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Changing the Game: The Emergence of NIL Contracts in Collegiate Athletics and the Continued Efficacy of Title IX

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Changing the Game: The Emergence of NIL Contracts in Collegiate Athletics and the Continued Efficacy of Title IX

Leeden Rukstalis*

Abstract

On June 30, 2021, the National Collegiate Athletic Association ("NCAA") suspended a 115-year prohibition on college athletes' ability to profit from the use of their names, images, and likenesses ("NIL"). Historically, NCAA eligibility was determined by an athlete's amateur status. Student athletes forewent compensation to preserve a line between professional and college sports. Today, the NCAA's novel NIL policy recognizes an athlete's right to publicity and allows them to share in the billions of dollars it generates every year. According to estimates, college athletes earned $917 million in the first year of NIL activity. By 2023, the NIL market is projected to reach $1.14 billion. Despite the abundance of NIL options in the United States, not all athletes benefit. Currently, male athletes receive approximately 74.35% of all NIL compensation. Football and men's basketball, in particular, receive nearly 71.4% of all NIL deals and 93% of NIL donations. Growth in economic disparity between male and female athletes raises a novel legal question: what role will Title IX, a federal civil rights law enacted to ensure gender equality, play in the NIL era of college sports? This Note analyzes whether Title IX regulations will influence colleges' and universities' marketing, promotion, and facilitation of NIL opportunities. In the absence of

* Candidate for J.D., May 2023, Washington and Lee University School of Law. Thank you to everyone who supported me throughout the Note writing process. To my faculty advisor, Dr. Todd C. Peppers, thank you for your recommendations and motivational voicemails. To my family, thank you for never failing to listen to me discuss the newest story in college sports and for supporting my vision of an equal future for all athletes. Finally, thank you to my friends for their insight, help, and encouragement.

Title IX's guarantees of equal access to NIL deals or profits, this Note proposes what could be done to ensure that all public-school students are empowered and uplifted in their pursuit of equitable educational and athletic opportunities.

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"NIL policy opens up a free market of financial opportunity for college athletes. Yet, the infrastructure of this free market is not free of biases of race, gender, and sexuality."[1]

I. Introduction

"If you let me play," says an eight-year-old girl pitching a softball.[2] Over muffled voices of children on a playground, the girl's friends can be heard pleading for permission to play sports.[3] "If you let me play . . . I will have more self-confidence . . . I will be 60% less likely to get breast cancer . . . I will suffer less depression . . . I will learn what it means to be strong."[4]

"If You Let Me Play" first aired in 1995 as part of Nike's Just Do It campaign.[5] The advertisement emphasizes the benefits of sports for young girls' health and wellness, as well as the barriers they face in accessing the field.[6] Today, women and girls in the United States can participate in athletics at a variety of levels. There are currently 3,402,733 girls playing on high school varsity

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1. Cat Ariail, *NIL Agreements Could Expose Enduring Racial, Sexual Inequities*, SB NATION (Jul. 7, 2021) [perma.cc/JB7B-SMMB]; *see also* Lou Moore, *The Smaller Scope of Black Women Athletes' NIL Deals Was Predictable*, GLOB. SPORT MATTERS (Dec. 7, 2021) (stipulating that most Black female student-athletes will not experience their rightful share of endorsements because NIL deals are driven primarily by what the market values: white men) [perma.cc/CS4D-3ZSM].

2. *See* Ross Knights, *Nike Ad: If You Let Me Play*, YOUTUBE (Mar. 4, 2007) [perma.cc/HW3A-U3LV].

3. *See* Jennifer Frey, *Nike Puts Shoe on Other Foot*, THE WASH. POST (Oct. 15, 1995) [perma.cc/FMG9-HCZH].

4. *Id.*

5. *See* Margo Harakas, *If You Let Me Play Sports . . .' Nike Ad Uses Powerful Statistics to Encourage Girls to Participate*, THE SPOKESMAN-REVIEW (Oct. 10, 1995) (explaining the impetus of Nike's "If You Let Me Play" campaign).

6. *See* Frey, *supra* note 3 (stating the purpose of the Nike's ad); *see also Benefits—Why Sports Participation for Girls and Women*, WOMEN'S SPORTS FOUND. (Aug.30, 2016) (providing statistics on the health benefits of sports) [perma.cc/FQ75-SXT7].

teams.[7] A total of 215,468 female athletes compete in the National Collegiate Athletic Association ("NCAA").[8]

Title IX of the Education Amendments of 1972 ("Title IX")[9], a federal civil rights law which prohibits sex discrimination in public schools, played a critical role in the evolution of gender equity in sports.[10] Since its enactment, Title IX has served as a catalyst for promoting equal athletic participation for members of both sexes.[11] The proportion of female athletes in high school has increased from 7% in 1972 to roughly 43% today.[12] The percentage of female students participating in college athletics has increased from 15% in 1972 to 44% in 2020-21.[13]

On the 50th Anniversary of Title IX, there is no question that the statute has had a lasting impact on athletics and the "opportunities available to pursue an educational environment free from the limitations of gender stereotyping and gender discrimination."[14] The Women's Sports Foundation, in their documentation of 50 years of Title IX, aptly described the historical and social achievements of young female athletes:

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7. *See 50 Years of Title IX: We're Not Done Yet,* WOMEN'S SPORTS FOUND. 1, 7 (May 4, 2022) [perma.cc/A8CL-TCNK].

8. *See id.*

9. *See* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (prohibiting sex discrimination in any educational program receiving federal financial assistance).

10. *See* WOMEN'S SPORTS FOUNDATION, *supra* note 7, at 7; *see also* Rachel Schwarz, *Timeout! Getting Back to What Title IX Intended and Encouraging Courts and the Office of Civil Rights to Re-evaluate the Three Prong Compliance Test*, 20 WASH. & LEE J. CIV. RTS. & SOC. JUST. 633, 637 (2014) (asserting Title IX's prohibition of discrimination based on sex in institutions receiving federal financial assistance).

11. *See* 34 C.F.R. § 106.41(c) (2013) ("A recipient [of Federal financial assistance] which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.").

12. *See* WOMEN'S SPORTS FOUNDATION, *supra* note 7, at 7 (comparing participation rates for women at the time of Title IX's passage in 1972 to women's participation rates in 2022).

13. *See id.* (supplying the most recent data for college enrollment and athletic participation).

14. *Id.* at 15.

> A society that once justified limiting sporting opportunities for girls and women on the basis of now disproven notions of female inferiority and physical delicacy has witnessed a transformation of the U.S. sport system to one where women as victors dominate on a world stage and demonstrate on a daily basis in their local communities what strong, talented, and forceful women can do.[15]

Despite significant progress toward equalizing the playing field for male and female athletes at the high school and collegiate levels, athletes today face new challenges with respect to equal opportunity.[16] "If you let me play sports" has turned into "if you let me get paid."[17]

According to the Equity in Athletics Disclosure Act ("EADA"),[18] a 1994 federal law requiring colleges and universities to publicly report gender equity information about their athletic programs, female and male athletes receive remarkably different amounts of money and resources.[19] For example, female athletes received only 30% of the $241 million spent recruiting college

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15. *Id.*

16. *See* Kristi Dosh, *Name, Image and Likeness Legislation May Cause Significant Title IX Turmoil*, FORBES (Jan. 21, 2020, 1:22 PM) (suggesting that the emergence of NILs in college sports might impact a school's obligation to try to ensure similar or equal opportunities for both male and female athletes) [perma.cc/MMN7-DGMT].

17. *See* Thuc Nhi Nguyen, *Once Empowered by Title IX, Female Athletes Are Now Among Big Winners in New NIL Era*, L.A.TIMES (June 21, 2022, 5:00 AM) ("Beyond physical and societal benefits of simply playing sports, female athletes are wading through the uncharted NIL waters. They're building social media empires. They're gaining financial stability that could set them up into their professional athletic careers and beyond.") [perma.cc/E2D6-QML6]; *see e.g.,* Alan Blinder, *The Smaller, Everyday Deals for College Athletes Under New Rules,* N.Y. TIMES (Dec. 10, 2021) ("Many of the arrangements involve football or basketball players, and the majority of compensation has gone to male athletes.") [perma.cc/2BPY-MTNM].

18. *See* 34 C.F.R. § 668.47 (requiring data on athletic program participation rates and financial support data from institutions receiving federal financial assistance).

19. *See* WOMEN'S SPORTS FOUNDATION, *supra* note 7, at 11 (describing the EADA's requirements for postsecondary institutions).

athletes during the 2019–2020 academic year.[20] When comparing athletic scholarship aid, male athletes received $252 million more than female athletes in 2019–2020.[21] There would have to be an additional $750 million in athletic scholarships offered if the funds were to be proportional to women's enrollment.[22] A comparison of the dollars spent on athletic scholarships and recruiting, coaches' salaries, and television contracts indicate that educational institutions at all levels fail to invest equally in female athletes.[23] Currently, work needs to be done to ensure that athletes receive equitable distributions of resources from their institutions.[24] However, the problem of creating a more sustainable Title IX program is further complicated by the newly coined "NIL era of college sports."[25]

The NCAA suspended its 115-year prohibition on compensation for college athletes on June 30, 2021.[26] In the past, a student-athletes amateur status determined their eligibility.[27] Consequently, athletes could not enter endorsement contracts or profit from the use of their names, images, and likenesses ("NILs").[28] NCAA athletes have long fought against the NCAA's

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20. *See id.* (rounding out to only $75,290,142 of the $241 million spent in recruiting college athletes in the 2019–2020 academic year).

21. *See id.* (noting the substantial economic disparity in athletic scholarship aid given to male and female athletes).

22. *See id.* (arguing that institutions would have to furnish an additional hundreds of millions to proportionally provide adequate resources to male and female student athletes).

23. *See id.* at 15 (proffering that schools have failed to equally invest in female athletes since Title IX's enactment in 1972).

24. *See id.* (arguing that Title IX's mission has not been achieved yet).

25. *See id.* (marking the changing tide for college sports: athlete compensation).

