

UNSTRUCTURED NIL SETTLEMENTS

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On October 7, 2024, the U.S. District Court for the Northern District of California granted preliminary approval to the largest, most transformative antitrust settlement in intercollegiate athletics history. Popularly known as the House Settlement (the “Settlement”), its terms remove National Collegiate Athletic Association (NCAA) scholarship limits and provide \$2.8 billion in retroactive name, image, and likeness (NIL) compensation to both current and former NCAA athletes. But more importantly, the Settlement allows schools to disburse up to \$20 million annually to athletes as part of a historic, new revenue-sharing model—effectively abolishing NCAA amateurism. Analysts estimate that intercollegiate men’s basketball and football athletes will receive roughly 90 percent of the Settlement funds, which raises far-reaching Title IX concerns.

*This Essay asks whether the court properly excluded Title IX concerns when preliminarily approving the multi-billion-dollar Settlement. In response, this Essay references Judge Guido Calabresi and Professor Sir Philip C. Bobbitt’s framework from their seminal book *Tragic Choices* to explore the egalitarian conflict within the Settlement classes, whose legal interests initially converged for antitrust purposes but later diverged as Title IX issues arose. This Essay concludes that although the Settlement properly excluded Title IX concerns, it is imperative that more appropriate legal authorities expeditiously address these concerns.*

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INTRODUCTION

“[F]or where your treasure is, there will your heart be also.”¹

Does the multi-billion-dollar *House v. National Collegiate Athletic Ass’n*² name, image and likeness (NIL) Settlement³ (the “Settlement”) allocate damages in accordance with Title IX? The answer is no. *House*’s predominate legal theory arises under the Sherman Act⁴ (the “Act”), a commercial statute that addresses harm resulting from unreasonable restrictions on competition.⁵ By contrast, Title IX, enacted nearly a century after the Sherman Act, is a civil rights statute that addresses harm resulting from sex discrimination.⁶ Nevertheless, the Settlement includes terms to

1. *Matthew* 6:21 (King James).

2. 545 F. Supp. 3d 804 (N.D. Cal. 2021).

3. Revised Order Granting Plaintiffs’ Motion for Preliminary Settlement Approval As Modified at 10, *In re College Athlete NIL Litig.*, No. 20-cv-03919 (N.D. Cal. Oct. 7, 2024).

4. 15 U.S.C. §§ 1–7.

5. *Id.* § 1.

6. 20 U.S.C. § 1681(a) (1972).

which Title IX arguably applies, specifically: retroactive NIL compensation, revenue sharing, and unlimited scholarships.

Whereas some analysts argue that the vast majority of the Settlement should be reserved for revenue-generating male athletes, others argue that Title IX dictates a different outcome.⁷ Both approaches have merit but are based on vastly different perspectives of what the Settlement can and should accomplish. The former is based on the view that the Settlement should primarily redress the antitrust violations that resulted in economic losses for athletes who generate the greatest economic returns for their schools—typically male basketball and football players. The latter is based on the view that female athletes suffered parallel economic losses due to such violations and those losses were compounded by Title IX violations.⁸ These two approaches reveal the conflicting legal interests of male and female intercollegiate athletes, along with a persistent lack of clarity surrounding Title IX’s applicability to NIL.

Despite this lack of clarity, the National Collegiate Athletic Association (NCAA) schools are on the precipice of distributing the largest, most transformative settlement in intercollegiate athletics history. Yet they are no more well-versed on Title IX’s applicability to NIL than they were three years ago when the NCAA shocked the nation by allowing NIL compensation to proceed.⁹ As such, the Settlement presents a novel Title IX dilemma.

This dilemma perhaps can be characterized as a choice between the devil and the deep blue sea: the devil allocates Settlement funds equally between male and female athletes, likely triggering additional antitrust lawsuits from revenue-generating male athletes;¹⁰ the deep blue sea allocates a higher proportion of the Settlement to revenue-generating (primarily male) athletes, likely triggering Title IX lawsuits from female athletes. In preliminarily approving the Settlement, which allocates almost 100 percent of retroactive NIL to male athletes, the court presumably chose the latter as the lesser of the two evils.¹¹

7. Paula Lavigne & Dan Murphy, *Title IX Will Apply to College Athlete Revenue Share, Feds Say*, ESPN (July 16, 2024, 10:58 AM), https://www.espn.com/college-sports/story/_/id/40567726/title-ix-college-athlete-revenue-share-nil [https://perma.cc/D8DN-BUTE] (describing potential Title IX approaches to the Settlement).

8. Objection to Settlement Agreement and Opposition to Motion for Preliminary Settlement Approval at 10, *In re College Athlete NIL Litig.*, No. 20-cv-03919 (N.D. Cal. Aug. 9, 2024).

9. Lavigne & Murphy, *supra* note 7 (quoting Florida athletic director Scott Stricklin’s statement on authoritative legal guidance for Title IX compliance under the Settlement).

10. *See id.* (describing the legal vulnerability of various revenue-sharing options). This assumes that such lawsuits are not waived by the Settlement.

11. Dan Murphy, *Settlement Designed to Pay College Athletes Gets Preliminary Approval*, ESPN (Oct. 7, 2024, 3:00 PM), https://www.espn.com/college-sports/story/_/id/41665307/settlement-designed-pay-college-athletes-gets-preliminary-approval [https://perma.cc/ZR7J-D8R3] (“[R]oughly 90% of the \$2.8 billion will go to football and men’s basketball players.”).

This Essay asks whether the court properly excluded Title IX concerns when preliminarily approving the multi-billion-dollar Settlement. In answering this question, this Essay references Judge Guido Calabresi and Professor Sir Philip C. Bobbitt's framework from their seminal book *Tragic Choices* to explore the egalitarian conflict within the Settlement classes, whose legal interests initially converged for antitrust purposes but later diverged as Title IX issues arose.¹² This Essay concludes that although the Settlement properly excluded Title IX concerns, it is imperative that more appropriate legal authorities expeditiously address these concerns.

This Essay proceeds in four parts. Part I provides an overview of the alleged antitrust violations that gave rise to the Settlement. It also describes the Settlement's impetus and terms. Part II discusses the potential Title IX implications of the Settlement. Next, Part III introduces this Essay's thesis that the court properly excluded Title IX concerns from the Settlement for multiple reasons, including claim scope, legislative uncertainty, and competing egalitarian goals and interests. Lastly, Part IV describes the tragic choices required by the Settlement and proposes an optimal solution for prioritizing those choices.

I. WHAT IS THE SETTLEMENT?

If approved, the Settlement will resolve three separate class-action lawsuits against the NCAA: *House v. National Collegiate Athletic Ass'n*,¹³ *Hubbard v. National Collegiate Athletic Ass'n*,¹⁴ and *Carter v. National Collegiate Athletic Ass'n*.¹⁵ Although these cases share a common cause of action, they each take a different approach to challenging NCAA regulations restricting intercollegiate athlete compensation.¹⁶ These lawsuits commonly allege inter alia violations of § 1 of the Sherman Act, which prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.”¹⁷

12. GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* (1978).

13. No. 09-cv-03919 (N.D. Cal. filed June 15, 2020); *see also* Class Action Complaint and Demand for Jury Trial, *House v. Nat'l Collegiate Athletic Ass'n*, No. 09-cv-03919 (N.D. Cal. June 15, 2020).

