINN. L. REV. 1598, 1598 (2004) (explaining that Title IX is "[h]ailed as one of the great civil rights statues in history . . .").

64. See Nathan R. Cordle, *Title IX at 45: The Evolution and Impact on LGBTQ+ Rights*, AMERICAN BAR ASSOCIATION, www.americanbar.org/groups/young_lawyers/publications/tyl/topics/sexual-orientation-gender-identity/title-ix-at-45-the-evolution-and-impact-on-lgbtq-rights.html (last visited Apr. 10, 2018):

Title IX started as an Act designed to eliminate gender discrimination in athletics and educational programs and activities. However, over time it has evolved into a more powerful tool used to combat other forms of discrimination, harassment, and violence. *Id.*

65. 42 U.S.C. § 2000 (1994); see also *Cannon*, 441 U.S. at 696 (stating "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.").

federally funded programs.⁶⁶ Similarly, Title IX prohibits sex-based discrimination in educational activities receiving federal funds:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal financial assistance.⁶⁷

For purposes of this discussion the critical language is “any education program or activity receiving federal financial assistance.”⁶⁸ Although it is impossible to know precisely which programs Congress intended Title IX to cover, the logical conclusion is that the law focused on issues in higher education.⁶⁹ Undoubtedly, some readers will immediately look to the original language and disagree with that assertion. That is certainly understandable. Such disagreement is supported by the text itself, but historical context supports the higher education focus. This is apparent for two reasons. First, there was no demonstrated sex based discrimination, in primary and secondary education opportunities, when Congress enacted Title IX. Second, Title IX’s pragmatic purpose was to remove higher education barriers to facilitate more employment opportunities for women.

Title IX likely did not contemplate sex discrimination in primary and secondary schools, at least in terms of the number of educational opportunities, as this simply was not an issue prior to its enactment. During the last half of the 19th Century the numbers of male and female students, ages 5-19, enrolled in primary and secondary schools, were approximately equal.⁷⁰ In fact, the number of female high school graduates actually exceeded the number of male high school students for decades preceding Title IX.⁷¹ It is unlikely Title IX intended to address primary and/or secondary

66. 42 U.S.C. § 2000e (1991) (stating “[i]t shall be an unlawful employment practice for an employer . . . (a) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”).

67. 20 U.S.C. § 1681(a) (2002); *see also Cannon*, 441 U.S. at 704 (identifying the two primary objectives of Title IX as “avoid[ing] the use of federal resources to support discriminatory practices” and “provid[ing] individual citizens effective protection against those practices.”).

68. *Id.*

69. *See Buzuvis, supra* note 6, at 7 (stating “. . . [Title IX] was primarily aimed at eliminating discrimination against women in college admissions and faculty hiring . . .”).

70. *See* Thomas D. Snyder, *120 Years of American Education: A Statistical Report*, NATIONAL CENTER FOR EDUCATION STATISTICS, (1993) at 6, nces.ed.gov/pubs93/93442.pdf, (stating “[a]lthough enrollment rates fluctuated, roughly half of all 5- to 19-year-olds were enrolled in school . . . [r]ates for males and females were roughly similar throughout the period . . .”).

71. *Id.* at 8.

educational institutions because there was no sex-based opportunity disparity at those levels.⁷² Title IX does not identify primary or secondary education sources in its language, period.⁷³

However, sex disparity unquestionably existed in higher education. In 1970 women under age 25 constituted 41% of students enrolled in college⁷⁴ and only 8.2% of females had completed 4 years of college or earned an undergraduate degree.⁷⁵ Male students were almost twice as likely to graduate from college as female students.⁷⁶ A congressional subcommittee, addressing discrimination against women, concluded there were “. . . massive, persistent patterns of discrimination against women in the academic world.”⁷⁷ The identified issues in higher education included systemic barriers such as, “. . . having higher standards for admission for women, not accepting married women into nursing schools, giving less scholarship money to females and excluding females from honor societies because of their gender.”⁷⁸ The lack of women’s opportunities in education particularly concerned Senator Bayh as he viewed such discrimination as a barrier to employment

72. When I say, “there was no opportunity disparity,” I refer only to student enrollment by sex. See Snyder, *supra* note 70. I do not contend there was no sexual discrimination impacting primary and secondary school students at the time, but that is beyond the scope of this article.

73. See 20 U.S.C. § 1687 (1972) (1)(A) – (2)(B):

Section 1687. Interpretation of "program or activity"

For the purposes of this title, the term "program or activity" and "program" mean all of the operations of –

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributed such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 2854(a)(10) of this title, system of vocational education, or other school system . . .)

74. Karen A. Holbrook, *Statistics Mask the Real Story of Women in Higher Education*, N.Y. TIMES (2005), www.nytimes.com/ref/college/faculty/coll_pres_holbrook.html?8bl (last visited Apr. 11, 2018).

75. *Percentage of the U.S Population Who Have Completed Four Years of College or More from 1940 to 2016, by Gender*, STATISTA, www.statista.com/statistics/184272/educational-attainment-of-college-diploma-or-higher-by-gender/ (last visited Apr. 11, 2018).

76. 8.2% of female students graduated from college while 14.1% of male students did. *Id.*

77. Rhine, *supra* note 49, at 12.

78. *Id.*

and financial security.⁷⁹

As the numbers of boys and girls in primary and secondary schools were approximately equal, and as more girls graduated from high school than boys, the discrimination Senator Bayh railed against was, logically, in higher education. So, when and how did Title IX actionably encompass primary and secondary education? The answer is imprecise with no single piece of mandatory authority to turn to.⁸⁰ However, a chronological line of events leaves no question regarding the actual evolution.

It began in 1984 with the United States Supreme Court's decision in *Grove City College v. Bell*.⁸¹ *Grove City's* central issue was whether a college was subject to Title IX when its students received federal grants, but the school received no direct federal funding.⁸² The Court concluded that such indirect funding

79. See U.S. DEP'T OF JUST., *supra* note 56, at II(2):

. . . Title IX began its congressional life in earnest when an amendment was introduced in the Senate by Senator Birch Bayh of Indiana, who explained that its purpose was to combat "the continuation of corrosive and unjustified discrimination against women in the American educational system." 118 Cong. Rec. 5803 (1972). During debate, Senator Bayh stressed the fact that economic inequities suffered by women can often be traced to educational inequities. In support of the amendment, Senator Bayh pointed to the link between discrimination in education and subsequent employment opportunities:

The field of education is just one of many areas where differential treatment [between men and women] has been documented but because education provides access to jobs and financial security, discrimination here is doubly destructive for women. Therefore, a strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women. *Id.*

80. I was surprised by this realization, and concerned I missed something incredibly obvious. So, I emailed both the Office of Civil Rights and the Department of Justice for clarification. The DOJ did not respond, but the OCR provided the following:

Many federal courts have addressed Title IX's application to elementary and secondary school, including, for example, the following decisions of the U.S. Supreme Court: *Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60 (1992); *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274 (1998); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005); *Fitzgerald v. Barnstable School Comm.*, 555 U.S. 246 (2009).

Email from Office of Civil Rights, Title IX – Primary and Secondary Institutions, to author (Jan. 11, 2018 8:49 AM CST) (on file with author).

