LEVELING THE PLAYING FIELD: TITLE IX, REVENUE SHARING, AND THE NEED FOR A SHIFTING APPROACH TO GENDER EQUALITY IN COLLEGE ATHLETICS

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Title IX has been essential for gender equality in college athletics, supported by the Department of Education (ED) and its Office of Civil Rights (OCR). The recent Supreme Court ruling in *Loper Bright Enterprises v. Raimondo* challenges administrative decisions, raising concerns about future legal challenges to agency decisions. College athletics has already been impacted by the allowance of NIL money for athletes, and now will be by the introduction of revenue sharing. While a recent ED ruling temporarily implements Title IX guidelines for revenue sharing, its long-term viability is uncertain due to potential litigation and administrative turnover. This article argues that to secure the future of Olympic sports, especially women's sports, college athletes must be considered employees of conferences, with gender protections provided under Title VII and the Equal Pay Act.

INTRODUCTION

Title IX has long been the backbone supporting gender equality fostered by the interpretation and effectuation of the Department of Education (ED) and connected Office of Civil Rights (OCR).[1] The recent Supreme Court ruling in *Loper Bright Enterprises v. Raimondo*[2] has called into question a wide array of administrative decisions, even going so far as to see current

[1] United States Courts, https://www.uscourts.gov/educational-resources/educational-activities/14th-amendment-and-evolution-title-ix#:~:text=In%201975%2C%20the%20United%20States,document%20assuring%20its%20compliance%20with, (last visited Sept. 27, 2024).

[2] Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024).

legislation deciding in favor of plaintiffs who challengeadministrative rules.[3] The future of college athletics has rapidly changed over the last few years, following the allowance of NIL money for athletes. These three issues converge on the right of athletes to receive TV money from their schools. A decision must be made on how this money is distributed and whose job it will be to make such a decision.[4] While the recent Department of Education ruling provides a temporary shield for Title IX complaint revenue sharing, the question is begged: how long will this administrative ruling actually last?[5] The challenge of litigation as well as the possibility of future agency changes that come naturally with administration turnover will likely threaten this decision rather quickly. This article will argue that in order to protect the future of Olympic sports, especially female sports, in college athletics, a shift away from Title IX must occur. To save the future of these sports at the college level, athletes must be deemed employees of conferences, finding alternative gender protections now under Title VII.

BACKGROUND

Title IX

On June 23, 1972, Title IX of the Education Amendments of 1972 was passed by Congress and later signed into action by President Nixon.[6] The statute in its entirety reads: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance…"[7] Over the last fifty years, the

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[3] Jenny Lee, Hailey Golds, Michael Warner, Franczek (Aug. 20, 2024), https://www.franczek.com/blog/chevron-overturned-federal-agency-deference-over-impact-of-loper-bright-on-regulations-affecting-employers-and-educators/.

[4] The concept of this comment came from a series of conversations with Professor Berry.

[5] Karl Ludwig, *Department of Education Says Revenue Sharing Must Comply with Title IX*, Pittsburgh Sports Now (Jan. 17, 2025), https://pittsburghsportsnow.com/2025/01/17/department-of-education-says-revenue-sharing-must-comply-with-title-ix/ .

[6] *History of Title IX,* Women's Sports Foundation (Aug. 13, 2019), https://www.womenssportsfoundation.org/advocacy/history-of-title-ix/.

[7] 20 U.S.C.A. § 1681.

original statute has been interpreted and effectuated by the ED and OCR as to effectively achieve what the statute had sought out to do, provide equal opportunity to female athletes. [8] Each subsequent administration has demonstrated this by effectuating the statute continually, creating a constant ebb and flow of restrictions, regulations, and guidelines. Most recently, in April of 2024, the Biden administration announced that the DOE's set of final rules would go into effect beginning August 1st.[9] These rules most notably put into effect the expansion of 'sex discrimination', coming to incorporate discrimination based on sexual orientation and gender identity (this final rule will be discussed more later with relation to the *Loper Bright* decision).[10] Title IX has been effectuated as to annunciate a three-prong test with relation to funding and equitable opportunities. The OCR provided a three-prong test stating that to be in compliance with Title IX, an institution must demonstrate one of the following to comply: substantial proportionality, history and continuing practice of program expansion, and full and effective accommodation of athletic interests.[11] This administrative agency deference has been the status quo since the mid 1980s, but post-*Loper Bright*, the water seems murky as to what the future holds for administrative decisions.

Loper Bright

Beginning in 1984, the Supreme Court ruled that administrative agency interpretations would withstand judicial review.[12] In this ruling the Court granted deference to administrative agencies to interpret ambiguous statutes.[13] Following nearly forty years of administrative agency deference, in hearing and ruling in favor of Loper Bright Enterprises, today's

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[8] *Supra* Lee note 3, *supra* note 6.

[9] American Council on Education, *Biden Administration's Final Title IX Rules Goes Into Effect Aug. 1*, Am. Council on Educ. (Apr. 22, 2024), https://www.acenet.edu/News-Room/Pages/Biden-Admin-Final-Title-IX-Rule-Effective-Aug-1.aspx.

[10] *Id.*

[11] Lee Green, NFHS (Feb. 8, 2022), https://www.nfhs.org/articles/title-ix-compliance-part-i-the-three-prong-test/.

[12] *See generally* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)

[13] *Id.*

Supreme Court overruled *Chevron*.[14] The Court held that "the Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous."[15] This ruling has already proven to be problematic as applied for agency decisions over the last year alone. Referring to the Biden administration's final rule regarding sex discrimination, a multitude of challenges have already been brought against such.[16] To date, courts around the country granted preliminary injunctions against these rules to twenty-six states, showing the new power vested in the courts post-*Loper Bright*.[17] Challenges have been brought across a variety of industries, another notable one being the District Court in Texas which struck down the FTC's rule banning non-competes.[18] Hope for agency power as a whole is not to be lost though. Even in the Court's rejection of *Chevron*, Chief Justice Roberts consistently articulates that the option for agency opinion to be heard may still exist under a preceding case.[19] In the 1940s the Court heard a case in which the ruling left room for an agency's power to be persuasive, even in times when they lack the power to control.[20] This case outlines three factors for courts to take into account to decide on the persuasive nature of the agency's interpretations: "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements…"[21] This case leaves room for agency persuasiveness in the wake of *Loper Bright*, opening the door for options in agency interpretations.

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[14] Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024).

[15] *Id.* at 2263.

[16] Carrie Evans Wilson & Abigail L. Parnell, *Loper Bright, Final Rule Injunctions, And More – Just How Messy Are Things Going to Get?*, Montgomery McCracken (Aug. 6, 2024), https://www.mmwr.com/loper-bright-final-rule-injunctions-and-more-just-how-messy-are-things-going-to-get/.

[17] *Id.*, Alabama v. U.S. Sec'y of Educ., No. 24-12444, 2024 WL 3981994 (11th Cir. Aug. 22, 2024).

[18] *See generally* Ryan, LLC v. Fed. Trade Comm'n, No. 3:24-CV-00986-E, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024).

[19] *Loper Bright Enterprises*, 144 S. Ct. 2244 (2024).