14. No. 09-cv-03919 (N.D. Cal. filed Apr. 4, 2023); *see also* Class Action Complaint and Demand for Jury Trial, *Hubbard v. Nat'l Collegiate Athletic Ass'n*, No. 09-cv-03919 (N.D. Cal. Apr. 4, 2023).

15. No. 09-cv-03919 (N.D. Cal. filed Dec. 7, 2023); *see also* Class Action Complaint and Demand for Jury Trial, *Carter v. Nat'l Collegiate Athletic Ass'n*, No. 09-cv-03919 (N.D. Cal. Dec. 7, 2023); Revised Order Granting Plaintiffs' Motion for Preliminary Settlement Approval As Modified, *supra* note 3.

16. Nicole Auerbach & Justin Williams, *How the House v. NCAA Settlement Could Reshape College Sports: What You Need to Know*, THE ATHLETIC (May 20, 2024), <https://www.nytimes.com/athletic/5506457/2024/05/20/ncaa-settlement-house-lawsuit-college-sports/> [https://perma.cc/5RLV-ADZC] (summarizing the legal claims in the three cases resolved by the Settlement).

17. 15 U.S.C. § 1.

A. House, Hubbard & Carter

1. *House v. National Collegiate Athletic Ass'n*

On June 15, 2020, Arizona State University men's swimmer, Grant House, and University of Oregon women's basketball player, Sedona Prince, filed a class-action antitrust lawsuit against the NCAA and its then-Power Five Division I conferences ("Power Five conferences"), challenging rules restricting compensation that Division I college athletes could earn for the commercial use of their NILs.¹⁸ The court later consolidated with *House*, a similar but separate lawsuit, filed by former University of Illinois football player and team captain, Tymir Oliver.¹⁹

Together, the *House* plaintiffs alleged Sherman Act antitrust violations, which include price-fixing, group boycott, and refusal to deal, in addition to unjust enrichment.²⁰ Plaintiffs seek an injunction, damages, attorneys' fees, and, ultimately, a judgment in their favor against the challenged NCAA amateurism rules.²¹ Injunctively, a ruling in favor of the athletes in *House* would ensure permanence for the NCAA's interim policies allowing NIL compensation.²² Economically, a favorable ruling would allow athletes to recover retroactive payments for lost NIL opportunities, future NIL payments derived from broadcasting revenues, and treble damages.²³

2. *Hubbard v. National Collegiate Athletic Ass'n*

The *Hubbard* litigation receives inspiration from the landmark U.S. Supreme Court decision in *National Collegiate Athletic Ass'n v. Alston*.²⁴ *Alston* held that NCAA restrictions on education-related compensation violate antitrust law.²⁵ Post-*Alston*, certain schools began to offer academic

18. Class Action Complaint and Demand for Jury Trial, *supra* note 13. The then-Power Five conferences (also known as "autonomy conferences") consisted of members of the Atlantic Coast Conference (ACC), Big Ten Conference, Big 12 Conference, Pac-12 Conference and the Southeastern Conference (SEC). See Zac Ellis, *Breaking Down NCAA's Approval of Power Five Autonomy*, SPORTS ILLUSTRATED (Aug. 7, 2014), <https://www.si.com/college/2014/08/07/ncaa-power-five-autonomy-passes> [https://perma.cc/T7RA-QUCJ]. Power Five conference members may change rules for themselves in a specified list of areas. *Id.*

19. Order Granting Motion For Certification of Damages Classes at 2, *In re College Athlete NIL Litig.*, No. 20-cv-03919 (N.D. Cal. Nov. 3, 2023).

20. *House v. Nat'l Collegiate Athletic Ass'n*, 545 F. Supp. 3d 804, 810 (N.D. Cal. 2021).

21. Consolidated Amended Class Action Complaint and Demand for Jury Trial at 111, *In re College Athlete NIL Litig.*, No. 20-cv-03919 (N.D. Cal. July 26, 2021). The NCAA's concept of amateurism generally stands for the ideal that intercollegiate athletes "must not be paid." See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 102 (1984).

22. NAT'L COLLEGIATE ATHLETIC ASS'N, INTERIM NIL POLICY (2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf [https://perma.cc/33D8-SHJ9].

23. Consolidated Amended Class Action Complaint and Demand for Jury Trial, *supra* note 21, at 111.

24. 141 S. Ct. 2141 (2021).

25. *Id.*

achievement awards pursuant to newly adopted NCAA bylaw 16.1.4.5, which allows, but does not require, schools to provide such awards.²⁶

Nearly two years after *Alston*, former Oklahoma State University football player, Chuba Hubbard, and Kiera McCarrell, a former track and field athlete from the University of Oregon and Auburn University, filed a class action against the NCAA and the then-Power Five conferences.²⁷ This lawsuit demanded damages for athletes who were eligible for, but had been prohibited from receiving, *Alston* academic achievement awards dating back to April 1, 2019.²⁸

3. *Carter v. National Collegiate Athletic Ass'n*

Sequentially, *Carter v. National Collegiate Athletic Ass'n* is the third antitrust lawsuit opposing NCAA restrictions on athlete compensation that will be resolved by the *House* settlement.²⁹ Former Duke University football captain, DeWayne Carter, Stanford University soccer player, Nya Harrison, and former University of Oregon basketball player, Sedona Prince, filed the *Carter* antitrust lawsuit against the NCAA in December 2023.³⁰ *Carter* differs from *House* and *Hubbard* by seeking to invalidate all NCAA restrictions on athlete compensation, including pay-for-play.³¹ A ruling in favor of the athletes in *Carter* would unequivocally end NCAA amateurism, which still prohibits pay-for-play.³²

Taken together, these three lawsuits represent the most significant threat to the NCAA's core business model since the U.S. Supreme Court decided *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*.³³ There, the Court held that NCAA restrictions on television broadcasts of college football games violated § 1 of the Sherman Act.³⁴ It was the first major decision to hold the NCAA accountable under U.S. antitrust laws.³⁵

B. *Settlement Incentives*

Prior to 2009, the NCAA seemingly had a lower risk tolerance for legal challenges to its amateurism regulations. For example, the year before *O'Bannon v. National Collegiate Athletic Ass'n*³⁶ was filed, the governing

26. NAT'L COLLEGIATE ATHLETIC ASS'N, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION DIVISION I MANUAL, at art. 16.1.4.5 (2024).

27. Class Action Complaint and Demand for Jury Trial, *supra* note 14.

28. *See id.* at 24, 29.

29. Class Action Complaint and Demand for Jury Trial, *supra* note 15; Auerbach & Williams, *supra* note 16.

30. Class Action Complaint and Demand for Jury Trial, *supra* note 15.

31. Auerbach & Williams, *supra* note 16.

32. NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 26, art. 12.1.2.

33. 468 U.S. 85 (1984).