26. *See* Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA MEDIA CTR. (June 30, 2021, 4:20 PM) ("Governance bodies in all three divisions today adopted a uniform interim policy suspending NCAA name, image and likeness rules for all incoming and current student-athletes in all sports.") [perma.cc/JJP7-E7QE].

27. *See Amateurism*, NCAA ("College-bound student-athletes enrolling for the first time at a Division I or II school must receive a final amateurism certification before being eligible to compete.") [perma.cc/22MT-ZPZM].

28. *See* WOMEN'S SPORTS FOUNDATION, *supra* note 7, at 15 (highlighting that prohibitions included appearing in advertisements, participating in promotional

strict requirement of amateurism, but starting in 2019 the NCAA began to face external opposition as the league generated $18.9 billion in revenue and college athletes did not make a cent. [29]

On September 30, 2019, California Governor Gavin Newsome signed the Fair Pay to Play Act[30] which provided college athletes with the right to profit from their NILs.[31] Nine months later, Florida passed their rendition of a NIL law titled "Intercollegiate Athlete Compensation and Rights."[32] To date, thirty-two states have passed similar laws.[33] Consequently, faced with growing opposition from state legislatures and the Supreme Court, the NCAA suspended its prohibition on NIL compensation.[34]

The NCAA's Interim NIL Policy[35] fundamentally changed the landscape of collegiate athletics—redrawing the line between

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activities, facilitating their own sports camps, or receiving compensation for articles written and published under their own names).

29. *See 15-Year Trends in Division I Athletic Finances*, NCAA (2020) (providing statistics on the NCAA's revenue from Division I to Division III); *see also* Steve Cameron, *The NCAA Brings in $1 Billion a Year—Here's Why It Refuses to Pay Its College Athletes* (noting that the NCAA uses "amateurism" to justify not paying college athletes a cent of the billion dollars of profits) [perma.cc/5EWQ-HYQL]; *see generally* Keely Fresh, *Blood Sweat and Tears: A Re-Examination of the Exploitation of College Athletes*, 28 WASH. & LEE J. CIV. RTS. & SOC. JUST. 165 (2021) (providing that instead of allowing athletes to profit from their labor, the NCAA spent millions on coaches' salaries, upscale stadiums, and securing television advertisements).

30. *See* CAL. EDUC. CODE § 67456 (West 2023) (amending the Education Code to allow for NIL compensation in intercollegiate athletics).

31. *See* Braly Keller, *NIL Incoming: Comparing State Laws And Proposed Legislation*, OPENDORSE (Nov. 30, 2022) (describing the change in college athletics after California's NIL law) [perma.cc/H3S4-D4SP].

32. *Id.*

33. *See* Amy L. Piccola, *Your Guide to Federal and State Laws on Name, Image and Likeness Rules for NCAA Athletes*, SAUL EWING ARNSTEIN & LEHR (2023) (providing a list of NIL state legislation across the country) [perma.cc/92RB-8LXK].

34. *See* Ishan K. Bhabha et al., *Challenges and Opportunities: The NCAA Suspends Its Name, Image, and Likeness Amateurism Rules*, JENNER & BLOCK (Aug. 2, 2021) (suggesting that the questions raised by the Supreme Court in Alston led the Board to suspend the penalties for profiting from NIL) [perma.cc/5SSZ-9FH3]; *see also* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2151–53 (2021) (determining that the NCAA violated the Sherman Antitrust Act by limiting education related benefits for athletes).

35. *See* NCAA's Interim NIL Policy (July 1, 2021) [perma.cc/4LK6-F6UF].

professional and college sports.[36] In the aftermath of the NCAA's decision, national media coverage exploded with stories of college athletes promoting their ventures with retailers,[37] restaurants, car dealerships,[38] fitness products,[39] and global brands.[40] The value of these endorsements have ranged from tangible merchandise to seven-figure deals.[41] Between 2021-2022, college athletes earned

> For institutions in states without NIL laws or executive actions or with NIL laws or executive actions that have not yet taken effect, if an individual elects to engage in an NIL activity, the individual's eligibility for intercollegiate athletics will not be impacted by Bylaw 12 (Amateurism and Athletics Eligibility).

36. *See* Gregory A. Marino, *The NCAA Declares Independence from NIL Restrictions*, FOLEY & LARDNER LLP (Aug. 23, 2021) (stating that for over a century the NCAA has dedicated itself to the principle that only unpaid amateurs are permitted to engage in intercollegiate athletics) [perma.cc/H7M8-QZF2].

37. *See* Eric Prisbell, *NIL: A Quick Snapshot One Month into the NCAA's New Era*, ON3NIL (Aug. 1, 2021) (reporting that after one month of NIL deals, there were 1,361 NIL transactions totaling $1.256 million in value) [perma.cc/PP6E-AD9A].

38. *See NIL Deal Tracker*, ON3NIL (2023) (providing data for five Texas football players, with a collective NIL value of $785,000, whom have contracts with Volkswagen) [perma.cc/V9DK-5T5E].

39. *See* Ariail, *supra* note 2 (describing Fresno State twins, Hannah and Haley Cavinders', deal with Six Star Pro Nutrition and Boost Mobile as a "whopper of a deal," estimated to be upwards of five figures).

40. *See* WOMEN'S SPORTS FOUNDATION, *supra* note 7, at 15 (supplying a list of NIL deals for female athletes); *see also* Daniel Miller, *NIL deals: College Football, Track Star Known as 'King of NIL' has 70 Endorsements*, FOX SPORTS (July 29, 2022) (noting that Raquan Smith, a decathlete and running back at Norfolk State University and the coined "King of NIL" already has 70 deals including Body Armor, Eastbay, Arby's, Champs Sports, GOAT Fuel, and Spikeball) [perma.cc/D82N-K34X].

41. *See, e.g.,* Matt Reed*, Alabama's Bryce Young Secures $1M in NIL Deals, He Hasn't Started a Game Yet for The Crimson Tide*, THE SHADOW LEAGUE (Aug. 5, 2021) (reporting that a month after the NCAA ruling, Bryce Young signed deals worth $800,000 and received offers worth well more than $1 million) [perma.cc/UQQ3-MXBD]; *see also* Oliver Hodgkins, *Top 10 NIL Deals in 2022: Ohio State and Alabama Players at the Forefront of CFB's Financial Revolution*, PRO FOOTBALL NETWORK (Aug. 18, 2022) (speculating that the top deals are going to offensive line football players, one of whom may have received a deal for $9.4 million to play at the University of Miami) [perma.cc/AST4-84B7].

$917 million from NIL activity.[42] Student-athlete NIL compensation is expected to reach $1.14 billion by July 2023.[43]

Paying college athletes for their labor is a revolutionary step forward.[44] Student athletes deserve to earn money for the time, dedication, and work they devote to preparing their bodies, performing on the field, and generating revenue for their schools.[45] For over a century, the NCAA has profited from student athletes, primarily Black athletes.[46] Modern athletics is enhanced by athletes receiving their share of the profits.[47]

Despite the positive impact of NIL compensation on individual athletes, the new marketplace introduces a novel legal issue:

42. *See* Josh Schafer, *NIL: Here's How Much Athletes Earned in the First Year of New NCAA Rules*, YAHOO FIN. (July 1, 2022) ("Through May 31, the average NCAA Division 1 athlete had received $3,711 of money through NIL while some big-name players scored high six-figure deals.") [perma.cc/Y74U-M6M4].

43. *Id.*; *see also* Khristopher J. Brooks, *It's the 'Wild, Wild West' for Companies Hoping to Monetize College Athletes*, CBS NEWS (July 30, 2021, 12:21 PM) ("One sports business expert predicted the NIL space will become a $100 million industry in the first year alone, with some athletes commanding $1 million a year or more by the end of 2021.") [perma.cc/V549-HHRL].

44. *See* Nguyen, *supra* note 17 (sharing how remarkable it is that the NCAA changed its policy).

45. *See* Fresh, supra note 29, at 173 (stating that athletes spend an average of fifty hours a week on athletics, twenty-two hours a week for traveling, and countless hours attending classes, finishing academic assignments, and performing in their individual sports).

46. *See id.* at 184.

> Football and men's basketball are consistent revenue-producing sports at NCAA institutions—and nearly fifty percent of the athletes participating are Black. Advocates of change have long stated that the Black athlete is the backbone of the process of producing tremendous wealth—with nearly every other person involved with the process profiting off of the uncompensated labor of these players.

47. *See id.* at 185 (calculating the fair market value of revenue-sport athletes and the magnitude of economic injustice caused by athletes generating profits for the school); *see also* David Rieder, *College Swimmers Now Profiting off Their NIL Rights? Good for Them*, SWIMMING WORLD MAG. (Aug. 22, 2021, 6:31 AM) ("[Athletes] deserve to keep the prizes they earn, and they deserve the opportunity to make some cash when their profile is the highest without having to sacrifice all-important NCAA eligibility to do so.") [perma.cc/AFZ4-LVR8].

unequal economic opportunities.[48] According to Opendorse, a leading industry tracker of intercollegiate NIL deals, male athletes earn more than 74.3% of all NIL compensation.[49] Between 2021-2022, male athletes received $681,331,000 out of an estimated $917 million.[50] Men's football and basketball programs account for nearly 71.4% of all NIL activity and receive 93% of NIL donations.[51] As alumni and booster collectives continue to join forces to fund NIL opportunities for athletes at particular schools, the field will likely further separate.[52] These collectives have already made several multimillion-dollar deals for football players.[53] For example, Southern Methodist University ("SMU") alumni and boosters have pledged more than $1 million a year for a school-wide NIL program to attract collegiate football players.[54] Moreover, a total of $540,000 in scholarships have been offered to Hurricane football players by University of Miami boosters.[55]

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48. *See* Alan Blinder, *The Smaller, Everyday Deals for College Athletes Under New Rules*, N.Y. TIMES (Dec. 10, 2021) ("Many of the arrangements involve football or basketball players, and the majority of compensation has gone to male athletes.") [perma.cc/2BPY-MTNM].

49. *See NIL Insights July 1, 2021, to November 30, 2022*, OPENDORSE (Nov. 30, 2022) (tracking NIL compensation per sport, program, school, and position on the field) [perma.cc/DW58-SBR2].