81. See generally *Grove City*, 465 U.S. 555.

82. *Id.* at 558:

This case presents several questions concerning the scope and operation of these provisions and the regulations established by the Department of Education. We must decide, first, whether Title IX applies at all to Grove City College, which accepts no direct assistance but enrolls students who

triggered Title IX application⁸³ but only to the recipient program,⁸⁴ and not to the entire institution.⁸⁵ This distinction narrowed the scope of Title IX far more than some thought it should be.⁸⁶

Congress quickly responded to *Grove City* with the Civil Rights Restoration Act of 1987.⁸⁷ That law specifically brought all education institutions receiving federal funding under Title IX, regardless of whether such funding was direct.⁸⁸ It also explicitly encompassed "local education agenc[ies]"⁸⁹ and those included elementary and secondary education institutions.⁹⁰

Two significant Title IX decisions soon prominently displayed this newly clarified depth.⁹¹ First, in *Franklin v. Guinnett County Public Schools*,⁹² the Court held that a high school student could pursue monetary damages for Title IX violation by a teacher.⁹³ Then *Davis v. Monroe County* took *Franklin* further.⁹⁴ The *Davis* Court held that an elementary school could be monetarily liable for

receive federal grants that must be used for educational purposes. *Id.*

83. *Id.* at 569-70:

With the benefit of clear statutory language, powerful evidence of Congress' intent, and a longstanding and coherent administrative construction of the phrase "receiving Federal financial assistance," we have little trouble concluding that Title IX coverage is not foreclosed because federal funds are granted to Grove City's students rather than directly to one of the College's educational programs. *Id.*

84. *Id.* at 572.

85. *Id.* (stating "the fact that federal funds eventually reach the College's general operating budget cannot subject Grove City to institution wide coverage.").

86. *Id.* at 601 (showing Justice Brennan's dissent, arguing that "[u]nder the Court's holding . . . Grove City College is prohibited from discriminating on the basis of sex in its own 'financial aid program,' but is free to discriminate in other 'programs or activities' operated by the institution.").

87. *See* 20 USC § 1687.

88. *Id.* (in pertinent part):

§ 1687. Interpretation of "program or activity"

For the purposes of this title, the term "program or activity" and "program" mean all of the operations of –

(2)

(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section [section] 8101 of the Elementary and Secondary Education Act of 1965 [20 USCS § 7801]), system of vocational education, or other school System . . . *Id.*

89. 20 USC 1687 § 908(1)(a).

90. *Id.* at (2)(B).

91. *Franklin*, 503 U.S. 60; *Davis*, 526 U.S. 629.

92. *See generally Franklin*, 503 U.S. 60.

93. *Id.* at 76.

94. *See generally Davis*, 526 U.S. 629.

a Title IX violation arising from student-on-student sexual harassment.⁹⁵ As of today, “[a]ll public school districts are covered by Title IX because they receive some federal financial assistance and operate education programs.”⁹⁶

This subsection looked at, arguably, Title IX expansion beyond congressional intent, primarily shaped by common law, but also with some legislative action. The following subsection looks at Title IX expansion primarily via formal legislative amendment, an amendment that dramatically increased the law’s breadth.

B. Title IX’s Expanded Breadth: Title IX Prohibits Sex Discrimination in Athletics

*The law that has become synonymous with women’s sports was never meant to address inequality on that kind of playing field.*⁹⁷

Many tout Title IX as the law creating opportunities for female athletes in the United States.⁹⁸ Some even believe Title IX’s primary purpose was remedying sex based athletic inequalities.⁹⁹

95. *Id.* at 642.

96. See *Sex Discrimination*, U.S. DEPARTMENT OF EDUCATION, www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html (last visited Apr. 11, 2018).

97. See Susan Ware, Title IX’s Unintended Revolution for Women’s Athletics, AAUW (Sept. 1, 2015), www.aauw.org/2015/09/01/title-ix-womens-athletics/ (last visited Apr. 11, 2018).

98. See *Before and After Title IX: Women in Sports*, N.Y. TIMES (June 17, 2012), www.nytimes.com/interactive/2012/06/17/opinion/sunday/sundayreview-titleix-timeline.html:

It’s hard to exaggerate the far-reaching effect of Title IX on American society. The year before Title IX was enacted, there were about 310,000 girls and women in America playing high school and college sports; today, there are more than 3,373,000.

See also Richard C. Bell, *A History of Women in Sport Prior to Title IX* (Mar. 14, 2008), thesportjournal.org/article/a-history-of-women-in-sport-prior-to-title-ix/:

Subsequent to Title IX, women and girls have become much more involved in sports. College women’s athletic participation has increased from 15% in 1972 to 43% in 2001. High school girl’s athletic participation increased from 295,000 in 1971 to 2.8 million in 2002-2003, an increase of over 840%. In 2004, the average number of teams offered for females per college/university was 8.32, up from 2.50 per school in 1972 . . . In 1981-82, women’s championships became a part of the NCAA program. Today, the NCAA sponsors forty women’s championships, thirty-eight men’s championships, and three combined championships in all three of its divisions . . . *Id.*

99. See, e.g., Alia Wong, *Where Girls are Missing out on High-School Sports*, THE ATLANTIC (Jun. 26, 2015), www.theatlantic.com/education/archive/2015/06/girls-high-school-sports-inequality/396782/ (stating “the impetus behind Title IX was the lack of opportunity for female athletes.”); Some even go

The former argument is empirically supportable;¹⁰⁰ the latter is likely incorrect.¹⁰¹ While many commentators will not like this, Congress probably did not intend Title IX to apply to athletic opportunities. The only reported mention of “sports,” by sponsor Senator Bayh, was his “reassurance to a colleague that the statute would not require schools to put women on their football teams.”¹⁰² The original legislation never specified “athletics” as part of the scope of covered “program or activity.”¹⁰³ It is quite probably the fact that Congress intended Title IX to combat sex discrimination in academia only.¹⁰⁴

However, in 1974 Congress expanded Title IX’s breadth

so far as to argue a conspiracy to enact Title IX before its true intent was clear. See, e.g., Jake Simpson, *How Title IX Sneakily Revolutionized Women’s Sports*, THE ATLANTIC (Jun. 21, 2012), www.theatlantic.com/entertainment/archive/2012/06/how-title-ix-sneakily-revolutionized-womens-sports/258708/:

When Title IX was signed into law 40 years ago this weekend, most people had no idea what an impact it would have on women’s sports in America. And that’s exactly what the architects of the bill wanted. *Id.*

But see Ware, *supra* note 97.