34. *Id.* at 117–20.

35. *Id.*

36. Class Action Complaint and Demand for Jury Trial, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, No. 09-cv-03329 (N.D. Cal. July 21, 2009).

body settled *White v. National Collegiate Athletic Ass'n*,³⁷ a class-action lawsuit challenging its regulations capping athletic scholarships below a school's full cost of attendance.³⁸ Notably, the NCAA settled *White* even though Supreme Court dicta in *Board of Regents* indicated that perhaps the Court would defer to the NCAA's longstanding amateurism regulations.³⁹ After *White*, the NCAA optimistically started taking amateurism cases, not only to trial but all the way to the U.S. Supreme Court, all of which produced unfavorable precedent.⁴⁰

The Settlement represents a welcome return to a more calculated approach to amateurism litigation. This strategy is particularly wise due to the devastating impact that an unfavorable *House* ruling would have on the NCAA. The most significant reasons why the NCAA should settle *House* are explored in further detail below.

1. Precedent Does Not Support the NCAA's Position

Judge Claudia Wilken, who will preside over *House*, also presided over NCAA defeats in *O'Bannon* and *Alston*. In *O'Bannon*, Judge Wilken invalidated NCAA regulations limiting athletic scholarships to amounts less than a school's cost of attendance.⁴¹ She similarly invalidated NCAA restrictions on education-related compensation in *Alston*.⁴² In both cases, her decisions were affirmed on appeal by the U.S. Court of Appeals for the Ninth Circuit.⁴³

But more importantly, a unanimous Supreme Court affirmed Judge Wilken's ruling in *Alston*.⁴⁴ If *House* were litigated, Judge Wilken need only look to her own rulings to decide against the NCAA, but with substantially more confidence that outcomes would not change on appeal. Thus, settling *House* prevents the establishment of further unfavorable NCAA amateurism precedent.

37. No. CV06-0999, 2006 U.S. Dist. LEXIS 101374 (C.D. Cal. Oct. 19, 2006).

38. *Id.* at *19–20 (granting plaintiffs' renewed motion for class certification); Stipulation and Agreement of Settlement Between Plaintiffs and Defendant National Collegiate Athletic Ass'n, *White v. Nat'l Collegiate Athletic Ass'n*, No. CV06-0999 (C.D. Cal. Jan. 29, 2008).

39. *Board of Regents*, 468 U.S. at 102 (agreeing with the NCAA in dicta that "[i]n order to preserve the character and quality of the 'product,' athletes must not be paid").

40. *See, e.g.*, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016) (holding that various NCAA amateurism rules violate the Sherman Act); *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2141 (2021) (holding that NCAA limits on education-related benefits violate the Sherman Act).

41. *O'Bannon*, 7 F. Supp. 3d at 1008.

42. *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1110 (N.D. Cal. 2019) (*Alston*).

43. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015); *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239 (9th Cir. 2020) (*Alston*).

44. *Alston*, 141 S. Ct. at 2166.

2. An Unfavorable Ruling Will Restrict the NCAA's Ability to Set Its Own Athlete Compensation Policies

Although the NCAA is a fully self-governing organization, each unfavorable court ruling has forced a change in its policies. For instance, during and after the *O'Bannon* litigation, the NCAA amended its amateurism rules to permit cost of attendance scholarships and other benefits.⁴⁵ Post-*Alston*, the NCAA amended its amateurism rules to allow athletes to receive additional education-related compensation in addition to allowing once highly contested NIL compensation.⁴⁶ An unfavorable *House* ruling would effectively allow the courts to set NCAA policy on amateurism, as opposed to its members.⁴⁷

3. Litigating *House* Could Bankrupt the NCAA

With current assets that are significantly less than plaintiffs' estimated damages, an unfavorable outcome would send the NCAA into either immediate bankruptcy or insurmountable debt. The *House* plaintiffs alone claim over \$1 billion in damages.⁴⁸ The NCAA currently lists assets of \$565 million, according to its most recently published financial statements.⁴⁹ Thus, settling the *House* litigation is critical to ensuring the NCAA's continued existence.

C. Settlement Terms

Rather than proceed to trial, the NCAA and its then-Power Five conferences announced on May 23, 2024, that they had reached a potential settlement that would resolve *House*, *Hubbard*, and *Carter*.⁵⁰ Initially filed on July 26, 2024, the Settlement addressed four key issues: back pay for lost

45. Michelle Brutlag Hosick, *Autonomy Schools Adopt Cost of Attendance Scholarships*, NCAA (Jan. 18, 2015), <http://www.ncaa.org/about/resources/media-center/autonomy-schools-adopt-cost-attendance-scholarships> [https://perma.cc/YB6H-VYJY].

46. Michelle Brutlag Hosick, *DI Council Approves One-Year Waiver of Football Scholarship Limits*, NCAA (Oct. 6, 2021, 4:05 PM), <https://www.ncaa.org/news/2021/10/6/general-di-council-approves-one-year-waiver-of-football-scholarship-limits.aspx> [https://perma.cc/DL87-L4KN] (approving academic or graduation award or incentives up to \$5,980).

47. *But see* John Hult, *South Dakota Board of Regents Sues NCAA over Proposed Athlete Pay Settlement*, S.D. SEARCHLIGHT (Sept. 10, 2024), <https://southdakotasearchlight.com/2024/09/10/south-dakota-board-of-regents-sues-ncaa-over-proposed-athlete-pay-settlement> [https://perma.cc/3UQT-WEPE] (describing smaller schools' objections to the Settlement).

48. Defendants' Joint Opposition to Plaintiffs' Motion for Class Certification [Redacted Public Version] at 1, *In re* College Athlete NIL Litig., No. 20-cv-03919 (N.D. Cal. Apr. 28, 2023).

49. NAT'L COLLEGIATE ATHLETIC ASS'N, CONSOLIDATED FINANCIAL STATEMENTS (2023), https://naaorg.s3.amazonaws.com/ncaa/finance/2022-2023NCAAFIN_FinancialStatement.pdf [https://perma.cc/62JZ-4TJX].

50. *Joint Statement on the Agreement of Settlement Terms*, NCAA (May 23, 2024, 8:29 PM), <https://www.ncaa.org/news/2024/5/23/media-center-joint-statement-on-the-agreement-of-settlement-terms.aspx> [https://perma.cc/MT9R-F3WM].

NIL opportunities, future revenue sharing, unlimited scholarships, and third-party NIL enforcement.⁵¹

The Settlement will significantly alter the compensation structure of intercollegiate athletics in favor of athletes. First, it provides \$2.8 billion in retroactive NIL compensation that will be divided among the three damages Settlement classes: football and men's basketball, women's basketball, and all other Division I athletes.⁵² Second, it allows schools to disburse up to \$20 million annually to athletes as part of a historic, new revenue-sharing model that allows schools to compensate athletes directly.⁵³ Third, it removes scholarship limits and instead imposes roster limits, clearing the way for all athletes on a team to receive either partial or full scholarships.⁵⁴ Lastly, it allows the NCAA to monitor and regulate third-party NIL transactions, such as those facilitated by NIL collectives.⁵⁵

Although the initial Settlement was hailed as “revolutionary” by plaintiffs’ counsel, the court rejected it in September 2024.⁵⁶ The rejection occurred primarily due to concerns over restrictions on third-party NIL payments.⁵⁷ But there were also other pressing concerns—Title IX.