50. *Id.* (calculating 74.3% of $917 million of NIL compensation).

51. *Id.* (noting that donors provide 52.6% of total NIL compensation to athletes).

52. *See* Claudine McCarthy, *NIL Collectives Could Trigger Title IX Scrutiny*, 22 COLLEGE ATHLETICS & L. 4 (2022).

> Creative juices among prominent alumni and boosters really started to flow, and collectives walked onto the national stage as a means to connect athletes to NIL opportunities associated with their communities and interests . . . Of the 54 collectives associated with 42 different schools (as of April 2022), they might be sport-specific, charitable, and/or institution-led; be designed to create direct interaction between collective members and student-athletes or to facilitate outside NIL deals; or even overlap multiple categories.

53. *See* Nguyen, *supra* note 17 (stating that groups of boosters have pooled multimillion-dollar deals, primarily for star football players).

54. *See* Jim Vertuno, *Latest NIL Twist: Millions Being Pledged to College Athletes*, GLOBE GAZETTE (Dec. 15, 2021) (providing data on the millions of dollars collectives are introducing into the NIL market) [perma.cc/3JVM-V5P5].

55. *See* Chloe Singer, *Where Title IX and the NIL Collide*, 2ADAYS (Mar. 18, 2022) (breaking down the collectives from the top schools) [perma.cc/RL2Y-

It is true that top female athletes receive lucrative NIL deals,[56] but the overall distribution of revenue, booster sponsorships, athletic scholarships, and promotional resources to male and female teams reveals a substantial disparity.[57] Therefore, there is a new question for college sports regarding equal opportunity. What role will Title IX play given the economic difference between institutional spending and NIL compensation for male and female athletes? Many have argued that Title IX is not applicable because most NIL contracts involve direct payments between a third-party vendor and a student-athlete. [58] Others argue that the inequality of market-driven demand falls outside the scope of Title IX. [59] However, NIL opportunities do not exist in a vacuum.[60] It is inevitable that schools will play a role in their athlete's NIL opportunities as the institutions themselves compete to provide unique NIL programs or deals for their athletic departments.[61]

NK5G]; *see also* Scooby Axson, *Report: 2023 Five-Star Recruit Signs NIL Collective that Could Net More than $8 Million*, USA TODAY (Mar. 12, 2022 (stating that the unnamed athlete will receive $350,000 immediately and a monthly payment that will increase to more than $2 million per year for each year of college) [perma.cc/336U-6ZWE].

56. *See On3 Women's 100 NIL*, ON3NIL (2023) (providing the top 100 women for NIL deals; Livvy Dunne (gymnastics) has a NIL valuation of $2.7 million, Sunisia Lee (gymnastics) $1.5 million, and Paige Bueckers (basketball) $825k) [perma.cc/K2VL-JTCF].

57. *Id.*

58. *See* Alexander Burrage, *Contract Basics for Every Student-Athlete NIL Deal*, JDSUPRA (Aug. 18, 2021) (stating that a typical NIL contract includes the student athlete, who provides a deliverable to the endorsers, and the third-party vendor who provides a benefit to the student athlete) [perma.cc/6JAU-TA5G]; *see also* Karen Weaver, *Already on an Untenable Financial Path, NCAA Schools Are Inviting More Legal Trouble If They Oversee NIL*, FORBES (Jun. 30, 2022)

(quoting Cari Josi, a partner at Bailey & Glasser, "[o]n the 50th anniversary of Title IX, not enough is being done today with regards to treatment and benefits as it is . . . What makes you think schools will suddenly be in compliance if they get involved with NIL?") [perma.cc/D488-QR8Z].

59. *See* Dosh, *supra* note 16 (warning that many might have quickly dismissed Title IX as a nonissue because payment occurs directly between vendors and athletes).

60. *See infra* Part IV.

61. *See* Jim O'Brien & Francis Pray III, *Navigating the New World of Name Image Likeness for Student Athletes*, POYNER SPRUILL (Jul. 27, 2021) (discussing the emergence of NIL programs at the University of Virginia, University of North

Therefore, this Note analyzes the novel legal issue of whether a college or university's involvement in the marketing, promotion, support, or approval of NIL deals violates Title IX. Part II lays the groundwork for intercollegiate NIL deals by discussing the NCAA's century-long commitment to prohibiting payment for college athletes.[62] Part III discusses the NCAA's decision in 2021 to recognize a college athlete's right to profit from their NIL. Student-athlete NIL contracts are presented in Part IV.

Part V of this Note examines Title IX's legislative history as it relates to college sports.[63] Part VI analyzes the relationship between NILs and Title IX regulations. Considering that legislatures and courts have historically interpreted Title IX to be narrowly focused, this Note posits whether schools will avoid noncompliance because NILs concern *expenditures* rather than athletic participation.[64] Finally, Part VII discusses the future of college sports now that student athletes can be paid. In the event that Title IX does not cover equal access to NIL deals or profits, this Note posits what can and should be done to ensure that all students attending public schools are empowered and uplifted in their pursuit of equitable educational and athletic opportunities.[65]

Carolina, and Duke, which provide guidance on NIL contracts to student athletes) [perma.cc/PYP2-AA6B].

62. *See* W. Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 222 (2006) (providing a history of the NCAA, the original bylaws, and the organization's focus on the principle of amateurism in relation to eligibility).

63. *See* Schwarz, *supra* note 10, at 637–49 (tracing the legislative history of Title IX and the three-prong compliance test); *see also* Melody Harris, *Hitting 'Em Where It Hurts: Using Title IX Litigation to Bring Gender Equity to Athletics*, 72 DENV. L. REV. 57, 71 (1994) (providing that the 1975 Regulation, 1979 Policy Interpretation, and the Investigator's Manual set out three areas in which a college must comply with Title IX in its athletic departments).

64. *See* Cohen v. Brown Univ., 991 F.2d 888, 896 (1st Cir. 1993) (stating that equal opportunity to participate lies at the core of Title IX's purpose) (emphasis added).

65. *See* WOMEN'S SPORTS FOUNDATION, *supra* note 7, at 15 (stipulating that a lot of work needs to be done to move forward into the next 50 years of Title IX); *compare* Liann Herder, *Title IX Can Still Help Women Access Opportunities Through the NIL*, DIVERSE ISSUES IN HIGHER EDUC. (Aug. 11, 2021), (explaining that Title IX can play a crucial role in facilitating opportunities for female athletes) [perma.cc/XYU6-77K8], *with* Joshua C. Sorbe, *The NCAA's Breaking Point for Equal Opportunity: A Title IX Perspective on Name, Image, and Likeness*

II. A Brief History of the NCAA: The Ideal Amateur Student-Athlete

The National Collegiate Athletic Association (NCAA) was established in 1906 to unify intercollegiate athletic programs across the United States.[66] The organization's first constitution included the following pledge:

> The Colleges and Universities enrolled in this Association severally agree to take control of student athletic sports, as far as may be necessary to maintain in them a high standard of personal honor, eligibility, and fair play, and to remedy whatever abuses may exist.[67]

The NCAA sought to provide eligibility requirements and improved safety guidelines for football while preserving the integrity of the educational environment.[68] By 1907, West Point Captain Palmer Pierce, the first president of the NCAA, expressed that the greatest abuses present in college sports were professionals "parading under false college colors."[69] At the NCAA's first conference, Captain Pierce famously stated:

Sponsorship Legislation 25, 26 (2020) (Honors Thesis, University of South Dakota) (on file with the University of South Dakota RED Libraries) ("Money yields opportunity, and the influence of money in NCAA athletics departments expenditures has diminished the efficacy of Title IX.").

66. *See* Carter, *supra* note 62, at 217–22 (describing the origination of the NCAA, the Executive Committee of the Intercollegiate Athletic Association of the United States ("IAAUS"), as stemming from President Roosevelt's concern over the number of injuries and deaths in college football).

67. *Id.* at 220*; see also The Intercollegiate Athletic Association of the United States*, *in* PROCEEDINGS OF THE FIRST ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES, CONST. art. VII (1906) [hereinafter 1906 PROC.] (stating the goals of the association).

68. *See* Carter, *supra* note 62, at 220 (providing that the NCAA wanted to distinguish college athletics from professional sports to preserve the honor and integrity of college sports).

69. *See* Palmer E. Pierce, *The Intercollegiate Athletic Association of the United States: Its Origin, Growth and Function, in* PROCEEDINGS OF THE SECOND ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES 27, 28 (1907) (establishing the main concerns at the origins of the NCAA); *see also The Intercollegiate Athletic Association of the United States*, *in* PROCEEDINGS OF THE SECOND ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES 12 (1906) (asserting that the NCAA

> The year 1905 was memorable in the athletic world on account of a campaign waged against the various abuses that had grown up in college athletics. Newspapers were filled with articles reflecting, not only on the methods of play in various sports, but also on the amateur status of many members of prominent college teams. Even the magazines took part in the discussion, and the need of change and reform in our supposedly amateur college athletics was emphasized by citing specific examples of proselyting, of prominent college players not really amateurs, and of the various covert forms of payment to certain men for their athletic services. It was related in detail under what disguise money returns were given. For instance, one prominent player was said to have derived hundreds of dollars from the privilege of furnishing programs for games; another received the profit from a special brand of cigarettes named after him; a third was the ostensible head of an eating club, while still others were in the private employ of rich college graduates.[70]

Captain Pierce's statement illustrates the NCAA's goal to distinguish college athletes from professional.[71] As defined by the NCAA's first constitution, the ideal student athlete is a gentleman amateur; a person "who played sports as an *avocation*, who derived pleasure from the game itself and not external factors such as fame or fortune."[72] Despite numerous updates over the past century to the organization's bylaws, this NCAA's ideal of amateurism has remained remarkably the same.[73] For example, in 1916 eligible

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would be defined by the ideal of athletics like gentlemanly behavior and honor, rather than the evils of professionalization).

70. *Id.*

71. *See* Carter, *supra* note 62, at 221 (suggesting that the framers of the NCAA wanted student-athletes to play the sport for the sport itself, not for money or fame).