[20] *Skidmore Deference: Agency Actions Without the Force of Law*, Bloomberg Law (2024), https://www.bloomberglaw.com/document/X7RFJ404000000.

[21] *Skidmore v. Swift & Co.*, 323 U.S. 134 at 140 (1944).

The Future of College Athletics

College athletics as we know it has existed for over 100 years.[22] The NCAA finds its roots in providing safety for collegiate football to continue, and it has grown into a billion-dollar industry today.[23] The NCAA promotes regulations outlining academic eligibility requirements, competition and practice scheduling, and amateurism regarding athletes.[24] Over the last few years though, the world of college athletics has experienced a dramatic shift. Athletes have been challenging the NCAA's rules preventing them from benefiting off of their NIL ("Name, Image and Likeness") for years, followed by the first big successful challenge in 2015.[25] Athletes in the *O'Bannon* and *Alston* cases were able to shift the NCAA's regulations allowing athletes to obtain money beyond just tuition and room and board.[26] Following this case, in 2021, the Supreme Court ruled that the NCAA's restrictions on the amount of education-related benefits also violated antitrust laws.[27] Justice Kavanaugh's concurrence pointed attention to the questionable nature of the longstanding NCAA rules and regulations, stating how any other business following similar models in the US would be flat out illegal under antitrust laws.[28]

Justice Kavanaugh even went so far as to state "The NCAA is not above the law", calling other actors into action to challenge the NCAA's monopoly model.[29] These recent decisions opened the door for states, beginning with California, to begin passing legislation that prevented the NCAA from interfering with college athletes' abilities to benefit from their NIL. After California's passing of the Fair Pay to Play Act in 2019, other states – Colorado, Florida, Nebraska, and New Jersey to name a few – passed their own laws prohibiting the NCAA from penalizing schools and athletes in their

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[22] *History*, NCAA, https://www.ncaa.org/sports/2021/5/4/history.aspx , (last visited Sept. 27, 2024).

[23] *Id.*

[24] *Summary of NCAA Regulations – NCAA Division I*, NCAA, https://ncaaorg.s3.amazonaws.com/compliance/d1/2024-25/2024-25D1Comp_SummaryofNCAARegulations.pdf.

[25] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015).

[26] *See generally id.*; Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69 (2021).

[27] *See generally* Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69 (2021).

[28] *Id.* at 109, 110 (Kavanaugh, J., concurring).

[29] *Id.* at 112 (Kavanaugh, J., concurring).

states from benefiting from their NIL.[30] As of early 2024, thirty-one states and DC have passed legislation regulating and allowing NIL deals.[31]

Athletes do not want to stop here though, further litigation has been filed since, including a class action in California in which current and past athletes are making claims for their NIL money, as well as a claim to entitlement for payment of a share of the TV money earned by schools each year.[32] In early October of 2024, this proposed settlement became a reality for the NCAA and its member institutions, as Judge Claudia Wilkin granted it preliminary approval.[33]

This settlement is not only groundbreaking in the way of revenue sharing, but it also poses to shift another long standing basis within NCAA sports: scholarship numbers. The settlement states that when revenue sharing begins, schools will now be limited to roster caps where every athlete on the team is entitled to a full scholarship.[34] These scholarships will still be subject to Title IX provisions, balancing scholarships between male and female athletes, but these new roster limits create other issues for schools and athletes.[35] Based on the current participation and size of rosters, these caps will eliminate roughly forty spots at schools, cutting around 7% of a school's student athlete body.[36] While a move towards no restriction on the number of scholarships being

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[30] Simon Lockard, *The Fair Pay to Pay Act and How California Led the Way to College Athlete Pay Reform and the Development of NIL*, USC Gould Sch. of Law (Apr. 27, 2024), https://lawforbusiness.usc.edu/the-fair-pay-to-pay-act-and-how-california-led-the-way-to-college-athlete-pay-reform-and-the-development-of-nil/ .

[31] Noah Henderson, *High School NIL: Will Losing Star Athletes Make States Rethink Policy?*, Sports Illustrated (Jan. 31, 2024), https://www.si.com/fannation/name-image-likeness/news/high-school-nil-will-losing-star-athletes-make-states-rethink-policy-noah9.

[32] *In re College Athlete NIL Litigation*, Pl's Notice of Mot. and Mot. for Prelim. Settlement Approval (Hearing date Sept. 5, 2024).

[33] Dan Murphy, *Settlement Designed to Pay College Athletes gets Preliminary Approval*, ESPN (Oct. 7, 2024), https://www.espn.com/college-sports/story/_/id/41665307/settlement-designed-pay-college-athletes-gets-preliminary-approval_.

[34] Noah Henderson, *New NCAA Roster Limits: The Death of the Walk-On Athlete*, Sports Illustrated (Oct. 30, 2024), https://www.si.com/fannation/name-image-likeness/nil-news/new-ncaa-roster-limits-the-death-of-the-walk-on-athlete.

[35] *Id.*

[36] *Id.*; Tweet from Braly Keller. Twitter (Jan. 4, 2025), https://twitter.com/BralyKeller/status/152850460955953 .

offered (besides roster limit numbers) may appear hopeful for many – guaranteeing certain individuals on high profile and coincidentally revenue generating sports a full scholarship – the prospect of such alternatively seems to be the end of the line currently for others.

The culmination of this groundbreaking antitrust decision against the NCAA with the *Loper Bright* decision leads college athletics to a troubling crossroads. Where does the college athletics model go from here, and how will non-revenue sport athletes be disproportionately affected going forward?

PROBLEM

With the prospect of athletes receiving a share of the TV money generated by their schools now inevitable, there will be an influx of millions of dollars into the college athletics sphere, which prior to January 17, 2025 was due to be largely unregulated.[37] The current influx of funds distributed to athletes is regulated by state NIL laws (collectives/booster donations and sponsorships) and the OCR/Title IX regulations (scholarships and opportunity funding).[38] Prior to the very recent Department of Education statements, no agency, school, or state had made it known exactly how this new money is to be distributed and whether that will be equitably amongst sports and genders. The recent memo put out by the ED and the OCR states that money distributed by schools pursuant to revenue sharing is "athletic financial assistance" and therefore must be distributed proportionally under Title IX. [39]

While writing this paper prior to the recent statements, two suggestions often rose to the surface: (1) All of the money should be distributed to revenue sports (seeing they are the ones creating it), or at least proportionally based on how much they earn for the school, and (2) That the OCR should oversee equitable distribution

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[37] Ludwig, *supra* note 5.

[38] 34 CFR § 106.41 (c) (2025) (referencing the three part test for Title IX compliance with regard to scholarships: proportionality, history or continuing practice of program expansion, or showing interests are fully and effectively accommodated by the present program).

[39] John Talty, *Explaining What Department of Education's Startling Title IX Memo Could Mean For Revenue-Sharing Future*, CBS Sports (Jan. 17, 2025), https://www.cbssports.com/college-football/news/explaining-what-department-of-educations-startling-title-ix-memo-could-mean-for-revenue-share-future/ .

similar to that in the proportionality prong of the three-prong test.[40] These suggestions fall on a few points of scrutiny.

