

Federalism Through a Transgender Lens

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Many current issues—including those that directly apply to K-12 schools—can best be taught and understood through a federalism perspective. Federalism is consequential, for example, in teaching about transgender people and identities. To what extent and in what ways should public schools include transgender topics in the curriculum, regulate restroom use, or restrict athletic participation? Policy authority in much of this area is reserved to state and local governments under the Tenth Amendment. As such, there is diversity in state laws and local policies covering transgender nondiscrimination, vital records, hate crimes, sports participation as well as access to health care, education, and restrooms. Recently, states have started to diverge between restricting versus protecting transgender rights. This divergence is evident in Figure 1, showing the distribution of state [Movement Advancement Project \(MAP\) Gender Identity Policy](#) scores from 2017 and 2024.

The index scores states on a set of pro-transgender and anti-transgender policies covering adoption and foster care, non-discrimination, religious exemptions, transgender youth, health-care, criminal justice, and identity documents. Higher scores indicate a greater portion of possible protections and fewer restrictions, with 100 being the maximum. In 2017, states were spread between -20 and 90 points. By 2024, the distribution had expanded to -40 to 100 points, with a large gulf between states that mostly restrict transgender rights and those that mostly protect them. In this digest, we explain how federalism, separation of powers, and partisanship are fueling policy divergence, which is necessary to foster student understanding of a complex political issue.

NATIONAL POLICYMAKING ON TRANSGENDER RIGHTS

Transgender rights are a new front in the [culture wars](#) where religious and partisan preferences increasingly shape attitudes on transgender rights. Yet, when partisan division over issues is added to institutional features in American government, such as the separation of powers and the super-majoritarian rules of the

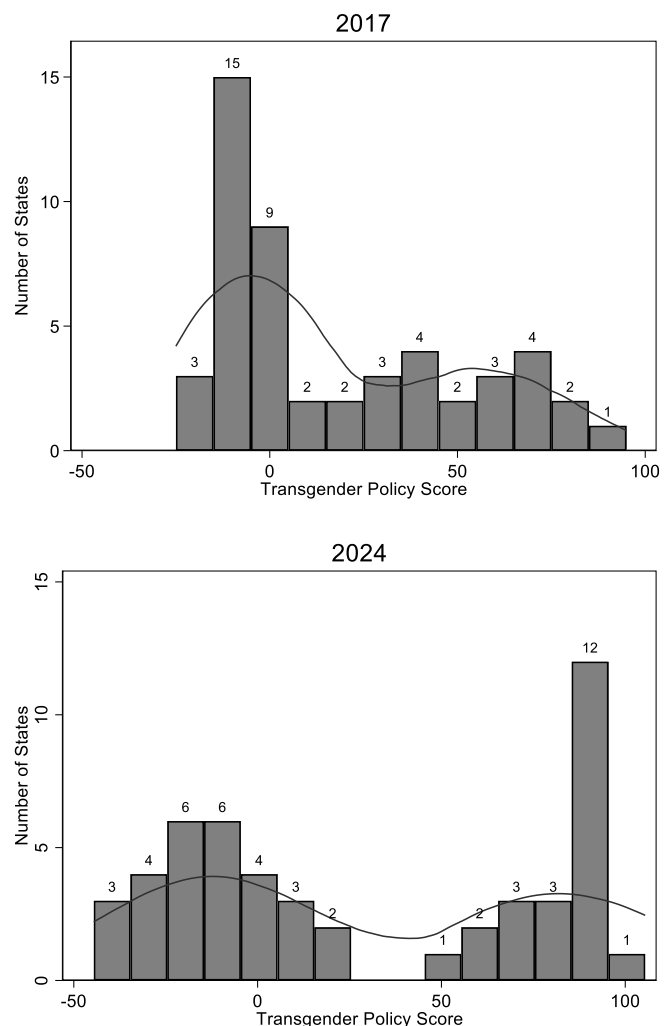


Figure 1. Divergence of State Transgender Policy, 2017-2024

U.S. Senate, national policy gridlock is likely.

Indeed, since the rise of the transgender rights movement in the late 1980s, this area of policymaking has largely remained gridlocked within the federal government. The only break occurred during the 111th Congress in 2009 when Democrats controlled the House of Representatives, a supermajority in the Senate, and

the White House. This Congress passed the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, one of the few explicitly transgender-inclusive laws enacted by the federal government. Most other transgender-related legislation has languished in Congress, including the [Equality Act](#) to prohibit discrimination based on gender identity, the [Military Readiness Act](#) to ban transgender people from military service, and the [Protection of Women and Girls in Sports Act](#) to bar transgender girls and women from participating in girls' or women's sports.