72. *See* Carter, *supra* note 62, at 230.

73. *See* Fresh, *supra* note 29, at 167 (citing Jayma Meyer & Andrew Zimbalist, *A Win Win: College Athletes Get Paid for Their Names, Images, and*

athletes were defined as amateurs who participated in competitive physical sports "only for the pleasure, and the physical, mental, moral, and social benefits derived therefrom."[74] By 1922, an amateur sportsman was "one who engages in sport solely for the physical, mental, or social benefits he derives therefrom and to whom the sport is nothing more than an avocation."[75]

Additionally, the NCAA has provided examples of athletes exemplifying the antithesis of amateurism over the past century.[76] Among the behaviors that are indicative of a professional spirit rather than an amateur one includes calculated timeouts, blocking base runners, and trash talking.[77] Additionally, the "grand centerpiece on the altar of amateurism was the principle that the amateur [student-athlete] did not receive pay for play, directly or indirectly."[78] In other words, accepting money fundamentally altered the athletes' ability to conduct themselves in a sportsmanlike manner.[79] As Captain Pierce stated,

> There can be no question that a [young student-athlete] who is habituated to endeavor to win games by means, some of which he knows to be unfair and against the rules, later will play the game of life with the same ethical standards.[80]

The Founders of the NCAA maintained that if student-athletes' were paid, they would not play sports for the game.[81] Instead, they

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Likenesses and Colleges Maintain the Primacy of Academics, 11 HARV. J. SPORTS & ENT. L. 247, 250–53 (2020)).

74. *Id.*

75. *Id.* at 168.

76. *See* W. Carter, *supra* note 62, at 229 (providing examples of why a professional athlete is directly contrary to a student-athlete).

77. *Id.* at 231.

78. *Id.* at 232.

79. *See id.* (suggesting that at one point the NCAA questioned whether athletic scholarships had any place in the American college).

80. Pierce, *supra* note 69, at 30.

81. *See* Carter, *supra* note 62, at 232 ("[T]he mere acceptance of money in any form made it impossible for a professional to enjoy the game for its own sake or to aspire to lofty principles such as sportsmanship.").

would play for money.[82] Moreover, the Founders worried that if schools and sports programs started to sponsor athletes or advertise their teams, the financial incentives would inevitably undermine the educational purpose of athletics, "by making the program commercially dependent upon outsiders, and thus beholden to their views."[83] The NCAA perceived great harm would come to athletes and education if intercollegiate athletics were exploited by institutions.[84] Therefore, the Founders sought to establish amateurism as the guiding principle that would preserve college sports as something distinct from the perils of capitalism and professionalism.[85]

Although the Founders framed the amateurism debate in terms of honor and integrity, it is important to note that this concept was largely shaped by class, race, and gender.[86] As described above, the ideal amateur was based on the idea of a gentleman amateur from England. Specifically, an upper-class white male.[87] Consequently, the Founders perceived payment as an "abuse" to college sports because it was viewed as low class or beneath the dignity of a gentleman athlete.[88] A gentleman would only engage in sports as a hobby or avocation, not as a means of

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82. *See id.* (highlighting the outcry when amateurs accepted money for tangential pursuits such as reporting on their sport or going pro in one sport while remaining an amateur in another).

83. *See id.* at 233 ("[A]mateurists viewed the primary purpose of an institution's program to be athletics for all or universal participation.").

84. *See id.* ("[E]ven if the amateurs did not accept money, [but played with professionals] they might gain unfair advantage, and even worse, bring the disease of professionalism back to infect amateur teams.").

85. *See, e.g.*, NCAA Division I Manual § 2.9, NAT'L COLLEGIATE ATHLETIC ASS'N (2021) ("Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.").

86. *See* Carter, *supra* note 62, at 233 (explaining why the NCAA's ideal athlete is riddled with bias).

87. *See id.* (describing the ideal of England's system—the gentleman-amateur—and how the Founders sought to introduce it in America).

88. *See id.* (suggesting that amateurisms reflect "high-brow biases against the lower classes who regularly engaged in such activities to make extra money").

earning a living.[89] The reality, however, is that not all students had the ability to afford to play sports without compensation.[90] Therefore, students who inhabited a racial or socioeconomic status different from the ideal amateur were forced to forgo financial stability due to the NCAA's concern that it would give them an "unfair advantage" or "even worse, bring the disease of professionalism back to infect amateur teams."[91]

Furthermore, the NCAA's adoption of amateurism adversely affected women and student athletes of color by prioritizing the "needs of young white males" over those of other athletes.[92] The NCAA's original members did not include any historically Black colleges or universities ("HBCU").[93] Due to this, HBCUs competed independently from the NCAA, and "white schools, teams, or coaches sometimes refused to play if it meant they had to play with or against Black players."[94] In addition, the NCAA's vision of amateurism expressly excluded women.[95] The NCAA continued to reject the inclusion of female athletes until 1972 by restricting participation to "eligible male athletes."[96] Overall, the promise of a unified intercollegiate athletic program under the NCAA did not guarantee athletics for all.[97]

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89. *See id.* at 230 ("An amateur was one who played sports as an avocation, who derived his pleasure from the game itself and not external factors such as fame or fortune.").

90. *See id.* at 232 (arguing that Bobby Jones, a golfer in 1927, should be afforded a chance to make a decent living to support his wife and children, given that others were making money off his name and amateur status).

91. *Id.* at 233.

92. *See id.* at 257 ("The primary aim of the NCAA's founders, like the aim of so many leaders at that time, was to satisfy the needs of the young white males who they envisioned would be the country's leaders.").

93. *See id.* at 259 (noting the lack of diversity amongst NCAA original members).

94. *See id.* at 259–60 (reporting that Nebraska University denied a "gentleman's agreement" existed so that no Black athletes could compete in Missouri Valley college athletics).

95. *See id.* at 257 (providing that there were no women in NCAA leadership and no female student-athletes).

96. *See id.* at 258–59 (highlighting that after Title IX, the NCAA ended the restrictions on female participation).

97. *See id.* at 260 ("Athletics for all did not really mean athletics for everyone.").

A. The Relationship between Amateurism and NCAA Eligibility

Although amateurism primarily benefits one type of athlete, the NCAA considers it to be more than just an ideal for college sports. Athletes must be amateurs to be eligible to compete in the NCAA.[98] Under Article XII of the NCAA's first constitution,

> No student shall represent a College or University in any intercollegiate game or contest who has at any time received either directly or indirectly, money or other consideration, to play on any teams, or for his athletic services as a college trainer, athletic or gymnasium instructor, or who has competed for a money prize or portion of gate money in any contest, or who has competed for any prize against a professional.[99]

The NCAA's most recent Bylaws include a similar provision: "only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport."[100] This rule disqualifies any student who receives any form of payment, "gain or emolument, or position or profit, direct or in direct."[101] In other words, paid athletes are not eligible to compete in the NCAA.[102] Instead, the NCAA's eligibility requirements are designed to "ensure proper emphasis on educational objectives, to promote competitive equity among institutions and to prevent exploitation of student-athletes."[103]

Prior to enrollment in school, athletes are required to fill out an eligibility card. The second question on the card asks whether the athlete has "ever received money or any other compensation or concession for your athletic services, directly or indirectly, either

98. *See id.* at 223 (providing that eligibility to participate in college sports is directly tied to the notion that student-athletes cannot be paid).

99. *Id.* at 222.

100. NCAA Division I Manual *supra* note 85, § 12.01.1 (defining eligibility for intercollegiate athletics).

101. *See* Carter, *supra* note 62, at 223.

102. *See id.* at 232 (maintaining that prohibiting compensation "preserved the game as primarily a game for undergraduates and avoided the image of professionalism").

103. *See* NCAA Division I Manual, *supra* note 85, § 2.3.

as a player or in any other capacity." Eligibility hinges on the answer to this question, with little to no exceptions. For example, American Olympians have been known to turn down endorsements to compete at the Games, and star athletes have denied monetary competition prizes to preserve their amateur status.[104] Given the NCAA's century-long opposition to the payment of any student athlete, it is remarkable that the organization could be persuaded to change its policy.[105] The following section discusses the primary reasons for the NCAA's decision in 2021 to suspend its policy prohibiting payment of student-athletes.

III. A College Athlete's Right to Publicity: Redefining Amateurism in the 21sst Century

Under Article XII of the NCAA's most recent bylaws, an athlete's amateur status is required for eligibility.[106] Accordingly, at the beginning of 2022, the NCAA perceived amateurism as the "clear line of demarcation" between college athletics and professional sports.[107] However, in July of that same year, the NCAA suspended Article XII.[108] As a result, college athletes gained the right to profit from the use of their own NIL for the first time in 115 years.[109] The NCAA did not suspend its requirement solely

104. *See, e.g.*, Pete Schauer, *Missy Franklin College: 17-Year-Old Star Crazy to Turn Down Endorsement*, BLEACHER REP. (Aug. 4, 2012) ("High school senior Missy Franklin has turned down endorsement deals to remain an amateur and compete in college.") [perma.cc/D4NC-UEQH].

105. *See* Hosick, *supra* note 26 (stating that it took over a hundred years for the NCAA to vote to suspend the prohibition on NIL compensation for student-athletes).

106. *See* NCAA Division I Manual § 12.01.1, NAT'L COLLEGIATE ATHLETIC ASS'N (2022) ("Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.").

107. *See id.* § 12.01.2 ("The student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between college athletics and professional sports.").

108. *See* Marino, *supra* note 36 ("The NCAA's interim NIL policy is essentially a waiver that excuses compliance with Article [XII] of the NCAA Bylaws until federal legislation or new NCAA rules are adopted.").

