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Can I Play Too? Transgender Student Athletes' Inclusion in "Because of Sex"

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Can I Play Too? Transgender Student Athletes' Inclusion in "Because of Sex"

by PAUL JONES*

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I. Introduction

There she was. Dressed in a revealing corset, it was the former spokesman for the "Breakfast of Champions."¹ Those same people who first saw her, while roaming through the cereal aisle of their local supermarket, remember her from her iconic image and reputation as being the gold medalist of the 1976 Olympic decathlon. No longer did she adorn the cereal aisle. Now she looked up at them from the cover of *Vanity Fair*.² She reintroduced herself to the world with three simple words: "Call Me Caitlyn."³

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1. Caitlyn Jenner, formerly Bruce Jenner, was the spokesman for Wheaties from 1977 to 1984.

2. VANITY FAIR, June 2015.

3. VANITY FAIR, *supra* note 2.

Caitlyn Jenner, formerly Bruce Jenner, debuted her gender transition from male to female before countless millions.⁴ Long after her athletic career ended, but before transitioning, she found new fame and stardom as the stepfather to the Kardashian clan.⁵ But the stepfather of one of cable's most-watched reality television shows had stepped into the spotlight herself. With those three simple words, Jenner would now become a powerful figure in the LGBTQ movement.⁶

Before Jenner officially transitioned, the topic of LGBTQ visibility in athletics remained in the continuing spotlight for the past few years. On the cover of another nationally circulated staple of the magazine industry, the first male athlete, currently playing, from any of the four North American professional team sports⁷ publically revealed that he was gay.⁸ He would play again for a short time with the Brooklyn Nets before announcing his retirement in November 2014.⁹

The envelope was pushed further when the St. Louis Rams drafted a former University of Missouri football player named Michael Sam.¹⁰ He would become the first openly gay male player to be drafted in the NFL.¹¹ Yet, the honor was short-lived. Sam was cut from the Rams at the end of training camp.¹² The former defensive end called the Montreal Alouettes of the Canadian Football League home for a short while.¹³ His tenure there was troubled and concluded with Sam publically stating that “[i]t was a really last call to go to the CFL.”¹⁴ I never really wanted to go to the CFL.”¹⁵ He has since gone back to school to pursue further education.¹⁶

4. *Vanity Fair Circulation Demographics*, CONDE NAST, <http://www.condenast.com/brands/vanity-fair/media-kit/print> (last visited Mar. 19, 2016).

5. *Keeping Up with the Kardashians* (E! television broadcast).

6. LGBTQ stands for individuals who are lesbian, gay, bisexual, transgender, and questioning.

7. Nate Silver, *The ‘Big Five’ in North American Pro Sports*, FIVETHIRTYEIGHT (Apr. 4, 2014), <http://fivethirtyeight.com/datalab/theres-a-big-five-in-north-american-pro-sports/> (The top four North American sports are baseball, basketball, football and hockey).

8. SPORTS ILLUSTRATED, May 2013.

9. Jason Collins, *Parting shot: Jason Collins announces NBA retirement in his own words*, SPORTS ILLUSTRATED (Nov. 14, 2014), <http://www.si.com/nba/2014/11/19/jason-collins-retirement-nba>.

10. Joe Drape, Steve Eder And Billy Witz, *Before Coming Out, a Hard Time Growing Up*, N.Y. TIMES (Feb. 11, 2014), http://www.nytimes.com/2014/02/12/sports/football/for-nfl-prospect-michael-sam-upbringing-was-bigger-challenge-than-coming-out-as-gay.html?_r=0.

11. *Id.*

12. Nick Wagoner, *Michael Sam cut by Rams*, ESPN.GO (Aug. 31, 2014), http://espn.go.com/nfl/story/_id/11431047/michael-sam-cut-st-louis-rams.

13. *Michael Sam ‘never’ wanted to play for the Montreal Alouettes*, THE ASSOCIATED PRESS (Sept. 26, 2015), <http://www.cbc.ca/news/canada/montreal/michael-sam-nfl-montreal-alouettes-1.3245323>.

14. *Id.*

But what if the envelope was pushed even further? Jenner revealed his transition long after his athletic career ended. Collins came out during his professional career. And Sam came out just after college. What would have happened if Collins or Sam had publically come out during their college careers? What would have happened if Jenner had transitioned during or even before her Olympic career?

Some think Collins' and Sam's careers were diminished by publically announcing their sexual orientations, yet both were able to still play at the college and professional levels. But, for athletes such as Jenner who may be transgender, the opportunity to play in college may never arise.

This note will examine the history and obstacles transgender individuals have faced in the past. The note will also discuss how Title VII and Title IX may be interpreted to offer protections to transgender student athletes. The note will also examine what are the obstacles involved, both legislatively and judicially, before transgender student athletes are afforded full recognition that discrimination based on gender identity is discrimination because of sex.

II. What Is the History of Transgender Rights?

The history of the transgender movement begins within the last century or so. The idea of being born female in a male body or male in a female body was not recognized as a biological or psychological condition—now named “gender dysphoria,”—until the 20th century.¹⁷ People who were born with this condition before then were all regaled to the term “cross-dresser.”¹⁸

Cross-dressing has long been practiced in the realms of entertainment.¹⁹ Cross-dressing was common for stage actors.²⁰ Being a stage actor was thought to be a demeaning profession for a woman.²¹ Men played many of history's most famous roles, including William

15. *Id.*

16. *Id.*

17. *Gender Dysphoria*, PSYCHOLOGY TODAY, <https://www.psychologytoday.com/conditions/gender-dysphoria> (last visited Mar. 19, 2016). *See also* Karl Bryant, *Gender dysphoria (GD)*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/science/gender-dysphoria> (last visited Mar. 19, 2016).

18. *See Cross-dressing*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/cross%E2%80%93dressing> (last visited Mar. 19, 2016).

19. Fraser McAlpine, *The Brits and Cross-Dressing: A History*, BBC AMERICA, <http://www.bbcamerica.com/anglophenia/2014/11/brits-cross-dressing-history> (last visited Mar. 19, 2016).

