

One Step Forward, Two Steps Back: Why Title IX Does Apply, and Should Apply, to Student-Athlete NIL Deals

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ABSTRACT

The history of women in education is frustrating. Although it is commonplace to see women in education and sports today, women were not visible in these places prior to 1972, and they faced discrimination in many facets of life. Women were denied access to educational programs, even education altogether. Women could not go to medical school, faced more rigorous admission standards than men, and were rarely afforded the opportunity to play sports. In response to these inequalities, Congress passed Title IX of the Education Amendments in 1972. After 1972, women had protections that allowed them to become visible in educational settings. Title IX prohibits sex-based discrimination by federally funded institutions. These protections were extended to athletics in 1975.

Recently, the Supreme Court decided *NCAA v. Alston*, permitting student-athletes to be compensated for use of their name, image, and likeness (“NIL”). This decision, while intended to benefit athletes, will jeopardize female athletes. Commentators have argued that Title IX will not apply to NIL deals, leaving female athletes with no protection from inequalities that emerge from NIL-related benefits. This result would not only undermine Title IX but also the progress made towards gender equality in sports.

This Comment analyzes how Title IX *does* apply to NIL deals both directly—when a university donates, facilitates, or assists with the distribution of NIL-related compensation—and indirectly—when the university provides educational and marketing opportunities for student-athletes. This Comment also argues that Title IX *should* apply to NIL deals because the statutory language supports its application, and applying Title IX will avoid regressing the progress for women that Title IX has already effectuated. Lastly, this Comment recommends provisions that should be

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implemented into final NIL legislation so that Title IX unambiguously applies to student-athlete NIL deals.

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I. INTRODUCTION

Imagine a male college football player. During his time as a collegiate athlete, the Supreme Court decides *NCAA v. Alston*.¹ That ruling allows him to be compensated for the use of his name, image, and likeness (“NIL”).² He is excited, especially after being contacted by a variety of companies that want to sponsor him. He receives free shoes, energy drinks, and clothing. He also receives cash when he advertises these products. He feels this deal is fair. He has worked for much of his life to be successful at his sport, and he is recognized on a national level. His school has been able to profit off his hard work and talents. He should, too.

Now, imagine a female athlete. She is also excited about the Supreme Court’s decision. However, this excitement dwindles when she realizes

1. See *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

2. See *id.* at 2166. This Comment uses “NIL” to refer specifically to “NIL deals” and “name, image, and likeness” elsewhere.

that she cannot find sponsors. She also worked for much of her life to be successful at her sport, and she also received recognition on a national level. Donors only want to sponsor male athletes.³ These male athletes are paid, while she, and other female athletes, are left with nothing.⁴ This result does not seem fair.

Her disappointment increases when she realizes that Title IX would have protected her from inequalities of this sort less than a year prior.⁵ Title IX protections prohibit disproportionate funding of men's sports,⁶ but these protections are undermined by the supposedly beneficial *Alston* decision.⁷

The decision in *Alston* was theoretically a victory for all college athletes.⁸ Despite the opposition to pay-for-play, *Alston* served to benefit athletes generating revenue for their universities by allowing the athletes to reap their own monetary benefits.⁹ However, this new ruling may not benefit all athletes equally. Without Title IX protections, male athletes will benefit the most from NIL deals, while female athletes will be overlooked.¹⁰ If universities cannot regulate NIL deals, then Title IX's progress is threatened.¹¹

Title IX's progress is threatened because NIL deals will be distributed at the donors' discretion, with no regard to who receives the deals.¹² When universities become involved in NIL deals, Title IX protections will apply.¹³ Title IX's application in NIL deals is important for female athletes because its protections will ensure compensation and resources are

3. See Andy Berg, *Iowa Star Clark Talks Gender Inequality in NIL Profits*, ATHLETIC BUS. (Mar. 11, 2022), <https://bit.ly/3CrDt7I>.

4. See *id.*

5. See 20 U.S.C. § 1681.

6. See Athletics, 34 C.F.R. § 106.41 (1975)

7. See also *Alston*, 141 S. Ct. at 2169; *infra* Section III.B.1.

8. See *Sherman Act-Antitrust Law-College Athletics-NCAA v. Alston*, 135 HARV. L. REV. 471 (2021). *Alston* made it clear that the NCAA and its member schools are subject to scrutiny under the Sherman Antitrust Act, thus, they cannot prohibit student-athletes from receiving compensation for the use of their name, image, and likeness. See *id.*

9. See Josh Escovedo & Michelle Yegiyants, *A Brave New World: The NCAA's New NIL Policy and the Need for Federal Legislation*, WEINTROB TOBIN (July 11, 2022), bit.ly/3I9vHDI. Student-athletes generate approximately \$19 billion in revenue each year for the NCAA and their universities. See *id.*

10. See *infra* Section III.A.

11. See *infra* Section III.B.

12. See, e.g., Ben Kercheval, *Miami Booster Offers \$540,000 NIL Endorsement Deal to all Hurricanes Scholarship Football Players*, CBS SPORTS (July 7, 2021, 11:24 AM), <https://bit.ly/3ZkOkeA> (discussing an endorsement given to male athletes that excluded female athletes).

13. See 20 U.S.C. § 1681 (imposing requirements on only on federally funded institutions).

distributed equitably to both male and female athletes.¹⁴ By applying Title IX to NIL deals, *Alston* can provide its intended benefits to college athletes without creating inequalities.¹⁵

This Comment discusses Title IX as it relates to the *Alston* decision, arguing that Title IX's application to NIL deals is consistent with public policy.¹⁶ Part II focuses on Title IX's history, promulgation, application to sports and the landscape of education and athletics since its promulgation.¹⁷ Part II also outlines the NIL debate leading up to *Alston*, including the NCAA's amateurism principal and proposed state and federal legislation contradicting this principal.¹⁸ Lastly, Part II discusses *Alston* and its implications.¹⁹

Part III lays out the important relationship between Title IX and *Alston*.²⁰ Part III makes three arguments. First, Title IX applies, both directly and indirectly, in student-athlete NIL deals.²¹ Second, Title IX should apply to NIL deals based on policy.²² Last, Part III proposes specific provisions that should be included, both in permanent NCAA policies and in state and federal legislation, regarding NIL deals. The proposed provisions include the ability for universities and affiliates to act as donors and agents in NIL deals, a requirement that non-monetary NIL benefits be distributed in an equal manner to male and female athletes, and a requirement for universities to work alongside NIL collectives to facilitate student-athlete NIL deals.²³

II. BACKGROUND

Since the 1970s, women have increasingly attended college.²⁴ Many participate in sports.²⁵ Because of their increased representation in both

14. See Policy Interpretation of Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86). When Title IX applies, institutions are required to provide equal athletic benefits and opportunities and to equally accommodate the interests and abilities of both male and female athletes. See *id.*

15. See *id.*; see also *infra* Section III.B.

16. See *infra* Section III.B.

17. See *infra* Section II.A.

18. See *infra* Section II.B.

19. See *infra* Section II.C.

20. See *infra* Section III.A.

21. See *infra* Section III.A.

22. See *infra* Section III.B.

23. See *infra* Section III.C.

24. See *Women in the labor force: a databook*, U.S. BUREAU LAB. STAT. (Apr. 2021), <https://bit.ly/3fYsLv> (noting that 45% of women between the ages of 25 and 64 have at least a bachelor's degree, compared with only 11% in 1970).

25. See Sarah Pruitt, *How Title IX Transformed Women's Sports*, HISTORY (June 23, 2022), <https://bit.ly/3FXb9gy>.

education and sports, women are well-represented in collegiate athletics.²⁶ Before 1972, however, this representation was nearly nonexistent.²⁷ Prior to the enactment of Title IX, women were excluded from educational opportunities.²⁸ For example, high school girls were prohibited from taking classes in male-dominated fields, such as medicine.²⁹ Some universities excluded women altogether.³⁰ Additionally, some universities required higher test scores and grades for women's admittance.³¹

A. *An Introduction to Title IX*

In 1970, only 8% of women aged 19 and older were college graduates, compared to 14% of men.³² Even when women attended college, they faced discrimination.³³ Women were excluded from certain educational programs and were denied scholarships.³⁴ In addition, female faculty members were often denied membership in professional organizations and were unable to obtain tenure.³⁵ It was clear that legislation was needed to protect women in the world of education.³⁶

1. The Reality of Education before the Enactment of Title IX

To combat the inequalities women faced, Senator Birch Bayh, along with Patsy Mink—a victim of gender discrimination in education—and

26. *See id.* (noting that the number of women participating in intercollegiate athletics increased six-fold in the 40 years after Title IX's enactment).

27. *See A look at women's education and earnings since the 1970s*, U.S. BUREAU LAB. & STAT.: TED: THE ECONOMICS DAILY (Dec. 27, 2017), <https://bit.ly/3RuhlJK> (explaining that in 1970, only 11% of working women obtained a bachelor's degree or higher in 1970 and 33% of working women had no more than a high school diploma).

28. *See* U.S. DEP'T OF JUST., EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX 2 (2022), <https://bit.ly/3dr2Td1>.

29. *See id.*

30. *See id.*

31. *See id.* Discrimination extended beyond the actual education being provided. *See id.* Female students often faced stricter social rules than male students, such as earlier curfew. *See id.*

32. *See* U.S. DEP'T OF COM. ECON. & STAT. ADMIN. & EXEC. OFF. OF THE PRESIDENTIAL OFF. OF MGMT. & BUDGET, WOMEN IN AMERICA: INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING 19 (2011), <https://bit.ly/3f0dKLe>.

33. *See* U.S. DEP'T OF JUST., *supra* note 28 at 2.

34. *See id.* For example, Patsy Mink, a key figure in the promulgation of Title IX, was denied admission to nearly twenty medical schools because of her gender. *See Patsy Takemoto Mink*, NAT'L WOMEN'S HALL FAME, bit.ly/3YinfrD (last visited Dec. 14, 2022); *see also* FEMINIST MAJORITY FOUND., THE TRIUMPHS OF TITLE IX 43 (2007), bit.ly/3Yzdzcm.

35. *See* U.S. DEP'T OF JUST., *supra* note 28. Edith Green, another Title IX proponent, was denied a full-time position because she "[came] on too strong for a woman." FEMINIST MAJORITY FOUND., *supra* note 34.

