BATTLE OF THE SEXES: DISAGREEMENT ABOUT THE DEFINITION OF SEX IN TITLE IX AND THE NEED FOR JUDICIAL REVIEW

Sarah W. Keller [*]

[*] Wake Forest University School of Law Juris Doctor Candidate, 2022; University of Virginia Master of Education: Higher Education Administration, 2013. Special thanks to the editors and staff of the Virginia Journal of Social Policy and Law for their diligent work on this Article. The author further extends thanks to her parents for their unwavering support, and to Wake Forest School of Law professors Timothy Davis, Marie-Amélie George, Sally Irvin, and Sidney Shapiro for their thoughtful mentorship.

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Title IX of the Higher Education Amendments of 1972 was modeled after both Title VI and Title VII of the Civil Rights Act of 1964. As such, the Supreme Court often interprets Title IX through the lens of these statutes. This approach, coupled with Title IX's limited legislative history, has crafted Title IX in a patchwork manner; a Statute built from and extended to mirror its two model statutes.

As a result, Supreme Court interpretation of Title IX has become more of an interpretation of other statutes than of Title IX itself. Circuit courts and the executive branch have adopted this approach as well. Over the last year, each entity has repurposed the Supreme Court's reasoning in Bostock v. Clayton County, Georgia—a Title VII case—and applied the reasoning to Title IX. While both Title VII and Title IX share similarities, blanket application of the Bostock opinion to Title IX overlooks Title VI's relationship to Title IX and disregards the Supreme Court's limiting language in Bostock, in which the Court stated the opinion only applied to Title VII.

The application of the Bostock opinion to Title IX is not the only interpretive issue for Title IX. The Department of Education has also failed to provide clarity, overlooking the opportunity to define sex in Title IX and consistently defaulting to non-binding interpretations or analogy to Title VII. Agency interpretations are published anew with each administration, leaving students at risk of losing civil rights.

Title IX's dizzying and conflicting landscape can only be solved with judicial review. Although the common assumption is that the Supreme Court will defer to the Department of Education during review, this Article argues that should not be. Exceptions to deference arise, as they did in Gonzales v. Oregon, when agencies merely repeat statutory language without clarifying or interpreting the statutory language. Exceptions additionally arise, as they did in King v. Burwell, when the financial impact of deference is extremely high. The Department of Education's mere repetition of the phrase "on the basis of sex" and the contractual nature of Title IX which places over one hundred billion federal dollars at risk if educational institutions are not in compliance, leaves judicial review without agency deference as the only answer.

INTRODUCTION

Words matter.[1] For many individuals in our nation's schools, access to certain federal protections hinges on a single word and its statutory context.[2] The word in question—sex—and its meaning in Title IX of the Higher Education Amendments of 1972 ("Title IX")[3] has become a nationwide debate creating contentious judicial opinions,[4] administrative

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[1] SALLY MCCONNELL-GINET, WORDS MATTER: MEANING AND POWER 1–7 (2020). Words and word choice have important and significant impacts on human social and political relationships:

> Words matter enormously, but often mainly because they bring into the light of day attitudes, assumptions, and actions that ground social relations and arrangements. They make public ideas, hopes and plans, commitments, values, and affiliations. . . . [L]inguistic awareness helps uncover what's happening. It helps challenge and disturb existing power relations. Linguistic and social change go hand in hand because linguistic practices are fundamental to social practices more generally. Words are woven into the social fabric. *Id.* at 7.

See also Kate Blackwood, *Linguist links language to social change in 'Words Matter*,' CORNELL CHRON. (Oct. 5, 2020), https://news.cornell.edu/stories/2020/10/linguist-links-language-social-change-words-matter ("Social movements based on identity, including the civil rights movement of the 1960s, second-wave feminism and more recent pushes for LGBTQ rights have all included language reforms"); Dahlia Lithwick, *Words Mean Something Again*, SLATE (Jan. 20, 2021, 4:35 PM), https://slate.com/news-and-politics/2021/01/joe-biden-inauguration-speech-stutter.html.

[2] Changes to administrative and judicial interpretations to the meaning of the word "sex" in Title IX change whether LGBTQ+ students receive protection in the educational setting. A transgender student is protected under an expansive reading of sex, while unprotected under an interpretation that construes sex as a binary construct. *See, e.g.*, *Transgender Students Face a lot of Discrimination, and the Trump Administration isn't Helping*, LEADERSHIP CONF. EDUC. FUND (Apr. 13, 2017), https://civilrights.org/edfund/resource/transgender-students-discrimination/ (stating that the Department of Education's February 2017 recission of a more expansive 2016 interpretation of Title IX led schools to immediately remove policies protecting transgender students); *see also* discussion *infra* Part III.

[3] 20 U.S.C. §§ 1681–1688.

[4] *See* Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286 (11th Cir. 2020); *see also* Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034, 1047 (7th Cir. 2017) (reaffirming a narrow construction of "sex" in Title IX as established by Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984) yet permitting transgender claims under sex stereotyping), *abrogated by* Illinois Republican Party v. Pritzker, 973 F.3d 760, 762 (7th Cir. 2020).

battles,[5] legislative stalemates,[6] and executive branch conflicts.[7] The definition of sex as applied in Title IX, which protects against sex discrimination in education, has a dramatic impact on the rights of students.[8] Because the Statute protects students from discrimination based on sex, if the word "sex" is ambiguous, then the rights these students receive in the school setting may also be ambiguous, undefined, and leave students unprotected. This includes access to bathrooms, STEM education, extracurricular activities, and protections from harassment.[9] These rights will remain subject to the whims of executive branch turnover and unpredictable legislative initiatives until judicial consistency is achieved.

Administrative issues during transitions of power demonstrate the legal precariousness present when the Supreme Court is silent, creating space for executive action to conflict with administrative action. This conflict exists, in part, due to judicial failure to define sex conclusively.[10] At present, Executive Order 13988 ("EO 13988"), signed by President Biden on the day of his inauguration, implies that the definition of sex in Title IX is the same definition announced by the Supreme Court in *Bostock v. Clayton County, Georgia.*[11] The *Bostock* majority interpreted Title VII of the Civil Rights Act of 1964 ("Title VII") and held discrimination based on sexual orientation or gender identity necessarily fits within the confines of the statutory phrase "discrimination based on sex."[12] EO 13988 specifically states that *Bostock*'s interpretation shall apply to all statutes targeting sex discrimination so long as EO 13988's application is consistent

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[5] The Department of Education has consistently modified its stance on this topic, dependent on the political leanings of the current President. *See* discussion *infra* Part III.

[6] *See* Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1755 n.1 (2020) (Alito, J. dissenting) (listing numerous bills between 1975 and 2019 seeking inclusion of "sexual orientation" as its own separate category in statutes addressing sex discrimination) ("Last year, the House of Representatives passed a bill that would amend Title VII by defining sex discrimination to include both 'sexual orientation' and 'gender identity,' . . . but the bill has stalled in the Senate."); *but see* Equality Act, H.R. 5, 117th Cong. (2021) (as passed by House, Feb. 25, 2021).

[7] *Compare* Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021), *with* SANDRA BATTLE & T. E. WHEELER, DEAR COLLEAGUE LETTER, U.S. DEP'T OF ED. (Feb. 22, 2017) [hereinafter *2017 Dear Colleague Letter*].

[8] *See* Andrew Kreighbaum, *Transgender Protections Withdrawn*, INSIDE HIGHER ED (Feb. 23, 2017), https://www.insidehighered.com/news/2017/02/23/trump-administration-reverses-title-ix-guidance-transgender-protections.

[9] *See Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC. (last modified June 16, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

[10] *See* discussion *infra* Part II(C) on judicial failure to act.

[11] *See* Exec. Order No. 13,988, *supra* note 7; *see also Bostock*, 140 S. Ct. at 1747.

[12] *Bostock*, 140 S. Ct. at 1747; 42 U.S.C. § 2000e.

with the interpretation of the statute to which it is applied.[13] However, the *Bostock* majority specifically noted that their opinion did not purport to interpret any other statute with similar language, and that such statutes were not at issue before the Court.[14] Additionally, the Department of Education (DOE) used its formal regulatory power in May 2020 to state that the definition of sex in Title IX was the same as that in Title VII, only to walk back that interpretation in August 2020 in response to the *Bostock* opinion.[15]

The current state of the law shows fast action on the circuit court level to apply the *Bostock* interpretation of sex to Title IX.[16] This application is generally arbitrary and does not consider the appropriateness of applying an interpretation of one statute to another.[17] While the assumption from lower courts and the Biden administration is that the definition of sex in Title VII and Title IX are the same,[18] the current approach is simply that: an assumption.

In addition to lower court, executive, and administrative action, numerous bills to define sex have made their way through Congress, yet sex remains undefined in statutes prohibiting sex discrimination.[19] In its most recent attempt to define sex, the House passed the Equality Act on

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[13] Exec. Order No. 13,988, *supra* note 7, at 7023.

[14] *Bostock*, 140 S. Ct. at 1753 ("But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. *The only question before us* is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'") (emphasis added).

[15] *See* discussion *infra* Part III(A).

[16] *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616–17 (4th Cir. 2020) (deciding through incomplete analysis that *Bostock*'s interpretation applies to Title IX); Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1305 (11th Cir. 2020) (applying *Bostock*'s definition of sex through limited analysis, using the but-for causation and nexus to discrimination in each statute as sufficient to apply the *Bostock* definition to Title IX). The same broad expansion and assumption has occurred at the state level. *See* Clark Cnty. Sch. Dist. v. Bryan, 478 P.3d 344, 354 (Nev. 2020) (holding, without analysis, that the "because of . . . sex" language in both Title VII and Title IX equates to *Bostock*'s reasoning also applying to Title IX). *But see* DuBois v. Bd. of Regents of the Univ. of Minn., 439 F. Supp. 3d 1128, 1138 (D. Minn. 2020) ("The fact that Du Bois has to rely on Title VII in arguing that she has a cause of action under Title IX highlights the problem with her argument: Title VII and Title IX are different statutes.").

[17] *See infra* note 18; *see also* discussion *infra* Part II(D).

[18] *See Adams*, 968 F.3d at 1305 (deciding through incomplete analysis that *Bostock*'s interpretation applies to Title IX); *see also* Exec. Order No. 13,988, *supra* note 7 (applying *Bostock*'s interpretation to Title IX despite statements from the *Bostock* opinion that the definition only applies to Title VII).

[19] *See Bostock*, 140 S. Ct. at 1755 n.1–2 (Alito, J., dissenting).

February 25, 2021, to prohibit discrimination on the basis of sex, gender identity, and sexual orientation.[20] The Equality Act incorporates the *Bostock* decision into an expansive definition of sex and modifies the statutory language of anti-discrimination statutes,[21] which many agencies are expressly authorized to administer.[22] Because Congress has delegated administration of these statutes to agencies, practical application of the Equality Act, if enacted, would be a task for the applicable agency. Passage of the Equality Act, or similar legislation, will spark litigation on both sides of the aisle contesting agency interpretations—in some respects it already has.[23]

The Equality Act is a congressional attempt to apply EO 13988 and resolve the meaning of sex in Title IX. However, legislation affecting agency-supervised statutes ultimately leads to agency interpretations maintaining control of statutory implementation.[24] The executive

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[20] Equality Act, H.R. 5, 117th Cong. (2021) (as passed by House, Feb. 25, 2021). While the Bill passed the House, there is no guarantee of passage in the Senate. *See* Jarrell Dillard, *House Passes LGBTQ-Rights Bill; Faces Long Odds in Senate*, BLOOMBERG (Feb. 25, 2021, 4:33 PM), https://www.bloomberg.com/news/articles/2021-02-25/house-passes-lgbtq-rights-bill-that-faces-longer-odds-in-senate.

[21] *See Bostock*, 140 S. Ct. at 1755 ("Last year, the House of Representatives passed a bill that would amend Title VII by defining sex discrimination to include both 'sexual orientation' and 'gender identity,' H.R. 5, 116th Cong., 1st Sess. (2019), but the bill has stalled in the Senate."); *see also* Equality Act, H.R. 5, 117th Cong. (2021) (as passed by House, Feb. 25, 2021) (defining sex expansively, following the lead set by the *Bostock* interpretation).