20. Fraser, *supra* note 19.

21. *Id.*

Shakespeare's *Romeo and Juliet*.²² This would eventually evolve into a form of comic relief with men cross-dressing for the primary purpose of entertainment.²³

It was when cross-dressing was taken off the stage that Victorian mores were challenged. "Fanny & Stella: The Young Men Who Shocked Victorian England"²⁴ tells the story of just that,²⁵ with Mrs. Fanny Graham and Miss Stella Boulton, respectively Frederick William Park and Ernest Boulton.²⁶ These young individuals regularly donned women's clothing.²⁷ Both would perform in the theaters of London but the male personas of Frederick and Ernest, respectively, were the actual characters Fanny and Stella portrayed.²⁸ Suitors vexed by their exotic nature and femininity wooed both women.²⁹ Fanny would come to describe Stella as her sister.³⁰ Stella had dressed in clothes of the opposite sex during her childhood as "Ernest."³¹

The diagnosis of gender dysphoria was not available to Fanny and Stella at this time. Fanny and Stella were arrested and charged with sodomy.³² Homosexuality was made criminal under the Buggery Act 1533 and its subsequent reincarnations.³³ The jury acquitted both³⁴ but Victorian England's prejudices, coupled with puritanical foundings, had already permeated the New World colonies in the Americas. Homosexuality remained illegal throughout North America.³⁵ It wouldn't be until *Lawrence v. Texas*³⁶ that the Supreme Court struck down sodomy laws targeting the community.³⁷

22. *Id.*

23. *Id.*

24. Max Fincher, *Journal of the History of Sexuality*, Vol. 24, Iss. 1, 165 (2015) (reviewing NEIL MCKENNA, *FANNY & STELLA: THE YOUNG MEN WHO SHOCKED VICTORIAN ENGLAND* (2013)).

25. Fincher, *supra* note 24.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. Buggery Act 1533, 25 Hen. VIII c. 6 (Eng.); *See also* The Offences against the Person Act 1828, 9 Geo. IV c.31 (Eng.).

34. Fincher, *supra* note 24.

35. *History of Sodomy Law*, GLAPN, <http://www.glapn.org/sodomylaws/history/history.htm> (last updated Apr. 15, 2007).

36. 539 U.S. 558 (2003).

37. *Id.* at 578.

The “T” in LBGQT still largely had been ignored in the gay rights movement, which started with the Mattachine Society³⁸ and its female counterpart The Daughters of Bilitis,³⁹ and escalated with the Stonewall Riots.⁴⁰ In 2007, the only openly gay member of Congress⁴¹ scrubbed transgender protections from the ENDA when trying to get it approved by Congress.⁴² There are many legal impediments to the government’s recognition of gender transition and identity. Some states simply require a physician’s attestation that the individual has had a gender-related medical history.⁴³ Other states require the individual to have sexual reassignment surgery, which can include up to sterilization.⁴⁴ These impediments lead to transgender individuals being misgendered⁴⁵ on their birth certificates, passports, and even driver’s licenses.

Recently, there was a movie about the Stonewall Riots that was the subject of controversy. The Roland Emmerich film titled “Stonewall” chronicled the events of a group of young gay men standing up against police persecution of Christopher Street gay bars.⁴⁶ Many commentators lambasted the movie. The Roland Emmerich film has been called a “white-and cis-washing” of a pivotal moment of the gay rights movement.⁴⁷ There were calls for a boycott of the film because many felt the film’s fictionalized account ignored the transgender women who were instrumental in the start and duration of the Riots.⁴⁸

38. Susan Stryker, *The Transgender Movement Welcomes Gay Allies*, N.Y. TIMES, <http://www.nytimes.com/roomfordebate/2013/10/15/are-trans-rights-and-gay-rights-still-allies/the-transgender-movement-welcomes-gay-allies> (last updated Oct. 8, 2014); *Gay rights movement*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/gay-rights-movement> (last visited Mar. 19, 2016).

39. *Gay rights movement*, *supra* note 38.

40. *Id.*

41. Stryker, *supra* note 38 (Barney Frank was the only openly gay member of U.S. Congress).

42. *Id.*

43. *Changing Birth Certificate Sex Designations: State-By-State Guidelines*, LAMBDA LEGAL, <http://www.lambdalegal.org/know-your-rights/transgender/changing-birth-certificate-sex-designations> (last updated Feb. 3, 2015).

44. *Id.*

45. *See Misgender*, OXFORD DICTIONARY, http://www.oxforddictionaries.com/us/definition/american_english/misgender (last visited Mar. 20, 2016) (Misgendered is defined as referring to a transgender person by using a word, especially a pronoun or form of address that does not correctly reflect the gender with which they identify).

46. STONEWALL (Centropolis Entertainment 2015).

47. Raquel Willis, *5 Tweets That Sum Up Why People Are Upset About Stonewall*, PRIDE.COM (Aug. 12, 2015), <http://www.pride.com/lgbt/2015/8/05/5-tweets-sum-why-people-are-boycotting-stonewall>.

48. *Id.*

All of these actions can be seen as culminating in a belief that the “T” in LGBT has been ignored. Many in the trans community feel as if the mainstream gay rights movement only includes the trans community when it is convenient.⁴⁹ The gay rights movement’s largest organization—the Human Rights Campaign—has come under fire for predominantly advocating for causes that largely benefit only gay men and lesbians. Additionally, there is animosity not only between the Human Rights Campaign and the trans community, but many others in the gay community that feel like the Human Rights Campaign seeks to heteronormalize⁵⁰ all things LGBTQ.⁵¹

The Human Rights Campaign was the main driving force for the legalization of same-sex marriage across the United States.⁵² The showdown between the liberal and conservative blocs of the Supreme Court ended with Justice Anthony Kennedy pinning the majority opinion in *Obergefell v. Hodges*,⁵³ holding that the states must allow gays to marry.⁵⁴

While this was a coup for the gay rights movement, the trans community seems yet to gain a foothold within the mainstream policy agenda until recent years.

III. What Is the History of Sex-Segregation in Athletics?

The history of sex-segregation within athletics begins with sex-segregation itself. Historically, women were not formally educated.⁵⁵ Their upbringing was confined to learning household duties from the female members of the family unit.⁵⁶ Those who were formally educated may not have been exposed to athletic activities as society knows today.⁵⁷

It wasn’t until the 19th century that women began to be more formally educated.⁵⁸ The continuing belief was that women were not as intelligent as men, leading to sex-segregated education based on gender stereotypes.⁵⁹

49. Stryker, *supra* note 38.

50. Heteronormativity is the belief or attitude that heterosexual societal constructs are the only normal and natural expressions of societal behavior.

51. Monica Roberts, *Why The Transgender Community Hates The Human Rights Campaign*, SAN FRANCISCO SENTINEL, <http://www.sanfranciscosentinel.com/?p=7291> (last visited Mar. 22, 2016).

52. Roberts, *supra* note 51.

53. 135 S. Ct. 2584 (2015).

54. *Id.* at 2607 – 08.

55. *Women’s History in America*, WOMEN’S INTERNATIONAL CENTER, <http://www.wic.org/misc/history.htm> (last visited Mar. 22, 2016).

56. *Women’s History in America*, *supra* note 55.

57. *Id.*

58. *Id.*

59. *Id.*

This belief led to many women being discouraged from pursuing higher education and relegated them into domesticity.⁶⁰

These attitudes that the female sex's role was within the domestic sphere transferred over to women's ability to participate in athletics.⁶¹ Athletics were thought to be traditionally masculine because society feared that athletics might interfere with women's menstruation cycle.⁶² All professional athletic teams were comprised of men.