100. See sources cited, *supra* note 99 and accompanying text; see also *Bridging the Gender Gap: The Positive Effects of Title IX*, ATHNET, www.athleticscholarships.net/title-ix-college-athletics-3.htm (last visited Apr. 11, 2018):

Before Title IX’s inception, only 1 in 27 girls played varsity sports; today, that figure is 1 in 2.5. There are now a total of 2.8 million girls playing high school sports with the hopes of obtaining a scholarship in a university. Before Title IX, there were only 32,000 women competing at the intercollegiate level; now there are 150,000 competing women. In addition, athletic scholarships were virtually nonexistent prior to Title IX; now there are over 10,000 athletic scholarships awarded to women to compete at the collegiate level each year . . . *Id.*

101. See, e.g., Jaeah Lee and Maya Dusenbery, *Charts: The State of Women’s Athletics, 40 Years After Title IX*, MOTHER JONES, (Jun. 22, 2012 at 10:00 AM), www.motherjones.com/politics/2012/06/charts-womens-athletics-title-nine-ncaa/:

Bernice Sandler, who helped draft the legislation back in 1972, recently told ESPN, “The only thought I gave to sports when the bill was passed was, ‘Oh, maybe now when a school holds its field day, there will be more activities for the girls.’” During the Senate hearings on the bill—aside from one Senator’s crack about coed football which drew hearty guffaws—sports weren’t mentioned at all. *Id.*

102. See Michael A. McCahn, *The Oxford Handbook of American Sport* 366 (2018).

103. 20 U.S.C. § 1687.

104. See Rachel Schwarz, *Timeout! Getting Back to What Title IX Intended and Encouraging Courts and the Office of Civil Rights to Re-Evaluate the Three-Prong Compliance Test*, 20 WASH. & LEE J.CIV. RTS. & SOC. JUST. 633, 634 (2014).

when it passed the “Javits Amendment.”¹⁰⁵ That amendment directed the then Department of Health, Education, and Welfare (“HEW”) to implement regulations with “a provision stating that such regulations shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of the particular sports.”¹⁰⁶ HEW did so effective July 21, 1975,¹⁰⁷ mandating that:

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.¹⁰⁸

This language created significant operational questions and, “[b]y the end of 1978, the Department had received nearly 100 complaints alleging discrimination in athletics against more than 50 institutions of higher education.”¹⁰⁹ The Office of Civil Rights (“OCR”) quickly responded by issuing its 1979 Policy Interpretation: Title IX and Intercollegiate Athletics.¹¹⁰ That Interpretation clarified that:

105. Pub. L. No. 93-380. § 844 (1974); *see also* *Equity in Ath., Inc. v. Department of Education*, 639 F.3d 91, 95 (4th Cir. 2011) (stating “Title IX did not specifically address its application to athletics, and in 1974, Congress enacted the Javits Amendment”).

106. *Id.*; *see also* *A Policy Interpretation: Title IX and Intercollegiate Athletics*, U.S. DEPARTMENT OF EDUCATION, www2.ed.gov/about/offices/list/ocr/docs/t9interp.html (last visited Apr. 11, 2018):

1. Legal Background

A. The Statute

Section 901(a) of Title IX of the Education Amendments of 1972 provides:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Section 844 of the Education Amendments of 1974 further provides:

The Secretary of [of HEW] shall prepare and publish ! ! ! proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports. *Id.*

107. *See* *TITLE 34 EDUCATION § 106.1*, U.S. DEP’T OF EDUC., www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr106.html (last visited Apr. 11, 2018).

108. *Id.* at § 106.41.

109. *See* U.S. DEP’T OF EDUC., *supra* note 107, at § II.

110. *See generally* *Id.*

This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation. Accordingly, the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate.

This policy interpretation applies to any public or private institution, person or other entity that operates an educational program or activity which receives or benefits from financial assistance authorized or extended under a law administered by the Department.¹¹¹

Pursuant to the combined actions of Congress (in passing the Javits Amendment), the HEW (specifically expanding Title IX to prohibit sex discrimination in athletics), the OCR (defining the scope of affected entities and activities), and the Civil Rights Act of 1987 (legislating that federal funding did not have to be direct to trigger Title IX),¹¹² Title IX now applied to all athletic opportunities arising out of educational activities receiving direct and/or indirect federal funds.¹¹³ Title IX’s breadth expanded greatly since 1972 and it would make another significant advancement in the future.

C. Title IX’s Greater Scope: Title IX Encompasses Sexual Violence on Campuses

This subsection discusses Title IX’s most recent, and most aggressive, expansion. I use the term “aggressive” because this expansion brought not one, but two issues that do not actually exist in Title IX text under Title IX’s scope.

Title IX prohibits discrimination on the basis of sex.¹¹⁴ Its text does not include “sexual harassment” or “sexual violence”.¹¹⁵ However, the OCR aggressively utilized Title IX common law interpretations to encompass both. It did this in two steps. First, it construed Title IX sexual discrimination to encompass sexual harassment. Second, it then construed Title IX sexual harassment to encompass sexual violence.

111. *Id.* at Section III.

112. 20 U.S.C. 1687; *see* source cited, *supra* note 90.

113. *See* sources cited, *supra* notes 82-87 and accompanying text.

114. 20 U.S.C. § 1681; *see* source cited *supra* note 59 and accompanying text.

115. *See generally* U.S. DEP’T OF JUST., *supra* note 56; *see also* Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 51 (2013):

As the wording suggests, Title IX was not originally designed to adjudicate claims of sexual violence on college campuses; nothing in its legislative history and first seven years of existence suggests an intent to reach claims of sexual misconduct in any setting . . . [and], [f]rom Title IX’s passage in 1972 until 1997, OCR never claimed authority over rape or sexual assault between students. *Id.* at 56.

In 1986, the Supreme Court decided *Meritor Savings Bank v. Vinson*,¹¹⁶ holding that sexual harassment constituted an actionable form of sexual discrimination.¹¹⁷ *Meritor* was not a Title IX suit, but it set the stage for later Title IX related actions. In 1992, the Court cited *Meritor* in *Franklin v. Gwinnett County Public Schools, et al.*¹¹⁸ Unlike *Meritor*, *Franklin* was a Title IX case.¹¹⁹ The plaintiff alleged she was a victim of teacher/student sexual harassment in a high school setting.¹²⁰ There was no employment relationship at issue, but the Court held that, “when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor ‘discriminate[s]’ on the basis of sex.”¹²¹ The combination of *Meritor* and *Franklin* provided rationale to bring sexual harassment under the Title IX sex discrimination umbrella. Then, in 1999, the Supreme Court opened the door to sexual violence as a form of sexual harassment in *Davis v. Monroe County*.¹²²

Davis involved alleged student-on-student sexual harassment in an elementary school.¹²³ While the Court did not hold that sexual violence was per se Title IX sexual harassment, it provided two important pieces going forward. First, the Court established that, “sexual harassment’ is ‘discrimination’ in the school context under Title IX . . . [and] if sufficiently severe, can . . . rise to the level of discrimination actionable under the statute.”¹²⁴ Second, “[t]he statute's other prohibitions . . . help give content to the term ‘discrimination’ in this context. Students are not only protected from discrimination, but also specifically shielded from being ‘excluded from participation in’ or ‘denied the benefits of’ any ‘education program or activity receiving Federal financial assistance.’”¹²⁵

Thirteen months later, the OCR issued its Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties Title IX (“2001

116. See generally *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

117. *Id.* at 58.

118. See generally *Franklin*, 503 U.S. 60.

119. *Id.*

120. *Id.* at 63.

121. *Id.* at 75.

122. See generally *Davis*, 526 U.S. 629.

123. *Id.* at 633.