109. *See id.* (discussing the change in NIL policy and the benefit it provides for student-athletes: money).

in order to benefit individual athletes.[110] Instead, the decision was largely the result of legislative and judicial pressure.[111] The following sections discuss two contributing factors to the NCAA's decision to suspend Article XII: the enactment of numerous state NIL laws for college athletes, and the Supreme Court's ruling in *National Collegiate Athletic Association v. Alston*.[112]

A. The Emergence of State NIL Laws Pertaining to Intercollegiate Athletics

College sports have traditionally been regulated by the NCAA. As one of the nation's most profitable businesses, institutions are often inclined to defer to the NCAA on issues concerning college athletes.[113] Considering the NCAA's widespread influence across the nation's schools, it is noteworthy that certain state legislatures initiated the discussion concerning pay for play against the NCAA's vocal opposition.[114] Moreover, the NCAA's decision to follow public opinion is unprecedented.[115] Some view the NCAA's

110. *See id.* ("The NCAA's new interim NIL policy represents a sea [of] change in college sports, but one that comes only as a consequence of mounting legislative pressure from state governments, as well as a jurisprudential nudge from the Supreme Court.").

111. *See* Blinder, *supra* note 48 ("The [NCAA], rocked by a Supreme Court decision last week that made it more vulnerable to antitrust cases, opted for a largely hands-off approach and will not mete out punishments for players who earn money off their names, images, and likenesses.").

112. *See* Marino, *supra* note 36 ("By adopting its interim NIL policy the day before those state NIL laws took effect, the NCAA not only avoided the conflict with the early-adopting states, it also effectively pushed the NIL issue squarely into the federal government's lap."); *see generally* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021) (reasoning that the NCAA is vulnerable to federal antitrust laws).

113. *See, e.g.*, Rory Jones, *NCAA Generates Record US $1.16bn Revenue for 2021*, SPORTSPRO (Feb. 3, 2022) (stating that the NCAA made a record $1.16 *billion* in 2021)[perma.cc/Z9VR-2Y93]**;** *see also 15-Year Trends in Division I Athletic Finances*, *supra* note 29 (finding that NCAA schools across all divisions reported total athletics revenue of just over $18.9 billion in 2019).

114. *See* Hosick, *supra* note 26 (stating that the NCAA threatened to exclude California colleges from NCAA competition if Governor Newsom did not reconsider passing NIL legislation that conflicted with NCAA regulations).

115. *See, e.g.*, Bhabha et al. *supra* note 34, at 1 ("Because of the dynamic nature of this issue, the patchwork of state laws regarding student NIL, and the

decision as a near direct response to mounting legislative pressure.[116] By the time the NCAA suspended Article XII, thirteen states had passed NIL laws which overruled the NCAA's eligibility restrictions on paid athletes.[117] The following section discusses the first law, California's "Fair Pay to Play Act,"[118] which precipitated the domino-effect of all other state NIL laws.[119]

1. California's Fair Pay to Play Act

California Governor Gavin Newsome signed the "Fair Pay to Play Act" ("Act") into law on September 30, 2019.[120] The Act is the first state law to create a legal right for student athletes to be paid for the commercial use of their NIL.[121] Under the Act, student

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absence of a federal law that provides uniform guidance, the NCAA chose to leave it to the schools to determine and implement their own NIL policies consistent with their state laws.").

116. *See* Marino, *supra* note 36 (explaining that waiving compliance with Article XII a day before various state NIL laws took effect ensured that the "NCAA not only avoided the conflict with the early-adopting states, it also effectively pushed the NIL issue squarely into the federal government's lap").

117. *See* Rudy Hill & Jonathan D. Wohlwend, *College Athletes Now Allowed to Earn Money from Use of Their Name, Image, and Likeness*, NAT'L L. REV. (July 1, 2021) (providing the list of states that have passed NIL laws) [perma.cc/MYL7-3AND]; *see, e.g.*, Piccola, *supra* note 33 (noting that to date, 32 states have passed NIL laws allowing payment for college athletes).

118. *See* Fair Pay to Play Act, CAL. EDUC. CODE § 67456(a)(1) (West 2023) ("A postsecondary educational institution shall not uphold any rule, requirement, standard, or other limitation that prevents a student of that institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, likeness, or athletic reputation.").

119. *See* Benjamin Tullis, *California Fair Pay to Play Act to Become Effective September 1, 2021*, JD SUPRA (Sept. 1, 2021) (describing the exponential increase in NIL-tailored state legislation for college athletes) [perma.cc/7EKU-N8YL].

120. *See* Michael McCann, *What's Next After California Signs Game Changer Fair Pay to Play Act into Law?*, SPORTS ILLUSTRATED (Sept. 30, 2019) (noting that the California law is the first in the country to guarantee college athletes a right to profit from their identities) [perma.cc/ATH5-MCUJ].

121. *See id.* ("California on Monday becomes the first state in the country to create a legal right for college athletes to be compensated for the commercial use of their identities."); *see also* Jack Kelly, *Newly Passed California Fair Pay to Play Act Will Allow Student Athletes to Receive Compensation*, FORBES (Oct. 1, 2019, 12:36 PM) (discussing the Fair Pay to Play Act) [perma.cc/Y5C6-9WUT].

athletes have control and authority over the marketing and use of their NIL.[122] In effect, the law makes it illegal to deny student athletes opportunities to gain compensation for their NILs. Additionally, the Act ensures that athletes can secure endorsements, sponsorships, and deals without losing scholarship eligibility to compete.[123]

Regarding eligibility, the Act prohibits any postsecondary institution in California from creating any rule, requirement, or limitation that prevents student-athletes from benefiting financially from the use of their NIL.[124] Meaning, even private schools in California or schools which wish to limit their student's NIL activity are prohibited from doing so. Notably, the Act also expressly overrules the NCAA's restrictions on eligibility,

> An athletic association, conference, or other group or organization with authority over intercollegiate athletics, including, but not limited to, the National Collegiate Athletic Association, shall not prevent a student of a postsecondary educational institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness.[125]

In other words, the Act protects all California-based college athletes from having their eligibility rescinded based on NIL activity.[126] The Act is the first state attempt to counter the NCAA's extensive control over intercollegiate athletics.[127]

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122. *See* Tulis, *supra* note 119 (describing the overall purpose of the Fair Pay to Play Act).

123. *See id.* (noting that the Fair Pay to Play Act was amended as an urgency statute to "ensure that California schools and athletes were not put at a disadvantage in light of other laws being passed in 2021 in other states").

124. *See* Fair Pay to Play Act, CAL. EDUC. CODE § 67456(a)(1) (West 2023) (limiting the actions of colleges and universities in California)

125. § 67456(a)(2).

126. *See* § 67456(a)(1) ("Earning compensation from the use of a student's name, image, likeness, or athletic reputation shall not affect the student's scholarship eligibility.").

127. *See* § 67456(a)(3) ("[T]he [NCAA], shall not prevent a postsecondary educational institution from participating in intercollegiate athletics as a result of the compensation of a student athlete for the use of the student's name, image, likeness, or athletic reputation.").

Like the provision protecting eligibility, the Act also directly circumvents the NCAA by providing college athletes with the right to obtain professional representation to facilitate NIL opportunities.[128] Athletes may hire agents, personal representatives, and attorneys.[129] Previously, the NCAA restricted eligibility to unrepresented athletes.[130] Overall, California's Act artfully carved out exceptions to the NCAA's prohibition on NIL compensation by preventing retaliation from the organization.[131]

Following the Act's passage, the NCAA Board of Governors wrote to Governor Newsome demanding retraction, stating that the law would "erase out the distinction between college and professional athletes and eliminate the element of fairness that supports all of college sports."[132] Governor Newsome signed the Act despite the NCAA's request to wait for federal NIL legislation.[133] To date, California's Act has been modeled and adopted by more than twenty-eight states.[134] NIL legislation is pending in an

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128. *See* Kelly, *supra*, note 121 (discussing the rights of student-athletes under the Act).

129. *See id.* (providing examples of rights of student-athletes).

130. *See* NCAA Division I Manual, *supra* note 85, § 12.3.1 ("An individual shall be ineligible for participation in an intercollegiate sport if the individual ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing athletics ability or reputation in that sport.").

131. *See* Ariail, *supra* note 1 (stating that the new law allows student-athletes to reap the financial rewards for their athletic abilities while placing a bar on retaliation from the NCAA).

132. *See NCAA Responds to California Senate Bill 206*, NCAA (Sept. 11, 2019, 10:08 AM) ("[N]early half a million student-athletes in all 50 states compete under the same rules. This bill would remove that essential element of fairness and equal treatment that forms the bedrock of college sports.") [perma.cc/B7J7-3UF5].

133. *See id.* (suggesting that the NCAA requested that Governor Newsome wait for federal NIL legislation to create unified regulations in intercollegiate athletics).

134. *See* Piccola, *supra* note 33 (providing an updated list on federal NIL bills, state NIL bills, and states with proposed NIL laws); *see generally* AL H.B. 404 (Apr. 15, 2021) (providing the rights of student athletes to receive compensation for their NIL in Alabama); CO S.B. 20-123 (July 1, 2021) (establishing the right of college athletes in Colorado to receive compensation for their NIL and their right to obtain professional and legal representation); FL S.B. No. 406 (providing equal opportunity for athletes in Florida to control and profit from the commercial use of his or her NIL); New Jersey Fair Play Act, NJ S.B. 971 (Sep. 14, 2020) (allowing collegiate student-athletes to earn compensation for the use of one's NIL

additional eleven states.[135] Furthermore, a total of eight additional proposals have been introduced in Congress. However, no federal legislation has passed.[136]

In addition to pressure from state and federal legislatures between 2019 and 2021, the NCAA also had to contend with an increase in legal challenges.[137] The next section covers some of the cases the NCAA has faced concerning the organization's treatment of regulating compensation and profits in intercollegiate athletics.[138]

B. Challenging the Fairness of Amateurism under Federal Antitrust Law

The NCAA's requirement of amateurism has been criticized since it's the organization's first Bylaws in 1906.[139] Newspapers throughout the mid-20th century were filled with stories about how

in New Jersey); SC S.B. 685 (May 13, 2021) (amending the South Carolina code so as to provide for the compensation of intercollegiate athletes for the use of their NIL); TX S.B. 1385 (June 14, 2021) (relating to the compensation and professional representation of student athletes participating in intercollegiate athletics in Texas).