World War II brought changing gender attitudes. The rise of the "Rosie the Riveter" character took women from their homes into the workspace and into military service.⁶³ World War II also saw an influx of women in athletics.⁶⁴ Up until then, there was no such thing as a professional women's sports team in the major North American sports. It wasn't until 1943 that there was a professional women's sports team.⁶⁵ The All-American Girls Baseball League was started as an attempt to substitute for Major League Baseball, which had been canceled due to World War II.⁶⁶ The league lasted until 1954.⁶⁷ Women finally broke the glass ceiling in the realm of professional sports.

But there still remained an attitude that athletic sports must be segregated by sex. And this attitude remains today, from professional sports to grade schools.

IV. How Does Title IX Apply to College Athletics?

Congress passed Title IX in 1972.⁶⁸ Title IX prohibited gender discrimination by any school receiving federal funds.⁶⁹ The language explicitly states that "no person in the United States, shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."⁷⁰ No longer could colleges and

60. *Id.*

61. Richard C. Bell, *A History of Women in Sport Prior to Title IX*, THE SPORTS JOURNAL (Mar. 14, 2008) <http://thesportjournal.org/article/a-history-of-women-in-sport-prior-to-title-ix/>.

62. Bell, *supra* note 61.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. KATHRYN CULLEN-DUPONT, *ENCYCLOPEDIA OF WOMEN'S HISTORY IN AMERICA* 9–10 (2nd ed, 2000).

68. United States Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (1972) (codified as amended at 20 U.S.C. §§ 1681–1688) [hereinafter Title IX].

69. 20 U.S.C. §§ 1681–1688.

70. 20 U.S.C. 1681(a).

universities, who received federal funding, exclude women from athletic programs.

Men's teams had existed for many years. Due to this, to comply with the new federal restrictions colleges and universities created women's teams as analogues.⁷¹ The beginning of the equaling of the genders in college athletics started with the formation of the Association of Intercollegiate Athletics for Women.⁷² Women were finally able to play college sports. Title IX had opened the door for women to be seen as athletes themselves but the playing field was far from level.

The sports landscape evolved but Title IX remains largely unchanged since its enactment. Additionally, while Title IX provides equal opportunity to participate in athletic programs, two exceptions have left Title IX a hollow victory. When the U.S. Department of Health, Education, and Welfare⁷³ was tasked with creating the regulations that would govern how Title IX would be implemented, two exceptions were created that allowed athletic teams to be segregated by sex: the competitive skill exception and the contact sports exception.⁷⁴

The competitive skill exception provides for gender-separate teams when "selection for such teams is based upon competitive skill."⁷⁵ The contact sports exception provides separation of sex when the sport has the "purpose or major activity of which involves bodily contact."⁷⁶ The regulation explicitly lists several contact sports: "boxing, wrestling, rugby, ice hockey, football [and] basketball."⁷⁷ Additionally, the regulation includes all "other sports [with] the purpose or major activity of which involves bodily contact."⁷⁸

The exceptions have gutted Title IX. Common sense suggests some sports would automatically be considered contact sports, such as the aforementioned activities, but where does it end? In 2009, the Wisconsin Supreme Court ruled that cheerleading was a contact sport.⁷⁹

71. *1972 Title IX Enacted*, HISTORY.COM, <http://www.history.com/this-day-in-history/title-ix-enacted> (last visited Mar. 26, 2016).

72. *1972 Title IX Enacted*, *supra* note 71.

73. In 1979, the U.S. Department of Health, Education, and Welfare would split into two separate agencies: the Department of Education and the Department Health and Human Services.

74. 34 C.F.R. § 106.41(b).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Noffke ex rel. Swenson v. Bakke*, 2009 WI 10 ¶23 (ruled that for the purposes of immunity from negligence claims that cheerleading was a sport that involves physical activity between parties).

These exceptions exclude every major North American professional sport from full Title IX protection. As a concession, the regulations state that contact sports teams must be created for members of the opposite gender when there is sufficient interest.⁸⁰ Schools must only provide equal athletic opportunity.⁸¹ But sporting opportunities have only been largely available to women for the past fifty years while athletics have been available to men for millennia. The demographics demonstrate that interest in professional sports is still largely male-dominated.⁸² Due to this, there has been a lack of funding and concern to generate female interest in sports.⁸³

Notwithstanding the lack of interest and the exceptions, there may be hope for full protection under Title IX for college athletes. The Supreme Court has decided to hear an appeal from the Fourth Circuit that may lead to transgender students receiving protections under Title IX.⁸⁴ The plaintiff in *G.G. v. Gloucester County Sch. Bd.* is an underage transgender boy.⁸⁵ He was born female but started transitioning to male when he was twelve.⁸⁶ After beginning high school, he used a separate bathroom in the nurse's office.⁸⁷ He asked the school's administration to use the male's bathroom and received approval.⁸⁸ The request soon became public knowledge and several parents expressed worry about a "girl" in the boys' bathroom.⁸⁹

The local school district took up the issue and passed a resolution mandating that for "privacy" concerns that all students would have to use the restroom that corresponded with their biological sex.⁹⁰ There was a provision that those with "gender identity issues" would be provided an "alternative" restroom facility.⁹¹

The proponents of this resolution used commonly cited rationalizations for denying the plaintiff in *G.G.*, a transgender male, the ability to use the bathroom corresponding with his gender identity.

80. *A Policy Interpretation: Title IX and Intercollegiate Athletics*, OFFICE OF CIVIL RIGHTS, <http://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html> (last visited Mar. 23, 2016).

81. 34 C.F.R. § 106.41(c).

82. *1972 Title IX Enacted*, *supra* note 71.

83. *Id.*

84. *See G. G. v. Gloucester Country. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *cert. granted*, 136 S. Ct. 2442 (2016).

85. *G.G.*, 822 F.3d at 714.

86. *G.G. v. Gloucester County Sch. Bd.*, No. 4:15cv54, 2015 U.S. Dist. LEXIS 124905 at *3-5 (E.D. Va. Sep. 17, 2015).

87. *Id.* at *6.

88. *Id.*

89. *Id.* at *6 – 9.

90. *Id.* at *8.

91. *Id.* at *7.