Although critics did raise Title IX concerns, these did not factor into the court’s initial decision to reject the Settlement.⁵⁸ Yet, according to many athletics administrators, Title IX is the single most important challenge to implementing the Settlement.⁵⁹ As such, this Essay explores the gender

51. See Plaintiffs’ Notice of Motion and Motion for Preliminary Settlement Approval, *In re College Athlete NIL Litig.*, No. 20-cv-03919 (N.D. Cal. July 26, 2024) (attached Stipulation and Settlement Agreement as exhibit one).

52. Murphy, *supra* note 11.

53. *Id.*

54. 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> [<https://perma.cc/C6QA-JKX4>].

55. Steve Berkowitz, *Judge Gives Preliminary Approval for NCAA Settlement Allowing Revenue-Sharing with Athletes*, USA TODAY (Oct. 7, 2024), <https://www.usatoday.com/story/sports/college/2024/10/07/ncaa-revenue-sharing-house-settlement-approved/75514164007/> [<https://perma.cc/WD9P-DPTR>] (describing the Settlement’s NIL deal clearinghouse and enforcement group).

56. Dan Murphy & Pete Thamel, *NCAA, Power 5 Agree to Deal That Will Let Schools Pay Players*, ESPN (May 23, 2024, 7:34 PM), https://www.espn.com/college-sports/story/_/id/40206364/ncaa-power-conferences-agree-allow-schools-pay-players [<https://perma.cc/Z2ZP-UY98>].

57. Justin Williams, *House v. NCAA Settlement on Hold As Judge Sends Parties ‘Back to the Drawing Board’*, N.Y. TIMES (Sept. 5, 2024), <https://www.nytimes.com/athletic/5749342/2024/09/05/house-ncaa-settlement-college-sports-nil-boosters> [<https://perma.cc/7DVB-J26Z>] (describing the court’s concern over NCAA policing of third-party NIL agreements and omitting any reference to Title IX as a barrier).

58. Ralph D. Russo, *NCAA President Charlie Baker Tells Membership Hearing on \$2.78B Settlement ‘Did Not Go As We Hoped’*, AP NEWS (Sept. 6, 2024, 8:21 PM), <https://apnews.com/article/ncaa-settlement-collectives-20bff6141066032ecdcf18a547f5b2d1> [<https://perma.cc/C3QZ-PENB>].

59. Ross Dellenger, *NCAA Settlement Q&A: How Will Schools Distribute Revenue, What Is the Future of NIL Collectives and More*, YAHOO! SPORTS (May 24, 2024), <https://sports.yahoo.com/ncaa-settlement-qa-how-will-schools-distribute-revenue-what-is-the-future-of->

equity implications of the Settlement and potential reasons why the court may have disregarded critics' Title IX concerns.

Specifically, this Essay asks whether the court properly excluded Title IX concerns when preliminarily approving the multi-billion-dollar Settlement. The purpose of this Essay is not to argue that gender equity goals should prevail when in conflict with other Settlement goals, but rather to argue that an explicit prioritization of gender equity vis-à-vis other Settlement goals is necessary and timely.

II. HOW WILL TITLE IX IMPACT THE SETTLEMENT?

Title IX prohibits sex discrimination in federally assisted education programs.⁶⁰ With respect to athletics compliance, Title IX focuses on three major areas: scholarships, benefits and services, and effective accommodation of students' interests and abilities ("participation opportunities").⁶¹ Although Title IX's applicability to retroactive NIL compensation and revenue sharing is unclear, the Settlement addresses at least two areas in which Title IX clearly applies: roster limits and scholarships.⁶²

A. Title IX Impacts the Settlement's Allocation of Participation Opportunities

The Settlement eliminates scholarship limits and instead imposes roster limits that may impact athletes' participation opportunities.⁶³ Rosters for the same sport can vary by school. The Settlement's proposed roster limit for football, for example, is 105 players.⁶⁴ But the University of Alabama's roster size ranges from 110 to 135 players, which is at minimum five players over the limit.⁶⁵ Whereas Alabama must eliminate athletes from its football roster, other schools might add them, which may have Title IX implications.

Although the Settlement may cause some schools to contemplate eliminating sports that cannot cover their costs, Title IX prevents schools from disproportionately decreasing athletic participation opportunities for underrepresented (typically female) athletes.⁶⁶ For example, Title IX would

nil-collectives-and-more-125519681.html [https://perma.cc/346G-X48Z] ("Title IX is the single most pressing issue in this entire settlement, most administrators say.").

60. 20 U.S.C. § 1681(a).

61. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71414 (Dec. 11, 1979).

62. *Id.* at 71415.

63. Plaintiffs' Notice of Motion and Motion for Preliminary Settlement Approval, *supra* note 51 (listing roster limits by sport in exhibit one, appendix B).

64. *Id.*

65. Matt Stahl, *How Would Alabama Football Adjust to Decreased Roster Limit?: There's Always a Way*, AL.COM (May 28, 2024), <https://www.al.com/alabamafootball/2024/05/how-would-alabama-football-adjust-to-decreased-roster-limit-theres-always-a-way.html> [https://perma.cc/YKK7-Z54P].

66. *See* Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71413, 71418 (Dec. 11, 1979).

prevent a school with a disproportionately small number of female athletes from decreasing the number of female players or women's teams to offset an increase in football players. Title IX does, however, provide certain safe harbors or exceptions to its equal participation opportunity standard.⁶⁷

Even so, these safe harbors apply only if a school can meet certain criteria. To qualify, a school must prove one of following: (1) participation opportunities for male and female athletes are substantially proportionate to their respective enrollments, (2) a history of continued program expansion for the underrepresented sex exists, or (3) students' athletic interests are fully and effectively accommodated by the current athletics program.⁶⁸ If a school does not meet any of these criteria, however, it would not be able to eliminate teams or decrease roster sizes without violating Title IX.⁶⁹ Thus, Title IX offers women's teams some level of protection against unfavorable roster changes made in response to the Settlement.

*B. Title IX Impacts the Settlement's
Allocation of Scholarships*

The Settlement eliminates scholarship limits and makes every NCAA sport an "equivalency" sport.⁷⁰ Historically, NCAA scholarships were limited to specified numbers.⁷¹ Under the Settlement, however, teams will no longer be limited to a specified number of full or equivalent scholarships.⁷² Previously, football was restricted to eighty-five full scholarships, but now, teams can offer any combination of full scholarships or partial scholarships, up to the new roster limit of 105.⁷³

Title IX requires schools to provide "financial assistance" to male and female athletes on a nondiscriminatory basis.⁷⁴ The 1979 Title IX policy interpretation clarifies that financial assistance focuses on scholarships.⁷⁵

67. *See id.*

68. *See id.* at 71414, 71418.