36. *See* U.S. DEP'T OF JUST., *supra* note 28 at 1–2.

others drafted a legislative response.³⁷ This response, which later became Title IX, was modeled after the 1964 Civil Rights Act.³⁸ Senator Bayh eloquently established the connection between both laws, asserting that educational opportunities should not be based on sex, “just as . . . [they] should not be based on race, national origin, or . . . other discriminations.”³⁹

2. The Enactment of Title IX

In response to inequalities women faced, Congress enacted Title IX of the Education Amendments of 1972.⁴⁰ Title IX provides: “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.”⁴¹ Currently, the Department of Education’s Office of Civil Rights (“OCR”) is the agency that enforces Title IX.⁴² Behavior that violates Title IX includes “sexual harassment; the failure to provide equal athletic opportunity; sex-based discrimination in a school’s science, technology, engineering, and math (STEM) courses and programs; and discrimination based on pregnancy.”⁴³ The failure to provide equal athletic opportunity is on the list of potential Title IX violations, but this protection did not always exist.⁴⁴

Women were historically underrepresented and inadequately protected in sports, substantiating the need for the extension of Title IX’s scope.⁴⁵ Title IX reformers recognized that women, who deserved to receive an education, also deserved the opportunity to compete in

37. See Danna Bell, *Patsy Takemoto Mink’s Title IX Legacy*, LIBR. CONG. (June 23, 2022), <https://bit.ly/3SMjYxw>. Senator Bayh was known as the “Father of Title IX,” while Patsy Mink was known as the “primary author and sponsor of Title IX.” *Title IX—The Nine*, ACLU, (Apr. 12, 2012), <https://bit.ly/3CCjowx>. After Mink’s death, Title IX’s name was officially changed to the “Patsy T. Mink Equal Opportunity in Education Act.” *Id.*

38. See 117 CONG. REC. 30,406–07 (1971).

39. *Id.*

40. See U.S. DEP’T OF JUST., *supra* note 28 at 2.

41. 20 U.S.C. § 1681.

42. See OFF. OF CIV. RTS., U.S. DEP’T OF EDUC., OCR-00016, CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST (1996), <https://bit.ly/3eNZJQK>.

43. OFF. OF CIV. RTS., U.S. DEP’T OF EDUC., SEX DISCRIMINATION: OVERVIEW OF THE LAW (2022), <https://bit.ly/3MmJ2IT>.

44. See 118 CONG. REC. 4953, 5812 (1972).

45. See Lauren Camera, *Title IX Marks 50 Years of Gains and Goals for Gender Equity in Education*, U.S. NEWS & WORLD REP. (June 22, 2022, 5:01 PM), <https://bit.ly/3xy3yAc> (noting that only one in 27 girls played sports and that less than 30,000 women played collegiate sports in 1972, just before Title IX’s enactment).

athletics.⁴⁶ Title IX reformers passed the Javits Amendments to bring these equal athletic opportunities under Title IX's protection.⁴⁷

3. The Application of Title IX to Sports

While Title IX is an important development in the women's rights movement, the statute did not originally address all gender inequality issues that arise in educational settings.⁴⁸ In fact, it did not help female athletes secure equal treatment in all aspects of their participation in sports.⁴⁹ As stated by Senator Birch Bayh, Title IX was just

an important first step in the effort to provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.⁵⁰

As advocates in Congress anticipated, Title IX left significant gaps in the protections offered to women, specifically in the sports context.⁵¹ In response to those gaps, Congress passed the Javits Amendment, which directed the Department of Health, Education, and Welfare to extend Title IX protections to collegiate athletics.⁵² The Javits Amendment further mandated that proposed regulations be comprehensive and contain provisions that addressed any relevant nuances of specific sports that may have an effect on implementation and compliance.⁵³

In 1975, and in compliance with the Javits Amendment, the Department of Education promulgated regulations that officially extended Title IX protections to athletics.⁵⁴ These regulations, coined “the 1975 Regulations,” mandated federally funded educational institutions to provide both sexes equal athletic opportunity.⁵⁵ Despite their beneficial intent, the regulations produced both confusion and complaints over the regulations' enforcement and how institutions were to comply.⁵⁶

46. See Provision Relating to Sex Discrimination, Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974). The drafters of the 1975 Regulations recognized that “[m]ale athletes had been given an enormous head start in the race against their female counterparts for athletic resources, and Title IX would prompt universities to level the proverbial playing field.” *Neal v. Bd. of Tr.*, 198 F.3d. 763, 767 (9th Cir. 1999).

47. See Athletics, 34 C.F.R. § 106.41 (1975); see also § 844, 88 Stat. at 612.

48. See CONG. REC. at 5812.

49. See *id.*

50. *Id.*

51. See § 844, 88 Stat. at 612; see also *Neal v. Bd. of Tr.*, 198 F.3d. at 767.

52. See § 844, 88 Stat. at 612

53. See *id.*

54. See Athletics, 34 C.F.R. § 106.41 (1975).

55. See *id.*

56. See Policy Interpretation of Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

In response to the confusion about how to carry out the regulations' requirements, the OCR formulated a policy interpretation to clarify the meaning of "equal opportunity."⁵⁷ Institutions did not know how to provide "equal opportunities."⁵⁸ They were also unable to determine whether a disparity in resources existed between sexes and whether that disparity constituted noncompliance.⁵⁹ Institutions had to recognize that allowing female athletes to play college sports was not enough.⁶⁰ They needed to introduce safeguards so female athletes had access to the same resources and opportunities as their male counterparts.⁶¹ To clarify misunderstandings about Title IX, OCR's policy interpretation outlined the Department's factors for enforcing Title IX and provided guidance to determine whether any disparities between men's and women's sports existed.⁶² Per the policy interpretation, the 1975 Regulations call for complicity in three main areas: interests and abilities; athletic benefits and opportunities; and financial assistance.⁶³

Under the interests and abilities prong, institutions are required to accommodate the interests and abilities of male and female athletes to provide equal opportunity in both the "selection of sports and the level of competition available" in each sport.⁶⁴ The Department assesses compliance with this prong based on a "three-part test."⁶⁵ Under the test, institutions can comply by demonstrating that

- (1) [t]he number of male and female athletes is substantially proportionate to their enrollments[;]
- (2) [t]he institution has a history and continuing practice of expanding participation opportunities responsive to the developing interests and abilities of the underrepresented sex[; or]
- (3) [if one sex is underrepresented,] the

57. *Id.* at 71,413–71,414.

58. *See id.* Equal opportunity can be present or absent in many realms, including financial assistance given to athletes, athletic benefits outside of scholarships, and the variety of sports available at a school. *See id.*

59. *See id.*

60. *See id.*

61. *See id.* Examples of resources and opportunities include: (1) financial assistance, such as scholarships; (2) other athletic benefits, such as equipment, scheduling, traveling and per diem expenses, coaching and tutoring, training facilities, medical resources, housing and dining, and publicity; and (3) interests and abilities of student-athletes, such as the level of competition for athletes and the selections of sports offered at a particular institution. *See id.* at 71,414–71,417.

62. *Id.* at 71,414.

63. *See id.*

64. *Id.* at 71,417.

65. *See* CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST, *supra* note 42.

institution is fully and effectively accommodating the interests and abilities of the underrepresented sex.⁶⁶

Additionally, in 1966, Norma Cantú, the Assistant Secretary for the OCR, wrote a “Dear Colleague” letter to provide specific guidance on the three-part test.⁶⁷ The first part of the test looks at the participation rates of both men and women in sports and allows an institution to show that they provide nondiscriminatory participation opportunities when substantial proportionality does not exist in a particular sport.⁶⁸ The second part of the test allows an institution to show that they have made a good faith effort to expand opportunities for otherwise underrepresented groups.⁶⁹ The third part of the test asks whether the underrepresented sex has “concrete and viable” interests the institutions should accommodate.⁷⁰ The OCR recognizes that not all discrimination is intentional.⁷¹ Each part of this test reflects the OCR’s goal: to help universities overcome challenges to providing nondiscriminatory participation opportunities.⁷² This goal helps ensure that female athletes are protected.⁷³

Under the second prong, athletic benefits and opportunities, the Dear Colleague Letter specifies resources that the Department considers when determining compliance,⁷⁴ including

[p]rovision and maintenance of equipment and supplies; scheduling of games and practice times; travel and per diem expenses; opportunity

66. Charlotte Franklin, *Title IX Administers a Booster Shot: The Effect of Private Donations on Title IX*, 16 NW. J.L. & SOC. POL’Y 150-51 (2021); *see also* Policy Interpretation of Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,414 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

67. *See* Letter from Norma V. Cantú, Assistant Secretary for Civ. Rts., Off. of Civ. Rts., Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, 2 (Jan. 16, 1996), <https://bit.ly/3eNZJQK>. Dear Colleague letters are written correspondence by a member, committee, or officer of one congressional office that are distributed to other congressional offices. *See* R. Eric Peterson, “Dear Colleague” Letters: A Brief Overview, CONG. RSCH. SERV.: LIBR. CONG. (Jan. 4, 2005), <https://bit.ly/3TXa4K3>. These letters are written to garner support, opposition, or sponsorship of a bill. *See id.*

68. *See* CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST, *supra* note 42. The term “substantial proportionality” refers to whether opportunities for female athletes are given in numbers that are substantially proportionate to their enrollment. *See* David Hoch, *Creating More Options for Title IX Compliance*, NAT’L FED’N STATE HIGH SCH. ASS’N. (Apr. 28, 2021), bit.ly/3jhzAvR.

69. *See* CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST, *supra* note 42.

70. *See id.* A “concrete and viable” interest refers to an interest among students to sustain a team. *Id.* Examples include requests for a sport to be added or elevated from intramural status, participation in intramural sports, and interviews and surveys indicating interest. *See id.*

71. *See id.*

72. *See id.*

73. *See id.*

74. *See id.*

to receive coaching and academic tutoring; assignment and compensation of coaches and tutors; provision of locker rooms, practice and competitive facilities; provision of medical and training services and facilities; provision of housing and dining services and facilities; and publicity.⁷⁵

To determine compliance, the Department compares the “availability[;] quality[;] and kinds of benefits, opportunities, and treatment afforded to members of both sexes.”⁷⁶ An institution complies so long as the opportunities are equal or equal in effect.⁷⁷ Additionally, if the differences are the result of nondiscriminatory factors, then the institution does not violate Title IX.⁷⁸

Lastly, in order to assess compliance with the financial assistance prong, the Department performs a calculation to determine whether the institution awards scholarships in substantially equal amounts between sexes.⁷⁹ Under the calculation, the total aid available to each sex is divided by the number of male or female participants in the athletic program.⁸⁰ The results are compared.⁸¹ Title IX does not require an equal amount of scholarships to be awarded; instead, a school is compliant if the comparison results in “substantially equal amounts [of financial aid for each sex] or if a resulting disparity can be explained by adjustments to take into account legitimate, nondiscriminatory factors.”⁸² The ultimate goal is

75. *Id.* This list is non-exhaustive, and the Department may expand the list at its discretion. *See id.*

76. Policy Interpretation of Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

77. *See id.* Opportunities given to student-athletes need not be identical for an institution to be considered in compliance. *See id.* If there are differences in opportunities, but the effect of those differences are “negligible,” an institution has not violated Title IX. *Id.*

78. *See id.* Nondiscriminatory factors include factors inherent in the operation of each sport, such as rules, nature of equipment, likelihood of injury, and the nature of facilities required. *See id.* at 71,416. Additional nondiscriminatory factors include the fluctuations of each team's recruiting needs, activities associated with the operation of a single-sex sport, and actions taken to mitigate previous historical limitations on members of one sex. *See id.*

79. *See* CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST, *supra* note 42.