[22] The Department of Education is responsible for administration of Title IX. *See Title IX and Sex Discrimination*, *supra* note 9. For an additional example, the Equality Act changes the definition of sex in the Fair Housing Act, which is administered through the authority granted by Congress to the Department of Housing and Urban Development. *See* LIBBY PERL, CONG. RSCH. SERV., R44557, THE FAIR HOUSING ACT: HUD OVERSIGHT, PROGRAMS, AND ACTIVITIES 1 (2018).

[23] The Equality Act will permit transgender athletes to compete on the athletic team of their gender identity. The ability for individuals born male yet identifying as female to compete against cisgender female athletes has led cisgender female athletes to raise Equal Protection and discrimination claims. Litigation pertaining to this issue most often occurs when females who were born female and compete as female (cisgender athletes) claim denial of their equal opportunity to compete. *See* TITLE IX DISCRIMINATION COMPLAINT ON BEHALF OF MINOR CHILDREN SELINA SOULE, [SECOND COMPLAINANT], AND ALANNA SMITH, ALL. DEFENDING FREEDOM (June 17, 2019), https://adfmedialegalfiles.blob.core.windows.net/files/SouleComplaintOCR.pdf; Pat Eaton-Robb, *Girls Sue to Block Participation of Transgender Athletes*, THE ASSOCIATED PRESS (Feb. 12, 2020), https://apnews.com/article/danbury-us-news-ap-top-news-hartford-sports-general-8fd300537131153cc44e0cf2ade3244b. Litigation arising from competitors who were born male desiring to compete as female is not new. *See* Richards v. U.S. Tennis Ass'n, 93 Misc. 2d 713 (Sup. Ct. N.Y. Cnty. 1973).

[24] *See* discussion *infra* Part IV(B).

pendulum swing remains inevitable, and thus judicial clarity is necessary. Until a case raising the issue of the definition of sex under Title IX reaches the Supreme Court, students who do not identify within the traditional binary construct of sex will fall victim to the changing policy preferences of the executive branch.[25] With over 90% of Americans earning at least a high school diploma or equivalent,[26] the majority of American students will receive education under at least two presidential administrations. Placing students at risk for arbitrarily losing rights due to the results of elections in which they cannot participate is a risk the Judiciary should not accept.

Recent lower court rulings and executive actions have exacerbated the problem. Prior to the *Bostock* decision, *G.G. ex rel. Grimm v. Gloucester County School Board*[27] was scheduled for oral argument at the Supreme Court in March 2017.[28] Had the Court heard *Grimm*, it would have addressed an educational-context version of the *Bostock* issue and interpreted sex under Title IX.[29] The case never fully reached the Court. Two weeks before oral argument, the Court vacated *Grimm* in deference to the Trump administration's *2017 Dear Colleague Letter* interpreting sex under Title IX as a binary construct.[30] The DOE reinforced the interpretation that sex in Title IX follows a binary construction when promulgating 34 C.F.R. § 106 ("*2020 Rule*"),[31] relying on the definition of sex in Title VII.

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[25] *Compare* Exec. Order No. 13,988, *supra* note 7, *with 2017 Dear Colleague Letter*, *supra* note 7. For information on the gender binary, *see* Anna High, *The Gender Binary*, MARQ. UNIV. L. SCH. FACULTY BLOG (Nov. 22, 2013), https://law.marquette.edu/facultyblog/2013/11/the-gender-binary/. Some parents have recently argued, unsuccessfully, that a broad definition of sex under Title IX—not a narrow one—is what will place students at risk. *See, e.g.*, Parents for Priv. v. Barr, 949 F.3d 1210, 1240 (9th Cir. 2020) (finding an argument that allowing transgender students to access the bathroom of their gender identity violated cisgender students' Title IX rights by discriminating against the cisgender students based on their sex to be unpersuasive).

[26] Press Release, U.S. Census Bureau, High School Completion Rate Is Highest in U.S. History (Dec. 14, 2017), https://www.census.gov/newsroom/press-releases/2017/educational-attainment-2017.html.

[27] G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016).

[28] Amy Howe, *Justices release March Calendar*, SCOTUS BLOG (Feb. 3, 2017, 1:53 p.m.), https://www.scotusblog.com/2017/02/justices-release-march-calendar/.

[29] *See Grimm*, 822 F.3d at 709.

[30] Gloucester Cnty. Sch. Bd. v. G.G. *ex rel.* Grimm, 136 S. Ct. 2442 (2016); *2017 Dear Colleague Letter*, *supra* note 7; *see also* High, *supra* note 25 (providing a discussion on the meaning of binary in this context).

[31] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,178 (May 19, 2020) (to be codified at 34 C.F.R. § 106) [hereinafter *2020 Rule*] ("Title IX and its implementing regulations include provisions that presuppose sex as a binary

A month later, the Supreme Court published the *Bostock* opinion which incorporated sexual orientation and gender identity into the meaning of sex in Title VII.[32]

Title VII is a different section of the U.S. Code than Title IX, and the application of a judicial interpretation of one statute should not automatically apply to another without judicial consideration.[33] This is especially true when the scope and enforcement of the two statutes are rooted in vastly different proof structures and avenues for relief.[34]

This Article analyzes the tension between competing interpretations of Title VII and Title IX. Part I details the history and legislative intent of Title IX. Part II addresses Supreme Court interpretations of Title IX and the influence and impact of those decisions on Title IX's evolution. Part III introduces the executive branch's interpretations of Title IX and the inherent conflict between these interpretations. Finally, Part IV presents and analyzes the deference issues arising from the current state of the law. This Article concludes that while judicial review is necessary, the DOE should not receive administrative deference and reconciliation of this issue is a task exclusively for the judiciary.

I. A BRIEF HISTORY OF TITLE IX

Title IX prohibits sex discrimination in federally funded educational programs or activities, stating: "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."[35] The foundation for the Statute began in 1970 as a proposal for a heavy-hitting bill addressing holes in current civil rights legislation and intending to extend civil rights protections to gender and education.[36] This first conceptual introduction came from Representative Edith Green during a meeting of the House

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classification . . . [we] interpret the word 'sex' solely within the context of Title VII.").

[32] *Bostock*, 140 S. Ct. at 1754.

[33] LARRY M. EIG, CONG. RSCH. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (Sept. 24, 2014). A matching term in a similarly situated statute may apply the same meaning as the term in a different statute, however this presumption that similar phrasing equates to identical meaning is "not rigid" and "readily yields" through analysis of statutory context and legislative history. *Id.* at 15 n.93, 15–16.

[34] *Id.* at 16 ("Context and statutory history overrides the [same-meaning] presumption."); *see also infra*, Part II(B).

[35] 20 U.S.C. § 1681.

[36] 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, 216 (1996).

Subcommittee on Education and Labor in June 1970.[37] During the meeting, Representative Green introduced a proposal to amend Title VI of the Civil Rights Act of 1964 ("Title VI") to include sex.[38] The Committee's intention was to extend Title VI's prohibitions on racial, ethnic, and national origin discrimination to sex; add executive-level employees to the Equal Pay Act; and expand employee protections in Title VII to educational institutions.[39]

While committee discussions on increased protections for women were plentiful, Representative Green's proposal did not gain traction in the form in which it was proposed.[40] The language which officially became Title IX was introduced by Senator Birch Bayh as a floor amendment during Senate debates on the Education Amendments of 1972.[41] Because Title IX was introduced on the Senate floor, it did not go through committee.[42] Lack of debate in committee leaves limited information on legislative intent.[43] Although the Supreme Court has since cautioned that "statements of one legislator made during debate may not be controlling,"[44] the Court has given Senator Bayh's floor statements "substantial weight," noting the comments "are the only authoritative indications of congressional intent regarding the scope" of Title IX.[45]

The weight accorded Senator Bayh's floor remarks is noteworthy for understanding Title IX. In his remarks, Senator Bayh asserted his proposed amendment (Title IX) was modeled after Title VI and designed to "close the loopholes" left by Title VI.[46] Title IX would also extend the

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[37] Discrimination Against Women: Hearing on § 805 of H.R. 16098 Before a Spec. Subcomm. of the H. Comm. on Educ. & Lab., 91st Cong., 2d Sess. 1 (1970) (statement of Rep. Edith Green, Member, H. Comm. on Educ. & Lab.).

[38] *Id.*

[39] *Id.*

[40] *See* CONG. REC. 11,874–76 (1997).

[41] North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 524 (1982).

[42] *Id.* at 527.

[43] *Id.* While the committee reports from Rep. Green's Discrimination Against Women hearings can provide some general information on thoughts of some elected officials, the discussion in those meetings was regarding a different proposal. There are no formal committee hearings or meeting minutes regarding Title IX or its language in its enacted form due to the statute's impromptu introduction by Senator Bayh. *Id.* at 550; *see also* Lynn Ridgeway Zehrt, *Title IX and Title VII: Parallel Remedies in Combatting Sex Discrimination in Educational Employment*, 102 MARQ. L. REV. 701, 741 (2019).

[44] *North Haven*, 456 U.S. at 526.

[45] *Id.* at 527 (stating further that Senator Bayh's statements are an "authoritative guide to the statute's construction" and "deserve to be accorded substantial weight").

[46] *Id.* at 549 (quoting Bayh's floor statement: "Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by [T]itle VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my

equal employment provisions of Title VII to educational institutions.[47] Accordingly, Title IX's legislative history, while sparse, provides authority that Title IX is not merely an educational extension of Title VII but also clearly rooted in Title VI.

In part due to its limited foundation, Title IX is held together through interpretive analogies to the statutes from which it borrows its language: Title VI and Title VII.[48] Often, the Supreme Court interprets Title IX by first establishing a similarity or difference to its two model Titles.[49] This judicial "recasting" of Title IX in light of Title VI and Title VII has drastically changed the Statute from its original foundation.[50] Title IX began as a statute generally combating sex discrimination in education, yet expansive interpretations from the Supreme Court[51] have significantly altered Title IX's scope.[52] Title IX now supports private rights of action,[53] allows for monetary damages,[54] and permits claims on behalf of the

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amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of [T]itle VI."); *see also* Cannon v. Univ. of Chicago, 441 U.S. 677, 704 (1979) ("Title IX, like its model Title VI . . ."); Ruth, *supra* note 36, at 192.

[47] *North Haven*, 456 U.S. at 524. At the time of Title VII's enactment, the Statute carved out an exception for educational institutions. Ruth, *supra* note 36, at 214. This exception furthered the need for protection against discrimination based on sex through a statute addressing educational institutions—a need filled by Title IX. The exception in Title VII, essentially, permitted sex discrimination to continue in a workplace setting primarily employing women: K–12 schools. Sean P. Corcoran et al., *Women, the Labor Market, and the Declining Relative Quality of Teachers*, 23 J. POL'Y ANALYSIS & MGMT. 449, 452 (2004) ("In 1964, more than half of working female college graduates were teachers . . .").

[48] *Compare* 20 U.S.C. § 1681, *with* 42 U.S.C. § 2000e-2, *and* 42 U.S.C. § 2000d.

[49] *See Cannon*, 441 U.S. at 694–704 (using Title VI to interpret Title IX); *see also* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283–84, 286–87 (1998) (interpreting Title IX by first differentiating it from Title VII); *cf.* Univ. of Tex. Sw. Med. Cent. v. Nassar, 570 U.S. 338, 356 (2013) (interpreting Title VII by differentiating it from Title IX).

[50] Ruth, *supra* note 36, at 190.

[51] *Id.* at 197.

[52] *Id.* ("By 1992, Title IX was transformed from a generally worded prohibition against sex discrimination in education—with questionable practical effectiveness—into a forceful tool for attacking sexual discrimination in educational institutions."); s*ee also Cannon*, 441 U.S. at 717 (creating a private right of action under Title IX); *North Haven*, 456 U.S. at 521–22 (holding employment claims come within Title IX's protections); Grove City Coll. v. Bell, 465 U.S. 555 (1984) (defining the federal funding scope of Title IX); Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 71–73 (1992) (allowing recovery of monetary damages under Title IX).