69. *See, e.g.,* *Cohen v. Brown Univ.*, 101 F.3d 155, 188 (1st Cir. 1996) (requiring university to submit a Title IX compliant alternative to reinstating women's gymnastics and volleyball teams); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 826, 833–34 (10th Cir. 1993) (requiring reinstatement of women's fast-pitch softball team); *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332, 334–35 (3d Cir. 1993) (requiring reinstatement of women's field hockey and gymnastics teams).

70. Dan Murphy & Michael Rothstein, *Pending NCAA Settlement, Roster Limits Pose National Signing Day Uncertainty*, ESPN (Nov. 11, 2024), https://www.espn.com/college-sports/story/_/id/42273737/college-athletes-face-national-signing-day-amid-uncertainty-new-roster-limits [<https://perma.cc/VNN5-WRF3>] (describing the impact of roster size changes on scholarships).

71. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 26, arts. 15.5.2–.5.3 (detailing NCAA scholarship limitations by sport).

72. Murphy & Rothstein, *supra* note 70.

73. NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 26, art. 15.5.6 1 (listing maximum football scholarships for Football Bowl Subdivision schools); *see* Plaintiffs' Notice of Motion and Motion for Preliminary Settlement Approval, *supra* note 51 (listing roster limits by sport in exhibit one, appendix B).

74. 34 C.F.R. § 106.37(c) (2020).

75. *See* Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71415 (Dec. 11, 1979).

The possibility of unlimited scholarships under the Settlement may lead some schools to increase scholarship funding for some or all sports.

Under Title IX, individual scholarships need not be equal so long as “the total amount of scholarship aid made available to men and women [is] substantially proportionate to their participation rates.”⁷⁶ Thus, in the aggregate, schools must award roughly equivalent scholarship amounts to male and female athletes unless a disparity is explainable by legitimate nondiscriminatory factors.⁷⁷

*C. Will Title IX Impact the Settlement’s
Allocation of NIL Compensation?*

The Settlement implicates each of the three Title IX compliance categories: scholarships, benefits and services, and participation opportunities. As indicated above, Title IX provides clear guidance regarding participation opportunities through its safe harbor criteria, and for scholarship opportunities through its proportionate equality standard. These well-established standards will allow schools to plan Settlement implementations for rosters and scholarships that comply with Title IX. Thus, female athletes have at least some assurances that Title IX will protect their legal interests in those areas. The same is not true, however, for the NIL compensation aspects of the Settlement. This is largely because Title IX does not address NIL compensation directly, leaving stakeholders to speculate as to whether and how Title IX applies to NIL.

NIL is largely unregulated.⁷⁸ Without clear guidelines, NIL is heavily skewed by markets toward revenue-generating male sports even though these markets reflect the same gender discrimination that Title IX was enacted to prevent.⁷⁹ For instance, football and men’s basketball have earned over 90 percent of all NIL compensation from 2021 to date.⁸⁰ Assuming that Title IX applies to NIL, this is an alarming gender disparity. Proponents of the status quo rationalize the disparity by noting that NIL collectives and commercial brands, to which Title IX does not apply, currently furnish most NIL funding.⁸¹ But with the Settlement allowing schools to compensate athletes directly, NIL distribution patterns undoubtedly will change.

76. *Id.*

77. *See id.*

78. *See* Mark Wogenrich, *Penn State’s James Franklin Calls NIL ‘the Wild, Wild West’*, SPORTS ILLUSTRATED (Dec. 21, 2022), <https://www.si.com/college/pennstate/football/penn-state-football-james-franklin-nil-wild-wild-west> [<https://perma.cc/H7U4-C7DA>] (Penn State football coach James Franklin stated that, in college football, “[t]here’s just really no guardrails, not a whole lot of guidance, not a whole lot of governance. And it’s concerning.”).

79. *See* Objection to Settlement Agreement and Opposition to Motion for Preliminary Settlement Approval, *supra* note 8, at 10.

80. *See* OPENDORSE, NIL AT THREE: THE ANNUAL OPENDORSE REPORT 4 (2024), https://biz.opendorse.com/wp-content/uploads/2024/07/NIL-AT-3-The-Annual-Opendorse-Report-1.pdf#gf_56 [<https://perma.cc/7A6D-UFV8>].

81. *See id.* at 5; Dellenger, *supra* note 59 (suggesting that funneling NIL funds through collectives will avoid Title IX consequences).

Some analysts argue that Title IX applies to NIL compensation, whereas others argue that it applies only to participation opportunities.⁸² This debate is expected to continue until either Congress or the U.S. Department of Education (DOE), which administers Title IX, *officially* weighs in on the matter.⁸³ Although DOE officials advised news outlets in July 2024 that Title IX applied to the Settlement,⁸⁴ the new administration recently announced it was rescinding that guidance.⁸⁵

Title IX unquestionably applies to schools, but as of yet, schools have not rigorously applied Title IX to NIL.⁸⁶ Given the current lack of guidance, two questions remain relevant: should schools distribute Settlement funds in accordance with Title IX, and if so, according to which standard?

If schools decide to proactively comply with Title IX for the purpose of the Settlement, there are at least three different standards by which compliance could be determined: absolute equality, equal access, or proportionate equality.⁸⁷ Absolute equality under Title IX requires schools to divide settlement funds equally between men's and women's teams. For example, given a \$100,000 budget, absolute equality requires women's and men's teams to each receive \$50,000 in the aggregate.

An equal access standard, on the other hand, requires only that both male and female athletes receive the same access to NIL opportunities. For instance, so long as both sexes are able to pursue and receive NIL opportunities under the same terms and conditions, a school is in compliance with Title IX even if its men's teams receive \$90,000 of the \$100,000 NIL budget with its women's teams receiving only \$10,000. Equal access reflects the somewhat market-driven approach to NIL compensation that appears to be the status quo.

Lastly, proportionate equality mirrors the Title IX scholarship compliance standard described earlier in this section.⁸⁸ Proportionate equality requires a school with a \$100,000 NIL budget, twenty female athletes, and eighty male

82. *See id.* (referencing NCAA president Charlie Baker's interview where he states that Title IX applies to participation opportunities and not NIL compensation); Tan Boston, *As California Goes, so Goes the Nation: A Title IX Analysis of the Fair Pay to Play Act*, 17 STAN. J. C.R. & C.L. 1, 50 (2021) ("While on the surface third-party NIL compensation appears to present fewer Title IX and financial concerns, in reality, Title IX likely will apply to third-party NIL compensation.").

83. *See* Lavigne & Murphy, *supra* note 7 (describing the DOE's lack of candor on how Title IX applies to the Settlement).

84. *See id.*

85. *See* Press Release, U.S. Dep't of Educ., U.S. Department of Education Rescinds Biden 11th Hour Guidance on NIL Compensation (Feb. 12, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-rescinds-biden-11th-hour-guidance-nil-compensation> [<https://perma.cc/PU4T-X56G>].