Proponents were worried about the privacy of other students and the increased probability that sexual assault may occur.⁹² The young man whose simple request to use the bathroom that corresponded with his gender identity would later speak of the debate, “I was spoken about as if I were some sort of creature on a pedestal for everyone to mock and make their comments about as if my rights to privacy and equal treatment aren’t the same as everybody else’s.”⁹³

Similar arguments were used in a fight for an inclusive city ordinance that would protected against discrimination based on gender identity.⁹⁴ The Houston Equal Rights Ordinance was originally approved by the Houston’s city council.⁹⁵ But in a devastating blow, the Texas Supreme Court ruled that no such law could be enacted by legislative measure; it must be put before the electorate.⁹⁶

The measure was put on the ballot.⁹⁷ Opponents of the measure launched a YouTube video “based on fear” and a fight for the protection of women’s privacy.⁹⁸ The video contained a young girl entering a bathroom stall, followed by an older man.⁹⁹ The words “No one is exempt. Even registered sex offenders could follow young women or girls into the bathroom” played against ominous background music.¹⁰⁰

The voter turnout was the highest for a city election in Houston in twelve years.¹⁰¹ And the measure failed 60.97% to 39.03%.¹⁰²

The plaintiff in *G.G.* refused to accept the school district’s short-sidedness, which was based on the same concerns of those who launched the disparaging video that defeated the Houston ballot measure.¹⁰³ He

92. *Id.* at *8.

93. Michael K. Lavers, *4th Circuit to hear transgender student lawsuit*, WASHINGTON BLADE (Jan. 26, 2016), <http://www.washingtonblade.com/2016/01/26/4th-circuit-to-hear-transgender-student-lawsuit/>.

94. Russell Berman, *How Bathroom Fears Conquered Transgender Rights in Houston*, THE ATLANTIC (Nov. 3, 2015), <http://www.theatlantic.com/politics/archive/2015/11/how-bathroom-fears-conquered-transgender-rights-in-houston/414016/>.

95. Berman, *supra* note 94.

96. *Id.*

97. *Id.*

98. *Id.*

99. Campaign for Houston, *Campaign for Houston - TV Spot 1*, YOUTUBE.COM (Oct. 13, 2015), <https://www.youtube.com/watch?v=D7thOvSvC4E>.

100. Campaign for Houston, *supra* note 99.

101. Matt Dempsy, *Voter Turnout Highest Since 2003*, HOUSTON CHRONICLE, <http://www.houstonchronicle.com/politics/election/local/article/Voter-turnout-highest-since-2003-6609254.php> (last updated Nov. 4, 2015).

102. *Cumulative Report – Official*, HARRISCOUNTYVOTES, http://www.harrisvotes.com/HISTORY/20151103/cumulative/cumulative_9.jpg (last visited Mar. 23, 2016).

103. *G.G.*, LEXIS 124905, at *10 – 11.

brought suit under Title IX for discrimination on the basis of sex.¹⁰⁴ The school district argued for dismissal because Title IX does not include discrimination based on gender identity.¹⁰⁵ *G.G.* posited that Title IX's employment counterpart Title VII has been interpreted to include gender identity with the language "because of sex."¹⁰⁶

The district court concluded that the meaning of Title IX's prohibition of discrimination on the "basis of sex" was likely to mean "biological sex."¹⁰⁷ The court dismissed the plaintiff's case¹⁰⁸ and did not give heed to how the decision would affect young transgender students, such as the plaintiff. In an interview after the decision, the young man said, "Right now I feel humiliated and dysphoric every time I'm forced to use a separate restroom facility just so I can carry out a basic function of human life."¹⁰⁹

He continued to fight. He appealed to the Fourth Circuit. The Fourth Circuit bucked against judicial stubbornness about gender identity. The court ultimately held that the Government's position, asserting that denial of transgender students' access to the restrooms corresponding with their gender identity violated Title IX, was permitted and reasonable.¹¹⁰ The court also discussed the various levels of agency deference.¹¹¹ As long as the agency's promulgation and interpretation of its own regulations was reasonable and not inconsistent with previous interpretations, the agency was allowed broad discretion pertaining to interpretation and enforcement.¹¹²

The Office for Civil Rights' (OCR) enabling statute was ambiguous but their interpretation pursuant to what "sex" means was reasonable.¹¹³ The Fourth Circuit reasoned that because OCR's interpretation of its own enabling statute was reasonable, the agency had the ability to promulgate regulations relating to gender identity.¹¹⁴ If these regulations were reasonable and not inconsistent with previous interpretations, the district court should have deferred to the agency's interpretation.

104. *Id.*

105. *Id.* at *13.

106. *See, e.g.,* Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011); Smith v. City of Salem, 378 F.3d 566, 574 – 75 (6th Cir. 2004); Finkle v. Howard Cnty., Md., 12 F. Supp. 3d 780, 788 (D. Md. 2014); Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); *see also* Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000).

107. *G.G.*, LEXIS 124905, at *23 – 24.

108. *Id.* at *43.

109. Lavers, *supra* note 93.

110. *G.G.*, 822 F.3d at 722 – 23.

111. *Id.* at 719 – 24.

112. This is called "Auer deference." *Infra* notes 214 to 217 and accompanying text.

113. *G.G.*, 822 F.3d at 722 – 24.

114. *Id.*

The Fourth Circuit opined that while the OCR's interpretation of its regulation was novel, it was consistent with previous policy and reasonable in its interpretation.¹¹⁵ And thus, the district court should have deferred to the OCR's interpretation. The district court was reversed and the case was remanded for further proceedings.¹¹⁶ But the fight is not over. The school board appealed and was granted review by the Supreme Court.

If the Supreme Court affirms the Fourth Circuit's opinion, a precedent would be set that Title IX includes a prohibition against discrimination on the basis of gender identity. It is uncertain what such a decision would do for the contact sport exception. If the same reasoning was applied to the contact sport exception, an educational institution with separate teams would not be permitted to prohibit a transgender student from participating on the team that corresponded with his or her gender identity. Such a broad sweeping decision may apply to college settings. If so, transgender student athletes, similarly to the plaintiff in *G.G.*, could not be prohibited from joining the sports team that corresponds with their gender. Transgender athletes would no longer have to hide or delay transitioning their gender identities for the chance of a college career, which for many athletes is the stepping-stone to a professional career.

V. Does "Because of Sex" Apply to Gender Identity?

There have been other advancements in anti-discrimination protections. Over eighteen states have some form of statewide legislation that prohibits discrimination based on gender identity in housing, employment and/or other areas of public accommodation.¹¹⁷ There have also been enactments of local municipal laws prohibiting gender identity discrimination.¹¹⁸ Governors have also issued executive orders banning discrimination in employment amongst state agencies.¹¹⁹

But there is no recognized federal legislation prohibiting discrimination based on gender identity. The Employment Non-Discrimination Act (ENDA) did not include gender identity when first introduced in 2007.¹²⁰ The language was restored when reintroduced in 2009 but failed to garner enough support to be enacted into law.¹²¹ But ENDA may not be needed. Title VII of the Civil Rights Act provides that

115. *Id.*

116. *Id.* at 723.