[53] *Cannon*, 441 U.S. at 704.

[54] *Franklin*, 503 U.S. at 63.

protected class.[55] Yet, for everything Title IX now encompasses thanks to its judicial expansion, the Statute contains equally large gaps. Title IX lacks a requirement for exhaustion of administrative remedies and a clear enforcement structure,[56] and is dependent on an individualized fact-based analysis.[57] Further, Title IX's most important word and the basis for its power—sex—remains undefined.[58]

Each of the aforementioned expansions and clarifications of Title IX has come at the hands of the Supreme Court through analyses which mold, compare, and differentiate Title IX from other statutes, creating a patchwork statute born of Titles VI and VII.[59] However, this approach overlooks the Court's own hand in creating increased similarities and differences between the statutes. The Court has placed itself in a situation where, with each new case, it is analyzing its own expansions rather than the statutory language; or, analyzing the language of other statutes to interpret the statute before it.[60]

II. JUDICIAL EXPANSION GIVES RISE TO A PATCHWORK STATUTE

Title IX has been increasingly interpreted and analogized to Title VII[61] without consideration for statutory language or structure beyond one enticing word: sex.[62] Reliance on interpretations of Title IX through the

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[55] Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 168 (2005) (allowing a male coach to raise Title IX retaliation claims after speaking out against discrimination against female athletes because his action was rooted in discrimination based on sex).

[56] Univ. of Tex. Sw. Med. Cent. v. Nassar, 570 U.S. 338, 356 (2013) ("Unlike Title IX . . . Title VII is a detailed statutory scheme."); McKenzie Miller, *Is Title VII > IX: Does Title VII Preempt Title IX Sex Discrimination Claims in Higher Ed Employment?*, 68 CATH. U. L. REV. 401, 404 (2019).

[57] The Office of Civil Rights within the Department of Education enforces Title IX. Because there is no set administrative procedure, each case is independently analyzed on its merits. *See, e.g.*, Letter from Kimberly M. Richey, Acting Asst. Secretary for Civil Rights, to Connecticut Interscholastic Athletic Conference: Notice of Impending Enforcement Action (Aug. 31, 2020) [hereinafter *Notice of Pending Enforcement*].

[58] *Cf.* Equality Act, H.R. 5, 117th Cong. (2021) (as passed by House, Feb. 25, 2021).

[59] *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 717 (1979) (comparing to Title VI); *Jackson*, 544 U.S. at 530–31 (analyzing Title IX in comparison to Title VII); Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 76 (1992) (analyzing Title VI to find damages remedies available in Title IX suits).

[60] *Cannon*, 441 U.S. at 717; Ruth, *supra* note 36, at 190 (analyzing the intent and legislative history at the time of Title IX's enactment, yet recognizing that the Supreme Court's gap-filling means analysis is often of the opinions filling gaps).

[61] 42 U.S.C § 2000e-2.

[62] Prior to the *Bostock* decision, the closest the term "sex" had come to being defined was its broadening to sexual stereotypes in Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) and the recognition in Oncale v. Sundowner Offshore

lens of Title VII fails to recognize that Title IX was modeled primarily after Title VI.[63] Like Title VI, Title IX was enacted with the twin goals of "avoid[ing] the use of federal resources to support discriminatory practices" and "provid[ing] individual citizens [with] effective protection against those practices."[64]

A. Giving Credit Where Credit is Due: Title VI's Influence on Title IX

The legislative intent and statutory language of Title IX make Title VI a more appropriate interpretive starting point than Title VII.[65] Title IX's headlining provision is a mere "cut and paste job" of Title VI, replacing "on the ground of race, color, or national origin" with "on the basis of sex."[66] The other thirty-two words are identical.

Title IX states that no person "shall, on the basis of sex, be excluded from participation in . . . any educational program or activity receiving Federal financial assistance."[67] This language mirrors Title VI's language prohibiting "exclu[sion] from participation in . . . any program or activity receiving Federal financial assistance" on the basis of race, color, or national origin.[68] The similar language between the two statutes was a

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Servs., Inc., 523 U.S. 75, 78–80 (1998) that "sex" in Title VII pertains equally to men and women (and to same-sex sexual harassment) despite the legislative intent of protecting women. Sex, while judicially broadened on these two instances, is not defined in either Title VII or Title IX. *See* 42 U.S.C. § 2000e(k) (despite defining "because of sex" to include pregnancy); *see also* 20 U.S.C. § 1681.

[63] *Cannon*, 441 U.S. at 694 ("Title IX was patterned after Title VI of the Civil Rights Act of 1964."); JODY FEDER, CONG. RSCH. SERV., RL31709, TITLE IX, SEX DISCRIMINATION, AND INTERCOLLEGIATE ATHLETICS: A LEGAL OVERVIEW 3 (2012); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 549 (1982).

[64] *Cannon*, 441 U.S. at 704 (discussing and comparing the objectives of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972).

[65] *See, e.g.*, *id.*

[66] *North Haven*, 456 U.S. at 528 (quoting *Sex Discrimination Reguls.: Hearings Before the Subcomm. on Postsecondary Educ. of the H. Comm. on Educ. & Lab.*, 94th Cong. 1st Sess., 409 (1975) (remarks of Rep. O'Hara, Member, H. Comm. on Educ. & Lab.)). Importantly, the classifications protected in Title VI receive strict scrutiny, which differentiates Title VI from the classification protected in Title IX, which receives intermediate or heightened scrutiny. Like sex, recent decisions have held that transgender status and gender identity receive intermediate scrutiny. While outside the scope of this Article, variation in scrutiny creates differences between Title VI and Title IX beyond—and because of—the suspect class protected in each statute. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 202 (1995) (establishing that "strict scrutiny is the proper standard for analysis of all racial classifications"); *see also* Karnoski v. Trump, 926 F.3d 1180, 1201 (9th Cir. 2019) (holding that intermediate scrutiny is appropriate in cases raised by transgender persons).

[67] 20 U.S.C. § 1681(a).

[68] 42 U.S.C. § 2000d.

central issue in the first major case to define the scope of Title IX's application.[69] *Grove City College v. Bell*[70] presented the question of whether federal funding applied to the school as a whole, or only a specific program at the school, such as the Biology Department or Department of Athletics.[71] The Supreme Court held that receipt of federal funds by some students or programs "does not trigger institution-wide coverage under Title IX," and Title IX bore weight only on the specific program within the educational institution receiving the federal funds.[72]

The *Grove City* Court's dissenters took issue with the majority's narrow application. The dissent noted the congressional intent behind Title VI should be applied to Title IX, and encouraged compliance in all areas of an institution regardless of where the federal funding was allocated.[73] Subsequently, Congress passed the Civil Rights Restoration Act of 1987,[74] which implemented *Grove City*'s dissent and required Title IX compliance in all areas—not merely in the specific programs or departments receiving funds.[75] The enforcement of Title IX, then, arises from a clarification of the statutory text, the genesis of which was a judicial interpretation relying on an analogy to Title VI.[76] Therefore, Title VI provides the framework for a language and scope analysis of Title IX.

The Supreme Court has additionally utilized Title VI when interpreting Title IX's legislative intent. As initially written, a claim for relief under Title IX only provided punishment in the form of federal fund revocation;[77] the original text of Title IX had no means to make an individual whole.[78] In *Cannon v. University of Chicago*[79] the plaintiff raised the question of how an individual discriminated against on the basis of sex could receive a remedy if the only remedy available punished the institution.[80] In response, the Supreme Court established an implied private right

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[69] Grove City Coll. v. Bell, 465 U.S. 555, 556 (1984); *see also* B. Glenn George, *Forfeit: Opportunity, Choice, and Discrimination Theory Under Title IX*, 22 YALE J. L. & FEMINISM 1, 6 n.10 (2010).

[70] *Grove*, 465 U.S. at 555.

[71] *Id.*

[72] *Id.* at 573.

[73] *Id.* at 586–93 (Brennan, J., dissenting) (discussing the program-specific language in Title VI, comparisons of the language to Title IX, and concluding that the similar statutory language requires an interpretation of Title IX similar to that applied in Title VI).

[74] Civil Rights Restoration Act of 1987, Pub. L. No. 100–259, 102 Stat. 28 (codified as amended in scattered sections of 20 U.S.C., 42 U.S.C.).

[75] *Id.*

[76] *Id.*; Cannon v. Univ. of Chi., 441 U.S. 677, 677 (1979) (using interpretation of the statutory language of Title VI to interpret Title IX).

[77] *See Cannon*, 441 U.S. at 695–96.

[78] *Id.* at 683.

[79] *Id.*

[80] *Id.*

of action within Title IX.[81] To correct the statutory lack of remedial process for individuals, the Supreme Court looked to the parallel goals of Title VI and Title IX.[82] Noting the similar statutory intent, and Title IX's modeling after Title VI, the Supreme Court determined it was nonsensical for Title IX to be without a private right of action when its mirror, Title VI, contained one.[83] Title IX's implied private right of action, then, was established through the legislative intent of Title VI.

Title VI's influence on Title IX is evident beyond the Supreme Court's reliance on Title VI to create Title IX's private right of action and programmatic enforcement structure. Most importantly, both statutes are contractual in nature.[84] Enacted under Congress' spending power, Title VI and Title IX create a contract between the Federal Government and the fund recipient.[85] The two statutes are parallel. Each prohibits discrimination in programming through a contractual promise that conditions continued receipt of federal funds on the obligation not to discriminate.[86] Title IX compliance is contractual rather than compulsory, which carries important implications in the context of judicial and administrative enforcement.[87] For judicial and administrative enforcement, a statute that is contractual in nature does not seek to remedy the discrimination an individual faced but instead seeks to prevent the discrimination from ever occurring.

Understanding Title IX through Title VI is apt. Addressing phrasing alone, Title IX's headlining provision mirrors Title VI's language. Further, each statute creates a contract with similar terms and provisions, complemented by an imposed institutional responsibility and the ability to raise private claims under both statutes.[88] Yet often, the comparison of Title IX to Title VI is overlooked in favor of Title VII. Use of the word "sex" in Title VII and Title IX has served as a catalyst to create statutory similarity

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[81] *Id.* at 717. "The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute." *Id.* at 705–06.

[82] *See id.* at 704.

[83] *Id.* at 694 n.16 ("The genesis of Title IX also bears out its kinship with Title VI.").

[84] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998).

[85] *Id.*; Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 640 (1999) ("[M]uch in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.") (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

[86] *Gebser*, 524 U.S. at 286; Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 181–82 (2005); Andrew T. Bell, Note, *Federally Funded and Religiously Exempt: Exploring Title IX Exemptions and Their Discriminatory Effect on LGBT Students*, 81 U. PITT. L. REV. 735, 736 (2020).

[87] *Jackson*, 544 U.S. at 181–82. *See* discussion *infra* notes 105–08.

[88] *Gebser*, 524 U.S. at 286.

and blanket interpretations that assume the statutes are equal.[89] This syllogism excludes the importance of Title VI to judicial interpretations and historical expansions of Title IX.[90] But, no one can resist the allure of sex.

B. Why was VI afraid of VII? Because VII, [ate], IX

The Court turns to Title VII when a judicial interpretation involves discrimination based on sex.[91] Although Title VI's mirroring language is important for understanding most elements of Title IX, the Court employs Title VII (which protects against sex discrimination in the workplace) for analysis when the issue is one arising from sex-based discrimination.[92] The mirroring language of Title VI and Title IX, then, is set aside for the merely similar phrasing of Title VII.[93] While the Court takes every opportunity to make a comparison between Title IX and Title VII when the comparison serves the Court, the Court also goes to great lengths to differentiate the two statutes.[94]

In one of the Supreme Court's leading Title IX cases, *Gebser v. Lago Independent School District*,[95] the Court discussed at length the differences between Title IX and Title VII.[96] In *Gebser*, the claimant asserted an agency theory of liability and attempted to impute to the school board a teacher's sexual abuse of a student.[97] The claim was raised under both

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[89] *See* Exec. Order No. 13,988, *supra* note 7; Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1305 (11th Cir. 2020); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616–17 (4th Cir. 2020).

[90] *See* discussion *supra* Part II(A).