First, many individuals would likely argue that since the revenue sports are the ones who bring eyes (and therefore money) to the schools, they should be the ones to which this money is distributed.[41] On average, football brings in $31.9 million per school per year and basketball brings in around $8.1 million per school per year.[42] These numbers are just averages to keep in mind, seeing that schools within Power 5 conferences, or those with big name brands in their sports, can bring in well over double the average.[43] This has been the status quo for over fifty years, allowing these sports to bring in the big money while funneling their revenue towards other sports, allowing for other athletic opportunities at universities.

Turning to the TV aspect though, in today's world it can easily be argued that female athletes are equally entitled to a share of this money. In early 2024, the NCAA women's basketball National Championship became the most watched basketball game *at any level*.[44] Yes, at around 18.9 million viewers, the number of people who watched women's college basketball on April 7, 2024, surpassed viewership for even professional games.[45] Women's volleyball, after being effectively promoted by ESPN, saw record viewership in 2024, seeing viewership increase 98%.[46] Women's

[40] Scott Dochterman, *As House v. NCAA Settlement Unravels, Big Ten Ads Are Rethinking Plans and Seeking Clarity*, The Athletic (Sept. 12, 2024) https://www.nytimes.com/athletic/5761263/2024/09/12/house-ncaa-settlement-big-ten-finances/.

[41] *See generally* George Malone, *Which College Sports Make the Most Money?*, Yahoo! Finance (Mar. 21, 2022), https://finance.yahoo.com/news/college-sports-most-money-130012417.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAANoYNxuw2Ua43E6exWYOCUqOMuppEycvqljufVvYBm7f4Um92JdBAdB4yTe-5uYwXshaWiRdsmQjWFZFkk13YVq2G4pdorDjTOuLGgFVkCSDziByPOYSiBIP7TYIeogka_W__5vbQQ9-JSMWci1bxh2d2a19UInzt9wgd2Z7cjrm.

[42] *Id.*

[43] *Id.*

[44] Nielsen, *Women's College Basketball Championship Draws Record-Breaking 18.9 Million Viewers*, Nielsen news center (Apr. 2024), https://www.nielsen.com/news-center/2024/womens-college-basketball-championship-draws-record-breaking-18-9-million-viewers/.

[45] *Id.*

[46] Katie Callahan, *Aced It! ESPN Scores Stellar Viewership During 2024 NCAA Women's College Volleyball Season*, ESPN Press Room,

sports clearly do bring in viewership today, so how can they be denied their share of the money they are now bringing in? Over the past decade women's sports and the attention to them have grown exponentially, leaving massive room for even more eyes to be on more sports in the coming years. Under Title IX, universities "are expected to make equal efforts to gain media coverage for men's and women's sports, [and] to provide the same assistance for men's and women's teams to reach media representatives and outlets."[47] Moving forward, seeing the imminent introduction of the availability of this money to athletes, schools should find themselves even more motivated to seek out media and promotion of their women's sports.

For this reason, and for the promotion of continued equality within college athletics, an ED/OCR final rule would be one of the best possible proposed solutions to this market. The main issue with this second suggestion is the implications of the *Loper Bright* decision, bearing the question of will an agency decision along these lines withstand judicial scrutiny?

Another issue that presents itself in this shifting world will be the allocation of funds. In combination with the new roster caps the future of college athletics has become even more uncertain. Athletes who have dedicated their lives to other Olympic sports now face the prospect that not only may their roster spot no longer exist, but with current uncertainty, if their sport will even be continued to be offered. The revenue sharing combined with the projected millions of dollars owed by schools for NIL remuneration as part of the settlement, schools must also grapple with how to allocate funds going forward.[48] University of Texas athletic director Chris Del Conte has recently discussed that the school expects to need an additional $11.5 million annually for athletic department expenses.

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https://espnpressroom.com/us/press-releases/2024/12/aced-it-espn-scores-stellar-viewership-during-2024-ncaa-womens-college-volleyball-season/#:~:text=The%20NCAA%20Women's%20Volleyball%20Regional,Nebraska%20on%20ABC (last visited Jan. 26, 2025).

[47] Josephine (Jo) R. Potuto, *Through the Looking Glass with Alice: The Current Application and Future of Title IX in Athletics*, 25 Vand. J. Ent. & Tech. L. 373, 404 (2023).

[48] Nick Bromberg, *Texas AD Expects NCAA House Settlement to Raise Expenses for Athletic Department by $11.5m Per Year*, Yahoo! Sports (Oct. 11, 2024), https://sports.yahoo.com/texas-ad-expects-ncaa-house-settlement-to-raise-expenses-for-athletic-department-by-115m-per-year-201337734.html.

[49] This statement from one of the richest athletic departments in collegiate sports may startle many seeing that most schools barely break even when it comes to their athletic departments.[50] This new development in school spending will require universities to make tough decisions that will greatly affect their current and perspective prospective athletes.

While universities, conferences, athletes, and coaches continue to wonder what their respective futures will look like, guidance is necessary to facilitate the dramatic shift that is occurring in college athletics.

SUGGESTED SOLUTIONS

When looking at the future of college athletics at this pivotal cross-roads, a few possible solutions rise to the surface. Each solution discussed below has strengths and weaknesses within its proposal, but keeping in mind a preference to attempt to preserve as many of the non-revenue Olympic sports (outside of football and basketball), one solution presents itself as the most ideal. Conferences should move forward accepting athletes as employees of themselves. This proposal shifts the focus with regard to this revenue sharing model away from Title IX, where questions of equality may arise and prove to be difficult to resolve, to protections based on the EPA and Title VII.[51]

Revenue Sharing Proposals

Congressional Action

Congressional action would be the first – and most ideal – solution to this issue. Congress has consistently taken action in the past to amend Court decisions and to realign the law with the outcome they had previously intended.[52] With relation to just Title IX, after the Court handed down a decision that did not align with the legislature's desired structure and reach, Congress acted to pass statutes that preempted the Court's decision.[53] This history

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[49] *Id.*
[50] *Id.*
[51] *See infra* section *Athletes as Employees*
[52] *See generally* Grove City Coll. v. Bell, 465 U.S. 555 (1984).

clearly illustrates Congress's ability to act both proactively and retroactively as to determine the course of laws. With this solution in mind, a few issues present themselves immediately. First, common knowledge of today's political world illuminates the fact that Congressional action is not always direct nor is it speedy. This solution would be ideal though, seeing that Congress could write specifically on the correct distribution of these funds to athletes, directly granting the authority to regulate and effectuate such statute to the ED and the OCR. One pressing issue presents itself with any of the solutions involving the introduction of a 'salary cap' in essence: anti-trust violations.

Antitrust law has been well entrenched in American law and jurisprudence for well over 100 years now.[54] As first effectuated by the Sherman Act in 1890, anti-trust legislation has protected competition in markets for consumers.[55] Following this act, Congress passed the Federal Trade Commission Act and the Clayton Act, further expanding the ban on unfair competition practices.[56] These laws are not the be all end all for the NCAA here though, Congress has previously acted to enact anti-trust exemptions within certain industries as to promote the business within certain markets.