117. *Know Your Rights: Transgender People and the Law*, ACLU, <https://www.aclu.org/know-your-rights/transgender-people-and-law> (last visited Mar. 25, 2016).

118. *Know Your Rights: Transgender People and the Law*, *supra* note 117.

119. *Id.*

120. Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007).

121. Employment Non-Discrimination Act of 2009, H.R. 2981, 111th Cong. (2009).

no employer may discriminate because of “race, color, religion, sex or national origin.”¹²² “Because of sex” has historically been narrowly construed as “anatomical sex” or “biological sex,” similarly to how the district court interpreted “sex” in *G.G.*

This issue has been raised before. Paula Grossman was a teacher in the Bernards Township of Somerset County, New Jersey.¹²³ She had begun her career as Paul Grossman at the school district in 1957.¹²⁴ She underwent sex reassignment surgery in 1971.¹²⁵ Several months later, she was suspended and subsequently fired.¹²⁶ She brought suit under several statutes, including Title VII, alleging wrongful termination based on discrimination because of sex.¹²⁷ The school district alleged that Grossman’s firing was due to the fact that her sexual assignment surgery would cause the children emotional harm.¹²⁸

The district court parsed Grossman’s termination as not “because of sex” but a termination because of a “change in sex.”¹²⁹ The court reasoned that the absence of an intent to include gender identity from the legislative history was definitive evidence that Title VII’s language “because of sex” did not include any protections for transgender individuals.¹³⁰

Title VII was enacted in 1964 and subsequently amended in 1972 to increase the Equal Employment Opportunity Commission’s (EEOC) enforcement power.¹³¹ Gender dysphoria, originally known as gender identity disorder, did not receive official recognition as a condition until it was added to the DSM-III in 1980.¹³² It is likely legislators may have never considered gender identity when drafting Title VII protections because the medical establishment had yet to recognize gender dysphoria as a legitimate medical condition. That may explain its absence from the legislative history.

But, the legislative history may have been a poor point of start. The “because of sex” provision was a last minute amendment added one day

122. 42 U.S.C. § 2000e-2.

123. *Grossman v. Bernards Tp. Bd. of Educ.*, No. 74-1904, 1975 WL 302, at *1 (D.N.J. Sept. 10, 1975).

124. *Id.*

125. *Id.* at *2.

126. *Id.* at *1.

127. *Id.* at *2–4.

128. *Id.* at *2.

129. *Id.* at *4.

130. *Id.*

131. 42 U.S.C. § 2000e-2; *see Id.* § 2000e-4.

132. *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, (American Psychological Association, 3rd ed. 1980).

before the House of Representatives approved the bill.¹³³ It passed mere hours later with limited to no hearing or debate on the amendment.¹³⁴

A proper start to a judicial interpretation should have begun with considering the overall purpose of Title VII. The Supreme Court stated that the “objective of Congress in the enactment of Title VII [was] plain.”¹³⁵ Congress wanted to “achieve equality of employment opportunities” and remove “artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”¹³⁶ Such sweeping language by the high court could mean that Title VII should be construed as broadly as possible to prohibit invidious discrimination.

A district court took heed of the Supreme Court’s word and held that sex stereotyping did include prescriptive stereotypes such as men should wear their hair short, and thus was actionable under Title VII.¹³⁷ The court went on to say Congress had “intended to attack these stereotyped characterizations” that many employers, as well as members of the public, may have about protected classes.¹³⁸ Congress wanted people to be “judged by their intrinsic worth.”¹³⁹ Yet, a narrow interpretation of “sex” still followed.

Courts held firm to the narrow interpretation, holding steadfast to the so-called plain meaning of the law while ignoring its spirit. Several federal appellate courts held that Title VII did not include a protection against discrimination based on gender identity.¹⁴⁰ Gender identity seemed to have been judicially excised from Title VII protection.

133. Jo Freeman, *How “Sex” Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 *LAW AND INEQUALITY: A JOURNAL OF THEORY AND PRACTICE* 163, 163 – 64 (1991).

134. Freeman, *supra* note 133.

135. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971).

136. *Id.*

137. *Donohue v. Shoe Corp. of America*, 337 F. Supp. 1357, 1358-59 (C.D. Cal. 1972).

138. *Id.* at 1359.

139. *Id.*

140. *Sommers. Budget Mktg., Inc.*, 667 F.2d 748, 749 (8th Cir. 1982) (holding that summary judgment was proper against a transgender defendant’s Title VII claim that she was fired after requesting to use the female restroom facilities); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 663 (9th Cir. 1977) (holding that dismissal for lack of jurisdiction and failure to state a cause for which relief can be granted was proper after a transgender defendant was fired after she required a name change from human resources); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221-22 (10th Cir. 2007) (holding that summary judgment was proper against a transgender defendant who fired because she used the female restroom because “transsexuals were not a protected class” under the 14th Amendment and were not deemed to have protection of Title VII).

But, some courts had a difference of opinion after the Supreme Court's decision in *Price Waterhouse v. Hopkins*¹⁴¹. The plaintiff in *Price Waterhouse* had been described by male colleagues as "macho" and was told by her supervisor that if she acted more feminine her chances of promotion would increase.¹⁴² The plaintiff sued under Title VII for sex discrimination.¹⁴³ The Supreme Court held that sex discrimination could take the form of sex stereotyping.¹⁴⁴

The Sixth Circuit in *Smith v. City of Salem*¹⁴⁵ held that a transgender plaintiff's Title VII claims were valid.¹⁴⁶ The court reasoned that "sex stereotyping based on a person's gender non-conforming behavior" is "impermissible discrimination."¹⁴⁷ The court ignored the labeling of "transsexual" because "a sex discrimination claim where the victim has suffered discrimination because of his or her gender nonconformity" was because of sex.¹⁴⁸

Because transgender individuals identify as the gender opposite their biological sex, this type of behavior may be viewed as gender nonconformity. If there was an adverse employment action because of this gender nonconformity, it may constitute sex-stereotyping¹⁴⁹ and because of that, it is actionable.

Additionally, the Ninth Circuit concluded in *Schwenk v. Hartford*¹⁵⁰ that "gender" and "sex" had become interchangeable.¹⁵¹ The plaintiff was a transgender woman incarcerated in an all-male prison.¹⁵² She brought suit under the Gender Motivated Violence Act, alleging rape by a male prison guard.¹⁵³ The Ninth Circuit concluded that the "because of gender" and "because of sex" language from the Gender Motivated Violence Act and Title VII, respectively, were interchangeable; gender nonconforming individuals were also protected under the Gender Motivated Violence Act.¹⁵⁴

141. 490 U.S. 228 (1989).

142. *Id.* at 235.

143. *Id.* at 231 – 32.

144. *Id.* at 250.