[91] North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 524–25, 530 (1982) (analyzing legislative history and statutory comparison to Title VII to establish that Title IX permits an employment claim); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 356 (2013) (differentiating Title IX and Title VII when assessing a Title VII retaliation claim); Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting) ("This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX").

[92] *See* G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd., 822 F.3d 709, 718 (4th Cir. 2016) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

[93] *Compare* 20 U.S.C. § 1681, *with* 42 U.S.C. § 2000e-2, *and* 42 U.S.C. § 2000d.

[94] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 285–87 (1998); *North Haven*, 456 U.S. at 552 (Powell, J., dissenting) (providing differences between Title VII and Title IX in dissent to the majority's adoption of an implied employment cause of action; disagreeing that legislative history of Title IX supports this comparison).

[95] 524 U.S. 274.

[96] *Id.* at 285–87 (listing the contractual framework of Title IX and the intention of Title IX's remedies as important differences when compared to Title VII).

[97] *Id.* at 277–78, 281 (attempting to invoke Title VII standards for sexual harassment within a Title IX claim for the same).

Title IX and Title VII because each protects against discrimination based on sex.[98] The Court provided several grounds for differentiating Title IX from Title VII to discredit the proposed agency theory and refused to impute agency liability in a teacher-on-student sexual harassment case.[99]

First, the Court acknowledged Title VII's structure as individualized (which by default allows for a private right of action) and its textual delineation of a damages structure to provide an express grant of relief.[100] Unlike the express grant provided in Title VII, relief under Title IX depends on judicial creation of a private right of action.[101] Next, the *Gebser* Court assessed the contractual nature of Title IX.[102] The Court stressed the extreme difference between Title IX's contractual promise not to discriminate and Title VII's absolute ban on doing so.[103] The final differentiating factor for the Court in *Gebser* was the statutory intent of the awarded remedy. Title VII is backward-looking and acts to remedy past discrimination.[104] In contrast, Title IX is a forward-looking statute aimed to protect against discrimination through creation of a contract.[105] In subsequent

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[98] *Id.* at 281.

[99] *Id.* at 283. The Court refused to adopt agency theory for Title IX, noting through statutory analysis that the comparison of Title IX to Title VII is inappropriate.

> Agency principles [that] guide the liability inquiry under Title VII rest[] on an aspect of that statute not found in Title IX: Title VII, in which the prohibition against employment discrimination runs against 'an employer,' 42 U.S.C. § 2000e–2(a), explicitly defines 'employer' to include 'any agent,' § 2000e(b). Title IX contains no comparable reference to an educational institution's 'agents,' and so does not expressly call for application of agency principles. *Id.* (citation omitted).

[100] *Id.* at 286–87; *see also* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 168 (2005) ("Title VII is a vastly different statute, which details the conduct that constitutes prohibited discrimination.").

[101] *Gebser*, 524 U.S. at 286–87; Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979). Title VII provides an explicit explanation of burdens of proof required for a successful claim, some specific actions to be taken by the employer which can serve as affirmative defenses, and administrative procedural requirements. *See* 42 U.S.C. §§ 2000e-2, 2000e-10, 2000e-14; *see also Jackson*, 544 U.S. at 175 ("Because Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered.").

[102] *Gebser*, 524 U.S. at 286–87.

[103] *Id.* (Title IX's "contractual framework distinguishes [it] from Title VII, which is framed in terms not of a condition but of an outright prohibition. . . . Title VII, moreover, seeks to 'make persons whole for injuries suffered through past discrimination' . . . [whereas] Title IX focuses more on 'protecting' individuals."); *see also Jackson*, 544 U.S. at 168.

[104] *Gebser*, 524 U.S. at 287.

[105] *Id.*

cases, the Supreme Court has acknowledged the "sharp contrast" between Titles VII and IX by adding Title IX's missing requirement for exhaustion of administrative remedies and the lack of guidance for grievance procedures to *Gebser*'s list.[106]

In addition to the significant structural differences outlined in *Gebser*, Title IX contains none of the important language of administrative deference seen in Title VII.[107] Title VII outlines timetables for claims and requirements for involvement by the agency to which Congress delegated authority.[108] Conversely, Title IX's force has been consistently dependent on interpretations at the judicial and administrative level to explain and elaborate on its bare-bones statutory protocol.[109] Although Title IX's "express statutory means of enforcement is administrative,"[110] administrative enforcement is based in revocation of federal funding, not the private right of action.[111] Once the Supreme Court created the private right of action in *Cannon*, the Court placed a responsibility on the judiciary to grant

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[106] *Jackson*, 544 U.S. at 168 ("Title VII is a vastly different statute" from Title IX); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 552 (1982) (Powell, J., dissenting) ("Title IX, unlike Title VII, has no time limits for action, no conciliation provisions, and no guidance as to procedure.").

[107] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 356 (2013) ("Unlike Title IX . . . Title VII is a detailed statutory scheme."); *North Haven*, 456 U.S. at 552 (Powell, J., dissenting) (asserting that, among other things, Title IX's limited procedural language creates further rift between Title VII and Title IX); Ruth, *supra* note 36, at 190; Miller, *supra* note 56, at 404.

[108] *See* 42 U.S.C. §§ 2000e-5(d), 2000e-5(f)(1). The right-to-sue letter from the Equal Employment Opportunity Commission providing the harmed party with a right to bring suit in federal court is statutorily required and procedurally codified. *See* 29 C.F.R. § 1601.28.

[109] *See* Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979); *Jackson*, 544 U.S. at 175–76; Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 258 (2009); Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 76 (1992); *see also* the significant guidance documents related to Title IX enforcement in athletics, single-sex education, transgender rights, and sexual assault adjudication. U.S. DEP'T OF EDUC., OFF. OF CIV. RTS., POL'Y GUIDANCE PORTAL, https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html (last visited July 18, 2021). While the Equal Employment Opportunity Commission also publishes guidance documents to interpret Title VII, Supreme Court decisions on Title IX and documents provided by the Department of Education fill much larger gaps. *See supra* Part I for a brief discussion on the role of the Supreme Court in expansion of Title IX, acknowledging the large gaps in the initial structure of Title IX; *see also infra* Part III explaining administrative interpretations of Title IX.

[110] *Gebser*, 524 U.S. at 280; *see also* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 638 (1999).

[111] *Gebser*, 524 U.S. at 281.

individualized relief for Title IX claims.[112] While the affirmative obligation not to discriminate based on sex is similar for each statute, in large part, the comparison ends there.

Although the Supreme Court has dedicated segments of opinions to differentiating the two statutes, it has also spent significant time interpreting Title IX in the image of Title VII.[113] By 1982, the Court solidified the ability to raise an employment claim under Title IX, mirroring Title VII and fulfilling the initial legislative goal to fill the statutory gap in protection of employees in the educational setting.[114] Additionally, in *Franklin v. Gwinnett County*,[115] the Court determined that private rights of action under Title IX (which had previously permitted declaratory or injunctive relief—as recognized in *Cannon* and created through analogy to Title VI) also permitted monetary damages.[116] Title IX, a statute previously void of monetary damages or explicit employment claims, now operates in the likeness of a statute explicitly containing these elements: Title VII.[117]

The Supreme Court's interpretations of Title IX rely on Title VI and on Title VII. When assessing the statutory language and legislative intent of Title IX, the appropriate statute for comparison is Title VI.[118] Statutory

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[112] *Cannon*, 441 U.S. at 717; Caroline B. Newcombe, *Implied Private Rights of Action: Definition, and Factors to Determine Whether a Private Action Will Be Implied from a Federal Statute*, 49 LOY. U. CHI. L.J. 117, 120 (2017).

[113] North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 524–26 (1982) (analyzing legislative history and statutory comparison to Title VII to establish that Title IX permits an employment claim); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 356 (2013) (differentiating Title IX and Title VII when assessing a Title VII retaliation claim); Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting) ("This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX"); Ruth, *supra* note 36, at 197.

[114] *North Haven*, 456 U.S. at 512.

[115] 503 U.S. 60 (1992).

[116] *Id.* at 63; *Cannon*, 441 U.S. at 694–704.

[117] This "recasting" of Title IX in the image of Title VII is in direct conflict with Supreme Court's actions outlining the differences in the two statutes. Ruth, *supra* note 36, at 190; *see, e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 281 (1998).

[118] Ruth, *supra* note 36, at 190 (analyzing the intent and legislative history at the time of Title IX's enactment yet recognizing that the Supreme Court's gap-filling means analysis is often of the opinions filling gaps); *North Haven*, 456 U.S. at 522 (using statutory language to address the meaning of individual yet relying primarily on Senator Bayh's floor statements). Comparison between Title VII and Title IX is even more common in the lower courts. *See, e.g.*, G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd., 822 F.3d 709, 718 (4th Cir. 2016) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX."); *see also* Emeldi v. Univ. of Or., 698 F.3d 715, 725 (9th Cir. 2012) ("[W]e hold that the Title VII framework generally governs Title IX.").

language analyses of Title IX have historically fallen to comparisons with Title VI.[119] "Sex" is the exception.

C. Along Came the Elephant in the Mousehole[120]

In 2020, the Supreme Court held in *Bostock* that an employer taking an adverse employment action against an employee based on their sexual orientation or gender identity violates Title VII.[121] The Court established that sex "plays a necessary and undisguisable role" in any adverse employment decision against an employee for their sexual orientation or gender identity.[122] In so holding, the Court dismissed the argument that its interpretation of sex was an "elephant in a mousehole."[123] The Court acknowledged the "elephants in mouseholes" canon, which does not accord deference when "vague or ancillary provisions" cause major policy change.[124] In *Bostock*, the Court noted the canon did not apply because the elephant (a broad interpretation of sex) was present—yet merely unnoticed—in the Statute all along.[125]

The Court's analysis in *Bostock* rested on two key aspects of Title VII: the statutory language's focus on the individual rather than the group, and

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[119] *See, e.g.*, *Cannon*, 441 U.S. 677; *cf. North Haven*, 456 U.S. at 524–25 (analyzing "person" and "student").

[120] The Elephant in the Mousehole Doctrine arises from Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001). "Generally, the Supreme Court is cautious to yield a statutory interpretation that constitutes a significant policy change. As the maxim goes, Congress does not hide elephants in mouseholes." Stephanie Taub & Michael Berry, *Hiding Elephants in Mouseholes: The original meaning behind "discrimination on the basis of sex"*, SCOTUS BLOG (Sept. 4, 2019, 11:30 a.m.), https://www.scotusblog.com/2019/09/symposium-hiding-elephants-in-mouseholes-the-original-meaning-of-discrimination-on-the-basis-of-sex/. This doctrine asserts that:

> Where an agency uses "vague terms and ancillary provisions" (the mousehole) to alter "the fundamental details of a regulatory scheme" (the elephant), the agency's assertion of authority is forbidden. In effect, the doctrine requires a clear statement in an obvious place for a significant expansion of regulatory authority. Without such a clear statement, the Court not only does not defer to the agency's interpretation of the statute, but it per se forbids the agency action—even if the agency's interpretation is a reasonable interpretation of ambiguous statutory language.

Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 21 (2010).

[121] Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731 (2020).

[122] *Id.* at 1737.

[123] *Id.* at 1753.

[124] *Id.*

[125] *Id.*

the language creating liability through but-for causation.[126] The majority reached its decision through textual analysis, avoiding discussion of legislative history because of the unambiguous nature of the phrase "because of sex."[127] Relying instead on history for the meaning of sex at the time of Title VII's adoption, the majority analyzed not only the word "sex," but also "the statutory phrase [which] ordinarily bears a different meaning than the term[] do[es] when viewed individually or literally."[128] Title VII's focus on the individual, and the Court's interpretation that "homosexuality and transgender status are inextricably bound up with sex," left the Court with a clear answer to the question at hand.[129]

The key phrase in the *Bostock* analysis was "because of sex."[130] The interpretation of sex as including more than the "ordinary and plain meaning" of sex (a male or female binary) was dependent on the individual nature of this phrase and the phrase's creation of but-for causation to reach its interpretive conclusion.[131] Previous Supreme Court analyses of Title VII found this but-for causation through the "because of" language in the statutory text.[132] In *Bostock*, the Court relied on the individualized nature of Title VII, and a hypothetical situation, to conclude that an employer's decision to fire a high-performing employee for bringing "Susan" to a company holiday party was entirely dependent on whether the high-performing employee was male or female.[133] According to the majority, a sexual orientation-based adverse employment action was necessarily based on the high-performing employee's sex.[134] In the majority's view, the terminated employee in the Court's hypothetical is discriminated

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[126] *Id.* at 1739.