Antitrust exemptions have history as either statutory antitrust exemptions or non-statutory antitrust exemptions (through court decisions).[57] As to promote stability, and further the explanation of this Congressionally enacted legislation as a possible solution, it is important to focus on statutory antitrust exemptions here. Additionally, seeing the current Court's stance towards the NCAA and their member institutions' actions, it is very unlikely that a judicially enacted exemption would be possible to obtain.[58]

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[53] Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).

[54] *The Antitrust Laws*, Federal Trade Commission, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Oct. 16, 2024).

[55] *Id.*; 15 U.S.C.A. § 1 (West).

[56] Malone, *supra* note 41.

[57] 7 USCA § 292 (West); 15 USCA § 1803 (West); *See generally* Bell v. Fur Breeders Agric. Co-op., 348 F.3d 1224 (10th Cir. 2003).

[58] *See* Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 109 (2021) (Kavanaugh, J., concurring).

Congress has in the past passed legislation granting various industries narrow antitrust exemptions such as the insurance industry and agriculture associations.[59] Through this type of action, Congress could grant an antitrust exemption to the NCAA, allowing them to set this 'cap' on how much athletes are able to receive as their share of the TV revenue (currently proposed to be around 22%).[60] By passing such legislation, Congress would be able to monitor the amount distributed generally and then would be able to perpetuate equity within college athletics by setting a standard for how this money should be distributed across athletic teams and individuals. If Congress wished to grant effectuation power to the ED and the OCR, as in Title IX, they could expressly do so in the legislation as well, allowing the agencies to continue to perpetuate their effective regulation of Title IX as it relates to the distribution of this TV revenue.

Alternatively, with other pending litigation, there remains the possibility that athletes may soon be considered employees of their respective universities.[61] Here a non-statutory antitrust exemption would arise, if athletes were considered employees and therefore afforded the ability to unionize.[62] Within the last ten years multiple challenges have been brought to the student-athlete model, instead shifting the focus to a more athlete-employee type model.[63] If athletes were to be acknowledged to be employees, whether it be by institutions or by their conferences, an antitrust exemption would arise allowing such a cap to be in place. The creation of labor unions within sports is not an unfamiliar realm, essentially every professional league in the United States has

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[59] 7 USCA § 291, 292 (West); 15 U.S.C.A. § 1012 (West).

[60] *In re College Athlete NIL Litigation*, Pl's Notice of Mot. and Mot. for Prelim. Settlement Approval (Hearing date Sept. 5, 2024).

[61] 31 No. 4 N.Y. Emp. L. Letter 5 (Apr. 2024).

[62] 15 U.S.C.A. § 17 (West).

[63] *See generally* Berger v. NCAA, 843 F.3d 285 (7th Cir. 2016), Dawson v. Nat'l Collegiate Athletic Ass'n,, 932 F.3d 905 (9th Cir. 2019), *See, e.g.*, Chip Patterson, *Northwestern Players Start Union Movement in College Athletics*, CBSSPORTS.COM, https://www.cbssports.com/college-football/news/northwestern-players-start-union-movement-in-college-athletics/ (Jan. 28, 2014); Ben Strauss, *In a First, Northwestern Players Seek Unionization,* N.Y. Times https://www.nytimes.com/2014/01/29/sports/ncaafootball/northwestern-players-take-steps-to-form-a-union.html (Jan. 28, 2014).

unions for its respective athletes.[64] Unions benefit members by providing better wages, better benefits (such as health insurance, workers compensation benefits, etc.) and a voice for those within the job.[65]

These antitrust exemptions are ones to keep in mind when moving forward with the proposed solutions, seeing that if either becomes a reality before the application and effectuation of such solutions, the outcomes could be dramatically different.

Overall, by writing a clear and unambiguous statute with such a delegation as part, Congress would effectively shield such action by the ED and the OCR from judicial interference. This solution remains the most ideal, while recognized to be unlikely. Under *Loper Bright,* courts now have the power to select the interpretation they feel is best, deferring any other contestation (by agencies) unless a statutory amendment or legislative action occurred. Proactive legislation action therefore is the best and most effective solution. Additionally, such legislation would promote stability across administrations, keeping the same guidelines in place continually without changes in effectuation in the CFR by different agency members under varying administrations.

ED and OCR Interpretation

The second solution would be for the ED and OCR to issue a final rule outlining equitable distribution of this money. This solution does present its own hurdles though. First, and most clearly, the issue of forthcoming litigation where prospective plaintiffs will cite *Loper Bright* as to strike a rule of this type. With that case in mind, injunctions may adversely affect equitable distribution disparately across different states and different courts. This path would likely take years and years of litigation and alternating rules from different administrations.

Throughout the process of writing this paper in the fall of 2024, no guidance had been pushed forward by the ED or the OCR, but in January of 2025, the outgoing administration published a memo stating that this new money would be considered "athletic financial

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[64] *Labor Organizations in the Sports Industry*, Rutgers University Libraries, https://libguides.rutgers.edu/c.php?g=336678&p=2267003 (Jan. 30, 2024).

[65] *The Union Difference*, AFL-CIO, https://aflcio.org/what-unions-do (last visited Oct. 16, 2024).

assistance", and therefore it should be distributed proportionally.[66] This section was initially focused on the challenges that such an administrative decision may face, but now it has shifted to what challenges this decision *will* face. Extensive litigation, whether it be the OCR attempting to enforce these regulations on a school who fails to comply or if it comes from athletes wishing to challenge the model to benefit themselves, is inevitable.[67] This section will discuss the best practices for the ED and OCR to follow in hopes of withstanding judicial scrutiny.

Just because *Loper Bright* grants courts more power when litigation arises around administrative regulations, there are still ways for the agency to promote their equitable distribution method. Agencies are still given a strong persuasive power through *Skidmore*.[68] Through a Skidmore analysis, courts could take an approach through which they would "uncover statutory meaning".[69] Such an analysis could still lead courts to rely on "longstanding, consistent, and/or contemporaneous agency decisions".[70] With that in mind, the ED and OCR may be able to craft a well-structured rule regarding this money that remains in line with previous rules with respect to school distributed funds that would still be granted a 'deference' of sorts by courts. Cases decided between *Skidmore* and *Loper Bright* have further illuminated the type of possible favor that courts will give agency decisions.[71] These cases have highlighted the courts' use of post-enactment evidence as ways to both support and defeat an agency's claims to authority respectively.[72] Looking again to *Skidmore*, some have stated that in future cases aligning with such 'deference', courts may focus instead on uncovering the underlying statutory meaning.[73] *Skidmore* leaves the door open for a level of respect to be granted to

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[66] *Talty, supra* note 39.

[67] *Id.*

[68] *Skidmore*, 323 U.S. 134 (1944).

[69] Daniel Deacon, *Loper Bright, Skidmore, and the Gravitational Pull of Past Agency Interpretations*, Yale J. on Regul., (June 30, 2024), https://www.yalejreg.com/nc/loper-bright-skidmore-and-the-gravitational-pull-of-past-agency-interpretations/.

[70] *Id.*

[71] *See generally West Virginia v. EPA*, 577 U.S. 1126 (2016); *Biden v. Nebraska*, 143 S. Ct. 2355, 216 L. Ed. 2d 1063 (2023).