124. *Id.* at 650.

125. *Id.*; see also *Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999) (holding shortly after *Davis* that rape, sexual abuse, and accompanying harassment “obviously qualifies as being severe, pervasive, and objectionably offensive sexual harassment that could deprive [the victim] of access to the educational opportunities provided by her school.”).

Guidance”).¹²⁶ That document concluded that “[b]oth the [*Davis*] Court’s and the Department’s definitions are contextual descriptions intended to capture the same concept – that under Title IX, the conduct must be sufficiently serious that it adversely affects a student’s ability to participate in or benefit from the school’s program.”¹²⁷ Phrased more succinctly, the 2001 Guidance left no question that sexual violence could create a barrier to education violating Title IX.¹²⁸ Then, on April 4, 2011, the OCR issued its perhaps most famous Dear Colleague letter.¹²⁹ That letter specifically tied sexual discrimination, sexual harassment, and sexual violence together¹³⁰ and established the OCR’s clear authority over campus sexual violence procedures via Title IX.¹³¹

The above sequence creates an interesting result. Two topics, sexual harassment and sexual violence, though never part of Title IX’s text, are now covered by Title IX.¹³² Could this also be true for gender?

V. GENDER PROTECTION UNDER TITLE IX

On its face, the plain meaning of Title IX protection seems to include [gender]. In order to prove discrimination on the basis of sex, a person must show that he or she was a victim of

126. See *Revised Sexual Harassment Guidance*, U.S. DEPT OF EDUC. (Jan. 19, 2001), www2.ed.gov/about/offices/list/ocr/docs/shguide.html (last visited Apr. 11, 2018).

127. *Id.*

128. *Id.* (specifying the term “sexual assault” three times in the 2001 Guidance). The terms are as follows:

1. “It may be appropriate for a school to take interim measures during the investigation of a complaint. For instance, if a student alleges that he or she has been sexually assaulted by another student . . .”
2. “In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.”
3. Under the subsection “Recipient’s Response”, “Offering assistance in changing living arrangements is one of the actions required of colleges and universities by the Campus Security Act in cases of rape and sexual assault.” *Id.*

129. See *Dear Colleague Letter*, U.S. DEPT OF EDUC. (Apr. 4, 2011), www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html.

130. *Id.* at 1 (stating “[s]exual harassment of students which includes acts of sexual violence, is a form of sexual discrimination prohibited by Title IX.”).

131. *Id.* at 2 (stating “[t]his letter supplements the 2001 Guidance by providing additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence.”).

132. See *Know Your Rights: Title IX Prohibits Sexual Harassment and Sexual Violence Where You Go to School*, U.S. DEPT OF EDUC., www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.pdf (last visited Apr. 11, 2018) (stating “[u]nder Title IX, discrimination on the basis of sex can include sexual harassment or sexual violence, such as rape, sexual assault, sexual battery, and sexual coercion.”).

*discrimination because of his or her “maleness” or “femaleness,”
that is, because he or she was [or was not] being
a “male” or “female.”*¹³³

One author states that, “[Title IX] sets forth a broad prohibition of gender-based discrimination concerning all programs conducted by educational institutions,”¹³⁴ while another asserts that “Title IX provides for affirmative action not only for women, but also for the non-advantaged gender . . .”¹³⁵, and a third argues that, “recent court cases and OCR policies suggest that [Title IX] also protects [claimants] from discrimination based on gender nonconformity . . .”¹³⁶ These are sincere and passionate contentions, but we must recognize two legal realities.

First, Title IX does not include gender on its face.¹³⁷ Second, the United States Supreme Court has not specifically held that Title IX incorporates gender.¹³⁸ However, there are two other scenarios by which Title IX may encompass gender.

The first possibility is that gender discrimination is a legally recognized form of Title IX sex discrimination. In simplest terms, gender would be a subcategory of the already protected class, sex. Because gender is not measurable and the number of potential genders is infinite, this discrimination would likely arise when a claimant alleged biased treatment based on perceived “deviation” from the “norm” for members of a biological sex.¹³⁹ Such actions could include transgender,¹⁴⁰ gender identity,¹⁴¹ gender

133. See Shults, *supra* note 22, at 343.

134. See Hudson, *supra* note 6, at 583.

135. See Katherine Kraschel, *Trans-cending Space in Women’s Only Spaces: Title IX Cannot be the Basis for Exclusion*, 35 HARV. J.L. & GENDER 463, 483 (2012).

136. See Curtis, *supra* note 6, at 470 (recognizing, however that, “. . . some district courts have already rejected the argument that Title IX protects transgender students from discrimination based on gender nonconformity.” *Id.* at 474).

137. See Shults, *supra* note 22, at 343.

138. Some authors would take this point further. See, e.g., Devi M. Rao, *Gender Identity Discrimination is Sex Discrimination: Protecting Transgender Students from Bullying and Harassment Under Title IX*, 28 WIS. J.L. GENDER & SOC’Y 245, 258 (2013) “[n]either courts nor OCR have explored whether Title IX’s prohibition of discrimination ‘on the basis of sex’ includes discrimination on the basis of gender identity.”

139. See sources cited *supra* notes 23-46 and accompanying text.

140. See *Definition Transgender*, GOOGLE, www.google.com/search?q=definition+transgender&ie=utf-8&oe=utf-8 (last visited Apr. 11, 2018).

141. See *Gender Identity*, MERRIAM-WEBSTER, www.merriam-webster.com/dictionary/gender%20identity (last visited Apr. 11, 2018) (defining gender identity as “a person’s internal sense of being male, female, some combination of male and female, or neither male nor female.”).

nonconformity,¹⁴² or gender stereotyping¹⁴³ discrimination. The second possibility is that Title IX's sexual harassment prohibition also encompasses gender-based harassment. Either or both of these developments likely would be driven by a combination of common law interpretation and administrative action. As we will see, in the following two subsections, that process has already begun. As the evolution in each is piecemeal, I proceed chronologically and address common law developments before administrative actions.

A. Gender Discrimination as Title IX Sex Discrimination

Title VII of the Civil Rights Act of 1964, is landmark civil rights law.¹⁴⁴ It prohibits, ". . . employment discrimination based on race, color, religion, sex and national origin."¹⁴⁵ Both Title VII, and the later Title IX, specifically prohibit sex discrimination,¹⁴⁶ though neither defines "sex."¹⁴⁷ According to at least one author, courts "routinely use Title VII cases in interpreting Title IX,"¹⁴⁸ while another contends that "[t]he Supreme Court had gradually

142. See *Gender Nonconformity*, MERRIAM-WEBSTER, www.merriam-webster.com/dictionary/gender%20nonconformity (last visited Apr. 11, 2018) (defining gender nonconformity as "a state in which a person has physical and behavioral characteristics that do not correspond with those typically associated with the person's sex.").

143. See *Gender Stereotyping*, EUROPEAN INSTITUTE FOR GENDER EQUALITY, eige.europa.eu/rdc/thesaurus/terms/1223, (last visited Apr. 11, 2018) (defining gender stereotyping as "is the practice of ascribing to an individual woman or man specific attributes, characteristics or roles on the sole basis of her or his membership of the social group [sex] of women or men.").