80. *See id.*

81. *See id.*

82. *Id.*; *see also* Policy Interpretation of Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,416 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86). Although this calculation seems straightforward, the NCAA scholarship rules create a “scholarship dilemma.” *See* B. Glenn George, *Title IX and the Scholarship Dilemma*, 9 MARQ. SPORTS L. REV. 278 (1999). This dilemma is mainly apparent in large, Division I schools with football programs. *See id.* at 279. For example, the NCAA maximum scholarship amount for football is 85 scholarships. *See id.* If an institution with a 45% female student body offers six men's sports and eight women's sports, there is proportionate participation (45% female student body and 45% female athletes). *See id.* However, if the institution chooses to award

to target institutions that have large disparities in financial aid with no legitimate explanation—institutions that are dangerous to female athletes and gender equality in sports.⁸³

Title IX and its supplementary guidance materials helped educational institutions make significant progress toward gender equality both in academia and sports.⁸⁴ However, Title IX has not yet provided a permanent, complete solution to gender inequality.⁸⁵

4. The Landscape of Sports and Education after Title IX

Title IX is vital for women in education and athletics.⁸⁶ In education, Title IX has vastly increased the number of women enrolled in graduate and undergraduate programs.⁸⁷ In athletics, Title IX has expanded opportunities for female athletes.⁸⁸ Participation rates in sports have increased every year since the passage of Title IX, and women's sports have become increasingly more competitive.⁸⁹ Additionally, American culture is now more accepting of women playing sports.⁹⁰

every permissible dollar to each sport, per the NCAA rules, then women only receive 37% of the total financial aid available. *See id.* Although the NCAA's precise scholarship rules are beyond the scope of this Comment, this dilemma has been the topic of many alleged Title IX violations since 1997. *See id.* at 278.

83. Policy Interpretation of Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,416 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

84. *See* Camera, *supra* note 45; *see also* Pruitt, *supra* note 25. In just a few years after the Javits Amendment, the number of girls participating in high school sports had increased by six times. *See id.* Additionally, in the academic realm, Title IX helped to ensure that not only women had the opportunity to be admitted into certain educational programs but also were treated equally once they were admitted. *See id.*

85. *See* Zara Abrams, *Title IX: 50 Years Later*, AM. PSYCH. ASS'N. (June 28, 2022), bit.ly/3hH32ej. For example, many institutions inflate numbers to give the "illusion of equity." *Id.* Additionally, many student-athletes facing sex discrimination, particularly sexual abuse, fail to report the violation. *See id.* Title IX has produced unintended negative consequences as well, including a decline in the number of female coaches and an increase in exposure to sexual abuse. *See* Courtney Tibbetts, *The FEMALE Act: Bringing Title IX into the Twenty-First Century*, 22 VAND. J. ENT. & TECH. L. 710–11 (2020).

86. *See* Camera, *supra* note 45; *see also* *Youth Sports Facts: Participation Rates*, PROJECT PLAY: ASPEN INST., <https://bit.ly/3DCUOMW> (last visited Sept. 18, 2022).

87. *See* Camera, *supra* note 45. In the 2020–2021 academic year, 60% of college students were female, and females accounted for 57% of all bachelor's degrees conferred. *See id.* In 1972, women earned only 7% of law degrees and 9% of medical degrees. *See id.* Today, they earn nearly 50% of all law and medical degrees conferred. *See id.* Additionally, women's participation in career and technical education programs has risen nearly 30% since the enactment of Title IX. *See id.*

88. *See* Pruitt, *supra* note 25.

89. *See id.* Female participation in high school sports is nearly ten times as high as it was prior to Title IX's enactment. *See* Camera, *supra* note 45. In 2020, 37% of females between the ages of six and 12 played sports regularly. *See id.*

90. *See* Camera, *supra* note 45. For example, in the 2016 Rio Olympics, 292 female athletes represented the United States. *See id.* in contrast, only 90 female athletes represented the United States in the 1972 Olympics. *See id.*

While Title IX has made great strides towards equality in education and in sports, an important limitation narrows its application: Title IX only applies to federally funded institutions.⁹¹ Thus, if an institution does not receive federal funding, then it is not required to comply with Title IX requirements.⁹² For example, donors or businesses that do not receive money from the federal government can donate any amount of money to any athlete, male or female, regardless of any discrepancies between genders.⁹³ Thus, external funding can seep through the cracks of a normally protected, federally funded institution, rendering Title IX powerless to protect student-athletes.⁹⁴ Further, unregulated outside funding may result in inequalities in compensation received by the athletes.⁹⁵

This problem is exacerbated if athletes are compensated for their name, image, and likeness.⁹⁶ Outside donors and other companies likely will disproportionately seek out male athletes to promote their products.⁹⁷ Female athletes are facing this problem now because the Supreme Court has settled the name, image, and likeness debate in *NCAA v. Alston*.⁹⁸

B. *An Introduction to NCAA v. Alston*

1. An overview of the Name, Image, and Likeness Debate

There has been a long-standing debate over paying student-athletes for the use of their name, image, and likeness.⁹⁹ The debate stems from the right of publicity, which “gives an individual the exclusive right to license

91. See 20 U.S.C. § 1681.

92. See U.S. DEP’T OF JUST., TITLE IX LEGAL MANUAL, bit.ly/3VNj3O2 (Aug. 12, 2021). Examples of federal assistance include “an award or grant of money[,] . . . use or rent of federal land or property at below market value, federal training, a loan of federal personnel, subsidies, and other arrangements with the intention of providing assistance.” *Id.*

93. See Alicia Jessop & Joe Sabin, *The Sky is Not Falling: Why Name, Image, and Likeness Legislation Does Not Violate Title IX and Could Narrow the Publicity Gap Between Men’s Sport and Women’s Sport Athletes*, 31 J. LEGAL ASPECTS SPORT 253, 271 (2021); see also § 1681.

94. See Jessop & Sabin, *supra* note 93, at 258.

95. See *id.* at 270 (noting that third-party payments to athletes do not trigger Title IX because third parties are not federally funded educational settings).

96. See Vox Creative, *The College Athlete Pay Gap, and Why it Matters*, SBNATION (Apr. 5, 2022, 11:02 AM), bit.ly/3hCVvgO (noting that female athletes are receiving fewer sponsorships and less compensation than male athletes).

97. See *id.*

98. See Berg, *supra* note 3. In fact, male athletes earned nearly 72% of NIL compensation for Division I athletes. See *id.* Additionally, half of all compensation goes to football programs and players. See Vox Creative, *supra* note 96.

99. See Vox Creative, *supra* note 96.

the use of their identity for commercial promotion.”¹⁰⁰ Traditionally, this right was denied to student-athletes under the NCAA’s amateurism principal, which dictates that an individual will lose their amateur status—and thus, their eligibility—if they use their athletic skill to obtain compensation.¹⁰¹ The purpose of the amateurism principle is to provide a barrier between collegiate and professional sports.¹⁰² To create this barrier, the NCAA ensures that athletes lose their eligibility if they

- (a) [u]se[] [their] athletics skill (directly or indirectly) for pay in any form in that sport;
- (b) [a]ccept[] a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation;
- (c) [s]ign[] a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received . . . ;
- (d) [r]eceive[], directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations . . . ; [or]
- . . .
- (g) [e]nter[] into an agreement with an agent.¹⁰³

The amateurism policy was the center of a heated debate about whether college athletes should receive pay-for-play.¹⁰⁴ Proponents of pay-for-play point to expenses paid by universities for luxury facilities and

100. See *Publicity*, CORNELL L. SCH., <https://bit.ly/3TIWRcm> (last visited Sept. 23, 2022). This right, though not prescribed by federal statute, was recognized by the Supreme Court in *Zacchini v. Scripps-Howard Broad Co.* See *Zacchini v. Scripps-Howard Broad Co.*, 433 U.S. 562, 578 (1977). The *Zacchini* case involved a television station secretly taping an entertainer’s performance and broadcasting said performance. See *id.* at 563. The Court held that the tort of infringement of the right of publicity protected the entertainer’s property interest in his act. See *id.* at 578. Thus, the entertainer was entitled to compensation from the tv station. See *id.*

101. NCAA, 2020-2021 NCAA DIVISION I MANUAL, art. 12.1.2 (2020), <https://bit.ly/3xxIgTa>.

102. See *id.* at art. 12.1.2.

103. *Id.*

104. See Brennan Thomas, *Pay-for-Play: Should College Athletes be Compensated?*, BLEACHER REP. (Apr. 24, 2011), <https://bit.ly/3CciZiT>. College football generates millions of dollars annually. See *id.* However, athletes were given a scholarship that was often less than the cost to attend college. See *id.* This created financial problems for student-athletes coming from low-income families, as well as ethical problems for student-athletes who were pressured to take compensation from alumni and fans. See *id.*

high coaches' salaries.¹⁰⁵ They note the coaches' ability to receive the same endorsement deals denied to athletes.¹⁰⁶ Proponents of pay-for-play also argue that scholarships inadequately compensate athletes for the revenue they bring into the school.¹⁰⁷ Proponents maintain that it is unjust to deny to athletes the very same financial opportunities that coaches and universities have benefitted from for years.¹⁰⁸

In contrast, opponents of pay-for-play argue that allowing athletes to be paid will transform intercollegiate teams into professional teams, destroying the "special fan attachment" to the team.¹⁰⁹ Opponents also emphasize the negative effects pay-for-play may have on women's sports.¹¹⁰ Specifically, pay-for-play opponents justify their concern for women's sports based on the progress made since Title IX's enactment.¹¹¹ Title IX requires that women receive financial aid proportionate to their enrollment in universities; however, pay-for-play may undermine these protections if payment comes from non-federally funded sources that are not required to comply with Title IX.¹¹² New concerns for women's sports center on NIL deals: Most NIL deals will go to football and basketball programs, while largely ignoring female athletes.¹¹³ Likewise, Title IX cannot regulate all NIL deals because the money does not always come from federally funded institutions.¹¹⁴ Potential financial gaps may result, specifically in the realm of athletic benefits and opportunities.¹¹⁵ Despite many convincing arguments in support of pay-for-play, the NCAA has historically reinforced its amateurism principle.¹¹⁶

105. See Jayma Mayer & Andrew Zimbalist, *A Win Win: College Athletes Get Paid for their Names, Images, and Likenesses and Colleges Maintain the Primacy of Academics*, 11 HARV. J. SPORTS & ENT. L. 247, 261 (2020).