[127] *Id.* at 1749 ("And as we have seen, no ambiguity exists about how Title VII's terms apply to the facts before us."). The *Bostock* majority relied on plain meaning, stating: "This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Id.*

[128] *Id.* at 1750.

[129] *Id.* at 1742.

[130] *See id.* at 1750 (outlining the necessity of addressing the statutory phrase "because of sex").

[131] *Id.* at 1739.

[132] *See id.* at 1739–40 (providing an initial overview of the but-for causation standard); *see also* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009) (stating that "because of" in the ADEA statute requires but-for causation); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013) (following the holding in *Gross* to hold that the "because of" language in Title VII creates but-for causation).

[133] *Bostock*, 140 S. Ct. at 1742.

[134] *Id.*

against in a but-for causation model.[135] Put differently, but-for the high-performing employee's sex, they would not have been terminated.[136]

The "because of sex" phrasing in Title VII is not present in Title IX. Rather, Title IX prohibits discrimination "on the basis of" sex.[137] Little guidance exists to determine if "on the basis of" and "because of" are synonyms. Intuitively, this seems correct, as reinforced by the Court's interchangeable use of "because of" and "on the basis of" in the *Bostock* opinion.[138] In that regard, Title IX also contains the but-for causation language the Court found necessary when expanding Title VII to include protections for non-heterosexual and transgender individuals.[139]

Bostock's reasoning needed two legs to stand on, hence the majority's focus on the individual to accompany the but-for causation analysis.[140] According to the Court, Title VII's focus on an individual's sex, as opposed to using broader phrasing "implying a focus on differential treatment between groups," made the decision to include sexual orientation in "sex" inevitable.[141] Specifically, Title VII uses "individual" three times in close proximity to the word "sex": "fail or refuse to hire or . . . discharge any *individual*, or otherwise . . . discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* . . . sex."[142] An analysis similar to that of Title VII can be made for Title IX; however, the comparison is not as clean. Title IX only provides a definition for "educational institution," neglecting to define any other statutory terms.[143] Additionally, the Statute's use of the word "individual" is located far from its principal provision,

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[135] *Id.*

[136] *Id.*

[137] 20 U.S.C. § 1681(a).

[138] *Bostock*, 140 S. Ct. at 1753. For example: "We can't deny that today's holding—that employers are prohibited from firing employees on the basis of homosexuality or transgender status . . ." and "[t]he only question before us is whether an employer . . . discriminated against that individual 'because of such individual's sex.'" (emphasis added). *Id.*

[139] *See, e.g.*, Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1161 (C.D. Cal. 2015) (citing Baldwin v. Anthony Foxx, Sec'y, Dep't of Transp., EEOC Appeal No. 0120133080, 2015 WL 4397641, at *10 (EEOC July 16, 2015)) ("[A]n employee could show that the sexual orientation discrimination he or she experienced was sex discrimination because it involved treatment that would not have occurred but for the individual's sex . . .").

[140] *See Bostock*, 140 S. Ct. at 1739.

[141] *Id.* at 1753 ("Congress's key drafting choices—to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff 's injuries—virtually guaranteed that unexpected applications would emerge over time. This elephant has never hidden in a mousehole; it has been standing before us all along.").

[142] *Id.* at 1738 (citing 42 U.S.C. § 2000e–2(a)(1) (emphasis added)).

[143] *See* 20 U.S.C. § 1681(c).

using "individual" only when speaking of the military, abortions, and beauty pageants.[144] However, Title IX begins with the phrase "no person shall"—undoubtedly a synonym for individual.[145] Therefore, Title IX includes the two major elements on which *Bostock*'s interpretation relies.

Since publication of the *Bostock* decision, lower courts across the country have used the presence of sex in both statutes, and the above elements, to conclude Title IX and Title VII should be interpreted harmoniously.[146] This conclusory determination by lower courts does not account for the Supreme Court's canon that Congress does not leave "elephants in mouseholes." Although the Supreme Court determined the meaning of sex in Title VII did not amount to an "elephant in a mousehole," Title VII and Title IX are different statutes. The Supreme Court must articulate its view on this essential aspect of Title IX to prevent the broad assumption from continuing.

D. Extending the Elephant Canon

Immediately following *Bostock*, lower courts began extending the Supreme Court's holding, without allowing the Court an opportunity to determine if that action is appropriate. One of the first to do so, coincidentally, was one of this issue's most famous cases. Well before the *Bostock* decision, determination of the scope of sex under Title IX had its most famous case in one involving a "bathroom policy" at a Virginia high school.[147] In *Grimm*, a high school sophomore assigned female at birth brought a claim against their high school alleging Title IX violations arising from an individual ban on using the boy's restroom.[148] The case extended over six years and three presidential administrations.[149] Timing is

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[144] 20 U.S.C. §§ 1681(a)(4), 1681(a)(9), 1688.

[145] 20 U.S.C. § 1681(a). When read against Title VII's definition of "person" (which includes individual), person in Title IX can be understood to include an individual.

[146] *See, e.g.*, Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1305 (11th Cir. 2020); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616–17 (4th Cir. 2020). Some lower courts developed this holding well before the *Bostock* decision. *See* Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (stating the distinction between gender identity and biological sex "is illusory and artificial, and that sexual orientation discrimination is not a category distinct from sex or gender discrimination. Thus, claims of discrimination based on sexual orientation are covered by Title VII and IX.").

[147] G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd., 132 F. Supp. 3d. 736, 739 (E.D. Va. 2015).

[148] *Id.*

[149] *Id.*; G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd. 822 F.3d 709 (4th Cir. 2016); G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd., No. 4:15cv54, 2016 WL 3581852 (E.D. Va. June 23, 2016); Gloucester Cnty. Sch. Bd. v. G.G. *ex rel.* Grimm, 136 S. Ct. 2442 (2016); Gloucester Cnty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 1239 (2017); G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd., 853

everything, and the courts' evolving reasoning over *Grimm*'s lifespan demonstrates both a marked shift in societal understanding of sex and continuing issues of deference in Title IX cases.

Grimm was decided for the first time in 2015, where the District Court for the Eastern District of Virginia held that sex was a binary construct and refused to defer to the DOE's 2014 guidance document urging institutions to respect the agency's expansive definition of sex, which included transgender students under Title IX.[150] The Fourth Circuit Court of Appeals reversed and declared that the DOE was entitled to deference.[151] The Supreme Court granted certiorari on the deference issue and oral arguments were scheduled for March 2017.[152] The deference issue was exacerbated—rather than resolved—when the DOE published the *2017 Dear Colleague Letter* which rescinded previous interpretations, including the 2014 guidance document, and removed transgender inclusion in the meaning of sex under Title IX.[153] In response to this new administrative action,

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F.3d 729 (4th Cir. 2017); Grimm v. Gloucester Cnty. Sch. Bd., 400 F. Supp. 3d 444 (E.D. Va. 2019); *Grimm*, 972 F.3d at 612, *cert. denied*, 2021 WL 2637992.

[150] G.G. *ex rel.* Grimm, 132 F. Supp. 3d. at 744. The DOE guidance document was published to clarify the 2011 Dear Colleague Letter which created increased responsibility for institutions related to Title IX. The guidance document specifically stated: "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 and OCR accepts such complaints for investigation." CATHERINE E. LHAMON, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE, U.S. DEP'T. OF EDUC., at 5 (Apr. 29, 2014) (clarifying requirements in RUSSLYNN ALI, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE, U.S. DEP'T OF EDUC. (Apr. 4, 2011)). The District Court for the Eastern District of Virginia instead relied upon 34 C.F.R. § 106.33 which permits separate bathroom facilities based on sex, basing the holding on a binary construction, and determining that separate bathrooms are permitted. The district court held that use of sex-segregated bathrooms required that Grimm use the bathroom of his birth sex (female). *G.G.* ex rel. *Grimm*, 132 F. Supp. 3d at 744. This decision ignored further guidance from a rule interpretation published by the DOE in 2015 which stated "[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." Letter from James A. Ferg-Cadima, Acting Deputy Assistant Sec'y for Pol'y, Off. for Civ. Rts., to Emily Prince (Jan. 7, 2015) (on file with the U.S. Dep't of Educ.).

[151] *Grimm*, 822 F.3d at 715 ("Because we conclude the district court did not accord appropriate deference to the relevant Department of Education regulations . . .").

[152] Caitlin Emma, *Parties in transgender student rights battle ask SCOTUS to move forward*, POLITICO (Mar. 1, 2017, 3:15 PM), https://www.politico.com/story/2017/03/gavin-grimm-transgender-rights-supreme-court-235581; Howe, *supra* note 28.

[153] *2017 Dear Colleague Letter*, *supra* note 7 (withdrawing guidance that sex includes sexual orientation and transgender status yet failing to define or interpret sex).

the Supreme Court vacated certiorari and the Fourth Circuit's ruling, since the Fourth Circuit's opinion was based on now-rescinded administrative guidance.[154] After several subsequent appeals, changes of plea, and reversals, *Grimm* made its way to the Fourth Circuit again in 2020.[155] There, in light of the Supreme Court's *Bostock* decision and without discussing the decision's analysis or the appropriateness of the application, the Fourth Circuit applied the *Bostock* interpretation of sex in Title VII to Title IX.[156]

The Fourth Circuit could have explored the appropriateness of applying an employment law decision to an education law case yet chose not to do so.[157] This blanket assertion that the *Bostock* decision applies to Title IX is similar to other recent circuit court cases. The Eleventh Circuit noted in *Adams ex rel. Kasper v. School Board of St. Johns County*[158]—decided within days of *Grimm*—that the word "sex" in Title VII and Title IX, coupled with the use of but-for causation in each statute, allowed for a comparison between the word's meaning in each statute.[159] The court did so simply by asserting it was following the lead of the Supreme Court in *Bostock*.[160]

This assertion has been a common trend in cases arising after *Bostock*, in which judges apply the *Bostock* interpretation to Title IX based on nothing more than general similarity.[161] Sweeping action of this nature does not interpret the word "sex" and overlooks the narrow scope articulated in

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[154] *Gloucester Cnty.*, 137 S. Ct. 1239.

[155] Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020).

[156] *Id.* at 616–17.

[157] *Id.* The Supreme Court denied the petition for writ of certiorari on June 28, 2021. 2021 WL 2637992. However, two Justices stated they would take up the issue. *Id.* After all, "the Fourth Circuit's decision rests on a fundamental misreading of *Bostock*." Petition for Writ of Certiorari at 19, Gloucester Cnty. Sch. Bd. v. Grimm (No. 20-1163).

[158] 968 F.3d 1286.

[159] *Id.* at 1305.

[160] *Id.* at 1309 ("[W]e follow the lead of the Supreme Court in *Bostock*, which found it unnecessary to perform that analysis as to Title VII. We need not interpret the term 'sex' to recognize that Mr. Adams suffered discrimination at school because he was transgender").

[161] *Id.*; *Grimm*, 972 F.3d at 616–17. Interestingly, each of the cases applying *Bostock* at the circuit level has done so on separate ground. The Eleventh Circuit made a sweeping assertion, without regard for statutory differences (*see* discussion *supra* Part II(A) and (B)) that "*Bostock* confirmed that workplace discrimination against transgender people is contrary to law. Neither should this discrimination be tolerated in schools." *Adams*, 968 F.3d at 1310. Utilizing a different assumption, the Fourth Circuit opted for the opinion that the presence of but-for causation in both statutes was sufficient for application of *Bostock*'s interpretation. *Grimm*, 972 F.3d at 616. Neither court seemed concerned with *Bostock*'s guidance not to make such an extension. Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1747 (2020).