144. See e.g. Tamara Lyte, *Title VII Changed the Face of the American Workplace*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (May 21, 2014), www.shrm.org/hr-today/news/hr-magazine/pages/title-vii-changed-the-face-of-the-american-workplace.aspx.

145. See *Title VII of the Civil Rights Act of 1964*, EUROPEAN U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, www.eeoc.gov/laws/statutes/titlevii.cfm (last visited Apr. 11, 2018).

146. *Id.* at (k) (intentionally not limiting *Title VII's* protected "sex" to one's biological sex: "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . .").

147. See Buzuvis, *supra* note 6, at 228 (stating "Congress did not define 'sex' in this context either, nor did it have a useful record suggesting how it may have interpreted the term.") That author then goes a step further and cites research contending that including "sex" in proposed Title VII legislation was actually intended to degrade or sabotage the bill. *Id.* at fn. 64 (citing Shawn D. Twing & Timothy C. Williams, *Title VII's Transgender Trajectory: An Analysis of Whether Transgender People Are a Protected Class Under the Term "Sex" and Practical Implications of Inclusion*, 15 TEX. J. ON C.L. & C.R. 173, 174 (2010) (" . . . describing how 'sex' was inserted into Title VII legislation in the first place as a joke in an effort to get the bill defeated.")).

148. See Rao, *supra* note 138, at 263.

reformed Title IX in the image of Title VII,¹⁴⁹ and a third asserts that, “[c]ourts have generally mimicked Title VII interpretations in the application of Title IX to combat sex discrimination.”¹⁵⁰ Accordingly, we turn to Title VII to analyze gender discrimination as potential Title IX sex discrimination.

For purposes of this discussion, the foundational Title VII case is *Price Waterhouse v. Hopkins*.¹⁵¹ Plaintiff Hopkins alleged unlawful sex discrimination when she was not promoted.¹⁵² She argued the promotion denial rested, at least in part, on her “macho”¹⁵³ behavior and her failure to “. . . walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”¹⁵⁴ The discrimination at issue was not based on her biological sex, but upon gender (her failure to conform to others’ expectations of a person of her biological sex).¹⁵⁵ As the Court explained, “[i]n the specific context of sex stereotyping . . . an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”¹⁵⁶ The Court further recognized, “[i]n passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees,”¹⁵⁷ and held that “Congress’ intent to forbid employers to take *gender* into account in making employment decisions appears on the face of the statute.”¹⁵⁸

A decade later, in *Schroer v. Billington*, plaintiff brought a Title VII action when denied employment after disclosing upcoming gender transition.¹⁵⁹ One author contends that plaintiff Schroer was successful under the theory that “discrimination on the basis of gender identity is sex discrimination,”¹⁶⁰ and she may be accurate,

149. See Douglas P. Ruth, *Title VII & Title IX =?: Is Title IX the Exclusive Remedy for Employment Discrimination in the Educational Sector*, 5 CORNELL J. L. & PUB. POL’Y 185, 197 (1996), scholarship.law.cornell.edu/cjlp/vol5/iss2/4 (last visited Apr. 11, 2018).

150. See Shults, *supra* note 22, at 344-45.

151. See *generally* *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

152. *Id.* at 231-32.

153. *Id.* at 235.

154. *Id.*

155. *Id.* at 256:

Certainly, a plausible – and, one might say, inevitable – conclusion to draw from this set of circumstances is that the Policy Board in making its decision did in fact take into account all of the partners’ comments, including the comments that were motivated by stereotypical notions about women’s proper department. *Id.*

156. *Id.* at 250.

157. *Id.* at 239.

158. *Id.* (emphasis added).

159. See *generally* *Schroer v. Billington*, 577 F. Supp. 2d 293 (2008).

160. See Rao, *supra* note 138, at 283.

although the decision never states such specifically.¹⁶¹ *Schroer* is particularly interesting because of its candor. Judge Robinson authored the opinion. He began by acknowledging that, “[a]fter *Price Waterhouse*, numerous federal courts have concluded that punishing employees for failure to conform to sex stereotypes is actionable sex discrimination under Title VII.”¹⁶² He then cited Sixth Circuit authority to summarize the then current interpretation of the law:

[D]iscrimination against a plaintiff who is transsexual – and therefore fails to act and/or identify with his or her gender – is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person’s gender nonconforming behavior is impermissible discrimination, irrespective of the cause of that behavior.¹⁶³

However, Judge Robinson admitted that, “[i]n my 2006 memorandum denying [this Defendant’s] motion to dismiss . . . I expressed reservations about the Sixth Circuit’s broad reading of *Price Waterhouse*,”¹⁶⁴ but “[t]hat was before the development of the factual record that is now before me.”¹⁶⁵ He ultimately concluded that:

In refusing to hire Diane Schroer because her appearance and background did not comport with the decisionmaker’s sex stereotypes about how men and women should act and appear, and in response to Schroer’s decision to transition, legally, culturally, and physically, from male to female, the Library of Congress violated Title VII’s prohibition on sex discrimination.¹⁶⁶

161. See discussion *infra* note 151.

162. *Schroer*, 577 F. Supp. 2d at 303.

163. *Id.* at 304.

164. *Id.*

165. *Id.*

166. *Id.* at 308. I earlier termed this opinion “particularly interesting” and it is. For those particularly curious though, I urge you to read Judge Robinson’s 2006 ruling in this matter. He explains that “[u]ntil very recently, all federal courts squarely facing the issue had held that Title VII does not prohibit discrimination on the basis of transsexualism or gender identity.” *Id.* at 207. “These cases based their reasoning on Congressional intent, finding that Congress ‘had a narrow view of sex in mind’ and ‘never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex.’” *Id.* “This narrow view of Title VII was challenged by the Supreme Court’s discussion of sex stereotyping in *Price Waterhouse v. Hopkins* . . .” *Id.* He then held that:

To the extent that Title VII after *Price Waterhouse* prohibits sex stereotyping alone, it does so to allow women . . . to express their individual female identities without being punished for being “macho,” or for men to express their individual male identities without reprisal for being perceived as effeminate. In other words, it creates space for people of both sexes to express their sexual identity in nonconforming ways. Protection against sex stereotyping is different, not in degree, but in

Three years later, the Eleventh Circuit extended and/or clarified this logic in *Glenn v. Brumby*.¹⁶⁷ The *Glenn* court cited *Price v. Waterhouse*'s rationale that “. . . discrimination on the basis of gender stereotype is sex-based discrimination,”¹⁶⁸ and held, “[a]ccordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.”¹⁶⁹ *Glenn* was an Equal Protection case, but its rationale likely applies to Title VII claims as well.¹⁷⁰ Then, in 2012, the Equal Opportunity Commission ruled in *Macy v. Holder*,¹⁷¹ that “. . . claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition.”¹⁷²

Finally, two cases provide the most recent common law perspective.¹⁷³ In *Anonymous v. Omnicom Group, Inc.*,¹⁷⁴ plaintiff, an openly gay male, “. . . alleged that his direct supervisor engaged in a pattern of humiliating harassment targeting his effeminacy and sexual orientation.”¹⁷⁵ He contended discrimination based, in part, on his failure to conform to gender stereotypes.¹⁷⁶ The Second

kind, from protecting men, whether effeminate or not, who seek to present themselves *as* women, or women, whether masculine or not, who present themselves *as* men. *Id.* at 210.