106. See Jessop & Sabin, *supra* note 93, at 255.

107. See Nick Caron, *NCAA Not Doing a Favor to Athletes by Banning Endorsements*, BLEACHER REP. (July 9, 2010), <https://bit.ly/3WLpe6J>. For example, the University of Texas, under the leadership of Vince Young, won the 2005 National Championship and reported 42 million dollars in profit. See *id.* Despite this massive payout, it is estimated that Young only received approximately \$50,000 from the University by way of his scholarship. See *id.*

108. See Jessop & Sabin, *supra* note 93, at 255–56.

109. *Id.* at 262.

110. See *id.* at 263–64.

111. See *id.*; see also Pruitt, *supra* note 25.

112. See 20 U.S.C. § 1681.

113. See Mayer & Zimbalist, *supra* note 105, at 264.

114. See *id.* at 264; see also § 1681; U.S. DEP'T OF JUST., *supra* note 92.

115. See § 1681; see also Policy Interpretation of Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86); Berg, *supra* note 3.

116. See Mayer & Zimbalist, *supra* note 105, at 267 (noting the NCAA's arguments that the anti-competitive nature of the amateurism principle is necessary "in order to protect the uniqueness of college sports and thus demand for the brand").

2. Pre-*Alston* Legislation

Student-athletes' inability to profit off of their name, image, and likeness has generated controversy between the NCAA and other legislative bodies.¹¹⁷ Both state and federal legislatures have pushed back against the NCAA's amateurism principle by enacting their own legislation.¹¹⁸ California led the way with its "Fair Pay to Play" Act ("FPTP").¹¹⁹ Under FPTP, students cannot lose their athletic eligibility by profiting off of their name, image, and likeness.¹²⁰ The only limitation is that athletes cannot enter into contracts that conflict with university-held contracts.¹²¹ Although this statute does not provide the most comprehensive regime for compensation of collegiate athletes, the statute has served as a template for other state legislatures.¹²²

Similarly, Florida's "Intercollegiate Athlete Compensation and Rights Act" contradicts the NCAA's amateurism principle.¹²³ Florida's statute is like FPTP, but with the added restriction that compensation may not be provided in exchange for athletic performance or as an inducement to attend a particular institution.¹²⁴ The statute also provides that compensation of any kind may only be provided by third parties unaffiliated with the institution.¹²⁵ This addition implicates the key argument against pay-for-play: Title IX's progress will be stunted.¹²⁶ By permitting only third-party donations, the statute endangers Title IX protections because these third-party donors are not subject to Title IX's requirements.¹²⁷

The NCAA's amateurism principal has drawn opposition on a federal level as well, leading politicians to interfere.¹²⁸ Although no federal regulation regarding name, image, and likeness has been passed,

117. See CAL. EDUC. CODE § 67,456 (West 2022); FLA. STAT. § 1006.74 (2022); Fairness in Collegiate Athletics Act, S. 4004, 116th Cong. (2020); H.R. 850, 117th Cong. (2021) (enabling student-athletes to profit from their name, image, and likeness despite the NCAA's prohibition).

118. See EDUC. CODE § 67,456; STAT. § 1006.74; S. 4004, 116th Cong. (2020); H.R. 850.

119. See EDUC. CODE § 67,456.

120. See *id.*

121. See *id.* For example, if an institution is sponsored by Nike, meaning all uniforms and equipment bear the Nike logo, its athletes will not be permitted to enter into an endorsement deal with a competitor of Nike, such as Under Armor. See Spencer Bauer, *NIL's Treacherous Conflict of Interest Problem*, CONDUCT DETRIMENTAL (June 30, 2021), bit.ly/3jgx8FT.

122. See Jessop & Sabin, *supra* note 93, at 265.

123. See STAT. § 1006.74.

124. See *id.*

125. See *id.*

126. See Mayer & Zimbalist, *supra* note 105, at 263; see *infra* Section III.A.1.

127. See 20 U.S.C. § 1681.

128. See S. 4004, 116th Cong. (2020); H.R. 850, 117th Cong. (2021).

legislation has been proposed.¹²⁹ The “Fairness in Collegiate Athletics Act” is one example of such proposed legislation.¹³⁰ Senator Marco Rubio proposed this bill, the first proposal of its kind at the federal level, in 2020.¹³¹ The bill places the burden on the NCAA to allow college athletes to be compensated by third parties for their name, image, and likeness.¹³² The bill also allows the NCAA to safeguard its amateurism principal through restrictions on compensation for the recruitment of prospective student-athletes and other illegitimate activities.¹³³

Another proposed federal bill, the “College Athlete Economic Freedom Act,” is more specific: It prohibits institutions from enacting rules that restrict or limit athletes’ abilities to market their name, image, and likeness.¹³⁴ The bill also entitles athletes to seek representation for contracts and legal matters.¹³⁵ Additionally, the bill requires universities to engage in equal marketing endeavors for all student-athletes.¹³⁶ This requirement gives the bill its own Title-IX-like protection by creating a cause of action when universities engage in unequal marketing of male and female athletes.¹³⁷ The opposition to the amateurism policy, combined with inconsistent legislation, necessitated a concrete decision on NIL deals—a decision that would speak to policy change.¹³⁸ *Alston* was that decision.¹³⁹

C. NCAA v. Alston

After much debate, the Supreme Court finally decided the name, image, and likeness issue in *NCAA v. Alston*.¹⁴⁰ The precise question answered in *Alston* was whether the NCAA’s amateurism principle violated the Sherman Antitrust Act.¹⁴¹ The Sherman Act provides: “Every contract, combination . . . or conspiracy, in restraint of trade or commerce

129. See S. 4004; H.R. 850; H.R. 8382, 116th Cong. (2020); S. 5003, 116th Cong. (2020).

130. See S. 4004.

131. See *id.*

132. See *id.*

133. See *id.* The phrase “other illegitimate activities” relates to third party attempts to recruit and retain student-athletes. *Id.*

134. See H.R. 850.

135. See *id.*

136. See *id.*

137. See Athletics, 34 C.F.R. § 106.41 (1975); see also Jessop & Sabin, *supra* note 93, at 269; Policy Interpretation of Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

138. See S. 4004, 116th Cong. (2020); H.R. 850; CAL. EDUC. CODE § 67456 (West 2022); FLA. STAT. § 1006.74 (2022); See S. 4004, 116th Cong. (2020).

139. See *infra* Section II.C.

140. See *NCAA v. Alston*, 141 S. Ct. 2141, 2151 (2021).

141. See *id.*

among the several States . . . is . . . illegal.”¹⁴² In order to determine whether a practice poses an unreasonable restraint of trade under the Sherman Act, federal courts use the “rule of reason” analysis.¹⁴³

The rule of reason analysis implements a three-step, burden-shifting framework that “requires courts to conduct a fact-specific assessment of ‘market power and market structure . . . to assess the [restraint]’s actual effect’ on competition.”¹⁴⁴ Under the framework, the plaintiff must prove that the restraint has a “substantial anticompetitive effect” that will harm consumers.¹⁴⁵ If the plaintiff successfully demonstrates an anticompetitive effect, the defendant then has the burden to show that the restraint has a procompetitive rationale.¹⁴⁶ Procompetitive rationales include increasing output,¹⁴⁷ generating operating efficiencies,¹⁴⁸ increasing consumer choice,¹⁴⁹ and enhancing quality.¹⁵⁰ If the defendant is successful, then the burden shifts back to the plaintiff to show that the procompetitive rationale could be achieved through less restrictive means.¹⁵¹

In *Alston*, the NCAA, rather than arguing that their amateurism policy was not anticompetitive, argued that their policy warranted an exception from the rule of reason analysis.¹⁵² The Supreme Court unanimously held that the rule of reason analysis applied to the amateurism principle and used the analysis to determine that the amateurism principle violated the

142. 15 U.S.C. § 1.

143. *Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 723 (1988).

144. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

145. *Id.* When competition is restrained, dominating firms can raise prices and decrease quality, while preventing other firms from entering the market. See Heather Boushey & Helen Knudsen, *The Importance of Competition for the American Economy*, WHITE HOUSE (July 9, 2021), <https://bit.ly/3DL7YpE>. Thus, large corporate firms make more money, while consumers bear the costs. See *id.*

146. See *Am. Express Co.*, 138 S. Ct. at 2284.

147. See, e.g., *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19–20 (1979).

148. See, e.g., *Westman Commun. Co. v. Hobart Int’l*, 796 F.2d 1216, 1226–27 (10th Cir. 1986).

149. See, e.g., *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85 (1984).

150. See, e.g., *Craftsman Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 393 (8th Cir. 2007).

151. See *Am. Express Co.*, 138 S. Ct. at 2284. Rationales that could be achieved through less restrictive means are likened to the idea that the restraint “goes too far compared to its justification.” See C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 937 (2016). Courts have used the analogy of “using a sledgehammer to crack a nut.” *Id.* As a more practical example, the Ninth Circuit in *O’Bannon v. NCAA* ruled that the NCAA’s amateurism policy, which provided a blanket prohibition on compensation for an athlete’s name, image, and likeness, had procompetitive justifications; however, there was a less restrictive alternative of allowing athletes to be given a stipend for incidental educational expenses in addition to their scholarships. See *O’Bannon v. NCAA*, 802 F.3d 1049, 1060–61 (9th Cir. 2015).