Bostock, where the majority explicitly stated its interpretation did not extend to other statutes.[162]

Grimm exemplifies the central issue of the scope of sex in Title IX, which will remain unresolved until the Supreme Court acts.[163] While the Fourth and Eleventh Circuits have swiftly applied *Bostock*'s broad interpretation of sex to Title IX, they have done so without consideration of statutory differences.[164] The issue is further intensified by deference, as seen in *Grimm*'s procedural posture. In 2017, the Supreme Court vacated the *Grimm* case in deference to the DOE, on grounds that the Fourth Circuit's reasoning was moot following the recission of the DOE's 2014 guidance document by the *2017 Dear Colleague Letter*.[165] *Grimm*'s procedural posture shows a government branch empowered to act with the force of law foregoing decisiveness in favor of a more tenuous administrative interpretation.[166]

The *Bostock* majority dismissed the argument that an extension of the meaning of sex beyond a binary construct invoked the "elephants in mouseholes" judicial canon—where the Court will not defer to an agency interpretation of a statute when there is a likelihood for significant policy change—asserting Congress does not leave profound change in vague statutory phrases.[167] The *Bostock* majority brushed aside the assertion that a broad interpretation of sex should not arise from such a small statutory gap, and determined this interpretation was present in Title VII all along.[168] Lower courts should not arbitrarily apply the Court's dismissal of the "elephants in mouseholes" canon. Title VII's elephant was never in

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[162] *Bostock*, 140 S. Ct. at 1753 ("But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. *The only question before us* is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'") (emphasis added).

[163] The Supreme Court denied the petition for writ of certiorari on June 28, 2021. 2021 WL 2637992.

[164] *See* discussion *supra* Part II(B).

[165] *See 2017 Dear Colleague Letter*, *supra* note 7 (rescinding LHAMAN, *supra* note 150 and CATHERINE E. LHAMON & VANITA GUPTA, DEP'TS OF JUSTICE & EDUCATION, DEAR COLLEAGUE LETTER: TRANSGENDER STUDENTS 1 (2016) [hereinafter *2016 Dear Colleague Letter*]); *see also supra* notes 151–54 and accompanying text.

[166] Interpretive rules do not carry the force and effect of law because they do not follow formal procedures as outlined in the Administrative Procedure Act. *See* 5 U.S.C. § 553; *see also* TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF JUDICIAL RULEMAKING 1, 7 (2017).

[167] *Bostock*, 140 S. Ct. at 1753.

[168] *Id.*

a mousehole, however whether that same elephant is hiding in plain sight within Title IX is a decision for the Supreme Court.

The Supreme Court's abdication of responsibility, as seen in *Grimm*'s procedural posture, places student civil rights in an untenable position, protected neither by an enforceable regulation nor binding Supreme Court precedent. Rather, students are left wholly dependent on ever-changing administrative actions. Congressional action does not provide a solution; congressional action merely modifies statutes whose oversight and enforcement Congress has expressly delegated to agencies.[169] This congressional delegation merely returns authority, and therefore reliance for clarity, to administrative agencies.[170] The decision on how far the *Bostock* interpretation extends should be decided by the authors of *Bostock*, who expressly limited the decision to Title VII. Student civil rights sit within a deferential quagmire which will not be solved until the Supreme Court acts.

III. THE ADMINISTRATION OF TITLE IX: INTERPRETATIONS AND APPLICATIONS

The Supreme Court consistently "recasts" Title IX in its own image.[171] The DOE has followed suit, and operates within Title IX's "express statutory means of enforcement, [which] is administrative."[172] Title IX's contractual nature mandates institutional compliance with the nondiscrimination requirement of Title IX as a condition of federal funding disbursement.[173] As the enforcement body for Title IX, the DOE "has a special interest in ensuring that federal funds are not used in contravention of Title IX's mandate,"[174] and thus at its most extreme, noncompliance results in revocation of federal funding.[175]

Much like the contrasting interpretations of Title IX and Title VII that permeate judicial opinions, administrative enforcement of the two statutes is strikingly different. The DOE's task of supervising the compliance of educational institutions prior to allocation of federal funds is a starkly

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[169] *See* discussion *infra* Part IV(B).

[170] *See* discussion *infra* Part IV(B).

[171] Ruth, *supra* note 36, at 190. *See supra* Parts II(A) and (B).

[172] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 280 (1998). Originally under the purview of the Department of Health, Education and Welfare (HEW), Title IX was transferred to the DOE upon its creation in 1980. *See* DOE Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (Oct. 17, 1979).

[173] *Gebser*, 524 U.S. at 286; Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 181–82 (2005) ("When Congress enacts legislation under its spending power, that legislation is 'in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.'") (quoting Pennhurst St. Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

[174] *Gebser*, 524 U.S. at 300 (Stevens, J., dissenting).

[175] 20 U.S.C. § 1682.

different enforcement mechanism than that required of the Equal Employment Opportunity Commission under Title VII.[176] Title VII is explicitly clear in its enforcement structure, which specifies requirements such as exhaustion of administrative remedies.[177] Title VII does as much to prohibit discrimination in the workplace as it does to provide plaintiffs with what amounts to a statutory checklist for how to raise claims.[178] Title IX, true to its patchwork style, provides no such instruction.[179] The lack of precise procedure in Title IX has required the DOE to step in and provide guidance regarding the proper administration of the statute.[180] The DOE's interpretations of Title IX, therefore, deserve weight.[181] But according weight is not the same as granting deference.

Despite the DOE's important administrative role, developing a meaning of sex under Title IX has been tumultuous for the DOE as the Department continues to struggle to make sense of its own Statute.[182] In 2016, the Obama administration published an informal interpretation stating that transgender students were included in Title IX's prohibition of discrimination "on the basis of sex."[183] This interpretive guidance lasted a mere nine months and was quickly rescinded by the Trump administration's DOE in 2017.[184] The *2017 Dear Colleague Letter* revoked the *2016 Dear Colleague Letter* and emphasized that the prior interpretation was not "consistent with the express language of Title IX."[185] The recission did more than lead to the vacation of *Grimm* and the postponement of the much needed clarity provided by judicial interpretation[186]—it flipped student civil rights on their head.[187]

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[176] *See* discussion *supra* notes 108–09 and accompanying text.

[177] *See* discussion *supra* notes 110–11 and accompanying text.

[178] *See, e.g.*, 42 U.S.C. §§ 2000e-2, 2000e-10, 2000e-14.

[179] *See* Univ. of Tex. Sw. Med. Cent. v. Nassar, 570 U.S. 338, 356 (2013) ("Unlike Title IX . . . Title VII is a detailed statutory scheme.").

[180] *See, e.g.*, *2017 Dear Colleague Letter*, *supra* note 7.

[181] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 300 (1998) (Stevens, J., dissenting).

[182] *Compare*, *e.g.*, Exec. Order No. 13,988, *supra* note 7, *with 2020 Rule*, *supra* note 31, at 30,178, *and* Kimberly M. Richey, Letter of Notification, Off. of Civ. Rts. Complaint No. 04-24-1409 (Aug. 31, 2020) [hereinafter *Opinion Letter*], *with Notice of Pending Enforcement*, *supra* note 57.

[183] *2016 Dear Colleague Letter*, *supra* note 165.

[184] *2017 Dear Colleague Letter*, *supra* note 7.

[185] *Id.*

[186] Gloucester Cnty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 1239 (2017). For a discussion on the judicial involvement in deference issues, see *supra* notes 164–66 and accompanying text.

[187] In the nine months between the *2016 Dear Colleague Letter* and the *2017 Dear Colleague Letter*, transgender students in America's schools went from having protected rights to having those rights stripped away. In some instances, this action occurred almost instantly. *See, e.g.*, LEADERSHIP CONF. EDUC. FUND, *supra*

Stating what something is not can, however, imply what something is. The *2017 Dear Colleague Letter* asserted that transgender students did not fit within the express language of Title IX. The informal interpretation did not offer clarity by providing a definition for the important statutory phrase: "on the basis of . . . sex."[188] However, the narrowed definition of sex in the *2017 Dear Colleague Letter* implied that individuals falling outside of the male-female gender binary were excluded from the definition of sex. This informal interpretation, then, revoked transgender protections while implying a binary definition of sex.[189]

A. The Department of Education's Interpretive Quagmire

The DOE's recent informal interpretations have contradicted the DOE's most recent formal publication, which further internally contradicts itself.[190] While the recent *2020 Rule* pertains to sexual harassment and assault policies,[191] the full rule and its text provide insight into the DOE's interpretation of sex. Despite clear knowledge of the gap in Title IX, the DOE chose once again not to define sex.[192] In using but failing to define "on the basis of sex" in the *2020 Rule*, the DOE reinforced statutory ambiguity.

In the *2020 Rule*, the DOE reinforced its informal interpretations and "presupposed sex as a binary classification."[193] This statement was not

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note 2 (citing to a school in Kansas that rescinded its protective policy for transgender students a mere week after the *2017 Dear Colleague Letter* was published; this policy was implemented after the *2016 Dear Colleague Letter* was published). Transgender students in some schools, then, spent less than a full academic year with protections. These protections have been "added back" through the Biden administration's extension of *Bostock* to other statutes through Exec. Order No. 13,988. *See* discussion *infra* Part III(B) and accompanying text for analysis of this extension.

[188] *See 2017 Dear Colleague Letter*, *supra* note 7 (rescinding the broad interpretation of sex in Title IX yet failing to provide guidance as to the word's definition).

[189] When the options for defining sex to include or not include a gender identity spectrum are a binary themselves (sex is more than male/female or it is not), it can be presumed that stating Title IX does not incorporate gender identity or sexual orientation means that it is interpretated by the agency as a binary. This assumption is solidified in rules and interpretations from the same administration publishing the *2017 Dear Colleague Letter*. *See, e.g.*, *2020 Rule*, *supra* note 31, at 30,178 ("Title IX and its implementing regulations include provisions that presuppose sex as a binary classification . . . Attorney General and U.S. Solicitor General interpret the word 'sex' solely within the context of Title VII.").

[190] *See 2020 Rule*, *supra* note 31, at 30,178. This rule promulgation asserts that sex is a binary classification, yet later implies gender identity and sexual orientation are protected. *Id.*

[191] *Id.*

[192] *Id.* ("[T]he Department does not define 'sex' in these final regulations.").

[193] *Id.*

unexpected, as administrative law principles provide that interpretations give hints to the direction an agency will take in its next formal rulemaking,[194] and previous DOE informal interpretations stated sex was a binary construct.[195] To make the assertion that sex is a binary construct, the DOE relied on Title VII to outline the government's stance on the meaning of sex.[196] The DOE stated that "the ordinary public meaning of 'sex' at the time of Title VII's passage was biological sex and thus the appropriate construction of the word 'sex' could not extend to a person's sexual orientation or gender identity."[197] Inexplicably, the DOE identified sex as a binary construct and simultaneously recognized that "any individual—irrespective of sexual orientation or gender identity—may be victimized" by sexual harassment or assault.[198] Though this statement does not explicitly establish that sexual orientation and gender identity are encompassed within "sex," if they were not, there would be no need to address these identifiers in a rule interpreting a statute which does not cover those identities.

Through promulgation of the *2020 Rule*, the DOE skirted the definition of sex and simultaneously spoke to multiple possible definitions. The *2020 Rule*'s conflicting language leaves the question: is "sex" in Title IX binary or does "on the basis of sex" include sexual orientation and gender identity? Upon publication of the *2020 Rule*, it appeared—through the express language of the Rule—that the DOE intended to defer to Title VII's interpretation of the meaning of sex.[199]

Such deference, however, led the DOE to an endorsement they did not foresee. A mere six weeks after the DOE formally recognized sex in Title IX as a binary construct—and relied on Title VII for the "ordinary public meaning of 'sex'"[200]—the Supreme Court redefined its interpretation of sex in *Bostock*, expanding the word to include gender identity and sexual orientation.[201] In reaction to the monumental shift *Bostock* appeared to create when read with the newly published Title IX regulations, the DOE responded with an opinion letter clarifying the undefined word's interpretive meaning.[202] The DOE's *August 2020 Opinion Letter* explicitly stated

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[194] *See* WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE: A CONTEMPORARY APPROACH 341 (6th ed. 2019).