145. 378 F.3d 566 (6th Cir. 2004).

146. *Id.* at 575.

147. *Id.*

148. *Id.*

149. *Id.*

150. 204 F.3d 1187 (9th Cir. 2000).

151. *Id.* at 1202.

152. *Id.* at 1193.

153. *Id.* at 1192.

154. *Id.* at 1201 – 03.

The plain meaning of “sex” and the plain meaning of “gender” are no longer societally the same. The spectrum of sexuality has established that “sex” may mean your biological sex and “gender” may mean which biological sex societal norms you adopt. If the Ninth Circuit’s reasoning is sound, gender is encompassed within “because of sex” language in Title VII of the Civil Rights Act. Therefore, the adverse employment action because of gender identity may be actionable under Title VII.

Additionally, the EEOC has been charged with creating interpretative guidelines and rulings for Title VII.¹⁵⁵ The EEOC issued a ruling in *Mia Macy v. Eric Holder*¹⁵⁶ in which the Commission concluded that “claims of discrimination based on gender identity, are cognizable under Title VII’s sex discrimination prohibition.”¹⁵⁷ The ruling cited *Price Waterhouse’s* sex-stereotyping line of doctrine as part of their analysis as to why gender identity must be included under Title VII.¹⁵⁸ This interpretation was a departure from earlier EEOC decisions and earlier Title VII litigation. Some federal courts were edging towards being more inclusive but the EEOC interpretation now gives the ability to push further litigation.

The federal circuit dispute coupled with the EEOC’s ruling may be enough to force the Supreme Court to grant certiorari to decide the interpretation of “because of sex” as it pertains to transgender coverage under Title VII. If the Supreme Court did favor the inclusion of a prohibition based on gender identity under Title VII, it would provide a remedy in employment law for all transgender individuals who may have received an adverse employment action.

VI. What Is an Employee Under Title VII?

Title VII is a powerful tool to ensure no one is discriminated against because he or she is a member of a protected class. Remedies provided under Title VII are only available if there has been an adverse employment action. An adverse employment action is defined as “an action” that “materially affects the terms, conditions, or privileges of employment.”¹⁵⁹ Generally, all employers with over fifteen employees fall under the purview of Title VII.¹⁶⁰ Federal and state government employees are provided protection as well as private employees.¹⁶¹

155. 42 U.S. Code § 2000e-4.

156. *Mia Macy v. Eric Holder*, EEOC Appeal No. 0120120821 (EEOC Apr. 20, 2012).

157. *Id.*

158. *Id.*

159. 42 U.S.C. § 2000e-2(a)(2).

160. *Id.* § 2000e(b).

161. *Id.*

But the definition of “employee” has been the subject of much debate. Generally, an employee under Title VII is simply “an individual employed by an employer.”¹⁶² The plain language is ambiguous, and courts have been trying to interpret it through various case law. Some courts seem to have taken to adopting the common law test to determine who an “employee” is under Title VII.

The common law test has evolved from the *Restatement (Second) of Agency* § 220.¹⁶³ Other courts have developed a different approach. The plaintiff in *Spirides v. Reinhardt*¹⁶⁴ wanted to bring suit under Title VII for sex discrimination.¹⁶⁵ The issue was whether she was an employee or an independent contractor.¹⁶⁶ The DC Circuit of Appeals focused on the “‘economic realities’ of the work relationship.”¹⁶⁷ The court went on to state that the “test calls for application of general principles of the law of agency to undisputed or established facts. Consideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative.”¹⁶⁸ The court also emphasized that the “extent of the employer’s right to control the ‘means and manner’ of the worker’s performance is the most important factor” when determining if there is an employer-employee relationship.¹⁶⁹ The court stated that if “an employer has the right to control and direct the work of an individual, not only as to

162. 42 U.S.C. § 2000e(f).

163. (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

164. 613 F.2d 826 (D.C. Cir. 1979).

165. *Id.* at 827-28.

166. *Id.*

167. *Id.* at 831 – 32.

168. *Id.* at 831.

169. *Id.*

the result to be achieved but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist.”¹⁷⁰ The D.C. Circuit also listed several factors to consider when making the determination:

- (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision;
- (2) the skill required in the particular occupation;
- (3) whether the “employer” or the individual in question furnishes the equipment used and the place of work;
- (4) the length of time during which the individual has worked;
- (5) the method of payment, whether by time or by the job;
- (6) the manner in which the work relationship is terminated; I. e., by one or both parties, with or without notice and explanation;
- (7) whether annual leave is afforded;
- (8) whether the work is an integral part of the business of the “employer”;
- (9) whether the worker accumulates retirement benefits;
- (10) whether the “employer” pays social security taxes; and
- (11) the intention of the parties.

Additionally, some courts have relied on legislative histories of other federal statutes or employment protections to interpreting the meaning of “employee” under Title VII.¹⁷¹ The Supreme Court has ruled on several different cases determining who is an “employee” under the National Labor Relations Act¹⁷², the Social Security Act¹⁷³ and the Fair Labor Standards Act¹⁷⁴. Subsequent to judicial interpretations, Congress amended to narrow the definition of “employee” in the aforementioned acts.¹⁷⁵

Specifically, the National Relations Labor Act has been the subject of scrutiny. Many of the provisions of Title VII were modeled after the National Relations Labor Act, but Congress chose not to import the National Relations Labor Act’s narrowed definition of “employee” to Title VII.¹⁷⁶

170. *Id.* at 832.

171. See Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75 (1984).

172. See 29 U.S.C. § 151–169; see also *NLRB v. Hearst Publications*, 322 U.S. 111 (1944).

173. See 42 U.S.C. § 410; See also *U. S. v. Silk*, 331 U.S. 704 (1947).

174. See 29 U.S.C. § 203. See also *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

175. Dowd, *supra* note 171.

176. *Id.*

This has led some to theorized that by declining to define “employee” under Title VII, Congress indicated that it wanted “employee” to be construed as broadly as possible.¹⁷⁷ But courts have largely ignored this.¹⁷⁸ Court still rely on the common law tests to determine which individuals are employees.

VII. Are Student Athletes Employees Subject to Title VII Protection?

Since Title IX only applies to educational institutions who receive federal funding, private universities who do not receive federal funding may escape Title IX’s prohibitions.¹⁷⁹ But even private universities must comply with Title VII protections because universities are employers.¹⁸⁰ Title VII may be the only powerful tool transgender athletes have to ensure they will not be left on the bench. And to be protected, college athletes must be considered as employees.

As previously stated, Title VII borrowed from the National Labor Relations Act, but the two statutes’ definitions of “employee” have split into two separate doctrines of jurisprudence. If some are right and Congress did intend against a wide definition of employee under Title VII, are college athletes employees for the purposes of Title VII?