[72] *Id.*

[73] Ryan D. Doerfler, *How Clear Is "Clear"?*, 109 Va. L. Rev. 651, 707 (2023).

agency decisions based on a few factors: (1) "the thoroughness evident in its consideration", (2) "the validity of its reasoning", and (3) "its consistency with earlier and later pronouncements".[74]

With this interpretative shift in mind, when crafting its final rule, the ED and the OCR should take into consideration all of the factors, making sure that the rule is written in a way that best exemplifies as many of these factors as possible. The agencies could draw support for such from validity granted to prior Title IX effectuations and a consistent approach to prior action. By aligning this proposed final rule with the proportionality aspect of the three-prong test, there would be a very strong stance for the agencies to take in support of a court upholding such a final rule.[75]

Prior to the January 2025 memo, schools and athletic directors already discussed the possibility of having to align themselves with an OCR rule that follows a similar trend to the proportionality aspect of the scholarship piece of Title IX.[76] This distribution at a school like Iowa, for example, where the split of students is 53% female, and 47% male would reflect as $11.66 million to female athletes and $10.34 million to male athletes (dividing $22 million).[77]

Legal challenges will arise regardless of the path that is taken, but this proposal would provide a storied history and abundant precedent. The ED and the OCR have overseen similar regulations and compliance rules for over fifty years, highlighting their expertise and knowledge in what would be deemed best for equality for athletes. This proposal could even be bolstered by an effort from the OCR to more actively enforce the provision in Title IX that provides that schools must put forth equal effort in order to garner media attention for male and female sports.[78] By actively enforcing this provision, the OCR would increase marketability for female sports and would help to strengthen the argument that this proportional share of money is fair to all athletes.

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[74] *Id.* (quoting *Skidmore* 323 U.S. at 140).

[75] Green, *supra* note 11.

[76] 34 CFR § 106.41 (c); Scott Dochterman, *As House v. NCAA Settlement Unravels, Big Ten Ads Are Rethinking Plans and Seeking Clarity*, The Athletic (Sept. 12, 2024), https://www.nytimes.com/athletic/5761263/2024/09/12/house-ncaa-settlement-big-ten-finances/.

[77] *Id.*

[78] Potuto, *supra* note 47.

The January 16 memo is a start, providing guidance, but again, guidance that will have little longevity. This memo also falls short in a few other ways as well. While it does align with the proposals stated above, stating that "if a school is not providing equivalent coverage for women's teams and student-athletes on its website, in its social media postings, or in its publicity materials, these student-athletes may be less likely to attract and secure NIL opportunities."[79] Schools are not only incentivized, but under this memo, they are required to shed equal light on women's sports to create opportunities for female athletes to earn NIL money. This memo does not explicitly include TV revenue, only stating that schools may face non-compliance if they fail "to provide equal benefits, opportunities, and treatment in the components of the school's athletic program that relate to NIL activities."[80] It leaves room for litigations to argue ambiguity in defining what these benefits should include. In attempting to write a more efficient effectuation, the OCR could create an illustrative list of benefits and opportunities that would fall under this umbrella to limit questions that could be raised. Additionally, the memo states that "compensation provided by a school for the use of a student-athlete's NIL constitutes athletic financial assistance under Title IX", but it again fails to explicitly include TV revenue in this. It would be argued that broadcasting the athletes on TV is use of the NIL since their names and play are what draws viewers to the TV programs. Again, the OCR should either explicitly state that TV revenue is included as athletic financial assistance or formulate an illustrative list to further promote equality in the college sports realm.

While this proposal has since come to fruition, it still leaves the door open for too much uncertainty moving forward. Courts have made it abundantly clear since the *Loper Bright* decision that they are exceedingly willing to take back interpretive power from agencies. Litigation is costly and time consuming, and in many cases regarding agency decisions, does not even provide consistent results across the country. As stated previously, preliminary

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[79] *Fact Sheet: Ensuring Equal Opportunity Based on Sex in School Athletic Programs in the Context of Name, Image, and Likeness (NIL) Activities*, United States Dept. of Educ. Office for Civil Rights, at 6 (Jan. 16, 2025); *Infra* Section III.

[80] *Id.*

injunctions may be granted in some courts, but not others, and the agency decision may be upheld or struck down depending on the court in which the cases find themselves. Additionally, agency effectuations are subject to change based on the administration. Since the country has just recently had a turnover in administration, there is no telling what the future ED and OCR will uphold or change about current regulations.

Athletes as Employees

It has previously been proposed that athletes should be employed by their conferences, who could then enact a revenue sharing model based on such a relationship.[81] With such a model in mind, it has been suggested that conferences add another share to the current split (i.e., in the SEC going from sixteen shares for sixteen schools to seventeen to include athletes) and distribute money to athletes from there.[82] With the new settlement in mind, this 22% of TV revenue may fit extremely well into the above proposed model. If athletes were considered employees of their respective conferences, such a share could be distributed by the conferences. This possibility would help to shift the burden away from schools, allowing athletic departments to continue the practice of allocating funds generated by revenue sports to helping to sponsor non-revenue sports.

While labor unions do provide an antitrust exemption, they do not always provide for efficient negotiations and positive relationship progress between employees and employers. In professional sports, three major examples can be seen in which a failure to reach an agreement through the union has caused major disruptions to games and even seasons.[83] A few examples of such include the cancellation of the 1994 World Series due to a strike, a shortened NBA season due to a lock-out, and most dramatically the cancellation of the entirety of the 2004-2005 NHL season due to a lock-out.[84] If such effects were felt in college sports the impacts on

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[81] William W. Berry III, *Amending Amateurism: Saving Intercollegiate Athletics Through Conference-Athlete Revenue Sharing*, 68 Ala. L. Rev. 551, 573 (2016-2017).

[82] *Id.* at 574.

[83] Genevieve F.E. Birren, *A Brief History of Sports Labor Stoppages: The Issues, The Labor Stoppages and Their Effectiveness (Or Lack Thereof)*, 10 DePaul J. Sports L. & Contemp. Probs. 1 (Spring 2014).

the athletes and the universities could be disparate. Seeing that eligibility for college athletes is extremely short, missing a championship or even a whole season would have a dramatic negative impact on athletes who simply wish to compete in the sport they attended the school to play. While it is acknowledged that the college sports industry is a massive profitable one, the revenue it generates comes nowhere near that of professional sports. In recent years professional sports as whole (NFL, NBA, MLB, NHL) have made around $47 billion dollars, while in the same time frame the NCAA only generated $1.3 billion.[85] A stoppage of play in any of the major sports spheres in college (think CFP or March Madness) would put a dramatic dent in this revenue.