86. *Compare* Lavigne & Murphy, *supra* note 7 (noting that some schools plan to spend 75 percent of the Settlement's revenue-sharing funds on football players), *with* 20 U.S.C. § 1681(a) (stating Title IX applies to "any education program or activity receiving federal financial assistance").

87. *See* Tan Boston, *The NIL Glass Ceiling*, 57 U. RICH. L. REV. 1107, 1162 (2023).

88. *See* Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71415 (Dec. 11, 1979).

athletes to allocate an aggregate \$20,000 and \$80,000 to female and male athletes, respectively. Ultimately, there are several workable standards that could be used to determine Title IX compliance for Settlement funds.

Nevertheless, the Settlement does not incorporate Title IX's requirements either in fact or by reference. Instead, it allocates over 90 percent of retroactive NIL compensation to male athletes in two sports, leaving the remaining amounts for women's basketball and all other NCAA sports.⁸⁹

It is uncertain whether the Settlement's retroactive NIL compensation formula and proposed revenue-sharing plans comply with Title IX. Title IX is silent with respect to NIL, and the Settlement is silent with respect to Title IX. Some schools will distribute the Settlement's revenue-sharing funds equally among male and female teams, whereas others likely will allocate more funds to revenue-generating sports.⁹⁰

According to many athletics administrators, Title IX is the single most frustrating challenge to implementing the Settlement.⁹¹ However, in 1972, Title IX's drafters could not foresee that intercollegiate athletes would someday receive NIL compensation. The thirty-seven-word law includes extensive guidance for athletics program areas that were foreseeable at the time, such as participation opportunities, scholarships, and certain then-existing benefits and services.⁹² Thus, any Settlement-related changes in those areas are guided by well-established standards. As uncharted territory, NIL compensation will present challenges for schools' revenue-sharing plans, as neither the Settlement nor Title IX provide similar guidance.

III. WHY DOES THE SETTLEMENT EXCLUDE TITLE IX CONCERNS?

The relative importance assigned to Title IX by Settlement stakeholders raises at least two questions, both of which are at the heart of this Essay. The first is: why does the Settlement completely exclude highly anticipated gender equity concerns? The second: is this exclusion justifiable? The answer to the first question is manifold and strongly supports the answer to the second question: Yes.

There are multiple valid reasons why the court could have excluded Title IX concerns from the Settlement. But the first—and most important—reason, is that the Settlement resolves a trio of antitrust lawsuits that contain no overlapping Title IX claims. Second, because NIL is a relatively new benefit in intercollegiate athletics, regulators have not yet determined how Title IX applies within the NIL context. This makes it extremely difficult, if not impossible, for a court to do so. Third, the egalitarian goals of the

89. See *Objection to Settlement Agreement and Opposition to Motion for Preliminary Settlement Approval*, *supra* note 8, at 7.

90. See Lavigne & Murphy, *supra* note 7.

91. See Dellenger, *supra* note 59.

92. See Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71414.

Settlement conflict with Title IX, such that Title IX issues should be resolved separately, and ideally at the federal level.

A. *The Settlement's Underlying Lawsuits
Raise Antitrust Claims*

The predominate legal theory of the Settlement arises under the Sherman Act, a commercial statute that addresses harm resulting from unreasonable restrictions on competition.⁹³ Section 1 of the Act prohibits “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.”⁹⁴ By contrast, Title IX, enacted nearly a full century after the Sherman Act, is a civil rights statute that addresses harms resulting from sex discrimination.⁹⁵

Critics of the Settlement argue that it discriminates against women in its allocation of Settlement funds, a potential Title IX violation.⁹⁶ Specifically, they argue that the Settlement perpetuates historic gender discrimination because male athletes will receive a disproportionately large share of the Settlement.⁹⁷ Judge Wilken and Plaintiffs’ counsel, Jeffrey L. Kessler, acknowledged in a hearing that the Settlement raises Title IX issues but tasked schools with resolving those issues.⁹⁸

Because none of the Settlement classes raised Title IX issues in their initial lawsuits, it would be an overreach for the court to require Title IX compliance. Further, because the Settlement does not release Title IX claims, future plaintiffs may litigate Title IX claims in a separate lawsuit.⁹⁹ This makes it less urgent for the court to consider the issue within the context of the Settlement.

93. See Sherman Act of 1890, 15 U.S.C. §§ 1–7; *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911).

94. See 15 U.S.C. § 1.

95. See 20 U.S.C. §§ 1681–1689 (1972).

96. See *Objection to Settlement Agreement and Opposition to Motion for Preliminary Settlement Approval*, *supra* note 8, at 10.

97. See *id.*; Cole Forsman, *Current and Former College Athletes Claim House v. NCAA Settlement ‘Undercompensates Female Athletes’*, SPORTS ILLUSTRATED (Sept. 5, 2024), <https://www.si.com/college/gonzaga/basketball/current-and-former-college-athletes-claim-house-v-ncaa-settlement-undercompensates-female-athletes-01j71hrwnsgn> [<https://perma.cc/QW7M-6BA6>].

98. See Michael McCann, *NCAA House Settlement Not Approved, Faces Fire in Hearing*, SPORTICO (Sept. 5, 2024, 9:42 PM), <https://www.sportico.com/law/analysis/2024/ncaa-house-settlement-not-approved-1234796270> [<https://perma.cc/LL8C-VAEL>].

99. See Peter Nakos, *Live Blog: How to Watch, Updates from House v. NCAA Settlement Preliminary Approval Hearing*, ON3 (Sept. 5, 2024), <https://www.on3.com/nil/news/live-blog-how-to-watch-updates-house-settlement-preliminary-approval-hearing-judge-claudia-wilken/> [<https://perma.cc/LBU7-BWH7>] (noting that Title IX claims will not be released in the Settlement).

*B. It Is Unclear How Title IX
Applies to NIL*

Even if the Settlement were to address Title IX, it is unclear how the statute would apply to NIL compensation. Neither Title IX nor its regulations contain any references to NIL,¹⁰⁰ and although commentators argue that NIL compensation falls within Title IX's definition of "financial assistance," the term is not defined by Title IX's regulations.¹⁰¹ It is also important to note that traditionally, "financial assistance" was understood to mean scholarships and other similar forms of grants-in-aid.¹⁰²

Yet to the extent that NIL may qualify as "financial assistance," § 106.37(a) of the Title IX regulations states that a recipient of federal financial assistance shall not discriminate "[o]n the basis of sex" in providing assistance.¹⁰³ Further, a recipient may not facilitate assistance from third parties that discriminate on the basis of sex.¹⁰⁴ If applicable, § 106.37(a) would require schools to ensure NIL equity whether it is provided by schools or third parties, such as collectives.