With Congress gridlocked, executive branch agencies become prominent in fights over transgender rights. For decades, executive agencies have issued policies related to transgender identity, such as rules about amending passports or Social Security records, but these drew little interest until Barack Obama's administration. Bolstered by various federal [district](#) and [appellate court rulings](#), the Obama administration expanded transgender rights by taking a gender identity-inclusive view of the term "sex" in laws that ban discrimination, including Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Section 1557 of the Affordable Care Act.

Yet, the limits of executive branch action quickly became clear. Some agency regulations can be challenged in federal court under the Administrative Procedure Act, and executive action can be reversed by a successor president. Indeed, [several state Republican attorneys general blocked a variety of Obama-era policies](#) in federal court. Further, after 2016, Donald Trump's administration [rolled back many of the Obama-era policies](#) with [narrow interpretations of the term "sex"](#) and a [ban on transgender troops](#). In turn, these actions were [largely reversed by Joseph Biden's administration](#).

Additionally, the U.S. Supreme Court's decision in [Bostock v. Clayton County \(2020\)](#) held that the Title VII prohibition of sex discrimination in employment is violated when an employer fires a person for being gay or transgender. However, the decision invited challenges examining how Title VII might conflict with religious liberties. The ruling was also applied narrowly to employment discrimination, and it explicitly did not address public restroom access.

Although the Biden administration wanted to apply *Bostock* to other types of sex-based discrimination, opponents often [blocked this in federal court](#). Thus, outside of federal hate-crimes policy and the *Bostock*-related employment discrimination ban, national policymaking on transgender rights is stymied by congressional gridlock, changing administrations, and judicial action.

STATE AND LOCAL POLICYMAKING ON TRANSGENDER RIGHTS

As a result, states have filled the policy void. Indeed, Justice Louis Brandeis asserts in [New State Ice Co. v. Liebmann \(1932\)](#) that states can serve as policy laboratories in areas outside the federal government's domain. Yet, the nationalization of Amer-

ican politics has made many states [laboratories of democratic backsliding](#) and [increasingly polarized](#). Nationalization refers to the increasing tendency for state and sometimes local elections to be determined by voter reactions to national partisan leanings and issues rather than state and local issues and candidate characteristics.

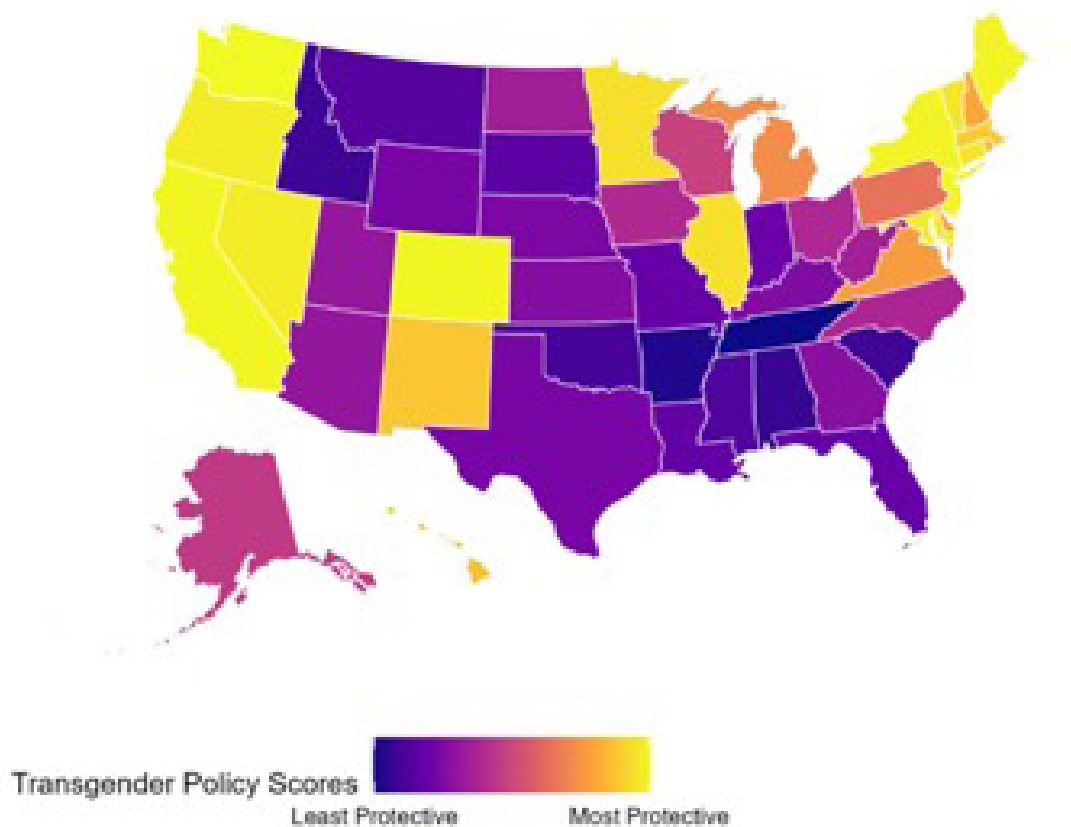
For transgender rights, this nationalization has included policies on public restrooms, locker rooms, medically necessary care, school curricula, identity markers, health insurance coverage, and sports participation. Similarly, local governments and school districts can sometimes pass their own transgender-related policies. Consequently, some states have legislatively [pre-empted](#) (i.e., valid state law supersedes local policy) local policies that go beyond state law.