Another perspective challenge for such a solution would again be agency discretion. Unions and union relations are monitored by the FTC and the NLRB, two administrative agencies whose power could be called into question regarding decisions post *Loper Bright*. As discussed in the previous section, under a *Skidmore* analysis a decision passed down by one of these agencies may have a hard time withstanding judicial scrutiny due to the lack of a history of similar decisions and the nature of any statutes relating to such.[86]

Nonetheless, leaning into the labor law possibility, female athletes who are employees of their conferences are now protected under Title VII when it comes to looking at the distribution of this TV revenue. Title VII and other labor legislation, such as the Equal Pay Act ("EPA"), provide protections for individuals from discrimination based on sex.[87] When thinking about such a proposed solution it is important to see how similar claims have

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[84] *Id.*

[85] Associated Press, *NCAA Generates Nearly $1.3 Billion in Revenue for 2022-23. Division I Payouts Reach $669 Million*, U.S. News(Feb. 1, 2024), https://www.usnews.com/news/sports/articles/2024-02-02/ncaa-generates-nearly-1-3-billion-in-revenue-for-2022-23-division-i-payouts-reach-669-million#:~:text=NCAA%20Generates%20Nearly%20%241.3%20Billion,I%20Payouts%20Reach%20%24669%20Million ; https://www.linkedin.com/posts/sportsbusinessventures_ranking-the-pro-sports-leagues-revenue-from-activity-7224126614983303169-lEsH#:~:text=Ranking%20the%20pro%20sports%20league's%20revenue%20from,you%20think%20will%20each%20league%20will%20hit (last visited Oct. 16, 2024).

[86] *Infra.* Section *ED and OCR Interpretation*

[87] 29 USCA § 206 (d); 42 USCA § 2000e-2 (a).

played out in the past with relation to college athletics and female athletes.

While both Title VII and the EPA both provide labor protections based on sex, the EPA provides the most relevant to this piece, seeing that it specifically discusses fair wages. The EPA prohibits sex discrimination stating that

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.[88]

Looking back to the 1990s, *Stanley v. USC* illustrates how an EPA claim played out with regard to a women's basketball coach.[89] Here Coach Marianne Stanley, the women's basketball coach at the University of Southern California ("USC"), attempted to negotiate a new contract for herself, raising her salary to that equivalent to Coach George Raveling, the men's basketball coach at the time.[90] In their opinion, the Ninth Circuit rested the majority of its decision on the second piece of this test, stating that the school could articulate a reason for the disparity in pay outside of sex.[91] Looking at the court's analysis of the first prong, regarding disparity in pay for *equal work*, the court discusses that differences in responsibilities the two jobs require provide a substantial difference in each coach's job.[92]

While this decision may seem disheartening for proposing that female college athletes be afforded the same protections as Coach

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[88] 29 USCA § 206(d)(1).

[89] *See generally* 13 F.3d 1313 (9th Cir. 1994).

[90] Robert Lattinville & Roger Denny, *Tying the Score: Equal Pay in College Coaching*, ADU, https://athleticdirectoru.com/articles/tying-the-score-equal-pay-in-college-coaching/ (last visited Sept. 5, 2024).

[91] *Stanley v. University of Southern California* , 178 F.3d 1069 at 1075 (9 th Cir. 1999).

[92] *Id*.

Stanley was here, there are two important factors to keep in mind. First, the commercialization of college athletics has grown exponentially since Coach Stanley's claim.[93] Female college athletes with name recognition, such as Caitlin Clark, have brought millions of eyes, and a related millions of dollars, to these athletes and their respective programs. Additionally, in the text of Title IX, universities "are expected to make equal efforts to gain media coverage for men's and women's sports, [and] to provide the same assistance for men's and women's teams to reach media representatives and outlets."[94] If this provision of Title IX is more well known and therefore actually enforced, female sports (and even other Olympic sports), may be able to garner much more media attention and more revenue for their schools.[95] This possibility would help to garner an EPA claim for current female athletes seeing that it would further support that the work they are doing requires equal skill, effort, and responsibilities. Alternatively, *Stanley v. USC* is not the only case from this era, others can be seen which actually illustrate wins for female coaches.[96]

When Molly Perdue, the women's basketball coach and sports administrator at Brooklyn College, brought a similar suit against her respective university, she prevailed.[97] While it is important to note that Perdue did perform two functions for the university, basketball coach and an administrative role, the key facet of her case was that she was able to prove that there was no significant difference in the jobs that she performed compared to her male counterparts.[98] Again, if today's female athletes are able to prove that the work they are performing requires equal skill, effort, and responsibilities through showing the growing viewership, media attention, and sponsorship attention, it would be more likely that they could possibly prevail on an EPA claim.

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[93] *Supra* Section III of this article.

[94] Josephine (Jo) R. Potuto, *Through the Looking Glass with Alice: The Current Application and Future of Title IX in Athletics*, 25 Vand. J. Ent. & Tech. L. 373, 404 (2023).

[95] As suggested in the recent OCR memo from the previous section, it seems this is something the OCR is considering more consistently enforcing in the future.

[96] Lattinville & Denny. *supra* note 90.

[97] *Id.*

[98] *Id.*

Another much more recent, and more well-known challenge brought under Title VII and the EPA, was one brought in 2020 by the United States Women's National Team (USWNT).[99] In this case, the USWNT brought claims against the US Soccer Federation (USSF), stating that the organization engaged in "institutionalized gender discrimination".[100] The claims brought by the USWNT included not only those regarding an unfair difference in pay, but additionally listed grievances revolving around practice, playing conditions, and travel accommodations (their respective 'working conditions').[101] While the litigation in this case did not prove to be fruitful, the public attention and outcry garnered eventually lead to a $24 million settlement for the players.[102] This case raises yet another question for the future of women's college sports: What is better, judicial rulings or settlements after public outcry?

While many may consider a judicial ruling to be more beneficial, judicial decisions often come after years of litigation, often including appeals and costly attorney expenses. Settlements are not limited to labor law cases, around 97% of civil cases settle before trial – trial is expensive and can take years to come to a conclusion.[103] While judicial rulings may prove to be the best with respect to future prospective plaintiffs, settlements often achieve the payout current plaintiffs are seeking in a timely manner. Additionally, the USWNT settlement and the *Stanley* case simply go to show how hard EPA and Title VII claims are to win on the merits. If athletes seeking to bring such claims in the future under this proposed plan are able to monetize their NIL properly by being supported by their school effectively, it is very likely that the public outcry related to even mentioning such a claim would end with a speedy and satisfactory settlement by the school or conference.

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[99] ESPN, *USWNT lawsuit versus U.S. Soccer explained: Defining the pay gaps, what's at stake for both sides*, ESPN (Jun. 3, 2020), https://www.espn.com/soccer/story/_/id/37582214/defining-pay-gaps-stake-sides.

[100] *Id.*

[101] Savanna L. Shuntich, *U.S. Women's Soccer Team Reaches $24 Million Settlement in Pay Case,* 19 No. 8 Fed. Emp. L. Insider 3 (Apr. 2022).

[102] *Id.*

[103] *When to Litigate and When to Settle,* Denton Peterson Dunn, https://arizonabusinesslawyeraz.com/when-to-litigate-and-when-to-settle/#:~:text=When%20to%20Settle-,When%20to%20Litigate%20and%20When%20to%20Settle,by%20means%20other%20than%20trial (last visited Feb. 10, 2025).