Lack of certainty surrounding Title IX continues to permeate the NIL debate since the DOE recently rescinded the prior administration's guidance on Title IX's applicability to the Settlement.¹⁰⁵ This uncertainty is further compounded by President Donald J. Trump's announced plans to eliminate the DOE.¹⁰⁶ Lack of certainty regarding the role of Title IX in NIL makes it almost impossible for a court to sustainably advise the Settlement parties on Title IX without committing judicial overreach.

*C. Title IX's Legal Goals Conflict
with Those of the Settlement*

A third reason the Settlement properly excluded Title IX issues is that, though both the Settlement and Title IX share similar philosophical goals, they have conflicting legal objectives. In other words, philosophically, both the Settlement and Title IX are egalitarian in that they both seek equity for

100. See generally Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413 (Dec. 11, 1979); 34 C.F.R. § 106.41 (2025).

101. See THE DRAKE GRP., PRELIMINARY ASSESSMENT: TITLE IX AND OTHER IMPLICATIONS OF THE PROPOSED SETTLEMENT OF *HOUSE V. NCAA*, *HUBBARD V. NCAA*, AND *CARTER V. NCAA* ON INTERCOLLEGIATE ATHLETICS PROGRAMS 51 (2024), <https://www.thedrakegroup.org/wp-content/uploads/2024/07/JULY-14-FINAL-Corrected-Briefing-Paper-Proposed-Settlement.pdf> [<https://perma.cc/DS7B-YH2P>]; 34 C.F.R. § 106.2(g) (listing certain Title IX definitions).

102. 34 C.F.R. § 106.37(c); see Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71415.

103. 34 C.F.R. § 106.37(a).

104. See *id.*

105. See Press Release, U.S. Dep't of Educ., *supra* note 85.

106. See Nandita Bose & Kanishka Singh, *Trump Says He Wants Education Department to Be Closed Immediately*, REUTERS (Feb. 13, 2025, 11:41 AM), <https://www.reuters.com/world/us/trump-says-he-wants-education-department-be-closed-immediately-2025-02-12/> [<https://perma.cc/5P8M-HKEV>].

previously financially disenfranchised intercollegiate athletes. Yet, the remedy for antitrust claims differs from that of Title IX claims in sometimes mutually exclusive ways. Conflicting legal goals must be prioritized. The Settlement appropriately prioritizes antitrust considerations, given that antitrust claims are at the heart of the Settlement.

At least initially, the legal interests of the Settlement classes converged. To fully establish the legal right to retroactive and prospective NIL damages, it was essential for all athletes to coalesce around a legal theory applicable to all of the Settlement damages classes. The litigants united around the antitrust claims, which ultimately secured NIL rights for all intercollegiate athletes. However, those legal interests later diverged as NIL rights, unforeseen by Title IX, raised gender equity issues.

Title IX mandates equal opportunity and equal treatment for male and female athletes.¹⁰⁷ Under the Settlement, the average female athlete will receive \$125 whereas the average football or men's basketball player will receive over \$100,000.¹⁰⁸ Facially, this difference is not equal treatment. The financial aspects of the Settlement are very heavily skewed toward revenue-generating, male athletes in several respects.¹⁰⁹ This is likely because the antitrust law underlying the Settlement serves a very different purpose than Title IX.

The Sherman Act is based on the premise that free competition will produce the best allocation of scarce economic resources.¹¹⁰ In fact, free competition is held in such high regard under the Sherman Act that liable defendants must pay their victims treble damages.¹¹¹ The Settlement relies on expert analysis of the economic harm to athletes caused by NCAA amateurism regulations.¹¹² It allocates damages resulting from this harm based on the market values of the Settlement classes, without regard to whether those values reflect historical sex discrimination.¹¹³

Although Title IX might produce a different allocation of damages than the Sherman Act, this does not change the reality that football and men's basketball programs at certain schools exponentially outearn women's programs.¹¹⁴ Football and men's basketball revenues are sufficient to

107. See *Boucher v. Syracuse Univ.*, 164 F.3d 113, 115 & nn.1–2 (2d Cir. 1999); see also Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71418.

108. See Objection to Settlement Agreement and Opposition to Motion for Preliminary Settlement Approval, *supra* note 8, at 10.

109. See *id.* at 10–13 (discussing the various ways in the which the Settlement favors male athletes).

110. See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4–5 (1958).

111. See 15 U.S.C. § 15(a).

112. See generally Declaration of Daniel A. Rascher, *In re College Athlete NIL Litig.*, No. 20-cv-03919 (N.D. Cal. July 26, 2024) (detailing sports economist and professor Daniel Rascher's expert report on the calculation of Settlement damages).

113. See *id.* at 16 (using professional sports as the “yardstick” to estimate settlement damages).

114. *The Tools You Need for Equity in Athletics Analysis*, U.S. DEP'T OF EDUC., <https://ope.ed.gov/athletics/#> [<https://perma.cc/V933-6ZUH>] (last visited Mar. 7, 2025) (allowing users to view revenues and expenses for intercollegiate athletics programs by sport and by school).

finance significant portions of athletic departments' operating expenses at certain schools.¹¹⁵ Critics of this sort of redistributive financing argue that revenues should benefit the sports that produce them, as opposed to other social or gender-based priorities.¹¹⁶

The Settlement is designed to compensate athletes who have suffered economic harm from the NCAA's anticompetitive practices. The dramatic differences in damages among the Settlement classes reflect current disparities in NIL earning potential for male and female athletes. They also reflect the reality that Settlement damages are not limitless, and, as such, must somehow be allocated in a manner that is "fair, reasonable and adequate" under the Federal Rules of Civil Procedure.¹¹⁷

The court ultimately concluded that the Settlement was "fair, reasonable, and adequate," and this Essay concludes that, in doing so, the court properly excluded Title IX concerns.¹¹⁸ The court was correct in that the Settlement resolves antitrust lawsuits that do not contain overlapping Title IX claims. Additionally, even if Title IX applies to the financial aspects of the Settlement, regulators have yet to establish clear Title IX criteria for courts to apply. Lastly, because the goals of the Settlement conflict with those of Title IX, Title IX issues should be resolved separately and, ideally, at the Federal level.

IV. WILL SCHOOLS MAKE THE *RIGHT* CHOICE?

The Settlement will provide over \$1 billion in damages to intercollegiate athletes over the next decade.¹¹⁹ Scheduled for final approval in April 2025, the Settlement removes scholarship limits, provides \$2.8 billion in retroactive NIL compensation, and allows schools to disburse up to \$20 million to athletes annually.¹²⁰ Because the Settlement does not address Title IX, schools must decide how to best allocate funds. Some schools will likely allocate funds equally among male and female teams, whereas others will allocate a larger share to revenue-generating male athletes.¹²¹

In this way, the Settlement presents a tragic choice between male and female athletes. Whereas Title IX requires equality among the sexes, the Settlement, grounded in antitrust law, does not. Will schools make the right choice?

In their seminal book *Tragic Choices*, Judge Calabresi and Professor Bobbitt describe the means by which societies allocate scarce resources,

115. *See id.*

116. *See* Dellenger, *supra* note 59 (A university official, among others, rhetorically asked: "Don't those generating the money need to get the most in distribution?").