[195] *See 2017 Dear Colleague Letter*, *supra* note 7.

[196] *See 2020 Rule*, *supra* note 31, at 30,178.

[197] *Id.*

[198] *Id.* at 30,177–78.

[199] *Id.*

[200] *Id.* at 30,178.

[201] Greta Anderson, *'Far-Reaching Consequences'*, INSIDE HIGHER ED (June 16, 2020), https://www.insidehighered.com/news/2020/06/16/landmark-supreme-court-ruling-could-redefine-title-ix.

[202] *Opinion Letter*, *supra* note 182.

"*Bostock* does not control the Department's interpretation of Title IX."[203] Incongruently, the *August 2020 Opinion Letter* did anything but clarify, stating further that "*Bostock* guides [the Department's] understanding that discriminating against a person based on their homosexuality or identification as transgender generally involves discrimination on the basis of their biological sex."[204]

The contradiction in these statements—mere sentences apart—was intensified further by a *Notice of Pending Enforcement* issued by the DOE on the same day as the *August 2020 Opinion Letter*.[205] The *Notice of Pending Enforcement* stated *Bostock*'s interpretation of sex as including gender identity "d[id] not alter the relevant legal standard" under Title IX.[206] The DOE's failure to step in to define undefined words and the apparent recognition of two varying definitions of sex, shows that the DOE is, similar to the judiciary, struggling to determine the scope of sex in Title IX. The DOE's uncertainty and the lack of judicial direction places student civil rights in the hands of politically driven agencies.

B. The Office of the President

The DOE is not alone in making unsupported and contradictory assertions. Though clearly enthusiastic for change, President Biden's office appears unclear as to the basis for its own Executive Orders. On January 20, 2021, President Biden signed numerous Executive Orders which were marketed to "jump start" his administration.[207] One of these orders, EO 13988, has the stated purpose to allow all persons in the United States to participate in their primary non-home environment (work or school) without fear of retaliation or mistreatment on the basis of gender identity or sexual orientation.[208] The policy delineates its legal basis, stating in part:

> [T]he Supreme Court held that Title VII's prohibition on discrimination "because of . . . sex" covers discrimination on the basis of gender identity and sexual orientation. Under *Bostock*'s reasoning, laws that prohibit sex discrimination—including Title IX of the Education Amendments of 1972 . . . along with their respective implementing regulations—prohibit discrimination on the basis of gender

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[203] *Id.* at 2.

[204] *Id.*

[205] *Notice of Pending Enforcement*, *supra* note 57.

[206] *Id.* at 33.

[207] *See* Aishvarya Kavi, *Biden's 17 Executive Orders and Other Directives in Detail*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/2021/01/20/us/biden-executive-orders.html; *see also* Peter Baker, *Copying Roosevelt, Biden Wanted a Fast Start. Now Comes the Hard Part*, N.Y. TIMES (Jan. 30, 2021), https://www.nytimes.com/2021/01/30/us/politics/biden-administration-early-goals.html.

[208] Exec. Order No. 13,988, *supra* note 7.

> identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.[209]

The phrasing is important for two reasons. First, the *Bostock* majority explicitly stated that no statute other than Title VII was before the Court, and "[the Court has] not had the benefit of adversarial testing about the meaning of [sex in any other statutes], *and we do not prejudge any such question today*."[210] How, then, can President Biden state *Bostock*'s reasoning applies to Title IX, when *Bostock*'s reasoning itself says that it does not?

Second, the Executive Order cautions that its application shall only apply unless there are "sufficient indications to the contrary."[211] The *Bostock* dissenters provided a litany of reasons why the majority's interpretation should not be extended, each of which can serve as a "sufficient indication[] to the contrary."[212] However, analysis of the dissent's extensive prose and exhaustive appendices is not necessary. Title IX, while construed as similar to Title VII when convenient,[213] is a patchwork statute showing greater alignment with Title VI than Title VII.[214] The statute itself is "sufficient indication[] to the contrary."

The *Bostock* majority provides more than an indication that EO 13988 should not apply to Title IX; it provides an express statement limiting its application to Title VII.[215] Title IX was not interpreted in *Bostock*, and should not receive blanket application of the definition of sex (as outlined in *Bostock*) that the President, the Fourth Circuit, and the Eleventh Circuit seem so keen to apply.[216] The nature of Title VII—which is exclusively focused on the narrowly tailored employment context—pales in comparison the breadth of Title IX.[217] Title IX is a broad statute; the prohibitions

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[209] *Id.*

[210] Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1753 (2020) ("The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'") (emphasis added).

[211] Exec. Order No. 13,988, *supra* note 7.

[212] *Bostock*, 140 S. Ct. at 1778–1822 (Alito, J., dissenting).

[213] *See* discussion *supra* Part II(B).

[214] *See* discussion *supra* Part II(A).

[215] *Bostock*, 140 S. Ct. at 1743.

[216] Exec. Order No. 13,988, *supra* note 7; Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1304–11 (11th Cir. 2020); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616–18 (4th Cir. 2020).

[217] North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) ("There is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'") (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

of Title VII, recast in Title IX, are but one of the many functions of Title IX.[218]

Statutory breadth and comparative indications conflict with President Biden's blanket application of the *Bostock* decision to Title IX. More notably, the executive branch now conflicts with itself, with an Executive Order and the DOE speaking on the same subject with different results.[219] The DOE will presumably come into agreement with EO 13988 as the Biden administration progresses. Importantly, while an informal interpretation from an administrative agency is often followed, it does not have the force of law, and formal action through notice and comment rulemaking will take—on a fast track—at least two years.[220]

President Bidens's flurry of executive orders on inauguration day, including the order formalizing the rift between DOE policy and presidential policy, is unique.[221] Despite the unconventional approach chosen by President Biden, disagreement between the agency and the White House still exists during the transfer of power every few years—albeit informally. For example, in the few weeks after President Trump took office and prior to the publication of the *2017 Dear Colleague Letter*, conflict existed between the *2016 Dear Colleague Letter* and President Trump's social policy.[222] Disagreement and inconsistency will always be present in transfers of political power, underscoring the need for judicial intervention.

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[218] Title VII "makes it 'unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin.'" *Bostock*, 140 S. Ct. at 1734 (citing 42 U.S.C. § 2000e-2(a)(1)). Title IX covers the employment and retaliation claims provided in Title VII. *North Haven*, 456 U.S. at 514; Jackson v. Birmingham Bd. of Ed., 544 U.S. 167, 173, 176–80, 183–84 (2005). This is, however, one aspect of Title IX, which is also important for: "recruitment, admissions, and counseling; financial assistance; athletics; sex-based harassment; treatment of pregnant and parenting students; discipline; single-sex education." *Title IX and Sex Discrimination*, *supra* note 22.

[219] *Compare* Exec. Order No. 13,988, *supra* note 7, *with 2017 Dear Colleague Letter*, *supra* note 7.

[220] *See* FUNK ET AL., *supra* note 194, at 139–40, 341.

[221] Morgan Chalfant & Brett Samuels, *Biden signs Executive Orders at Furious Pace*, THE HILL (Jan. 29, 2021), https://thehill.com/homenews/administration/536536-biden-signs-executive-orders-at-furious-pace.

[222] *2017 Dear Colleague Letter*, *supra* note 7; 2*016 Dear Colleague Letter*, *supra* note 165.

IV. TITLE IX'S ENFORCEMENT WILL BE DEPENDENT ON AGENCY ACTION UNTIL THE SUPREME COURT ACTS TO CLARIFY UNCLEAR STATUTORY GUIDANCE.

The issue of the meaning of sex in Title IX is ripe for review.[223] Blind judicial application,[224] executive disagreement during transfers of power,[225] and contentious legislative action[226] make a clear decision by the Supreme Court on the deference question of paramount importance. The circuit courts expanding the meaning of sex from *Bostock* beyond Title VII have applied *Bostock* without complete analysis.[227] The DOE currently has its own conflicting policies which allude to the inclusion of sexual orientation and gender identity in Title IX's meaning of sex and simultaneously construe sex as a binary construct.[228] The Equality Act aims to codify the sweeping change of EO 13988, providing legislative support for a change implicating numerous administrative agencies and their actions.[229] The dizzying reconciliation is impossible and necessitates judicial review.

A. Resolution Requires Non-Deferential Judicial Review

The nature of administrative law and Title IX's clear administrative scheme imply administrative deference to the DOE for Title IX interpretations.[230] The traditional *Chevron v. Natural Resources Defense Council*[231] two-step deference scheme is only the tip of the iceberg for judicial

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[223] *See* Petition for a Writ of Certiorari at 19, Gloucester County School Board v. Grimm (No. 20-1163).

[224] Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616–18 (4th Cir. 2020); Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1304–11 (11th Cir. 2020).

[225] *See* discussion *supra* Part III.

[226] Bostock v. Clayton Cnty. Ga., 140 S. Ct. 1731,1755, n.1, n.2 (2020) (Alito, J., dissenting) (acknowledging the absence of congressional clarity on a well-known statutory silence); *see also* Equality Act, H.R. 5, 117th Cong. (2021) (as passed by House, Feb. 25, 2021). For a discussion on current legislative action *see supra* notes 20–23 and *infra* Part IV(B).

[227] *See, e.g.*, *Grimm*, 972 F.3d at 616–18; *Adams*, 968 F.3d at 1304–11.

[228] *See supra* notes 193–99 and accompanying text.

[229] Equality Act, H.R. 5, 117th Cong. (2021) (as passed by House, Feb. 25, 2021).

[230] *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 280 (1998) (acknowledging the express administrative authority over Title IX to the Department of Education). The Supreme Court has accorded deference to administrative agencies since (at minimum) the 19th Century. Since that time, the Court has reasoned that "[t]he interpretation given to the regulations by the department charged with their execution . . . is entitled to the greatest weight." Kisor v. Wilkie, 139 S. Ct. 2400, 2412 (2019) (quoting United States v. Eaton, 169 U.S. 331, 343 (1898)).

[231] 467 U.S. 837 (1984).

deference.[232] And in this situation, choosing a deference test is subjectively futile. The DOE should not receive deference; the meaning of sex in Title IX is one for the courts.

Administrative law precedent reveals that deference to the DOE for the meaning of sex in Title IX should not occur at all. In a majority of cases, the Supreme Court does not specify a deference test.[233] Although the Court may rely on input from the agency and will consider the issue from a deferential lens, in a majority of cases, deference is simply a principle and not a defined method,[234] such as the tests outlined in *Chevron*[235] or *Auer v. Robbins*.[236] In most cases the Court is hesitant to create sweeping change implicating policy issues, deferring to the agency responsible for administration of the statute or to congressional action. However, the Court will set deference aside when necessary, sporadically employing the "elephants in mouseholes" canon.[237] This should be such an instance.

To understand the Court's use of the "elephants in mouseholes" canon, analysis of *Gonzales v. Oregon*[238] is instructive. In *Gonzales*, the petitioner sought declaratory and injunctive relief from federal enforcement of the government's interpretation of the Controlled Substances Act, which severely impacted Oregon's Death With Dignity Act.[239] In holding that the government's interpretive rule was not entitled to deference, the Supreme Court stated:

> The underlying regulation does little more than restate the terms of the statute itself. . . . [It] just repeats two statutory phrases and attempts to summarize the others . . . An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.[240]

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[232] William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamadan*, 96 GEO. L.J. 1083, 1098–1117 (2008) (analyzing the types of deference utilized by the Supreme Court); s*ee also* Cohen v. Brown Univ., 991 F.2d 888, 895 (1st Cir. 1993) (stating that the DOE's interpretation of Title IX must be given appropriate deference); Grimm v. Gloucester Cnty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016) (applying *Auer* deference to DOE interpretations).

[233] Eskridge & Baer, *supra* note 232, at 1117.

[234] *Id.*

[235] 467 U.S. 837 (1984).

[236] 519 U.S. 452 (1997).

[237] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001); Gonzales v. Oregon, 546 U.S. 243, 267, 290 (2006).

[238] 546 U.S. 243.

[239] *Id.* at 254.

[240] *Id.* at 257.