While not the main focus here, Title VII may provide alternative protections for female athletes and even other Olympic sport male athletes. The text of the relevant section of Title VII states that[104]:

> It shall be an unlawful employment practice for an employer—
>
> > **(1)** to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > **(2)** to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

This statute provides safety and has even been expanded recently by the Supreme Court in *Muldrow v. City of St. Louis*, providing even better protections for those seeking an actionable claim under this section.[105] This Court decision expanded protections under these claims, lowering the standard and stating that employees must no longer show "significant harm" in order to film a claim under this title.[106] These expanded protections could help further protect athletes from university and conference action which may disproportionately affect them.

If this proposal moves forward, conferences would be the ones who sponsor the sports, making them liable for claims that arise under both Title VII and the EPA. Conferences therefore could be held liable by not only female athletes who are discriminated against, but male athletes as well. In the settlement proposal, roster caps could give rise to these sort of claims. If a conference opts not to sponsor or even to discontinue a certain sports, athletes may be able to make the claim that such action was taken based on

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[104] 42 U.S.C.A. § 2000e-2 (West).

[105] *See generally* Muldrow v. City of St. Louis, Missouri, 601 U.S. 346, 144 S. Ct. 967, 218 L. Ed. 2d 322 (2024).

[106] *Id.*

sex. Athletes could frame this claim based on either a refusal to hire or even a claim that limits, segregates, or classifies them in a way that deprives them from employment opportunities. This type of claim would open the door for claims from athletes who may be fearing for the future of their sport as this settlement begins to be implemented.

Looking back at the litigation for the USWNT, the only claim that was able to proceed was the claim regarding working conditions (practice fields, travel accommodations, etc.).[107] These claims were brought under Title VII, claiming discriminatory working conditions.[108] In college athletics, discrepancies still arise around equity in practice facilities, locker rooms, equipment, and other athletic incident activities and expenditures required by schools. In 2021, controversy arose around the facilities provided for the NCAA women's basketball tournament teams versus those provided for similarly situated men's teams.[109] While the NCAA itself is exempt from Title IX regulations, if these athletes were deemed employees of conferences and such differences appeared, they may be able to bring alternative claims that have the possibility of proceeding on the merits based in Title VII. Additionally, these Title VII protections about working conditions, may also enable athletes to earn more equal facilities and locker rooms on their respective campuses. Conferences would monitor these 'working conditions' on the campus and be able to provide a remedy for athletes who are being subjected to discriminatory working conditions such as subpar facilities.

Providing athletes with the opportunity to be employees of the conferences may seem bleak at a first glance, due to the loss of Title IX protections regarding *equal* pay, but this perspective is clearly the best-case scenario for the continuation of other Olympic and non-revenue sports. Shifting the focus away from an equal share in this newly introduced TV revenue and leading it to being on EPA and Title VII protections would at least guarantee the existence of

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[107] *See* Shuntich, *supra* note 101.

[108] *Morgan v. United States Soccer Fed'n, Inc.*, 445 F. Supp. 3d 635 at 657 (C.D. Cal. 2020).

[109] Jaclyn Diaz, *The NCAA's Focus on Profits Means Far More Gets Spent on Men's Championship*s, NPR (Oct. 27, 2021), https://www.npr.org/2021/10/27/1049530975/ncaa-spends-more-on-mens-sports-report-reveals.

such sports going forward. The way current athletic directors and departments speak about the future of not only women's collegiate sports, but the future of essentially all non-revenue generating sports in this new and untreaded path seems bleak at the moment. This proposal to accept athletes as employees of their respective conferences is the best, and right now what seems like the only path forward which preserves the future of these non-revenue sports.

When looking at a proposal to accept athletes as employees of their conferences there are still some unresolved issues. While conferences and the NCAA are exempt from Title IX regulations due to their lack of federal funding, it would be important to analyze how Title IX still applies to schools in other realms.[110] Scholarships would still be subject to Title IX compliance. Schools would still be required to show proportionality, history or continuing practice of program expansion, or showing interests are fully and effectively accommodated by the present program.[111] This element of Title IX compliance may prove problematic moving forward for universities that already struggle to fund their current teams. Even universities with wealthy endowments are unsure of how they will move forward.

One conceded downside of this employee focused proposal is that labor law opens the door to much more litigation. Avoiding litigation in labor law disputes is avoidable through contractual agreements. For example, an athlete who is benched or removed from a team for conduct issues may attempt to raise a labor law claim stating that they were subject to retaliatory action by their coaches or school administration. This type of dispute could be handled proactively by having conferences and their member schools implement employee handbooks, similar to those at any other job, which outline reasons for removal or negative consequences for actions that the handbook outlines as violations of a code of conduct. In the NFL, the code of conduct outlines consequences for violations such as substance abuse and personal conduct violations.[112] This handbook could also contain an arbitration agreement, allowing conferences to handle employment disputes quickly and without any litigation.

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[110] *See generally* National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 *(U.S.Pa.,1999)*

[111] 34 CFR § 106.41 (c).

Hands-Off Approach

The fourth, and likely the worst, option presented with this issue is for agencies and the government generally to remain 'hands off' as they do now. This option would continue to perpetuate disparity among college athletics especially as it pertains to non-revenue generating sports. Title IX was passed over fifty years ago; therefore, its creators could never have imagined the world of college athletics as it exists now. By allowing this free-for-all approach to stand, Congress, the ED and the OCR would all fail in effectuating Title IX as it is written, allowing disparate impacts on women's college athletics as a whole.

Roster Cap from House Settlement

The proposed shift away from scholarship number limitations per team to roster caps as in the *House* settlement, reserves room for separate discussion. This piece of the proposed settlement may prove to be more troublesome for the future of college athletics than the current shift away from amateurism is presently viewed as.

As signing day 2024 came and went, many prospective college athletes found themselves in a place of uncertainty, not knowing how this pending settlement will affect the future of their sport.[113] These proposed roster limitations do increase the prospective aid athletes can receive from their prospective school, with the settlement stating that schools offer scholarships to *all* athletes who are contained on this now limited roster.[114]

This piece of the settlement proves to be troublesome for the future seeing that multiple parents of athletes have already filed suits with hopes of enjoining this piece of the settlement.[115]

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[112] *Notable suspensions under NFL's personal conduct policy* , Associated Press (Aug. 1, 2022, https://apnews.com/article/minnesota-vikings-cincinnati-bengals-nfl-entertainment-sports-23a5e3b3a16e852f41af2bd1c9319097.

[113] Dan Murphy & Michael Rothstein, *Pending NCAA Settlement*, ESPN (Nov. 11, 2024), https://www.espn.com/college-sports/story/_/id/42273737/college-athletes-face-national-signing-day-amid-uncertainty-new-roster-limits.

[114] *Id.*

[115] Ross Dellenger, *Historic House-NCAA Settlement Leaving Hundreds of Olympic Sport Athletes in Peril*, Yahoo! Sports (Oct. 25, 2024), https://sports.yahoo.com/historic-house-ncaa-settlement-leaving-hundreds-of-olympic-sport-athletes-in-peril-125238713.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAANoYNxuw2Ua43E6exWYOCUqOMuppEycvqljufVvYBm7

Additionally, if no antitrust exemption is accepted by Congress or if athletes do not become employees of conferences or other entities – creating a non-statutory antitrust exemption – this cap on how many athletes can be brought in by universities may create a separate antitrust issue down the line.