152. See *NCAA v. Alston*, 141 S. Ct. 2141, 2155 (2021).

Act.¹⁵³ Although the NCAA satisfied its burden to show a procompetitive rationale for its restraints,¹⁵⁴ the Court noted that the athletes succeeded in showing that less restrictive means existed to achieve the same rationale.¹⁵⁵

In addition to upholding the district court's findings regarding the rule of reason analysis, the Court denied the NCAA an exemption from the requirements of the Act.¹⁵⁶ The Court noted that there was a clear restraint on competition because college athletes do not have an alternative organization to join in order to reap financial benefits.¹⁵⁷ Further, the Court rejected the NCAA's argument that the NCAA, as a joint venture, should be exempt from the rule of reason analysis based on the fact that collaboration among its members is necessary to offer consumers the benefit of intercollegiate athletic competition.¹⁵⁸ The Court clarified that joint ventures are subject to the rule of reason analysis.¹⁵⁹ Although some

153. *See id.* at 2166.

154. *See id.* at 2153 (describing the procompetitive rationale as the "product differentiation" from professional sports that results from ensuring that student-athletes do not receive unlimited compensation).

155. *See id.* at 2162 (emphasizing that the product differentiation can be achieved through less restrictive restraints on education-related benefits).

156. *See id.* at 2166. An argument for an exemption from the Sherman Act is "properly addressed to Congress" rather than the courts. *Nat'l Soc. of Pro. Eng'rs v. United States*, 435 U.S. 679, 689–90 (1978). Congress has modified antitrust laws for various industries. *See* 7 U.S.C. § 291 (agricultural cooperatives); *see also* 15 U.S.C. §§ 1011–1013 (W2022) (insurance); 15 U.S.C. §§ 1801–1804 (2022) (newspaper joint operating agreements). The only resemblance of an exemption granted through the courts was detailed in *Fed. Baseball Club, Inc. v. Nat'l League of Pro. Baseball Clubs*, in which the Court stated that baseball exhibitions did not involve interstate trade or commerce and, therefore, did not implicate the Sherman Act. *See Fed. Baseball Club, Inc. v. Nat'l League of Pro. Baseball Clubs*, 259 U.S. 200, 208–09 (1922). Even so, the Court's decision has been criticized as being "unrealistic" and "inconsistent." *Flood v. Kuhn*, 407 U.S. 258, 282 (1972).

157. *See Alston*, 141 S. Ct. at 2156. The Court exemplified this point by describing a consumer looking to rent from a small van company. *See id.* When the company raises its price above market levels, the consumer can find another small van rental company with lower prices. *See id.* There is no similar alternative to the NCAA for athletes who would like to perform at the collegiate level while furthering their education. *See id.* The only alternative is to abandon their sport altogether. *See id.*

158. *See id.* ("This Court has regularly refused materially identical requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond enhancing competition."); *see* Marshall Hargrave, *Joint Venture (JV): What is It and Why Do Companies Form One?*, INVESTOPEDIA (Oct. 30, 2022), bit.ly/3WmJ9bu (defining a "joint venture" as an arrangement between two or more parties work to pool their resources to accomplish a specific task). The NCAA's joint venture is comprised of member universities, and the arrangement involves the formation of the rules of college athletics. *See* Todd Miller, *More to Supreme Courts NCAA Decision than Just Sports*, BAKER & MILLER (July 1, 2021), bit.ly/3PC2piL.

159. *See Alston*, 141 S. Ct. at 2155.

joint ventures are subject to a deferential review,¹⁶⁰ joint ventures generally require careful scrutiny due to the many rules and restrictions associated with them.¹⁶¹

In sum, the NCAA failed to meet its burden of showing its restraints on competition yield a pro-competitive benefit that could not be achieved through less restrictive means.¹⁶² The NCAA lost.¹⁶³

At its core, *Alston* is an antitrust case filed by individuals claiming that a business—the NCAA—was anticompetitive.¹⁶⁴ However, *Alston* extends beyond the applicability of and consistency with the Sherman Act.¹⁶⁵ *Alston* settled a long-standing debate about the rights of student-athletes and granted student-athletes the right to receive compensation for their name, image, and likeness.¹⁶⁶

D. Post-Alston Developments and Implications

Following *Alston*, the NCAA adopted an interim policy addressing name, image, and likeness compensation.¹⁶⁷ The initial interim policy was very vague; the only guidance it provided was that collegiate athletes can benefit from their name, image, and likeness so long as the benefit is not tied to pay-for-play or recruiting.¹⁶⁸ Even though the NCAA added some clarification to the policy in 2022,¹⁶⁹ they have yet to develop a permanent policy for NIL deals, and a federal statute has yet to be passed on the matter.¹⁷⁰ The inadequacies of the NCAA's interim policy, the lack of federal legislation, and the inconsistencies of state legislation demonstrate a need for guidance.

160. See *id.* at 2156. Examples of joint ventures subject to a deferential review those that are so obviously incapable of harming competition, and ventures that so clearly restrain competition that the venture can be characterized as illegal per se. See *id.*

161. See *id.*

162. See *id.* at 2162.

163. See *id.*

164. See *id.* at 2141.

165. See Michelle Brutlag Hosick, *NCAA adopts interim name, image, and likeness policy*, NCAA (June 30, 2021 4:20 PM), <https://bit.ly/3SdmBaV>.

166. See *id.*

167. See *id.*

168. See Jessop & Sabin, *supra* note 93, at 258; see also Hosick, *supra* note 165.

169. See NCAA, *NCAA Division I Institutional Involvement in a Student-Athlete's Name, Image and Likeness Activities*, 1 (Oct. 26, 2022), bit.ly/3PX6dv5. The clarifications relate to two main categories: (1) the distribution of education and (2) information and universities acting as supporters, not agents. See *id.* at 3.

170. See *NIL Legislation Tracker*, SAUL EWING LLP, <https://bit.ly/3elMjvB> (last visited Oct. 9, 2022). Although many states have implemented NIL legislation, more uniformity is needed. See Escovedo & Yegiyants, *supra* note 9. NIL legislation varies across states, so student-athletes in one state may be subject to less restrictions than student-athletes in other states. See *id.* This disparity is unfair for athletes, and it also may affect where student-athletes want to attend college, which in turn disadvantages colleges sitting in more restrictive states. See *id.*

III. ANALYSIS

Many commentators will argue that Title IX is inapplicable to student-athlete NIL deals because Title IX only applies to federally funded institutions.¹⁷¹ Although this argument holds some merit as to Title IX's application to federally funded institutions,¹⁷² this argument does not consider all the circumstances relevant to Title IX's applicability. The fact that a donor is not federally funded is not enough to preclude Title IX's application to NIL deals. This Comment argues that Title IX applies to NIL deals, both directly and indirectly. Further, this Comment argues that Title IX *should* apply to NIL deals. Finally, there are specific provisions that legislative bodies can implement into final regulations that can ensure Title IX's application to NIL deals.¹⁷³

A. Title IX and its Application to NIL Deals

The primary argument to why Title IX is inapplicable to NIL deals is that third-party donors are not federally funded and, therefore, not subject to Title IX.¹⁷⁴ However, this argument is overly simplistic. Although this argument has merit in cases in which university-affiliated donors are prohibited,¹⁷⁵ prohibitions on university-affiliated donors are not characteristic of all existing NIL rules. Some states have opted to permit donations from university affiliates (like booster clubs or alumni associations),¹⁷⁶ meaning that the university would have to distribute these donations in accordance with Title IX.¹⁷⁷ If these gifts create disproportionate benefits to athletes of one sex, the school must resolve the imbalance.¹⁷⁸

171. See Jessop & Sabin, *supra* note 93, at 271.

172. See U.S. DEP'T OF JUST., *supra* note 92.

173. See *infra* Section III.C.

174. See Jessop & Sabin, *supra* note 93, at 258.

175. See FLA. STAT. § 1006.74 (2022); S. 4004, 116th Cong. (2020); see also H.R. 8382, 116th Cong. (2020). University-affiliated donors can include university employees, university booster clubs, or the university itself. See Arthur Bryant & Cary Joshi, *College Sports NIL is Headed for a Collision with Title IX*, SPORTICO (Nov. 10, 2021, 8:55 AM), <https://bit.ly/3GbjkpE>.

176. See CAL. EDUC. CODE § 67456 (West 2022); see also S. 5003, 116th Cong. (2020).

177. See Policy Interpretation of Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,415–16 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86); see also Chalenor v. Univ. of N.D., 291 F.3d 1042, 1048 (8th Cir. 2002).

178. See Franklin, *supra* note 66, at 158. Schools can resolve this imbalance by reallocating institutional funds to underrepresented programs or by speaking with the donor about distributing their gifts equally among multiple athletic programs. See *id.* at 159.

Additionally, this argument assumes that universities must donate or manage physical money for Title IX to apply.¹⁷⁹ This assumption is weak because Title IX extends to the provision of student-athlete opportunities beyond monetary compensation.¹⁸⁰ Thus, Title IX has both direct application in NIL deals, when the university or its affiliates provide or handle the money, and indirect application in NIL deals, when student-athletes receive additional educational and marketing resources.¹⁸¹

Title IX directly applies to NIL deals when a university manages the money earned by student-athletes in their NIL deals.¹⁸² In these situations, the university or its affiliates provide, distribute, and/or directly assist in the procurement of endorsements.¹⁸³ One example of a university-affiliated donor is a booster club.¹⁸⁴ Booster clubs typically raise funds to support student programs in high schools and colleges, including athletic departments.¹⁸⁵ Funding from booster clubs is distributed directly to athletic departments to disperse.¹⁸⁶ Booster club donations, unlike third-party donations distributed to specific athletes, trigger Title IX.¹⁸⁷ Thus, universities are required to resolve any imbalances in accordance with

179. See Mayer & Zimbalist, *supra* note 105, at 264–65 (noting that Title IX may apply in NIL deals even when universities do not pay student-athletes directly and that other resources, such as promotional efforts, are also regulated under Title IX).

180. See Athletics, 34 C.F.R. § 106.41 (1975). These opportunities include efforts by the universities to educate student-athletes on NIL topics such as contracts, entrepreneurship, or personal branding, or to market their student-athletes to potential NIL donors. See Bryant & Joshi, *supra* note 175.