But see *Ulane v. Eastern Airlines, Inc.*, 742 F. 2d 1081, 1085 (7th Cir. 1984):

The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born. The dearth of legislative history on section 2000e-2(a)(1) strongly reinforces the view that that section means nothing more than its plain language implies. *Id.*

167. *See generally* *Glenn v. Brumby*, 663 F.3d 1312 (2011).

168. *Id.* at 1317.

169. *Id.*

170. *See* *Rao*, *supra* note 138, at 263 (stating “[a]lthough the *Glenn* decision was based on the Equal Protection Clause -which covers only governmental discrimination -its reasoning would seem to apply to the context of Title VII, which prohibits discrimination in both public and private workplaces.”).

171. *Macy*, EEOC Appeal No. 0120120821, 2012 WL 1435995, 2012 EEO-PUB LEXIS 1181 (E.E.O.C. Apr. 20, 2012).

172. *Id.* at 4.

173. *Anonymous v. Omnicom Group, Inc.*, 852 F.3d 195, 197 (2d Cir. 2017); 853 F.3d 339.

174. *See Anonymous*, 852 F.3d at 197.

175. *Id.* at 5.

176. *Id.* at 4.

Circuit ruled he presented a plausible “. . . Title VII claim based on the gender stereotyping theory of sex discrimination established in *Price Waterhouse* . . .”¹⁷⁷ noting that, “[s]ix members [of the *Price Waterhouse* Court] held that adverse employment action rooted in ‘sex stereotyping’ or ‘gender stereotyping’ was actionable sex discrimination.”¹⁷⁸ Approximately one week later, the Seventh Circuit issued its controversial¹⁷⁹ decision in *Hively v. Ivy Technical Community College*.¹⁸⁰

Plaintiff Hively, an openly lesbian adjunct professor at Ivy Tech Community College, filed suit against her employer.¹⁸¹ She alleged her employer discriminated against her because of her sexual orientation and that discrimination constituted Title VII sex discrimination.¹⁸² The *Hively* court was clear it did not address whether gender discrimination was legally the same as sex discrimination.¹⁸³ However, it provided two extremely interesting points in its rationale. First, “[v]iewed through the lens of the gender non-conformity line of cases, *Hively* represents the ultimate case of failure to conform to [a specific sex] stereotype . . .”¹⁸⁴ Second, “[o]ur panel [the Seventh Circuit, en banc] described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all.”¹⁸⁵ The latter is particularly compelling as that court ultimately concluded “[w]e hold . . . that a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes.”¹⁸⁶ If the line between sexual orientation discrimination and gender nonconformity discrimination is so thin as to not exist at all, then *Hively* may tell us, without technically deciding the issue, that gender falls under Title VII “sex.”

If we use Title VII as a guide to Title IX interpretation, the cumulative result of the preceding cases is that sex-based discrimination encompasses gender-based discrimination.

177. *Id.* at 9-10.

178. *Id.* at 10.

179. See e.g., *Seventh Circuit’s Historic Decision Prohibits Sexual Orientation Discrimination*, THE NAT’L L. REV. (Apr. 7, 2017), www.natlawreview.com/article/seventh-circuit-s-historic-decision-prohibits-sexual-orientation-discrimination; see also Nathan Lennon, *Seventh Circuit Breaks New Ground, Holding that Sexual Orientation is a Protected Characteristic Under Title VII of The Civil Rights Act*, REMINGER, (May 10, 2017), www.reminger.com/insights-reports-672.html.

180. See generally *Hively*, 853 F.3d 339.

181. *Id.* at 341.

182. *Id.*

183. *Id.* at fn. 1 (stating “[f]or present purposes, we have no need to decide whether discrimination on the basis of ‘gender’ is for legal purposes the same as discrimination on the basis of ‘sex,’ which is the statutory term.”).

184. *Id.* at 346.

185. *Id.*

186. *Id.* at 351-52.

Administrative action, primarily from the OCR and DOJ, also strongly supports this conclusion.

On April 29, 2014, the OCR issued Questions and Answers on Title IX and Sexual Violence.¹⁸⁷ While that document primarily focused on sexual violence, it also addressed gender: “Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity . . .”¹⁸⁸ Later that year, the OCR released another series of questions and answers.¹⁸⁹ Those included the following, in pertinent part:

31. How do the Title IX requirements on single-sex classes apply to transgender students?

Answer: All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX. Under Title IX, a recipient generally must treat transgender students consistent with their gender identity . . .¹⁹⁰

On January 7, 2015, the OCR published a response letter addressing transgender student access to school restrooms.¹⁹¹ It explained that, “[w]hen a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity.”¹⁹² Three months later the OCR issued its Title IX Resource Guide.¹⁹³ That guide specified that, “Title IX protects students, employees, applicants for admission and employment, and other persons from all forms of sex discrimination, including discrimination based on gender identity or failure to conform to

187. See *Questions and Answers on Title IX and Sexual Violence*, U.S. DEPT OF EDUC., www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf (last visited Apr. 11, 2018).

188. *Id.* at 5.

189. See *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, U.S. DEPT OF EDUC., www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf (last visited Apr. 11, 2018).

190. *Id.* at 25.

191. Letter from James A. Ferg Cadima, Acting Deputy Assistant for Policy Office for Civil Rights, to Emily T. Prince, Esq. (Jan. 7, 2015), www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf (last visited Apr. 11, 2018).

192. *Id.* (acknowledging this was not an isolated incident or interaction). The letter also explained, “it may be useful to be aware that in response to OCR’s recent investigations of two complaints of gender identity discrimination, recipients have agreed to revise policies to make clear that transgender students should be treated consistent with their gender identity for purposes of restroom access.” *Id.*

193. See *Title IX Resource Guide*, U.S. DEPT OF EDUC., www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf (last visited Apr. 11, 2018).

stereotypical notions of masculinity or femininity.”¹⁹⁴

On November 2, 2015, the OCR issued formal findings *In the Matter of Township High School District 211, Palatine, Illinois*, concluding the school district violated Title IX via discrimination based on transgender status of a student.¹⁹⁵ On April 29, 2016, the Fourth Circuit held, in *G.G. v. Gloucester County School Board*, that it gave the OCR’s interpretations of Title IX controlling weight¹⁹⁶ and the court deferred to the OCR’s previous guidance that Title IX required schools to generally accommodate gender identities.¹⁹⁷

Two weeks later, the OCR and DOJ issued a “Joint Guidance” statement containing the following:

Under Title IX of the Education Amendments of 1972, schools receiving federal money may not discriminate based on a student's sex, including a student's transgender status. The guidance makes clear that both federal agencies treat a student's gender identity as

194. *Id.* at 1. (informing readers that schools’ requisite Title IX coordinators can be “. . . effective agents for ensuring gender equity within their institutions . . .” *Id.* at 2). The guidance suggested that multiple coordinators be utilized to specialize in areas including “. . . gender equity in academic programs or athletics, harassment, or complaints from employees.” *Id.* at 3.