135. *See generally* IA S.B. 386 (pending legislation in Iowa on NIL compensation of college athletes); LA S.B. 60 (proposing NIL laws in Louisiana); MA H.R. 1335 (proposing state NIL laws in Massachusetts); NY S.B. 3513 (discussing pending legislation in New York to allow for student athletes to monetize their NIL and prevent colleges from disallowing such monetization); NC S.B. 324 (pending legislation in NC allowing for student-athlete compensation).

136. *See Tracker: Name, Image and Likeness Legislation by State*, BUS. COLL. SPORTS (Oct. 25, 2022) (providing NIL laws by state and official bill name) [perma.cc/KA4F-43AN].

137. *See* Weaver, *supra* note 58 (noting that the NCAA has spent over $300 million on legal fees since 2014).

138. *See infra* Part III.B (discussing challenges to the NCAA's regulation of compensation for college athletes).

139. *See* Carter, *supra* note 62, at 232 (stating that athletes have been pushing back against amateurism since the 1920s); *see also* Marc Tracy, *College Sports 101: A U.N.C. Class Reviews a Scandal as Its Source*, N.Y. TIMES (Apr. 4, 2019) ("[S]candals are the regular, inevitable consequence of the conflict between the NCAA's amateurism model and market forces such as fan interest and player value.") [perma.cc/BCL4-RD94].

top-ranked athletes were prevented from earning a living.[140] It was argued that the NCAA was unjustly enriched by the participation of student-athletes.[141] Athletes devoted considerable time and effort to sports that generated enormous profits for schools and the NCAA.[142] Despite years of public criticism, the NCAA has a record of successfully defending the principle of amateurism. The NCAA repeatedly faces the most difficult battles when it comes to defending amateurism requirements in court.[143]

The Sherman Antitrust Act[144] ("Sherman Act") has long provided a foothold "for plaintiffs challenging the NCAA's amateurism restrictions on the basis that they impose unreasonable restraints on trade."[145] Initially, federal district courts rejected claims from student-athletes on the basis that the NCAA's version of "amateur athletics" did not involve interstate

140. *See id.* (suggesting that sportswriters in the 1920s were arguing that it was unreasonable to completely bar the ability of top-rated amateurs to make a living in a sport that took so much time and dedication) (citing Grantland Rice*, The Sportlight,* BRIDGEPORT TELEGRAM (Apr. 27, 1927)).

141. *See id.* (providing reasons for why student-athletes should be paid); *see also* Felix Richter, *U.S. College Sports Are a Billion-Dollar Game*, STATISTA (July 2, 2021) (asserting that the NCAA generated approximately nineteen *billion* in revenue in 2019) [perma.cc/74CT-FG8D].

142. *See id.* (emphasizing the significant amount of revenue universities obtain through college athletics, specifically ticket sales, TV deals, and sponsorships).

143. *See* James Landry & Thomas A. Baker, *Change or Be Changed: A Proposal for the NCAA to Combat Corruption and Unfairness by Proactively Reforming Its Regulation of Athlete Publicity Rights*, 9 J. INTELL. PROP. & ENT. L. 1, 16 (2019) (stating that the NCAA is "battle-tested" when it comes to defending amateurism requirements in state and federal court).

144. *See* Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2006) (prohibiting any "contract, combination, or conspiracy in restraint of trade or commerce").

145. *See* Landry & Baker, *supra* note 143, at 16 (quoting Marc Edleman, *How Antitrust Law Could Reform College Football: Section 1 of the Sherman Act and the Hope for Tangible Change,* 68 RUTGERS U. L. REV. 809, 819 (2016)).

commerce.[146] Therefore, courts found that the NCAA rules were outside the Sherman Act's scope.[147]

However, the Supreme Court of the United States significantly altered the interpretation of NCAA rules in 1984. In *National Collegiate Athletic Association v. Board of Regents*,[148] the Universities of Oklahoma and Georgia alleged that the NCAA's restrictions on broadcasting rights of college football games were anticompetitive and violated the Sherman Act.[149] There, the Court determined that the NCAA's restrictions on broadcasting impermissibly limited competitive practices.[150] The Court's decision was the first to recognize that the NCAA engaged in commercial activity, as well as the first to subject any NCAA regulations to antitrust scrutiny.[151] Despite the significant impact of the Court's interpretation of antitrust law, the Court's opinion ultimately reaffirmed the NCAA's restrictions on student-athlete compensation under the "revered tradition" of amateurism.[152] Between the 1980s to 2019, athletes repeatedly attempted to litigate the assumption that amateurism led consumer interest in collegiate athletics.[153] Athletes attempted to argue that team

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146. *See id.* (describing amateurism and the law); *see also* Jones v. Nat'l Collegiate Athletic Ass'n, 392 F. Supp. 295, 304 (D. Mass. 1975) (finding that Jones, a hockey player at Northeastern, did not have a substantial likelihood of success under the Sherman Act since the NCAA rules were designed to protect amateurism, not to form a monopoly).

147. *See* Landry & Baker, *supra* note 143, at 16 (reasoning that the Sherman Antitrust Act did not cover NCAA athletics).

148. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 88 (1984) (determining that the NCAA violated the Sherman Antitrust Act in unreasonably restraining trade concerning the television and broadcast rights of college football games).

149. *Id.* at 89.

150. *See id.* at 120 ("Today we hold only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life.").

151. *See* Landry & Baker, *supra* note 143, at 17 (analyzing the impact of the *Board of Regents* decision on judicial interpretation of NCAA policies).

152. *See Bd. of Regents*, 468 U.S. at 101–02 ("In order to preserve the character and quality of the 'product,' *athletes must not be paid*.") (emphasis added).

153. *See* Landry & Baker, *supra* note 143, at 31 (stating that the Ninth Circuit, in *O'Bannon v. NCAA* was incorrect to assume that amateurism is

performance was the main driver of popularity, not their unpaid status.[154] The push back on amateurism culminated in 2021 with the Supreme Court's decision in *National Collegiate Athletic Association v. Alston*.[155]

1. National Collegiate Athletic Association v. Alston

The Court's decision in *Alston* represents the most successful antitrust lawsuit against the NCAA in recent history.[156] There, current and former Division I football and basketball players brought claims against the NCAA challenging the rules limiting compensation for athletes.[157] The United States District Court for the Northern District of California held that limitations on education-related benefits unreasonably restricted trade under Section 1 of the Sherman Act.[158] Some limitations at issue concerned restrictions on graduate or vocational school, payments for academic tutoring, and paid post-eligibility internships.[159] On the other hand, the district court refused to disturb the NCAA's rules "limiting undergraduate athletic scholarships and other

required for collegiate athletics to be successful); *see also* O'Bannon v. NCAA, 802 F.3d 1049, 1073 (9th Cir. 2015) (reasoning that the NCAA's amateurism rules serve the procompetitive purpose of preserving the popularity of collegiate athletics).

154. *See* Landry & Baker, *supra* note 143143, at 31 (noting that the district court, in *O'Bannon*, theorized that loyalty to one's alma mater and affinity for a school in one's region of the country were perhaps more indicative of college athletics success).

155. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2151–52 (2021) (upholding the district court ruling that the NCAA rules limiting education-related compensation violated Section 1 of the Sherman Act).

156. *See id.* (holding that the NCAA violated Section 1 of the Sherman Act).

157. *See NCAA v. Alston*, 135 HARV. L. REV. 471, 472 (2021) (describing the procedural history of *Alston*).

158. *See id.* (providing the holding of the district court); *see also* Sherman Act, 15 U.S.C. § 1 (setting forth basis antitrust prohibitions against contracts, combinations, and conspiracies "in restraint of trade or commerce among the several States and with foreign nations").

159. *See NCAA v. Alston*, *supra* note 157, at 473 (distinguishing education-related benefits from non-education-related benefits or athletic scholarships).

compensation related to athletic performance."[160] Both parties, the student-athletes and the NCAA, appealed.[161]

The Ninth Circuit affirmed in full.[162] The circuit court reasoned that the district court's decision struck the right balance between preventing "anticompetitive harm to student-athletes while serving the pro-competitive purpose of preserving the popularity of college sports."[163] The NCAA appealed.[164] The NCAA sought review in the Supreme Court in order to ensure future immunity from antitrust laws regarding restraints on athlete compensation.[165]

In a 9–0 decision, the Supreme Court unanimously affirmed the decisions of the lower courts.[166] Justice Neil Gorsuch, writing for the Court, first affirmed the district court's application of the rule of reason test, a judicial doctrine of antitrust law, to scrutinize the NCAA's regulatory scheme.[167] The Court's chosen standard of review for NCAA regulations radically changed the NCAA's hope

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160. *Alston*, 141 S. Ct. at 2147.

161. *See id.* at 2154 (explaining that the student athletes appealed based on the premise that the district court did not go far enough in enjoining the NCAA's compensation limits, and the NCAA appealed based on the premise that the district court went too far in weakening its compensation restraints).

162. *See id.* (rationalizing the Ninth Circuit's decision to affirm in full based on the balance the district court struck in crafting a remedy that both prevents anticompetitive harm to student-athletes and serves the procompetitive purpose of preserving the popularity of college sports); *see* In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1244 (2020) (affirming the district court's decision in full).

163. *See In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d at 1263.

164. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2147 (2021) ("Before us, the student-athletes do not challenge the district court's judgment. But the NCAA does. In essence, it seeks immunity from the normal operation of the antitrust laws and argues, in any event, that the district court should have approved all of its existing restraints.").

165. *See id.* at 2154 ("Unsatisfied with that result, the NCAA asks the Court to find that all of its existing restraints on athlete compensation survive antitrust scrutiny."); *see also NCAA v. Alston*, *supra* note 157, at 473 (arguing that the NCAA restrictions were necessary to preserve the distinction between college and professional sports).

166. *See Alston*, 141 S. Ct. at 2166 (affirming the district court's decision).