117. FED. R. CIV. P. 23(e)(2).

118. *Id.*; Revised Order Granting Plaintiffs' Motion for Preliminary Settlement Approval As Modified, *supra* note 3, at 2–3.

119. *See* Murphy, *supra* note 11.

120. *See id.*; *see also* Revised Order Granting Plaintiffs' Motion for Preliminary Settlement Approval As Modified, *supra* note 3, at 9–10 (detailing settlement timelines).

121. *See* Lavigne & Murphy, *supra* note 7.

which sometimes requires exceedingly difficult choices.¹²² A tragic choice is described as one that a society must make when distributing scarce resources and that typically evokes feelings of compassion or outrage.¹²³ For Judge Calabresi and Bobbitt, tragic choices involve two major decision points: how much of a scarce resource will be made available and who will receive the scarce resource?¹²⁴ The former question is a “first-order determination,” whereas the latter is a “second-order determination.”¹²⁵

Tragic choices invoke moral conflicts. These conflicts occur because such choices explicitly require resource allocations that present “insuperable moral difficulty, a nightmare of justice in which the assertion of any right involves a further wrong.”¹²⁶ Life-or-death decisions, such as how much of a life-saving therapy will be produced or who will receive it first, present such a choice.¹²⁷

The Settlement presents an exponentially less drastic, yet still tragic, choice between intercollegiate athletes. The first-order determination for the Settlement is the amount of damages to be paid to athletes. The second-order determination is who should receive those damages. For purpose of this Essay, the second-order determination is a gendered one based on the composition of the damage classes, which consist of football and men’s basketball, women’s basketball, and all other Division I athletes.¹²⁸

Although each damages class’s financial losses are significant, Settlement funds are finite. Consequently, the Settlement presents a choice between allocating funds toward male athletes, who generate the majority of revenues, or female athletes, who have endured decades of sex discrimination, thereby affecting their ability to generate comparable revenues. In this way, the Settlement presents a conflict between the strongly held societal values reflected in both the Sherman Act and Title IX.

Due to this conflict, views of the Settlement’s remedies, and inherently its purpose, differ dramatically. Advocates for the Settlement view it as a means of rectifying past economic wrongs and potentially past racism in NCAA sports with disproportionate numbers of players of African descent.¹²⁹ They

122. See CALABRESI & BOBBITT, *supra* note 12, at 17.

123. See *id.* at 17–18.

124. See *id.* at 19.

125. *Id.*

126. *Id.* at 18 (quoting William Arrowsmith, *The Criticism of Greek Tragedy*, in TRAGEDY: VISION AND FORM 332 (Robert W. Corrigan ed., 1965)).

127. See *id.* at 181–91 (discussing the allocation of artificial kidneys).

128. See Order Granting Motion For Certification of Damages Classes, *supra* note 19.

129. See D. Kevin McNeir, *Current, Former Black College Athletes Discuss Impact of Historic \$2.8B NCAA Settlement*, AFRO NEWS (Sept. 21, 2024), <https://afro.com/college-athletes-revenue-sharing-settlement/> [<https://perma.cc/J2LD-UVYP>] (highlighting estimates suggesting that “in 2017–2020 alone, \$10 billion was funneled to Power 5 coaches and administrators that could have been shared by football and men’s and women’s basketball players who are disproportionately Black”); see Press Release, Winston & Strawn LLP, Hagens Berman and Winston & Strawn Seek Court Approval of Historic Settlement to Revolutionize College Sports (July 26, 2024), <https://www.winston.com/en/insights-news/hagens-berman-and-winston-and-strawn-seek-court-approval-of-historic-settlement-to-revolutionize-college-sports> [<https://perma.cc/8TDW-PTPK>] (discussing how the Settlement

note that the Settlement's purpose under antitrust law is to address economic harm from the NCAA's past anticompetitive conduct.¹³⁰ "I expect the athletes who are generating the most money would get the greatest economic return," said Jeffrey Kessler, lead Plaintiffs' counsel in the *House* litigation.¹³¹ By contrast, opponents of the Settlement view it as perpetuating gender discrimination by overallocating Settlement benefits to football and men's basketball.¹³² Interestingly, neither view is incorrect, which is the nature of the tragic choice presented by the Settlement.

This Essay's purpose is not to argue that gender equity goals should prevail when in conflict with other Settlement's goals. But rather to argue that an explicit prioritization of gender equity vis-à-vis other goals is necessary and that the timing is ripe to do so.

CONCLUSION

NCAA schools are on the precipice of distributing the largest athlete compensation settlement in intercollegiate athletics history. Yet, they still are no closer to answering the pressing question of how Title IX applies to athlete compensation. Though the courts may eventually weigh in on this issue, it is ultimately up to Congress to determine how to resolve the competing societal goals of Title IX and the Sherman Act.¹³³ To do so, Congress must explicitly determine where athlete compensation falls under the purview of Title IX while recognizing that excluding it will substantially and, perhaps irreparably, expand gender inequities in intercollegiate athletics. Still, any guidance is better than the status quo, where individual schools must blindly operationalize complex, conflicting bodies of federal law.

is "rectifying past injustice"). It is notable that the impetus for the nation's first NIL law was to "ensure appropriate protections are in place to avoid exploitation of student athletes" and particularly African American athletes. Fair Pay To Play Act, 2019-2020 Leg., Reg. Sess. § 1(b) (Cal. 2019) (codified as amended at CAL. EDUC. CODE § 67456 (West 2024)). Previous iterations of the Fair Pay To Play Act included findings indicating that "California's African-American college athletes are overrepresented in revenue producing sports, and suffer the lowest graduation rates." *Id.* § 1(c)(11) (as amended by the state senate on March 11, 2019).

130. See, e.g., Class Action Complaint and Demand for Jury Trial, *supra* note 13; Class Action Complaint and Demand for Jury Trial, *supra* note 14; Class Action Complaint and Demand for Jury Trial, *supra* note 15; Ranjan Jindal, *Breaking Down the House v. NCAA Settlement and the Possible Future of Revenue Sharing in College Athletics*, THE CHRONICLE (May 27, 2024, 10:08 PM), <https://www.dukechronicle.com/article/2024/05/duke-athletics-ncaa-house-settlement-nil-revenue-sharing-college-sports-hubbard-carter> [https://perma.cc/4MG6-KQFR].

131. Jindal, *supra* note 130.

132. See Objection to Settlement Agreement and Opposition to Motion for Preliminary Settlement Approval, *supra* note 8, at 10.

133. See John Talty, *NCAA President Seeks Federal Help for 'National Standard' on Title IX as Questions Mount with House Settlement*, CBS SPORTS (June 24, 2024, 12:49 PM), <https://www.cbssports.com/college-football/news/ncaa-president-seeks-federal-help-for-national-standard-on-title-ix-as-questions-mount-with-house-settlement/> [https://perma.cc/DV2L-927G] (quoting NCAA president, Charlie Baker's statement that Title IX poses a "really hard question for schools to answer on their own").