The determination of whether college athletes are employees was raised in the context of the National Labor Relations Act when college football players sought to unionize for the purposes of collective bargaining.¹⁸¹ The football players were found to be employees under the definition of the National Labor Relations Act but the National Labor Relations Board declined jurisdiction over their petition and dismissed it upon rehearing.¹⁸²

Further examinations must consider the “employee test” based on the principles of agency.¹⁸³ The putative master is the university or athlete. The putative servant is the student athlete. The servant “perform[s] services in the affairs of another and who with respect to the physical conduct in the performance of the service is subject to the other’s control or

177. *Id.*

178. *Id.*

179. *See* 20 U.S.C. § 1681(a).

180. *See* 42 U.S.C. § 2000e(b).

181. *See* Northwestern Univ. & College Athletes Players Ass’n., 362 N.L.R.B. 167 (2015) [hereinafter Northwestern Univ.].

182. *Id.*

183. *See* RESTATEMENT (SECOND) OF AGENCY § 220.

right to control.”¹⁸⁴ To determine if the student athlete is a servant, there are a number of factors to consider¹⁸⁵:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

The analysis begins with an examination of how much control the master—the employer school—has over the servant—employee athlete. The student athlete is engaged in a distinct occupation or business. College athletics may be considered a distinct business.¹⁸⁶ The commercial and economic ventures related to college athletics create millions of dollars for the university employers.¹⁸⁷ If this is indeed a distinct business, the work is performed under the university employer through its agent: the coach.

The coaches of these athletic teams are responsible for student athlete employees. The student athletes must adhere to the demands of the university employers’ agents to remain on their respective teams. On most teams, the student athletes must try out before participating on the team.¹⁸⁸ Each team demands a certain ability of skill to compete effectively.¹⁸⁹ The university employers supply the tools and the places for the student athletes

184. *Id.*

185. *Id.*

186. See Kevin McGuire, *NCAA revenue jumps closer to \$1 billion*, NBC SPORTS (Mar. 11, 2015), <http://collegefootballtalk.nbcsports.com/2015/03/11/ncaa-revenue-jumps-closer-to-1-billion/>.

187. McGuire, *supra* note at 186.

188. *Playing College Sport Without a Scholarship*, COLLEGE SPORTS SCHOLARSHIPS, <http://www.collegesportsscholarships.com/team-walk-on-tryout.htm> (last visited Mar. 26, 2016).

189. *Playing College Sport Without a Scholarship*, *supra* note 188.

to work.¹⁹⁰ The universities have playing fields and sports equipment for the student athletes to use.¹⁹¹

In some sports, such as football, student athletes may engage in athletic-related activities up to fifty hours a week.¹⁹² While some sports may only be during “seasons,” some student athletes may be involved in the athletic programs several to all years of their matriculation.¹⁹³

Yet, there may be some difficulty in ascertaining the method of compensation. Some student athletes receive scholarships in turn for participating in college athletic programs.¹⁹⁴ Some scholarships may be thousands of dollars a year.¹⁹⁵ Additionally, there may be intangible compensation in the forms of the admiration and praise of their fellow students, which may lead to enhanced popularity around the college campus for performing well for the college employer.¹⁹⁶ Also, college athletes may have better nutritional and health opportunities, or increase academic support, leading to more favorable grades.¹⁹⁷ Furthermore, the compensation is subject to the student athletes obeying the educational institution’s rules.¹⁹⁸ If the student athlete does not adhere, the compensation, such as scholarships, may be withdrawn.¹⁹⁹

The university employers have control of the compensation of the student athlete. However, the university employer’s may argue that their primary business goal is educating the students; and as an additional goal, the university employer seeks to produce well-rounded individuals.²⁰⁰

Many students do not become involve in college athletics, but universities offer many other extracurricular activities to achieve their goals for well-rounded graduates. Offering college athletics as an extracurricular activity is likely another method of the university’s goal of ensuing its graduates receive the best higher educational experience possible.

190. Northwestern, 362 N.L.R.B. at 17.

191. *Id.*

192. Steve Wieberg, *Study: College Athletes Are Full-Time Workers*, USA TODAY (Jan. 13, 2008), http://usatoday30.usatoday.com/sports/college/2008-01-12-athletes-full-time-work-study_N.htm.

193. Wieberg, *supra* note 192.

194. *Id.*

195. *The Balancing and Benefits to Being a College Student Athlete*, ANDGOSPORTS (Feb. 27, 2015), <https://www.andgosports.com/the-balancing-and-benefits-to-being-a-college-student-athlete/>.

196. *The Balancing and Benefits to Being a College Student Athlete*, *supra* note 195.

197. *Id.*

198. Lynn O’Shaughnessy, *8 Things You Should Know About Sports Scholarships*, CBS NEWS (Sept. 20, 2012), <http://www.cbsnews.com/news/8-things-you-should-know-about-sports-scholarships/>.

199. O’Shaughnessy, *supra* note 198.

200. *The Balancing and Benefits to Being a College Student Athlete*, *supra* note 195.

This issue is debatable. Universities are businesses. College athletics continue to bring in millions for various enterprises, including donations to the universities with prominent athletic programs.²⁰¹ There has been litigation on whether student athletes are employees, but college athletics may still widely be considered an extracurricular activity, and not a legitimate, money-making business.²⁰² While there may not be a widespread belief that there is an employer-employee relationship, litigation of the subject brings visibility, and that belief may spread among campuses all over the United States. If the consideration of student athletes as employees gains broader visibility, there may be a shift in the belief that there is an employee-employer relationship between the student athlete and the university employer.

The student athletes are completely reliant on the universities to provide the instrumentalities and places of work. Universities compensate the student athletes with scholarships and other intangible rewards.²⁰³ The Sixth Circuit has held that for purpose of whether an individual is an employee, the definition should be construed to include “the full range of workers who may be subject to the harms the statute was designed to prevent, unless such workers are excluded by a specific statutory exception.”²⁰⁴

As of right now, transgender student athletes may not be able to receive the protection of Title VII, as well as Title IX, due to restrictive interpretations of “because of sex” and differing interpretations of what an employee is or isn’t. But recently, the EEOC has been responsive to include transgender individuals under of Title VII protection. Additionally, there has been a movement to consider college athletes employees, deserving of labor law protection. Coupled together, this can combat the evils Title VII was enacted to stop.²⁰⁵

VIII. How Much Deference Is the EEOC Granted?

The EEOC—or the OCR pursuant to Title IX—could promulgate regulations for the protection of transgender student athletes. Yet, these are merely executive agencies enacted by statute with interpretative, regulatory and enforcement power.²⁰⁶ Both agencies are still subject to judicial

201. See McGuire, *supra* note 186.

202. See Northwestern Univ. & College Athletes Players Ass’n., 362 N.L.R.B. 167 (2015).

203. See *The Balancing and Benefits to Being a College Student Athlete*, *supra* note 195; Northwestern Univ. & College Athletes Players Ass’n., 362 N.L.R.B. 167 (2015).