167. *See id.* at 2163 (asserting that the district court's factual findings point to a straightforward application of the rule of reason).

for antitrust deference in intercollegiate athletics.[168] The rule of reason test requires a fact-specific assessment of the market structure to determine whether the NCAA's restrictions affect competition in the market.[169] Therefore, the NCAA was forced to articulate a procompetitive justification for limitations on education-related compensation for student-athletes.[170] The NCAA attempted to assert that the uniqueness of the product, student athletes competing as amateurs, required limitations on compensation.[171] To do so, the NCAA referenced the Court's 1984 decision in *Board of Regents*.[172] There, the Court reaffirmed the NCAA's longstanding position on amateurism.[173] Therefore, the NCAA appealed to precedent by asserting that certain limitations, like limiting athlete compensation and preventing monetization of NILs, were already justified by the Court based on the need to preserve the distinction between college athletics and professional sports.[174] Ultimately, the Court in *Alston* declined to afford the NCAA with a deferential standard to antitrust scrutiny.[175] Instead, the Court found that the NCAA had "failed to show any economic analysis as to how or why the consumer market for college sports might be irrevocably destroyed by teenage athletes receiving from

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168. *See NCAA v.* Alston, *supra* note 157 at 476 (stating that the NCAA's sole justification for its remaining rules will likely not satisfy the prongs of the rule of reason test).

169. *See id.* at 473 (providing the three steps of the rule of reason test to determine anticompetitive behavior).

170. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2152 (2021) (articulating the NCAA's procompetitive justifications for its restraints, including increased output, maintaining a competitive balance among teams, and preserving amateurism).

171. *See id.* ("The NCAA's only remaining defense was that its rules preserve amateurism, which in turn widens consumer choice by providing a unique product—amateur college sports as distinct from professional sports.").

172. *See id.* (asserting that the NCAA's rules restricting compensation of college athletes preserve amateurism).

173. *See supra* Part III.B (discussing the court's holding in *Board of Regents*).

174. *See Alston*, 141 S. Ct. at 2152 (justifying compensation limits based on the need to preserve college athletes as a unique and distinct from professional athletes).

175. *See id.* (rejecting the NCAA's argument for the court to determine the anticompetitive effects of a challenged restraint (or lack thereof) under an abbreviated or "quick look" standard).

their schools" unlimited educational benefits.[176] As a result, the Court held that the NCAA's restrictions on education-related benefits violated the Sherman Act.[177] The Court's decision did not concern or impact athletics-related benefits (e.g., NILs).

However, in a concurring opinion, Justice Bret Kavanaugh questioned the legality of restraining *non*-education-related compensation.[178] Justice Kavanaugh sought issue with whether the NCAA could continue to restrict compensation of student-athletes, such as NIL compensation, under the assertion that college athletes were amateurs and should not be paid.[179] He warned any remaining restrictions on compensation would likely be rejected if brought before the Court,

> Nowhere else in America can businesses get away with agreeing to not pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate . . . . The NCAA is not above the law.[180]

It is likely that a successful future challenge to the NCAA's restrictions on compensation for non-education-related benefits, like an NIL, will be bolstered by the *Alston* decision, concerns raised by Justice Kavanaugh, and the new standard of review for federal antitrust law.[181] Considering this likelihood, the *Alston* decision is one of the primary reasons why the NCAA decided, on

176. Gregory A. Marino, *NCAA v. Alston: The Beginning of the End or the End of the Beginning?*, FOLEY & LARDNER LLP (Aug. 4, 2021) [perma.cc/5FNE-26DF].

177. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2151–52 (2021) (affirming the decision of the district court which enjoined the NCAA from limiting education-related compensation or benefits).

178. *See id.* at 2166–67 (Kavanaugh, J., concurring) (questioning the legality of the NCAA's remaining rules limiting compensation).

179. *See id.* at 2168 ("Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixing labor into the definition of the product.").

180. *Id.*

181. *See NCAA v.* Alston, *supra* note 157, at 471 ("[T]he Alston decision, combined with background principles of antitrust law that the Court did not consider, lays the groundwork for a successful future challenge to the NCAA's restrictions on compensation unrelated to education.").

its own accord, to waive the restriction on a student-athlete's ability to be paid for the use of their NIL.[182]

C. The NCAA's Interim NIL Policy: Suspending Amateurism in 2021

The NCAA established an Interim NIL Policy (the "Policy") in July of 2021 following the passage of state NIL laws, such as the Fair Pay to Play Act in California, as well as the Supreme Court's decision in *Alston*.[183] In accordance with the new Policy, the NCAA waived compliance with Article XII—prohibiting compensation—until a federal regulation or a new NCAA rule is issued.[184] The Policy provides the following guidelines to college athletes, recruits, their families, and their schools:

> (1) Individuals can engage in NIL activities that are consistent with the law of the state where the school is located. Colleges and universities may be a resource for state law questions; (2) college athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to name, image and likeness; (3) individuals can use a professional services provider for NIL activities; and (4) student-athletes should report NIL activities consistent with state law or school and conference requirements to their school.[185]

As a result, college athletes may receive compensation for the use of their NIL without violating any NCAA regulations or rules on eligibility.[186] On an individual level, the NCAA's new policy

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182. *See id.* (noting that the NCAA's decision took place shortly after the Court's ruling).

183. *See* Hosick, *supra* note 26 (describing the interim NIL policy); *see also* Bhabha et al., *supra* note 34 (suggesting that the questions raised by the Supreme Court in *Alston* led the Board to suspend the penalties for profiting from NIL).

184. *See* Marino, *supra* note 36 (describing the interim policy).

185. Hosick, *supra* note 26.

186. *See e.g.*, Dan Murphy, *NCAA Clears Student-Athletes to Pursue Name, Image and Likeness Deals*, ESPN (June 30, 2021) ("Every NCAA athlete in the

represents a positive development which athletes have fought for since 1906.[187] From an institutional perspective, the novelty of the NIL industry in college sports means that most athletes, businesses, and schools have little guidance on how to operate the market.[188] Therefore, the following section provides an overview of NIL contracts in intercollege athletics.

IV. Changing the Game: Recognizing College Athletes' Right to Profit from their Name, Image, and Likeness ("NIL")

The NCAA's suspension of Article XII lifts the restrictions on a student-athlete's right to profit from the use of their NIL.[189] NIL rights are akin to an individual's "right to publicity."[190] A right to publicity is universal; it is the right to profit from one's own identity.[191] For example, the right includes the ability to control the "commercial value of one's name, likeness, voice, signature, or other personal identifying traits that are unique" to the individual.[192] The right of publicity was first identified in the 1953 case *Haelan Laboratories v. Topps Chewing Gum, Inc.*.[193] There, the Second Circuit reasoned that the right of publicity was not based on protecting a person's privacy, but on preventing the unauthorized use of a person's name or likeness.[194] The Second

country will be able to make money from endorsements and through a variety of other ventures starting [June 30, 2021].") [perma.cc/ESZ3-R4J3].

187. *See supra* Part III (describing the progression of the movement to secure an athlete's right to compensation and publicity).

188. *See id.*

189. *See id.* (describing the waiver on prohibiting NIL compensation).

190. *See* Michael J. Hoisington, *Celebrities Sue Over Unauthorized Use of Identity*, HIGGS, FLETCHER & MACK (Aug. 20, 2021) (describing one's right to publicity) [perma.cc/63Q6-8F9L].

191. *See id.* (providing that everyone has a right to publicity, which was first identified as preventing the unauthorized use of a person's name or likeness).

192. *Id.*

193. *See* Haelan Lab'ys, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (reasoning that "in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture").

194. *See id.* at 867 (noting that the right of publicity is independent from the right of privacy).

Circuit determined that the plaintiff (a professional baseball player) had an interest in protecting the money he could receive from "authorizing advertisements" and "popularizing their countenances displayed in newspapers, magazines, busses, trains and subways."[195]

The exclusivity of the right to publicity ensures that it is a valuable asset to the individual.[196] In the 21st century, NIL rights are even more valuable given the variety of platforms available for monetization, including but not limited to: Tik Tok, Instagram, Facebook, Twitter, YouTube, Spotify, Hulu, and major sports networks like ESPN, the ACC Network, and CBS Sports.[197] Considering the expansive reach of the internet, at least twenty four college athletes have already received NIL values over a million dollars.[198] According to On3 NIL, an industry tracker for high school and college NIL activity, the top 100 athletes have NIL values over $462,000.[199] NIL values allow athletes to bargain for new commercial opportunities, sponsorships, and boosters for certain schools. Before, student-athletes were forced to forfeit or waive their right to publicity as a term of "signing their scholarship agreements and as a requirement for eligibility for participation in intercollegiate athletics."[200] Now, the only limitation on an athletes right to capitalize on their NIL is the free market.[201] The following

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195. *See id. (*describing how the right of publicity would yield no money unless it was made the subject of an exclusive grant).

196. *See* Hoisington, *supra* note 190 (describing the value of NIL rights after *Haelan*); *see* Mike Chiari, *Master P's Song Hercy Miller Signs $2M NIL Contract Ahead of Tennessee State Debut*, BLEACHER REP. (July 2, 2021) ("Hercy Miller, the son of rapper Master P . . . signed a $2 million-dollar name, image and likeness (NIL) deal with an American technology company.") [perma.cc/2BMV-B8TB].

197. *See NIL Valuations & Rankings*, ON3NIL (2023) (tracking the performance rates of college athletes on major social media platforms like Instagram, Tik Tok, and Twitter) [perma.cc/T99W-EL2P].

198. *See id.* (providing NIL valuations over one million dollars for 24 college athletes, including Bronny James ($7.5 million), Arch Manning ($3.6 million), Mikey Williams ($3.6 million), and Bryce Young ($3.5 million), to name a few).

199. *See id.* (stating that the On3NIL Valuation calculates an athlete's value by tracking performance, influence on social media, and exposure in the media).