195. Letter from Adele Rapport, Regional Director, U.S. DEPT OF EDUC., to Dr. Daniel E. Cates, Superintendent, Township High School District 211 (Nov. 2, 2015), www2.ed.gov/documents/press-releases/township-high-211-letter.pdf (last visited Apr. 11, 2018) (referencing OCR Case No. 05-14-1055). According to the OCR, this was first time it found a school district violated Title IX based on transgender issues *Id.*; see *Settlement Reached with Palatine, Ill., Township High School District 211 to Remedy Transgender Discrimination*, U.S. DEPT OF EDUC. (Dec. 3, 2015), www.ed.gov/news/press-releases/settlement-reached-palatine-ill-township-high-school-district-211-remedy-transgender-discrimination/.

196. *G. G. v. Gloucester County School Board*, 822 F.3d 709, 714 (4th Cir. 2016).

197. *Id.* at 715 (stating “[w]hen a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity”). The DOJ also filed an amicus brief in the matter. It advised that gender issues, specifically transgender issues, fell under Title IX. See *Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal, G.G. v. Gloucester Cty. Sch. Bd., No. 15-2056*, U.S. DEPT OF JUST., www.justice.gov/crt/file/788971/download (last visited Apr. 11, 2018):

Treating a student differently from other students because his birth-assigned sex diverges from his gender identity constitutes differential treatment “on the basis of sex” under Title IX.

A transgender person’s transgender status is unquestionably related to his sex: indeed, the very definition of being “transgender” is that one’s gender identity does not match one’s “biological” or birth-assigned sex (citations omitted) . . . [t]hus, discrimination against a transgender person based on the divergence between his gender identity and birth-assigned sex denies that person an opportunity or benefit based on a consideration “related to” sex. *Id.* at 8.

the student's sex for purposes of enforcing Title IX.¹⁹⁸

That statement referenced agency actions, including a joint DOJ/OCR Dear Colleague letter issued that same day.¹⁹⁹ That letter explained:

Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations prohibit sex discrimination in educational programs and activities operated by recipients of Federal financial assistance. This prohibition encompasses discrimination based on a student's gender identity . . .²⁰⁰

The letter then went to the ultimate issue: defining gender discrimination as Title IX sex discrimination:

As a condition of receiving Federal funds, a school agrees that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities unless expressly authorized to do so under Title IX or its implementing regulations. The Departments treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations.²⁰¹

B. Gender-Based Harassment as Title IX Sexual Harassment

As previously discussed, Title IX does not address sexual harassment. However, two Supreme Court cases provided rationale to bring sexual harassment under Title IX sex discrimination.²⁰² Then, in 1998, the Court unquestionably formalized that conclusion in *Gebser v. Lago Vista Independent School District*,²⁰³ when it held a school could be liable, under Title IX, for a teacher's sexual harassment of a student.²⁰⁴ At that point, at least at common law, Title IX prohibited sexual harassment under the broad umbrella of

198. See U.S. Departments of Education and Justice Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students, U.S. DEPT OF JUST. (May 13, 2016), www.ed.gov/news/press-releases/us-departments-education-and-justice-release-joint-guidance-help-schools-ensure-civil-rights-transgender-students (including the following quote):

No student should ever have to go through the experience of feeling unwelcome at school or on a college campus," said U.S. Secretary of Education John B. King Jr. "This guidance further clarifies what we've said repeatedly—that gender identity is protected under Title IX. *Id.*

199. Letter from U.S. Dep't of Just. & Dep't of Educ., Dear Colleague Letter on Transgender Students at 1 (May 13, 2016), available at www.ed.gov/ocr/letters/colleague-201605-title-ix-transgender.pdf.

200. *Id.*

201. *Id.* at 2.

202. See sources cited, *supra* notes 117-122 and accompanying text.

203. See generally *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998).

204. *Id.*

sexual discrimination. But does that prohibited sexual harassment include gender-based harassment? In order to address that question we must backtrack slightly.

One year prior to *Gebser*, the federal district court for the southern district of New York issued its decision in *Miles v. New York University*.²⁰⁵ The *Miles* plaintiff claimed, though he was a biological male, his professor discriminated against him because the professor believed he was a female.²⁰⁶ The court held, “Title IX was enacted precisely to deter that type of behavior, even though the legislators may not have had in mind the specific fact pattern here involved.”²⁰⁷ The court implied Title IX had a broader application than binary sexual harassment. As explained by one author:

In many ways, *Miles*...was ahead of its time and illustrated two important points: one, that transgender individuals are protected under Title IX based upon their perceived gender identity; and two, that protection follows even though legislators may not have had transgender individuals in mind at the time of enactment, and may have conceived of sex or gender as a male-female dichotomy.²⁰⁸

Two years later, in 1999, the Supreme Court decided *Davis v. Monroe County*.²⁰⁹ The *Davis* claimant alleged Title IX violation for a school’s failure to respond to alleged student-on-student sexual harassment.²¹⁰ The Court held that, “[t]he statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender.”²¹¹

In 2000, a federal district court denied defendant’s motion for summary judgment in *Montgomery v. Independent School District No. 70*,²¹² where a high school student alleged classmates harassed him because his gender did not conform to the “stereotyped expectations of masculinity”.²¹³ The court reasoned:

It is much more plausible that the students began tormenting [plaintiff] based on feminine personality traits that he exhibited and the perception that he did not engage in behaviors befitting a boy. Plaintiff thus appears to plead facts that would support a claim of harassment based on the perception that he did not fit his peers’ stereotypes of masculinity.²¹⁴

As framed by that court, *Montgomery* was really a Title IX gender-

205. See generally *Miles v. New York University*, 979 F. Supp. 248 (S.D.N.Y. 1997).

206. *Id.* at 249.

207. *Id.* at 250.

208. See Kraschel *supra* note 135, at 469.

209. See generally *Davis*, 526 U.S. 629.

210. *Id.* at 637.

211. *Id.* at 650.

212. *Montgomery v. Independent School District No. 70*, 109 F. Supp. 2d 1081 (2000).

213. *Id.* at 1090.

214. *Id.*

based harassment suit. Plaintiff's claim survived Defendant's motion for summary judgment.²¹⁵

The movement to include gender-based harassment under Title IX sexual harassment is not limited to common law, but is also supported by administrative action, primarily through the OCR. The OCR's first public position on this issue is likely found in a March 30, 2010, press release addressing the settlement of *J.L. v. Mohawk Central School District*, a suit alleging student-on-student harassment based on gender stereotypes.²¹⁶ While there are no public disposition details, the release contains a quote by an Assistant Attorney General for the OCR.²¹⁷ He stated, "All students have the right to go to school without fearing harassment based on sex, including stereotypes about appropriate gender behavior . . ." ²¹⁸ Approximately six months later the OCR issued its Dear Colleague Letter of October 26, 2010, informing recipients that Title IX "prohibits gender-based harassment."²¹⁹ At least one author interprets this as the OCR's conclusion that "[s]ex-based harassment includes both sexual harassment and gender-based harassment."²²⁰ She is likely correct as, in April of 2015, the OCR issued its Title IX Resource Guide²²¹ specifying that:

Gender-based harassment is another form of sex-based harassment and refers to unwelcome conduct based on an individual's actual or perceived sex, including harassment based on gender identity or nonconformity with sex stereotypes, and not necessarily involving conduct of a sexual nature. All of these types of sex-based harassment are forms of sex discrimination prohibited by Title IX.²²²

Much like the OCR, the DOJ's position on gender-based harassment, under Title IX, is clear:

[G]ender stereotypes remain prevalent throughout educational institutions, and both male and female students face harassment and other discrimination when they do not conform to these gender norms. The [DOJ] has been a leader in ensuring that courts and schools interpret Title IX's prohibition on sex-based discrimination to apply to harassment based on gender stereotypes and will continue to combat this and other odious forms of discrimination.²²³

215. *Id.* at 1100.