181. See Jessop & Sabin, *supra* note 93, at 271; see also Bryant & Joshi, *supra* note 175.

182. See Jessop & Sabin, *supra* note 93, at 271.

183. See *id.*

184. See *Role of Boosters*, NCAA, bit.ly/3XOi9SL (last visited Jan. 23, 2023). Boosters are “representatives of the institution’s athletic interests” and include anyone who has: [p]rovided a donation in order to obtain season tickets for any sport at the university[:]; [p]articipated in or has been a member of an organization promoting the university’s athletics programs[:]; [m]ade financial contributions to the athletic department or to a university booster organization[:]; [a]rranged for or provided employment for enrolled student-athletes; [a]ssisted or has been requested by university staff to assist in the recruitment of prospective student-athletes[:]; [a]ssisted in providing benefits to enrolled student[-]athletes or their families[:]; or [b]een involved otherwise in promoting university athletics.

Id.

185. See Franklin, *supra* note 66, at 154. Title IX’s applicability is important here because male sports teams generate more support and interest from these sponsors, and male-generated booster activity generates more public interest. See *id.* at 155 (citing Jurupa Unified Sch. Dist., OCR File No. 09-01-1222 (Feb. 7, 1995)).

186. See Bryant & Joshi, *supra* note 175.

187. See Jessop & Sabin, *supra* note 93, at 272.

Title IX.¹⁸⁸ In fact, Title IX applies any time NIL-related donations are gifted straight to athletic departments.¹⁸⁹ For example, if the university works with potential donors in organizing NIL deals, Title IX requires the universities to provide these deals to male and female athletes equally, or in a substantially proportionate manner, to satisfy the equal opportunity standard.¹⁹⁰ The substantially proportionate requirement applies regardless of whether the donation comes from a university-affiliated donor or a third-party donor.¹⁹¹ Thus, whether a donor is a university affiliate or a third party should not affect whether Title IX applies. Instead, other situational factors can trigger Title IX protections in NIL deals.

The identity of donors is not the only factor that may trigger Title IX's application to NIL deals. Some proposed NIL statutes allow university athletics departments to act as agents for student-athletes.¹⁹² When universities or their affiliates act as agents, Title IX is triggered.¹⁹³ The institution is then required to provide equal assistance and to secure an equal number of benefits for male *and* female athletes.¹⁹⁴

However, disparities in the number of available endorsements will not always result in a Title IX violation. Multiple factors matter when considering an institution's compliance with Title IX.¹⁹⁵ However, the

188. Policy Interpretation of Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,415–16 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86). In the case of donations from booster clubs and employees, the athlete would need to demonstrate that the donor is a “conduit” for the university to trigger Title IX protections. *See* Jessop & Sabin, *supra* note 93, at 271. The only way to avoid Title IX requirements would be for booster clubs to exert complete control over the funds and the allocation of those funds. *See* Franklin, *supra* note 66, at 154 (citing Jurupa Unified Sch. Dist., OCR File No. 09-01-1222 (Feb. 7, 1995)).

189. *See* Franklin, *supra* note 66, at 153 (“Once a university receives a monetary donation, the funds become public money, subject to Title IX’s legal obligations in their disbursement. Likewise, once an athletic department accepts external funds from booster clubs, alumni associations, or any other private donors, the gift falls under Title IX’s legal requirements.”).

190. *See* Jessop & Sabin, *supra* note 93, at 271.

191. *See id.*

192. *See, e.g.,* CAL. EDUC. CODE § 67456 (West 2022); FLA. STAT. § 1006.74 (2022); H.R. 8382, 116th Cong. (2020). Sports agents are professional representatives of athletes. *See Sports Agent Salary and Job Description*, JESSUP U., bit.ly/3G8OduL (last visited Dec. 20, 2022). They help athletes negotiate employment and other contracts and also help manage the image of the athletes they represent. *See id.* If a university were to step into this role, then Title IX would be triggered. *See* Jessop & Sabin, *supra* note 93, at 271.

193. *See* Jessop & Sabin, *supra* note 93, at 271.

194. *See id.*

195. Policy Interpretation of Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86). Factors considered by the OCR include the provision and maintenance of equipment and supplies, travel expenses, coaching and tutoring opportunities, provision of facilities, and publicity. *See id.* The extent to which these factors are present or absent in male and female sports teams will provide a basis for determining Title IX compliance. *See id.*

weight that should be given to disparities in endorsements as a factor is beyond the scope of this Comment.

Although direct financial compensation from donors and sponsors is a clear benefit that would trigger Title IX if distributed inequitably, Title IX can also apply when no endorsement is involved.¹⁹⁶ NIL deals open the door to increased benefits to athletes beyond endorsements.¹⁹⁷ Title IX is triggered any time the university provides these benefits.¹⁹⁸

Marketing is frequently used in the world of collegiate athletics. Universities often advertise various events and products using their athletes' names, images, and likenesses.¹⁹⁹ For example, universities sell jerseys and merchandise that use their student-athlete's names, pictures, and jersey numbers.²⁰⁰ After *Alston*, athletes are allowed to receive compensation from these sales.²⁰¹ The impact on women depends on the level of marketing a university gives to female sports: If a university only sells or advertises merchandise for men's teams, then female athletes would not receive the same opportunities to earn compensation from these sales as their male counterparts.²⁰² Title IX was designed to prevent this unfortunate consequence.²⁰³

The 1975 Regulations specifically include publicity in the list of factors to be considered in determining whether universities provide equal opportunity to their athletes.²⁰⁴ Although Title IX clearly applies to

196. *See id.*

197. *See* Dan Whateley & Colin Salao, *How college athletes are getting paid from brand sponsorships as NIL marketing takes off*, INSIDER (Dec. 19, 2022, 10:58 AM), bit.ly/3DgiOEw (noting that student-athletes have run branded sports clinics and received compensation for appearing and signing autographs at events).

198. Policy Interpretation of Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

199. *See* Timothy Boone, *Good luck finding a Joe Burrow jersey: LSU's dream football season has merchandise flying off shelves*, ADVOCATE (Dec. 31, 2019, 4:30 PM), bit.ly/3kNuEzS. Although schools traditionally could not sell jerseys with the players' names, the presence of the number of an influential player can produce substantial sales for the university. *See id.* For example, following his record-breaking season and Heisman Trophy win, Louisiana State University Quarterback Joe Burrow's number 9 jersey quickly sold out, producing substantial revenue. *See id.*

200. *See* Daren Rovell, *Michigan Players are the First to Cash In on Jersey Sales*, ACTION (Apr. 5, 2022 12:18 PM), <https://bit.ly/3gexvzH>.

201. *See id.* After *Alston*, the "M Den," a University of Michigan clothing store, provided Michigan football players the first opportunity to profit from jersey sales. *See id.*

202. *See* Bryant & Joshi, *supra* note 175; *see, e.g., Gender Equality in Sport and the Role of Media*, COUNCIL EUR., bit.ly/3I3I4RK (last visited Dec. 27, 2022) (noting that female sports are given less media attention than male sports generally).

203. *See* Athletics, 34 C.F.R. § 106.41 (1975).

204. *See* C.F.R. § 106.41. The OCR assesses compliance with the publicity factor by comparing between men's and women's sports the sports information personnel, access to other publicity resources, and the publication and other promotional devices that feature men's and women's programs. Policy Interpretation of Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,417 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

publicity and marketing,²⁰⁵ the compensation generated from publicity and marketing provides an additional benefit that did not exist prior to *Alston*. Now, not only are women given less exposure to fans, donors, and other sources of support, but women are also compensated less. As a result, universities must consider the compensation generated from these marketing campaigns in complying with the substantially proportionate requirement.²⁰⁶

An additional nonmonetary benefit of NIL deals that triggers the application of Title IX occurs when universities provide NIL-related education to their student-athletes.²⁰⁷ These opportunities include, but are not limited to, educating student-athletes on how to negotiate and create contracts, how to hire agents,²⁰⁸ and how to structure NIL deals.²⁰⁹ In these situations, the university is not directly providing or securing endorsements for athletes, but the provision and distribution of resources to student-athletes sufficiently triggers Title IX protections. As a result, universities must ensure that these educational opportunities are provided equally to male and female athletes.

B. Title IX Should Apply to NIL Deals Based on Policy Considerations

There are clear situations in which Title IX does apply to NIL deals.²¹⁰ Moreover, Title IX *should* apply to NIL deals because it is beneficial for female athletes. Despite the progress Title IX has made, it has not fully achieved its goal: to achieve gender equality in sports.²¹¹ Title

205. See C.F.R. § 106.41.

206. Policy Interpretation of Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,415 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

207. See Bryant & Joshi, *supra* note 175; see also Jessop & Sabin, *supra* note 93, at 271.

208. See, e.g., CAL. EDUC. CODE § 67456 (West 2022); FLA. STAT. § 1006.74 (2022); S. 4004, 116th Cong. (2020) (permitting student-athletes to hire agents to assist them in securing endorsements).

209. See Bryant & Joshi, *supra* note 175. Some schools have implemented NIL-focused classes that student-athletes can take for credit. See Lila Bromberg, *In the NIL Arms Race, Some Schools are Going the Extra Mile to Help Their Athletes*, S.I. (July 1, 2021), <https://bit.ly/3EaeHtw>. For example, universities in Nebraska and Colorado have partnered with entrepreneurship programs on campus to help educate student-athletes about marketing, personal branding, and financial literacy. See *id.* Additionally, the athletic director at the University of Arkansas created a senior staff position focused on NIL issues and dedicated to helping provide resources to student-athletes. See *id.*

210. See *supra* Section III.A.1.

211. See *What is Title IX?*, WOMEN'S SPORTS FOUND. (Sept. 10, 2019), bit.ly/3GlptiJ. Although Title IX regulations are applicable to all universities, approximately 80% of schools have not reached full compliance. See *id.* Schools also spend significantly less on female sports, see Jim Sergent, *Funding of college sports falls short of law's promise to women*, USA TODAY (Mar. 30, 2022, 5:00 AM), bit.ly/3WpNBGA, and dedicate less media

IX should apply to NIL deals for two reasons: first, to remain consistent with the language of the 1975 Regulations²¹² and, second, to ensure that gender equality progress is not stunted so that Title IX's goals are realized.