That same analysis applies here. The recent *2020 Rule*—and the interpretations that have come before and after it—simply repeats the statutory phrasing of Title IX. The DOE has consistently failed to use its own expertise to interpret Title IX's text and instead "paraphras[es] the statutory language" by repeatedly parroting yet failing to interpret "on the basis of sex."[241]

Further analysis of *Gonzales* shows its importance here. In *Gonzales*, the Court grappled with whether *Chevron* deference is appropriate when an informal interpretation creates a seismic shift in the function and breadth of a statute.[242] At the time *Gonzales* was decided, dignity in dying had become a "moral and policy issue at the national as well as state level."[243] The moral issues present in the *Gonzales* case were likely not considered by Congress in the 1970s when initial legislation was enacted.[244] The Court concluded that informal interpretations are not the

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[241] *Id.*; *see also* the discussion of administrative actions *supra* Part III. Additional attention should be paid to the fact that here, the Department of Education is often choosing not to interpret its own statute, instead relying on paraphrasing a statute over which it has no authority: Title VII. This has led, in part, to the current issue. *See supra* notes 199–201.

[242] *Gonzales*, 546 U.S. at 255–56, 258–59 (exploring the principles of *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984)). In 2001, the Attorney General issued an interpretation of the "legitimate medical purpose" exception for prescription of "Schedule II" substances, which restricted the use of "Schedule II" substances from use in physician assisted suicide. These substances were used by Oregon physicians under the Oregon Death With Dignity Act. This interpretation, then, significantly impaired the rights of Oregon citizens under the Act. The Court noted the interpretation would "substantially disrupt" the function of Oregon's policy. The Court identified the issue of restricting death with dignity—and therefore restricting rights within a hotly contested "political and moral debate" to be one where deference is inappropriate due to the "importance of the issue." *Gonzales*, 546 U.S. at 254, 249, 267; *see also* Eskridge & Baer, *supra* note 232, at 1131.

[243] *Gonzales*, 546 U.S. at 249 ("Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide.") (quoting Washington v. Glucksberg, 521 U.S. 702, 735 (1997)); Eskridge & Baer, *supra* note 232, at 1131.

[244] *See* Eskridge & Baer, *supra* note 232, at 1131–33; *see also* David M. Wagner, Gonzales v. Oregon*: The Assisted Suicide of* Chevron *Deference*, 2007 MICH. ST. L. REV. 435, 448 (2007) (stating that a modern Court cannot impose on a 1970s Congress a "postmodern moral" perspective on a hot-button issue). The *Gonzales* Court acknowledged that Congress, when it enacted the statute at issue in that case, was motivated to mitigate societal issues with drug abuse. Physician-assisted suicide was likely not considered in a statute impacting drug abuse. *See Gonzales*, 546 U.S. at 269. Similarly, it is unlikely transgender rights were considered by Congress when discussing Title IX, where related legislative discussion was not focused on protection of anything other than women. *See, e.g.*, *Discrimination Against Women: Hearing on Section 805 of H.R. 16098 Before the*

appropriate vehicle for an issue of moral and political divisiveness, asserting Congress does not leave "elephants in mouseholes."[245] As a result, the administrative interpretation was not entitled to any deference.[246]

The inclusion of sexual orientation and gender identity in the word "sex" within anti-discrimination statutes has the same moral and policy implication found in *Gonzales*.[247] Like the issue in *Gonzales*, sexual orientation and transgender rights have become a moral and policy issue demonstrating a societal shift between Title IX's statutory enactment in 1972 and modern social concern.[248] A moral and policy decision applied to a broadly-worded statute with an even broader reach should be viewed, following *Gonzales*, as too large to leave to administrative decision making.[249] As such, DOE interpretations of the word "sex" in Title IX should not receive deference.

Spec. Subcomm. on Educ. of the H. Comm. on Educ. & Lab., 91st Cong., 2d Sess. 1 (1970) (statement of Rep. Edith Green).

[245] *Gonzales*, 546 U.S. at 267 (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)) (stating further that the importance of the issue before the Court makes delegation "all the more suspect"); Eskridge & Baer, *supra* note 232, at 1133.

[246] *Gonzales*, 546 U.S. at 258 ("Just as the Interpretive Rule receives no deference under *Auer*, neither does it receive deference under *Chevron*.").

[247] *See* Nicholas Almendares, *Blame-Shifting, Judicial Review, and Public Welfare*, 27 J.L. & POL. 239, 267 (2012) ("Policies concerning primarily moral or value issues . . . will be unlikely candidates for broad delegation," meaning Congress would not delegate moral issues to the agency); *see also* Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1995 (2008) (stating in part that when "rights are in conflict, the Supreme Court may want to limit competing interpretations that could inspire greater political resistance"); *but see* William N. Eskridge & Kevin S. Schwartz, Chevron *and Agency Norm-Entrepreneurship*, 115 YALE L.J. 2623, 2628–30 (2006). Eskridge and Schwartz argue that agencies play "an important role . . . in developing public norms" and that agencies are important for the "testing of public norms," arguing that when "public values are implicated" deference becomes a larger issue. *Id.* at 2632, 2624.

[248] TRANSGENDER RIGHTS AND POLITICS 136–40, 163 (Jami K. Taylor & Donald P. Haider-Markel eds., 2014); *see also* Tia Powell et al., *Transgender Rights as Human* Rights, 18 AMA J. OF ETHICS 1126, 1126–27 (2016); *cf.* Wagner, *supra* note 244, at 448 (arguing that a modern Court cannot impose a "postmodern moral" perspective on a 1970s Congress, specifically for a culturally contentious issue).

[249] *See Gonzales*, 546 U.S. at 267. Title IX is a broad statute, which the Court has encouraged to be read as broadly as its language provides. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982). Application of a moral decision to a broad statute should be left to the Court, not the agency. *See* Joy Milligan, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 81 NYU L. REV. 1206, 1207–08 (2006) ("[J]udges play a visible and substantial role in regulating our public morality, as they rule on questions

B. No Other Way: Legislative Action Requires Agency Action

Legislative action does not mitigate the need for judicial review. The most recent congressional recognition of the need for clarity regarding the meaning of sex in anti-discrimination statutes comes in the revival of the Equality Act.[250] After failure to pass in 2019, the Act was passed in the House on February 26, 2021.[251] The Equality Act aims to amend Title VII to conform with the Court's interpretation in *Bostock* and imputes the broad interpretation of sex to other statutes to ensure consistency and to "provide guidance and notice to individuals, organizations, corporations, and agencies regarding their obligations under the law."[252]

The Equality Act modifies the language of statutes that many agencies are expressly authorized to administer.[253] Administration of new statutory language is a task for the agency, which acts through rules and interpretive guidance.[254] Within Title IX, the DOE retains the responsibility to interpret statutory requirements and to provide schools with guidance for proper compliance with Title IX.[255] As such, congressional action addressing equality through changes to statutory language will remain to a large extent administrative, and judicial review of legislative action (unless invoking a constitutional challenge) will follow principles of administrative law—invoking deference questions.[256]

Deference is inappropriate when the issue is one of large moral and policy significance. Policy significance can arise when a statute with strong financial impact is interpreted by an agency.[257] The Court established in *King v. Burwell*[258] that the Court will not use deference when a

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such as the legality of capital punishment, same-sex marriage, abortion regulation, and euthanasia . . . we [must] recognize the role of judges in arbitrating public morality").

[250] Equality Act, H.R. 5, 117th Cong. (as passed by House, Feb. 25, 2021).

[251] *Id.*; Trudy Ring, *House Passes Equality Act; Now on to Senate*, THE ADVOCATE (Feb. 25, 2021, 5:04 PM), https://www.advocate.com/politics/2021/2/25/house-passes-equality-act-now-senate.

[252] Equality Act, H.R. 5, 117th Cong. (as passed by House, Feb. 25, 2021).

[253] The Department of Education has direct authority over the administration of Title IX. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 280 (1998); *see also Title IX and Sex Discrimination*, *supra* note 22. For an additional example, the Equality Act changes the definition of sex in the Fair Housing Act, which is administered through the authority granted by Congress to the Department of Housing and Urban Development. *See* PERL, *supra* note 22, at 1.

[254] MAEVE P. CAREY, CONG. RSCH. SERV., IF10003, AN OVERVIEW OF FEDERAL REGULATIONS AND THE RULEMAKING PROCESS (2019).

[255] *Title IX and Sex Discrimination*, *supra* note 22.

[256] *See* deference discussion *supra* Part IV(A).

[257] *See* King v. Burwell, 576 U.S. 473, 485 (2015) ("In extraordinary cases, however, there may be reason to hesitate before [applying *Chevron* deference and] concluding that Congress has intended such an implicit delegation.").

[258] 576 U.S. 473 (2015).

financially impactful interpretation is challenged.[259] *King* demonstrates that the Court forgoes deference when an agency interpretation results in heavy financial impact. In the context of Title IX, the financial impact on schools—the risk of lost federal funding—reinforces that deference should not apply here.

Title IX creates a contract with the educational institution in which nondiscrimination conditions receipt of federal funds. When legislative action is part of judicial review of agency interpretations, the Court in *King* stated that judicial consideration must be paid to the "deep 'economic and political significance' that is central to this statutory scheme," when it impacts "billions of dollars in spending each year and affect[s] . . . millions of people."[260] In fiscal year 2019, $155.9 billion federal dollars were spent on an education system that served millions of people.[261]

Congressional action, such as the Equality Act, will require the DOE to provide educational institutions with guidance on maintaining compliance with the new statutory language. If that guidance is challenged, the fiscal impact on education of a loss in federal funding further reinforces that the Court will not—and should not—apply a deference scheme.

CONCLUSION

Judicial interpretation is the only means of resolution. The current trend toward judicial application of *Bostock* without analysis of the appropriateness of the action leaves this issue ripe for review. Further, issues with EO 13988 and the shaky foundation of the DOE's policy make a judicial determination a necessity.[262] Finally, any challenge to the Equality Act, which by its nature implicates agency action, will necessitate judicial review by the Supreme Court.[263]

Until the Supreme Court undertakes an interpretive analysis of Title IX, student civil rights will remain in the hands of agencies and the executive branch, placing students at risk for drastic changes to their rights occurring every four to eight years. The pendulum of inclusion swung

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[259] *Id.* at 485–86 (holding that deference is inappropriate when the fiscal impact is substantial).

[260] *Id.*

[261] *Spending Explorer: FY 2019*, USASPENDING.GOV (Sept. 30, 2019), https://www.usaspending.gov/explorer/budget_function; *Enrollment trends*, NAT'L CTR. FOR EDUC. STAT. (2019), https://nces.ed.gov/fastfacts/display.asp?id=65. In 2016, 56.4 million students were enrolled in K–12 education. *Id.* That same year, 19.8 million students were enrolled in post-secondary education. *Total Fall Enrollment in Degree-Granting Postsecondary Institutions*, NAT'L CTR. FOR EDUC. STAT. (2019), https://nces.ed.gov/programs/digest/d19/tables/dt19_303.10.asp.

[262] *See* discussion *supra* Part III.

[263] *See About the Supreme Court*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about (last visited Feb. 24, 2021).

drastically between 2016 and 2017 when the White House changed hands from President Obama to President Trump,[264] and that pendulum has swung back under President Biden.[265]

Vulnerable youth are on unstable ground every day.[266] Placing their civil rights in precarious reliance on the executive branch—where they remain even if both houses of Congress act—increases that vulnerability. The judiciary must step up to resolve this issue. Reliance on administrative law will not continue to suffice if real, effective, and lasting change is to be made.

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[264] *2017 Dear Colleague Letter*, *supra* note 7; *2016 Dear Colleague Letter*, *supra* note 165.

[265] Exec. Order No. 13,988, *supra* note 7, at 7024 (reinstating and expanding policies delineated in *2016 Dear Colleague Letter*, *supra* note 165).

[266] *See* Martha A. Fineman, *Vulnerability, Resilience, and LGBT Youth*, 23 TEMP. POL. & CIV. RTS. L. REV. 307, 315 (2014); Arnold H. Grossman & Anthony R. D'augelli, *Transgender Youth: Invisible and Vulnerable*, 51 J. OF HOMOSEXUALITY 111 (2006).