States adopt policies for various internal and external reasons. For morality policies like LGBTQ rights, a state's internal political and social factors, including partisanship and citizen ideology, are important. It was liberal allies in the Democratic party, mostly gained through the slow incorporation of transgender rights into the larger gay rights movement, that opened a path for transgender rights. With some exceptions, such as New Mexico and Illinois, this rights expansion occurred mostly on the West Coast and in the Northeast where states enacted non-discrimination laws, hate-crime laws, and less restrictive policies on identity documents.

However, as transgender rights have become more politically salient, federalism has been a double-edged sword for transgender people. Though states can (and do) protect transgender rights, they can also curtail those rights. So, as the [parties polarized over these policies](#), states with unified Republican control, constituting a plurality of states, gave social conservatives opportunities to restrict transgender rights. Absent federal laws, states have recently barred children from accessing transition-related medical care, restricted access to public restrooms, and banned transgender girls and women from participating in sex-segregated sports. Notably, the diffusion of these restrictive policies follows from the 2020 *Bostock* ruling, which explicitly highlighted policy areas where its holdings did not apply.

The rapid spread of these anti-transgender policies, which heavily contributes to the increasing transgender policy divide between states shown in Figure 2, is consistent with outbreaks of morality policy. These policies are likely perceived as winning political strategies by Republicans to push back against gains by the LGBTQ movement. Further, with anti-transgender legislation, Republicans reward the religious conservatives, an important party constituency, and these laws can be [used as wedge issues to mobilize partisans in elections](#). This is important given the declining effectiveness of abortion and same-sex marriage as mobilizing issues for Republicans. Of course, Democrats use similar wedge issues to mobilize and reward important constituencies in their party, such as the LGBTQ community.

Frequently, public schools are the place where many of these morality issues play out because the states and their localities



Source: Movement Advancement Project.

Figure 2: Transgender Rights Policies in the States 2024

are largely responsible for education. They are also highly visible, everywhere, and many local and state policy actors have the ability to seize upon an issue for political advantage. For example, California recently passed legislation that allows school teachers and staff to not disclose to parents if their child uses a different name or pronouns, or discloses their sexual orientation. This law is being challenged in the courts. It is likely some states may follow California’s lead while others might take the opposite direction and require parental notification.

CONCLUSION

Federalism is a “blessing” in the sense that it allows for advocates of transgender rights to advance their policy agenda in jurisdictions where institutional and public support is strong. It is also a “curse” for transgender advocates because many states are hostile to transgender rights. Currently, approximately 36 percent of transgender people in the United States aged 13 or older live in states where their rights are restricted by their state government. Without congressional action, the only national guidance will come from the federal courts. With the current make-up of the U.S. Supreme Court, the Court is unlikely to provide broad national protections for transgender people, especially given the Court’s concern for religious freedom signaled in *Bostock*. As such, the federal system will likely continue to produce a patchwork of polarized policies in states and localities. Teachers who wish to include timely, relevant, and important topics in the curriculum such as trans-

gender rights need to consider the federated context in which controversies exist.

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