1. The Language of the 1975 Regulations Supports Title IX's Application

Title IX should apply to NIL deals because the resulting opportunities, including publicity and monetary compensation, are of the type that Title IX's drafters intended to regulate. The 1975 Regulations explicitly mention "publicity" in the list of factors to be considered in determining Title IX compliance.²¹³ Publicity encompasses any activity used to garner public interest and the use of promotional materials or advertising.²¹⁴ NIL deals and endorsements fall into these categories. For example, many businesses pay student-athletes to promote their products or use an athlete's name or presence to attract customers. Including NIL deals in the realm of publicity, thereby triggering Title IX's application in NIL deals, is consistent with the legislature's ultimate purpose in passing the law: to protect females from discrimination in educational settings.²¹⁵ Additionally, a publicity gap already exists between men's and women's sports.²¹⁶ When a large publicity gap exists, a university may be in violation of Title IX.²¹⁷ Failing to regulate this new type of publicity exacerbates the existing gap and negatively impacts any progress that Title IX made to close it.²¹⁸

Title IX was passed to remedy inequalities that women faced in educational settings.²¹⁹ If the creators of Title IX thought it was important to include publicity in the 1975 Regulations, then they likely felt that

time to female sports, see *Gender Equality in Sport and the Role of Media*, COUNCIL EUR., bit.ly/3I3I4RK (last visited Dec. 27, 2022).

212. See Athletics, 34 C.F.R. § 106.41 (1975) (including publicity in the list of factors to be considered when determining Title IX compliance).

213. See *id.*

214. See *Publicity*, MERRIAM-WEBSTER (11th ed. 2019).

215. See U.S. DEP'T OF JUST., *supra* note 28.

216. See Emily Riley, *Title IX requires girls' sports get equal publicity. They often don't*, CAPITAL NEWS SERV. (Apr. 11, 2022), bit.ly/3I9BxoF. The NCAA typically spends more money on championship events that produce greater revenues: typically, those for men's sports. See Jaclyn Diaz, *The NCAA's focus on profits means far more gets spent on men's championships*, NPR (Oct. 27, 2021, 9:25 AM), bit.ly/3FZGDB7. In the 2018–2019 season, the NCAA spent \$1700 less on female participants for Division I championships than male participants, excluding basketball. See *id.*

217. See *id.*

218. See *infra* Section III.B.2.

219. See U.S. DEP'T OF JUST., *supra* note 28.

publicity was an area in which women would face discrimination.²²⁰ The drafters were correct in their suspicions. On average, female sports are given less media attention and publicity than male sports.²²¹ An illustration of this gap is prevalent in the context of fan festivals.²²² Fan festivals for male teams provide more games, music, and sponsors than for female sports.²²³ Further, the NCAA spent \$274,800 on the 2019 baseball fan festival and only \$53,900 on the softball fan festival in the same year.²²⁴ Adding new facets of publicity will continue to open doors for new gender discrepancies in the realm of collegiate athletics.

2. Title IX Shortcomings and Regression

Allowing student-athletes to be compensated for their name, image, and likeness is supposed to benefit student-athletes.²²⁵ However, taking away Title IX protections for these deals does more harm than good for female athletes. By introducing new benefits and opportunities for student-athletes via NIL deals, while failing to implement Title IX protections for those benefits, Title IX's progress toward gender inequality in sports will come to a halt.

Although Title IX requires athletic benefits be given to male and female athletes in a substantially proportionate manner,²²⁶ athletic benefits will not be substantially proportionate across genders if NIL compensation flows primarily to male athletes and Title IX protections cannot mitigate the inequalities.²²⁷ As the number of NIL deals and their corresponding

220. See Riley, *supra* note 216 ("If only male athletes are highlighted, girls get the message pretty quickly that they don't matter, that they're not as important, that their achievements are not valued.").

221. See *id.*

222. See AP, *Second NCAA gender equity report shows more money spent on male athletes than female ones on average*, ESPN (Oct. 16, 2021), bit.ly/3KxI8ur. Fan festivals, in the context of sports, are large events held by athletic departments and other organizations for fans of particular sports. See, e.g., *Men's Final Four Fan Fest presented by Capital One*, NCAA, <http://bit.ly/3IOmaBS> (last visited Feb. 23, 2023).

223. See AP, *supra* note 222.

224. See *id.* Notably, this illustration only addresses collegiate sports; this data does not include gaps in publicity that exist in professional sports, which is beyond the scope of this Comment.

225. See Bryan Finck, *5 Great Things About NIL that Critics Miss*, DREAMFIELD (Apr. 8, 2022), bit.ly/3WAGVEZ. The obvious benefit is the ability to receive compensation; however, there are additional benefits as well. See *id.* These benefits include avoiding sanctions for violating the amateurism policy, giving student-athletes the same opportunities as other students on campus, and developing real-world business skills. See *id.*

226. See CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST, *supra* note 42.

227. See generally AP, *'It's a man's world': Male athletes leading the way in NIL money*, KTAR NEWS (Jan. 27, 2022, 1:06 PM), bit.ly/3hSS8IU (demonstrating that male sports have already begun to dominate the NIL world).

compensation increases, so will the gap in benefits and opportunities between male and female athletes.²²⁸ This consequence disproportionately impacts female athletes when considering that legislation has not completely eliminated gender inequality in higher education.²²⁹ By eliminating Title IX's application in NIL deals, not only will current progress stunt,²³⁰ but existing gender inequalities will also be exacerbated.²³¹

Additionally, the NCAA itself is not subject to Title IX.²³² Thus, the NCAA will not face sanctions or be mandated to remedy the numerous instances of gender inequality it has demonstrated in recent years.²³³ The fact that the NCAA is not bound by Title IX is an example of yet another vulnerability for female athletes.

One of Title IX's final shortcomings is that it is rarely enforced.²³⁴ No school has actually lost federal funding for Title IX violations,²³⁵ despite the many lawsuits filed for violations.²³⁶ As a result, schools are not incentivized to comply with Title IX.²³⁷

228. *See id.* For example, the Washington State Volleyball team, the winningest team at the school, did not receive any NIL deals in the first year after *Alston* was decided. *See id.* Some female athletes worry that donor money that previously went to their sports program itself for necessities will be reallocated to NIL deals for male athletes. *See id.*

229. *See* Alex Butler, *Title IX at 50: huge gains for women's sports, but more work to do*, UPI (June 23, 2022, 4:00 AM), bit.ly/3v5Gpn5.

230. *See supra* notes 94–95 and accompanying text.

231. *See supra* notes 94–95 and accompanying text.

232. *See* Alex Azzi, *Title IX is 50 Years Old. Why Aren't Schools Complying with the Law*, NBC SPORTS (June 23, 2022, 2:40 PM), bit.ly/3HFGSDm. The NCAA is a nonprofit organization that does not receive federal funding; thus, it is not legally bound by Title IX. *See The NCAA is Not Subject to Title IX Discrimination*, BINNALL L. GROUP (June 30, 2021, 8:56 PM), bit.ly/3jgay0M. This is true even though the NCAA receives money from its federally funded members. *See NCAA v. Smith*, 525 U.S. 459, 470 (1999).

233. *See supra* note 222 and accompanying text; Alex Azzi, *Gender Inequity Report: NCAA Spends far Less on Women's Championships, Hindering their Growth Potential*, NBC SPORTS (Nov. 1, 2021, 12:31 PM), bit.ly/3WNKmbw.

234. *See* Alison Renfrew, *The Building Blocks of Reform: Strengthening Office of Civil Rights to Achieve Title IX's Objectives*, 117 PENN ST. L. REV. 563, 579 (2012). Part of the issue is that the Department of Education acts reactively, not proactively. *See* Nancy Armour et al., *Title IX: Falling Short at 50*, USA TODAY (Dec. 15, 2022 6:16 AM), bit.ly/3j2Tawl. When schools are found to be in violation, rather than receiving sanctions, they are given multiple opportunities to remedy the violations. *See Renfrew supra*, at 579. This lack of enforcement also comes from a reluctance to utilize the strong enforcement mechanisms of Title IX. *See id.*

235. *See* Paige Sutherland, Kimberly Atkins Stohr & Tim Skog, *Title IX, 50 Years Later: Why female athletes are still fighting for equality*, WBUR ON POINT (June 23, 2022), bit.ly/3BR7XQW.

236. *See, e.g.,* *Cohen v. Brown Univ.*, 101 F.3d 155, 161 (1st Cir. 1996); *Grove City v. Bell*, 465 U.S. 555, 557 (1984); *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 64 (1992).

237. *See Renfrew, supra* note 234, at 579. The threat of losing funding, as well as other sanctions such as administrative hearings, are empty ones. *See id.* at 578–80.

Today, inequalities in women's sports persist.²³⁸ Unfortunately, inequalities stem from institutions focusing more on meeting Title IX's minimum requirements and avoiding liability than on the "spirit" and purpose of Title IX.²³⁹ As a result, women face a harsh reality of discrimination and inequality in college sports,²⁴⁰ although universities meet the minimum Title IX requirements and produce data that gives the illusion of compliance.²⁴¹

As discriminatory practices continue to slip through the cracks of Title IX's protective barrier, unregulated NIL deals will open these cracks into gaping holes. By leaving NIL deals outside of Title IX's scope, gender equality in college sports will become an idealized myth, leaving female athletes to struggle for the same opportunities that are gifted to male athletes.

C. Recommendations for Final Legislation that Ensures the Application of Title IX to NIL Deals

Understanding the importance of Title IX's application to NIL deals is only the first step to protecting female athletes. The NCAA and other legislative bodies should take concrete steps to ensure Title IX applies to NIL deals. Doing so will effectuate Title IX's purpose: "to combat 'the

238. See Butler, *supra* note 229. Data analyzed by USA Today and the Knight-Newhouse Data Project showed that 71 cents were spent on travel, equipment, and recruiting for women's teams compared to every dollar spent on men's teams at Division I institutions. See Armour et al., *supra* note 234; see also Dean Golembeski, *Gender Equality Remains Elusive in College Sports*, BEST COLLEGES (Nov. 10, 2021), bit.ly/3kH6RBD (noting that female softball players participating in the College World Series are not provided with the same amenities as male baseball players, who are provided with benefits such as showers at the stadium, free massages, and rest days between games). Additionally, after the 2019–2020 NCAA Basketball Tournament, the Oregon Women's Basketball team flew home on commercial flights, while the men flew home on charter flights. See Armour et al., *supra* note 234.

239. See Butler, *supra* note 229. The goal is to avoid supporting discrimination in educational settings. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979). The drafters were less concerned with meeting quotas and more concerned with reducing discrimination and providing recourse for individuals experiencing discrimination. See U.S. DEP'T OF JUST., *supra* note 92.

240. See *id.* Inequalities surfaced during the 2021 NCAA March Madness Tournament when Oregon basketball player Sedona Prince posted a video showing the unequal facilities provided to the male and female teams. See Dan Murphy, *Sedona Prince, March Madness and the ongoing quest for gender equity at NCAA basketball tournaments*, ESPN (Mar. 15, 2022), bit.ly/3hGcpLw. For example, the men's teams were provided with a full weight room, while the women's teams were given a stack of weights and some yoga mats. See Butler, *supra* note 229.