216. *Justice Department Settles with New York School District to Ensure Students Have Equal Opportunities*, U.S. DEP'T OF JUST. (Mar. 30, 2010), www.justice.gov/opa/pr/justice-department-settles-new-york-school-district-ensure-students-have-equal-opportunities.

217. *Id.*

218. *Id.*

219. Letter from U.S. Dep't of Educ., Dear Colleague Letter (Oct. 26, 2010), available at www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201010.html (last visited Apr. 11, 2018).

220. See Rao, *supra* note 138, at 248.

221. See U.S. DEP'T OF EDUC., *supra* note 193.

222. *Id.* at 15.

223. U.S. DEP'T OF JUST., *supra* note 1, at 12.

Additionally, while full case and settlement details are not publicly available, the DOJ identifies lawsuits where it argued that Title IX encompassed at least aspects of gender-based discrimination.²²⁴ In *J.L. v. Mohawk Central School District*,²²⁵ the DOJ argued that the school district failed to prevent and remedy sex-based harassment when a student was harassed for failing to conform to gender stereotypes.²²⁶ In *Pratt v. Indian River Central School District*,²²⁷ the DOJ helped clarify that Title IX prohibits not only discrimination based on biological sex, but also discrimination when a student’s appearance or behavior do not conform to stereotypes regarding how individuals of the student’s gender are “supposed to” act.²²⁸ Finally, in *Putman v. Board of Education of Somerset Independent School*,²²⁹ the DOJ filed an amicus brief clarifying that Title IX prohibits sexual harassment based on gender stereotyping.²³⁰

VI. A NOT SO FINAL WORD: THE CURRENT STATUS OF GENDER UNDER TITLE IX

At the beginning of this article I posed the question, “Does Title IX encompass gender?” I also described Title IX’s evolution as “piecemeal” and that term reflects exactly what we saw, in the above analysis, regarding gender and Title IX. But within that piecemeal history we glean a fairly clear picture, or at least a strong trend. Multiple subsections demonstrate that the OCR, the DOJ, and several courts are either already, or moving toward, applying Title IX to gender discrimination or gender-based harassment. The “final word” seemed to come on May 13, 2016, when the OCR and DOJ issued their joint Dear Colleague Letter on Transgender Students²³¹ stating that:

Schools across the country strive to create and sustain inclusive, supportive, safe, and nondiscriminatory communities for all students. In recent years, we have received an increasing number of questions from parents, teachers, principals, and school superintendents about civil rights protections for transgender students. *Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations prohibit sex discrimination in educational programs and activities operated by recipients of Federal financial assistance. This prohibition encompasses discrimination based on a student’s gender*

224. *Id.* at 7.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. U.S. DEP’T OF JUST., *supra* note 1, at 7.

230. *Id.*

231. U.S. DEP’T OF JUST., *supra* note 199.

*identity . . .*²³² (emphasis added).

Then three things happened in fairly rapid succession. First, President Donald Trump officially took office on January 20, 2017.²³³ Second, his nominee for Secretary of Education, Betsy DeVos, was sworn into office on February 7, 2017.²³⁴ Third the OCR, an administrative sub-agency of the Department of Education,²³⁵ issued its vague and confusing Dear Colleague Letter of February 22, 2017.²³⁶ That document clearly repealed the May 13, 2016, letter Dear Colleague²³⁷ stating that while “all schools must ensure that all students, including LGBT students, are able to learn in a safe environment,”²³⁸ “. . . the [OCR and DOJ] believe that, in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy”²³⁹ and, as a result, “[i]n these circumstances, the Department of Education and the Department of Justice have decided to withdraw and rescind [the May 13, 2016, Dear Colleague letter]... in order to further and more completely consider the legal issues involved.”²⁴⁰

While it unquestionably repealed the prior Dear Colleague Letter, the February 22, 2017, Dear Colleague letter leaves the issue of gender, as potentially protected under Title IX, unclear. The letter does not explain the OCR’s long-term position on the issue, nor does it provide any guidance for common law interpretation or application. While these uncertainties are unfortunate, this is likely only a relatively brief political disruption. There have been nine Presidents, sitting for all or part of 13 terms, since Title IX’s original enactment.²⁴¹ The political parties occupying the Presidential office have changed, as have the majorities in the United State House of Representatives and Senate. However, one thing is constant; Title IX continues to evolve in breadth, depth, and scope. As a result, it is likely Title IX

232. *Id.* at 1.

233. Carrie Johnson, *In Inaugural Address Trump Decries “Carnage” and Promises “America First”*, NPR (Jan. 20, 2017), www.npr.org/2017/01/20/510746700/donald-trump-sworn-in-as-the-45th-president-of-the-united-states.

234. Dave Boyer, *DeVos Sworn in as Education Secretary by Pence*, THE WASH. TIMES (Feb. 7, 2017), www.washingtontimes.com/news/2017/feb/7/betsy-devos-sworn-education-secretary-pence/.

235. *See About OCR*, DEP’T OF EDUC., www2.ed.gov/about/offices/list/ocr/aboutocr.html (last visited Apr. 11, 2018).

236. Letter from U.S. Dep’t of Just., Dear Colleague Letter (Feb. 22, 2017), i2.cdn.turner.com/cnn/2017/images/02/23/1atransletterpdf022317.pdf (last visited Apr. 11, 2018).

237. *See id.* at 1.

238. *Id.* at 2.

239. *Id.*

240. *Id.*

241. *Presidents & Vice Presidents*, PRESIDENTSUSA.NET, www.presidentsusa.net/presvplist.html (last visited Jan. 15, 2018).

encompasses gender in the future, even if “gender” is never part of the statute itself. Title IX’s history shows us it is almost a living totem, not constrained by arguable legislative intent or existing text. As both eloquently and pragmatically articulated, “Title IX . . . has perhaps served better as a symbol than a law — the broader principle that everyone, regardless of gender, should be able to learn without fear . . .”²⁴²

242. See Alexandra Brodsky and Elizabeth Deutsch, *The Promise of Title IX: Sexual Violence and the Law*, DISSENT (Fall 2015), www.dissentmagazine.org/article/title-ix-activism-sexual-violence-law (last visited Apr. 10, 2018); or, as Rush urged us, “[p]ut aside the alienation and get on with the fascination.” See RUSH, LIMELIGHT (Anthem Records 1981).