204. *Armbruster v. Quinn*, 711 F.2d 1332, 1339 (6th Cir. 1983).

205. See *Macy v. Eric Holder*; See also *Griggs v. Duke Power Co.*, 401 U.S. at 429 – 30.

206. See 42 U.S.C. § 2000e-4; *Title IX and Sex Discrimination*, OFFICE OF CIVIL RIGHTS, http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last updated Apr. 2015).

scrutiny. The EEOC's interpretations when subjected to judicial review may receive some deference.

The U.S. Supreme Court decided in *Skidmore v. Swift & Co.*²⁰⁷ that certain nonadversarial decisions or rulings of a statute's administrator, while not binding upon the courts, may be entitled some deference because the rulings "constitute a body of experience and informed judgment" which have "the power to persuade" the court.²⁰⁸ Additionally, the Court in *Chevron, U.S.A., Inc. v. NRDC, Inc.*²⁰⁹ held that when an agency is specifically assigned to administer the statute, the amount of deference requires a two-step test.²¹⁰ The first step is whether Congress has directly spoken to the precise question at issue, if the intent of Congress is clear.²¹¹ If the answer is yes, the agency, as well as the reviewing court, must give deference to the unambiguously expressed intent of Congress.²¹² If the statute is ambiguous, the second step, the question becomes whether the agency's interpretation of the statute is a "permissible construction," or reasonable interpretation, of the statute.²¹³

There also exists another level of deference pursuant to *Auer v. Robbins*²¹⁴ An agency is only limited by the agency's enabling statute.²¹⁵ An agency's interpretation of its own regulations and regulatory scheme will survive judicial scrutiny if it is deemed reasonable and consistent with previous agency interpretations.²¹⁶ The Fourth Circuit ultimately used *Auer* deference in *G.G.* and deferred to the OCR's interpretation.²¹⁷

If the EEOC opine similar conclusions as the OCR, deeming it a violation of Title VII to deny transgender student athletes access to the corresponding sex-segregated teams, would it receive the same *Auer* deference by courts? The question remains unanswered. Before a court could begin inquiry into whether such an action was allowed, the question of whether the EEOC's interpretation was entitled to deference—likely to be *Chevron* deference—in its inclusion of gender identity in "sex" pursuant to Title VII must be answered first. The reliance on of judicially-created tests to determine who is or is not an "employee" also muddies the waters.

207. 323 U.S. 134 (1944).

208. *Id.* at 140.

209. 467 U.S. 837 (1984).

210. *Id.* at 842 – 43.

211. *Id.*

212. *Id.* at 843.

213. *Id.*

214. 519 U.S. 452 (1977).

215. *Id.* (holding that an agency is only limited in their creation of regulations by their enabling statute).

216. *G.G.*, 822 F.3d at 721 (citing *Auer*, 519 U.S. at 461).

217. *Id.* at 723.

The history of deference to the policy interpretations of EEOC decisions has been controversial. Courts have held that the EEOC does not have the authority to create rules and regulations, but the interpretative rulings should be given some weight and deference.²¹⁸ This type of deference renders the agency's interpretations of the statute all bark and no bite, and is more akin to *Skidmore* deference.²¹⁹

One coup for the EEOC interpretative guidelines was the interpretation of employer in *Meritor Savings Bank v. Vinson*,²²⁰ the Court upheld the EEOC's interpretation of the word "employer" to include "any agent of an employer."²²¹ The Court gave deference to the EEOC because the interpretative guidelines based on its enabling statute were created with a "body of experience and informed judgment."²²² Yet, in *Vance v. Ball State University*,²²³ the Court rejected EEOC's interpretative guidelines on the term "supervisor."²²⁴ The majority concluded that the EEOC's interpretation was "too ambiguous" with no meaningful restraint on employer liability.²²⁵

The reason for this may be that the EEOC tends to be more liberal with their interpretations than the Supreme Court.²²⁶ Some scholars suggested this shift may be the result of the Court's increasingly conservative ideologies.²²⁷ Other factors to consider may also be the Court's consideration of the larger legal landscape when interpreting a statute.²²⁸ But, whatever the reason may be, this conservative era of deference may not bode well for a more inclusive interpretation of "because of sex."

In the past, appellate circuits have been hostile towards the inclusion of transgender plaintiffs in "sex."²²⁹ While gender identity's inclusion in

218. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 – 42 (1976); *See EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991). *See also Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

219. *Chevron* and *Auer* deference require more deference to agency interpretations while *Skidmore* deference has a lesser deferential requirement.

220. 477 U.S. 57, 65 (1986).

221. *Id.* at 72.

222. *Id.* at 65.

223. 133 S. Ct. 2434 (2013).

224. *Id.* at 2443 – 48.

225. *Id.* at 2449.

226. Symposium, *Chevron At 30: Looking Back And Looking Forward: Chevron And Skidmore In The Workplace: Unhappy Together*, 83 *FORDHAM L. REV.* 497, 510 (the EEOC's interpretation are more than 90% pro-employee compared to the 64% pro-employee Supreme Court interpretative opinions of Title VII).

227. *Id.* at 512.

228. *Id.* at 520 – 25.

229. *See Sommers*, 667 F.2d at 749; *Holloway*, 566 F.2d at 663; *Etsitty*, 502 F.3d at 21 – 22.

“because of sex” is still being litigated in the lower courts, Title VII may be the best chance transgender student athletes have at getting needed protection. The Court should apply the *Chevron* deference standard to the EEOC’s interpretation of the term “because of sex” and *Auer* deference standard to any opinions or guidance about who is an employee and when they are protected due to the fact the EEOC is the executive agency tasked with the protections of all discriminatory employment matters.

IX. Conclusion

Since the days of the Civil Rights Movement until the present day, different social movements use the courts to seek protections when Congress has seemed unable or unwilling to provide protection. When Title VII and Title IX were first enacted, Congress may not have predicted that people may so fluidly change their gender identities. Yet, Congress provided tools to stamp out prejudice.

In today’s world, transgender individuals still face many legal obstacles. Transgender student athletes should be allowed to be included on the sex-segregated team that matches with their gender identity. The fight for protection under Title IX is just starting. But its employment discrimination counterpart Title VII has a rich history that may provide transgender student athletes with protection. When considering the totality of circumstances based on the law of agency under the “employee test,” student athletes should be deemed employees.

Courts should remember what the original purpose of Title VII is, give deference to the EEOC, and ensure a maximum amount of societal protections. Until courts realize that transgender athletes should be recognized under Title VII, many will continue to be penalized “because of sex.”