Furthermore, these new roster caps may create issues for universities attempting to remain in compliance with the scholarship portion of Title IX.[116] By eliminating spots on certain teams, schools may run into a dilemma when attempting to fulfill proportionality or showing that interests are fully and effectively accommodated. This issue may give rise to what some may view as more non-traditional Title IX claims, those coming from male athletes. The Title IX scholarship provision followed by most schools currently is the proportionality prong, allowing schools to demonstrate compliance by having the same ratio of male-to-female sports as the ratio of male-to-female students enrolled at the university. If schools are forced to cut male sports due to the new number of scholarships under these roster caps, a proportionality issue could quickly arise.

The biggest issue schools will run into here is that football rosters are now increased to 105 members, meaning 105 scholarships may be offered.[117] Schools already struggle to balance the high number of scholarships required by fully funded football teams, illustrated by the fact that many schools in FBS cannot sponsor nearly as many teams as schools that are not in FBS or that simply do not have a football team. This addition of twenty roster spots, and very likely twenty scholarships, will force this issue even more. Schools will likely be forced to cut additional male sports to remain in compliance with Title IX.

One possible solution that would allow schools to keep sponsoring the sports they currently do would be a movement towards accepting and sponsoring competitive cheer and/or dance

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[116] *Supra* Section II. A. *Title IX* of this article.

[117] Ross Dellenger, *New College Sports Roster Limits Revealed as* House *Settlement Expands Scholarship Numbers*, Yahoo! Sports (Jul. 26, 2024), https://sports.yahoo.com/new-college-sports-roster-limits-revealed-as-house-settlement-expands-scholarship-numbers-210542040.html.

teams by the NCAA. By allowing these teams to be accepted as part of NCAA sponsorship, schools would have the possibility to host more female scholarships, helping to retain the current robust student athlete body seen today on college campuses. This possible solution would require further discussion, and it would very likely have to involve either NCAA action – sponsoring these sports officially – or legal action in an attempt to overturn prior court action.[118]

While some schools have already issued statements saying that this settlement changes nothing, the reality for many is going to be tough decisions to leave athletes, coaches, and support staff without a home. Having a large and wealthy athletic department, like Ohio State, have enabled athletic directors and boards of trustees to issue statements reassuring athletes of the continued sponsorship of their sport, but this isn't the same for many other schools, even other power schools.[119]

The implication of these roster caps as proposed in *House*, without the adoption of athletes as employees, presents an entirely different antitrust issue for universities and the NCAA. Even if athletes are adopted as employees, whether as those of the conference or some other model, other issues regarding how binding this settlement can be on those who are non-parties to it. While the court at issue in the *House* case can bind all those with current claims in the litigation, the question still remains unanswered as to whether or not this settlement can be applicable to those who have not yet entered into the college athletics sphere. While there are financial and practical reasons for these non-parties to be bound by this settlement, i.e. the revenue sharing for the future, some athletes who may now miss out on college athletics opportunities may take an alternative view.[120]

[118] *See generally* Biediger v. Quinnipiac Univ., 928 F. Supp. 2d 414 (D. Conn. 2013).

[119] Sheridan Hendrix, *Ohio State Athletic Director Ross Bjork Issues Open Letter on* House v. NCAA *Settlement*, The Columbus Dispatch (Nov. 21, 2024), https://www.dispatch.com/story/sports/college/2024/11/21/ohio-state-athletic-director-ross-bjork-addresses-house-vs-ncaa/76475850007/ (quoting Ross Bjork "we are committed to maintaining all 36 programs"); Scott Dochterman, *As House v. NCAA Settlement Unravels, Big Ten Ads Are Rethinking Plans and Seeking Clarity*, The Athletic (Sept. 12, 2024), https://www.nytimes.com/athletic/5761263/2024/09/12/house-ncaa-settlement-big-ten-finances/ .

[120] *Enforcement of Settlement Agreements – Avoiding the Pitfalls*, Eversheds Sutherland (Feb. 2, 2022), https://www.eversheds-

These proposed roster caps are a bit unsettling and only add to the uncertainty for the world of college athletics moving forward, especially as it relates to spots for female athletes. Change and adaptation by the NCAA, conferences, schools, or all of the above is absolutely necessary. Whether that comes in the form of continuing to ask donors for more money, growing NIL collectives, accepting more sports as sponsored, or establishing some type of antitrust exemption is really the only question left to be answered. Athletic directors, like Iowa's Beth Goetz, have already expressed concerns about the prospective legal challenges after this settlement moves forward, stating that as of now "there's not a clear path forward in that sense."[121]

The issue of roster caps and their respective challenges could make for an entirely separate piece, but this brief discussion just furthers the uncertainty to the future of college athletics. This issue coupled with the proposed revenue sharing leaves many athletes, schools, and even the NCAA as a whole with an array of unanswered questions. Guidance in these realms is necessary to protect the future of the wide array of college athletics we see today.

CONCLUSION

The further evolution of college athletics to include the payout of some percentage of TV money generated is inevitable. Some level of government action is necessary to protect the world of equality in college sports before schools take advantage of this new money to further separate their revenue sports (mainly football and men's basketball) from the non-revenue sports.

Title IX has long provided a framework for equity within college athletics, and that fact should not be altered by the rapid changes occurring within the college athletics sphere. While the *Loper Bright* decision has effectuated the end of *Chevron* deference, other avenues still exist to allow for agency thoughts to be heard and be strongly persuasive. The future use of *Skidmore* 'deference' leaves the door open for strongly persuasive, if not essentially determinative, agency rulings in the future.

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sutherland.com/en/global/insights/enforcement-of-settlement-agreements-avoiding-the-pitfalls#:~:text=Who%20is%20bound%20by%20the,of%20a%20preliminary%20conditional%20element.

[121] Hendrix, *supra* note 119.

Title IX will not be completely eliminated from the college athletics sphere, but today's world of college athletics requires some dramatic shifts in order to preserve a future for non-revenue sports and their related athletes. By calling these athletes employees of their respective conferences, a future for their sports can be possible. Shifting to a world in which athletes are protected by Title VII and the EPA would help in allowing the continuance of these sports at the collegiate level.

Action by the ED and the OCR is great, outlining fair distribution of this money, as has been done in the past with other university funds, but it is accepted that this type of action would give rise to a multitude of future legal challenges. The agencies have effectuated Title IX for over fifty years, promoting equality and growth within the college sports sphere, and may continue to do so at the university level, but again change is needed when it comes to moving forward.

This essay explores the possible protections that can be created by such agencies or Congress as to prevent a regression in equality in college sports. Through the exploration of *Skidmore* 'deference', agency action can be tailored to avoid judicial striking of such regulations. Alternatively Congressional action will be discussed, shining a light on possible antitrust issues, and the respective solutions available through legislation rather than agency action. Additionally, a solution in which athletes become employees of their respective conferences is discussed at length, involving a shift from Title IX protections to Title VII and EPA protections. Whichever path is chosen to be pursued, prompt and proactive action is necessary to promote stability in this rapidly changing space, while aiding to provide protection to the world of women's college athletics that we see today.