241. See Butler, *supra* note 229. There is some evidence that deceptive measures are taken in reaching the minimum numbers. See *id.* Examples include double- and triple-counting the same students in reporting numbers and adding unnecessary roster spots to women's teams. See *id.* These measures provide a way for universities to create "opportunities" for female athletes without having to add new women's team. *Id.*

continuation of corrosive and unjustified discrimination against women in the American educational system.”²⁴² Doing so will also ensure that Title IX’s progress is not undermined by the *Alston* decision and the inequalities that still remain in collegiate athletics are not exacerbated.²⁴³ Final regulations should include numerous provisions that will ensure Title IX’s application to student-athlete NIL deals.

First, the ability of university and university-affiliated donors to participate in NIL athletic endorsements should be implemented in permanent NIL legislation.²⁴⁴ The benefits of this provision are twofold: First, Title IX’s application will be triggered, and second, NIL opportunities will be expanded for all student-athletes.

Allowing universities and university-affiliated donors to participate in NIL deals ensures that Title IX is applicable to at least a portion of NIL endorsements.²⁴⁵ Thus, female athletes will be protected from donors who only want to sponsor male athletes.²⁴⁶

The application of Title IX to NIL deals may also expand NIL opportunities for both male and female athletes. Some statutes have limited NIL deals to third-party donors, thereby eliminating Title IX’s potential application.²⁴⁷ However, when university-affiliated individuals and groups are allowed to participate in NIL endorsements, the pool of potential donors will increase, thereby increasing the number of NIL opportunities afforded to *all* student-athletes. Increasing NIL opportunities will, in turn, allow both male and female student-athletes to reap the maximum benefits from the *Alston* decision.

Second, permanent legislation should allow university and university affiliates to act as agents for student-athletes to assist them in securing NIL deals.²⁴⁸ When determining whether equal athletic opportunity exists between male and female athletes, the OCR should consider the benefits garnered by university-affiliated agents.²⁴⁹ If there is a large disparity in these benefits, then the university may be in violation of Title IX.²⁵⁰

242. U.S. DEP’T OF JUST., *supra* note 92.

243. *See supra* Sections III.B.1–2.

244. *See, e.g.*, CAL. EDUC. CODE § 67456 (West 2022); *see also* S. 5003, 116th Cong. (2020).

245. *See supra* notes 91–92 and accompanying text.

246. *See*, Kercheval, *supra* note 12. One of the first major NIL endorsements came from a Miami businessman and consisted of \$540,000 to be distributed to football players at the University of Miami. *See id.*

247. *See* FLA. STAT. § 1006.74 (2022); S. 4004, 116th Cong. (2020).

248. *See, e.g.*, CAL. EDUC. CODE § 67456 (2022); STAT. § 1006.74; H.R. 8382, 116th Cong. (2020).

249. *See* Athletics, 34 C.F.R. § 106.41 (1975).

250. Policy Interpretation of Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

New legislation should also require that non-monetary benefits be provided in an equal or substantially proportionate manner to all student-athletes. For example, universities should be required to engage in equal marketing efforts for both male *and* female student-athletes when helping them secure NIL deals.²⁵¹ NIL regulations should also require universities to provide NIL-related trainings to all student-athletes on contracts, financial literacy, and hiring representation.²⁵² The provision of these trainings will trigger Title IX and help all student-athletes maximize the benefits of NIL deals.²⁵³

A final step to ensure Title IX's application to NIL deals is to require universities to create, and work alongside, NIL collectives,²⁵⁴ so that universities can manage potential NIL deals for athletes. Many NIL collectives already exist.²⁵⁵ For example, at Auburn University, a group of donors and fans known as the Auburn Collective created an organization called "On To Victory"²⁵⁶ that allows businesses and other Auburn fans to donate money that will be dispersed to Auburn student-athletes.²⁵⁷ Similarly, former Penn State University quarterback Sean Clifford created Limitless NIL, an agency dedicated to helping student-athletes develop their personal brand and secure NIL deals.²⁵⁸ Although existing NIL-facilitating organizations may not be subject to Title IX themselves, when universities create and/or collaborate with these organizations, Title IX becomes applicable. Universities will then be required to distribute benefits equally.²⁵⁹

Title IX's application to NIL deals is imperative to protect female athletes from gender discrimination in educational settings.²⁶⁰ This importance is recognized by organizations like the Drake Group, which is

251. See C.F.R. § 106.41; *see also* H.R. 850, 117th Cong. (2021).

252. See H.R. 8382 (encouraging universities to provide such education).

253. See Finck, *supra* note 225. Teaching student-athletes entrepreneurial skills will allow them to identify the best opportunities for themselves rather than blindly navigating NIL deals. *See id.*

254. See Pete Nakos, *What are NIL Collectives and How do they Operate*, ON3NIL (July 6, 2022), bit.ly/40crExa (defining NIL collectives as organizations that facilitate NIL deals for athletes and create ways for athletes to monetize their brands).

255. See *Tracker: University Specific NIL Collectives*, BUS. COLL. SPORTS, bit.ly/3I6hDLo (last updated Dec. 9, 2022) (providing a list of NIL-facilitating programs already in existence for specific schools).

256. See *Welcome to the Auburn Collective*, ON TO VICTORY, bit.ly/3VsGA6z (last visited Dec. 27, 2022).

257. *See id.*

258. See *What is Limitless*, LIMITLESS, bit.ly/3WPsKfR (last visited Dec. 27, 2022). Limitless NIL is not limited to Penn State student-athletes, however. *See id.* In fact, the organization has assisted student-athletes from 12 different schools. *See id.*

259. See Carney N. Baker & Andy Zimbalist, *The Latest Title IX Battleground: Publicity Rights in College Sports*, Ms. (Jan. 19, 2023), bit.ly/3IyngAA.

260. See Camera, *supra* note 45.

dedicated to advocating for sports equity and integrity.²⁶¹ Inequalities have already emerged in the realm of NIL deals, and educational institutions are feeding into that inequality.²⁶² Although advocacy for female athletes by organizations like the Drake Group is a start, meaningful change is not possible until the legislature and other governing bodies implement Title IX's protections, namely, the requirement of substantially proportionate benefits and opportunities, into final legislation.

IV. CONCLUSION

In *NCAA v. Alston*, the Supreme Court ended the debate on whether student-athletes should be paid for their name, image, and likeness: They should.²⁶³ Although the Court's decision was a win for student-athletes, advocacy cannot end with *Alston*. Female athletes are currently at a disadvantage in NIL deals.²⁶⁴ Because there is currently no permanent legislation to protect female athletes, the NCAA and the federal government should cure this issue by implementing provisions in final regulations that ensure Title IX's application in NIL deals.

Despite arguments to the contrary, Title IX does apply to NIL deals, both directly and indirectly.²⁶⁵ Title IX applies directly when donations are provided, facilitated, or procured through the university. Title IX applies indirectly when universities provide financial literacy and other resources to student-athletes and when they market their athletes.²⁶⁶ Additionally, Title IX *should* apply to NIL deals because its application is consistent with the text of the 1975 Regulation. The two laws are consistent because the Regulation includes "publicity" as a factor that the OCR considers when determining compliance with Title IX.²⁶⁷ Additionally, Title IX should apply to NIL deals to avoid regression to a pre-Title IX era.²⁶⁸ Regression will take the form of substantial gaps in benefits, both in marketing and in compensation, provided to male and female athletes—a

261. See *Why is the Department of Education Office for Civil Rights Failing to Help Colleges and Universities Resolve the Current Name/Image/Likeness Chaos?*, DRAKE GRP., <https://bit.ly/47NYxE8> (last visited Aug. 27, 2023). For example, The Drake Group has sent multiple requests to the U.S. Department of Education Office for Civil Rights to use Title IX guidance to address gender discrepancies in the NIL landscape. See *id.*

262. See *id.* Although NIL collectives themselves are not inherently discriminatory, many collectives have been formed for the sole purpose of assisting football and men's basketball. See *id.* Despite the discriminatory nature of these practices, schools continue to encourage and support deals arising from these collectives. See *id.*

263. See *NCAA v. Alston*, 141 S. Ct. 2141, 2151 (2021).

264. See *supra* Section III.B.

265. See *supra* Section III.A.

266. See *supra* Section III.A.

267. See *supra* Section III.B.1.

268. See *supra* Section III.B.2.

gap that has been closing since the enactment of Title IX in 1972.²⁶⁹ Female athletes are already engaged in a war for equality, and regression of the progress made is a battle that female athletes should not have to fight.

Simply, the NCAA's permanent policy and other legislative action should ensure that Title IX is applicable to NIL deals to protect female athletes. Title IX's application can be ensured by allowing universities and their affiliates to donate to, and act as agents for, student-athletes.²⁷⁰ Relatedly, university involvement will expand NIL opportunities for student-athletes by (1) increasing their sources of compensation (no longer limited to third-party donors) and (2) maximizing the benefits that athletes can garner through NIL deals.²⁷¹ Additionally, application of Title IX can be ensured if universities market their student-athletes equally for NIL deals, ensure that they provide NIL-related education experiences for their student-athletes, and create and partner with NIL facilitating organizations.²⁷²

Although female athletes are facing newfound inequalities, it is important to note that there are some success stories. For example, current Louisiana State University gymnast Livvy Dunne is estimated to have made approximately \$2.3 million in NIL deals in 2022.²⁷³ Additionally, companies like Bumble and Sprouts Farmers Market celebrated Title IX's 50th anniversary by signing NIL deals with 50 female athletes.²⁷⁴ These successes are what student-athletes dreamed of after the *Alston* decision. The current state of NIL deals post-*Alston* does not prohibit success for female athletes. However, the NCAA and other legislative bodies should ensure the application of Title IX to NIL deals, making these wins the norm, not the outliers.

269. See *supra* Section II.A.4.

270. See *supra* Section III.C.

271. See *supra* Section III.C.

272. See *supra* Section III.C.

273. See Joe Winner, *Livvy Dunne, The Cavinder Twins, and the Top 10 Female Athlete NIL Valuations*, ESPN SW. FLA. (Nov. 16, 2022), bit.ly/3Kz9BvG.

274. See Andy Wittry, *A Year into NIL, 'Female Student-Athletes Crush it Every Single Day'*, ON3OS (June 8, 2022), bit.ly/3KCQNf9.