200. *Id.*

201. *See* Ariail, *supra* note 1 ("This new era of opportunity for college athletes carries with it old, enduring inequities, especially regarding how an athlete's racial and/or sexual identity determines her "value.").

section provides an overview of a specific NIL contract for college athletes, including the parties involved,[202] the market-value of the student athletes,[203] and the public perception of the advent of NIL compensation.[204]

A. An Inside Look at NIL Contracts for Student-Athletes

An athlete can sell their right to publicity in two ways: (1) as a commercial deal; and (2) as a promotional deal.[205] Commercial deals include "accepting money in exchange for appearing in an advertisement or endorsing a product."[206] Promotional deals, on the other hand, "refer to the use of an NIL to promote one's own public appearance, brand, or company."[207] Student-athletes have had a wide range of opportunities to engage in both commercial and promotional activities since July of 2021.[208] For example, a lacrosse player from Duquesne University marketed her NIL for promotional purposes by hosting a sports camp with the additional opportunity to review game film for high school prospects.[209] Other college athletes have started their own companies, hosted podcasts, and become "ambassadors, philanthropists, and pioneers of their own brand."[210] Opportunities have similarly abounded in the commercial sphere. Student-athletes have endorsed products, signed autographs, recorded Cameos (paid video messages), gave

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202. *See infra* Part IV.A.

203. *See infra* Part IV.B.

204. *See infra* Part IV.C.

205. *See* O'Brien & Pray, *supra* note 61 (detailing the two ways in which individuals profit from their NIL).

206. *Id.*

207. *Id.*

208. *See* Blinder, *supra* note 48 (stating that the market has seen an explosion of opportunities for willing college athletes).

209. *See id.* (describing a lacrosse clinic hosted by Emelie Curtis, an athlete at Duquesne University in Pittsburgh, PA).

210. *See A Look at State NIL Legislation Seven Months from July 1*, ALTIUS SPORTS PARTNERS (Jan. 2022) (providing a snapshot of the new NIL industry) [perma.cc/7FGW-EZXT].

motivational speeches, and appeared at business openings.[211] In exchange, athletes have received products, gear, and enormous brand deals.[212]

In general, NIL deals involve two parties: the individual and a third-party vendor.[213] However, recent developments in the intercollegiate and commercial sphere have changed this dynamic.[214] First, in addition to suspending the rule against NIL compensation, the NCAA also suspended the provision against hiring agents and attorneys.[215] Student-athletes may now hire their own agents, attorneys, and accountants to broker deals.[216] Additionally, athletes may contract with agencies tailored to the NIL market.[217]

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211. *See* Marino, *supra* note 36 (detailing some of the ways that student-athletes can sell their NIL rights).

212. *See* Dan Whateley, *How College Athletes Are Getting Paid from Brand Sponsorships as NIL Marketing Takes Off,* INSIDER (Dec. 30, 2021, 4:34 PM) (noting a NIL deal with sports-marketing company OpenSponsorship where "each athlete was given about $100 worth of free products, including a set of whey and plant protein, a True Athlete performance supplement, and a shake bottle, in exchange for promoting the brand on social media") [perma.cc/CC5R-HFCX]; *see also* David Rieder, *College Swimmers Now Profiting Off Their NIL Rights? Good For Them*, SWIMMING WORLD MAG. (Aug. 22, 2021) (listing the current NIL deals for college swimmers with Arena, TYR, and Speedo as well as the gear that the individuals are provided with) [perma.cc/JAV9-BQWU].

213. *See* Burrage, *supra* note 58 (describing the components of an NIL contract).

214. *See id.* (providing that the NCAA also decided to waive the prohibition on a student-athlete's right to contract with an attorney).

215. *See id.* (illustrating a standard NIL deal after the suspension of Article XII of the NCAA Bylaws); *see also* NCAA Division I Manual, *supra* note 85, § 12.3.1.

> An individual shall be ineligible for participation in an intercollegiate sport if the individual ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing athletics ability or reputation in that sport. Further, an agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports, and the individual shall be ineligible to participate in any sport.

216. *See* Burrage, *supra* note 58 (suggesting that the extent of a student-athlete's representation from agents and attorneys will depend on that student's earning potential).

217. *See* Matthew De Gorge, *Olympic Silver Medalist Erica Sullivan Signs with IHC Sports to Manage NIL Rights*, SWIMMING WORLD (Aug. 18, 2021) (noting that top Olympic athletes have already signed deals with agencies to manage

Second, although colleges and universities are currently prohibited from *directly* paying their own athletes for the use of their NIL, they are not wholly unremoved from the process.[218] NIL contracts do not exist in a vacuum. NIL opportunities hinge on the institution's profitability and partnerships.[219] Moreover, NIL contracts cover a wide range of interests, both commercial and legal, affecting students and the institutions they represent.[220] As money continues to flow towards student-athletes, middlemen are necessary to determine such things like brand deals (e.g., if a school contracts with Nike but the athlete signs with Adidas), intellectual property rights (e.g., a college's name or logo on a jersey or advertisement), and performance evaluations and expectations.[221] Additionally, the diversity of available contracts, and the potential for large sums of money, increases the likelihood that other individuals will want a cut of the profit.[222] Therefore, institutional resources are necessary to help student-athletes navigate the changing landscape.[223] For example, the University of

their expected NIL deals) [perma.cc/XUP6-ZLSF]; *see also* Blinder, *supra* note 48 ("Dreamfield plans to charge companies or people who hire athletes a [fifteen] percent fee on top of the players' rates. Later on, Dreamfield will send players, who will be considered independent contractors, paperwork so they may prepare their taxes."); *see also FAQ,* DREAMFIELD SPORTS, LLC (2021) (describing Dreamfield, a marketplace for businesses to book athletes for certain events and promotional activities) [perma.cc/396E-CM4Z].

218. *See* Lewis, *supra* note 119 (describing the limitations on schools in directly compensating student-athletes).

219. *See* Cameron Gerber, Highest Paid College Athletes in the NIL Era, ACTION (Oct. 4, 2022) ("[T]he number one school for player NIL valuation (based on average earnings across the team) is Texas A&M. Aggies players earn an average of $85,000 in off-field partnerships, sponsorships, and brand deals.") [perma.cc/TUP4-FL8G].

220. *See* Katie McInerney, *What is NIL? NCAA Rules are Changing Regarding Athlete Pay. Here's What It Means*, BOS. GLOBE (July 2, 2021, 10:57 AM) ("Schools will need to decide whether an athlete can sign a deal that competes with a preexisting university deal.") [perma.cc/PA5C-7D5L].

221. *See id.* (questioning whether Boston College would allow athletes to sign a deal with New Balance, even though certain teams (e.g., the football team) are sponsored by Adidas).

222. *See id.* (suggesting that NIL contracts will involve more than the student-athlete and a third-party because people will be interested in the profit).

223. *See id.* (stating that schools, like Nebraska, are already establishing programs to help their athletic departments).

Virginia ("UVA"), recently announced a partnership with an NIL-tailored marketing agency to enhance the school's name, image, and likeness program.[224] Others, like the University of North Carolina at Chapel Hill ("UNC"), have initiated multi-step programs for NIL marketing which include: (1) training on how to build a personal brand; (2) a partnership with Altius Sports Partners; (3) models to track compliance management with NIL activities; and (4) software to help student-athletes cultivate their social media platforms.[225]

Third, agents and athletic departments are not the only parties involved in negotiating and arranging NIL deals. With the NIL industry now resembling the professional sphere, NIL deals are also subject to the commercial considerations.[226] The following section discusses the market-value of college athletes.

B. The Fair Market-Value of College Athletes

Although NIL contracts are negotiated within the context of intercollegiate athletics, the deals are driven by market forces.[227] Previously, student athletes were excluded from NCAA compensation models due to the amateurism requirements. As a result of the NCAA's revenue share model at least 35% of the annual profits went to, colleges, universities, coaches, and the NCAA's administration.[228] In 2019, this accounted for nearly $6.6

224. *See* Matt Howe, *Virginia Athletics Announces NIL Partnership with Altius Sports*, 247 SPORTS (Jan. 28, 2:32 PM) (commenting on UVA's new partnership with Altius Sports Partners) [perma.cc/F7VT-4P2X].

225. *See* O'Brien & Pray, *supra* note 61 (providing an overview of UNC's NIL program).

226. *See infra* Part IV.B.

227. *See* Joshua C. Sorbe, *The NCAA's Breaking Point for Equal Opportunity: A Title IX Perspective on Name, Image, and Likeness Sponsorship Legislation* 1, 25 (2020) (Honors Thesis, University of South Dakota) (on file with the University of South Dakota RED Libraries) (proclaiming that NIL deals will be determined by revenue-generating sports, e.g., primarily male sports, which yield greater market-justified expenditures from schools).

228. *See 15-Year Trends in Division I Athletic Finances, supra* note 29 (providing that in 2019, the NCAA administration and coaches received 35% of $18.9 *billion*); *see also* Tim Parker, *How Much Does the NCAA Make Off March Madness?*, INVESTOPEDIA (Sept. 13, 2021) ("In 2019, college athletics' governing

billion.[229] Whereas $3.5 billion went to the entirety of student athletics aid over all three divisions and sports programs.[230] Today, student athletes can individually access their share of the profits while generating their own capital.[231] The opportunity to profit from NIL activity creates a free market in college athletics.[232] The professionalization of college sports, however, means that the value of a student athlete is determined by business models of success and profit.[233]

Visibility, celebrity, marketing, social capital, and athletic performance will determine how much money a student-athlete can earn from their NIL.[234] An athlete's appearance, mannerisms, treatment by the media, and time spent cultivating a brand will influence these factors.[235] Additionally, an athlete's value will be influenced by the team on which they play, as well as the team's success.[236] For example, the NCAA annually earns approximately

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body earned $1.05 billion in revenue from the tournament, representing more than 90% of its annual revenue. On the surface, that seems like cause for outrage, especially in light of how much the players earn: nothing.") [perma.cc/S5N3-WBME].

229. *Id.*

230. *Id.*

231. *See supra* Part III.C.

232. *See* Dosh, *supra* note 16 ("[W]ide-sweeping NCAA legislation [opens] up a free market for student athletes.").

233. *See, e.g.*, Ariail, *supra* note 1 ("[I]t will be relevant if NIL contracts reveal the continued existence of a racial hierarchy, where an athlete's skin color, as well as her perceived gender conformity, is a significant factor in the valuation of her individual brand.").

234. *See, e.g.*, AJ Maestas & Jason Belzer, *How Much Is NIL Worth to Student Athletes?*, ATHLETIC DIRECTOR U (2020) (projecting the amount of money student-athletes could make based on the number of followers they have on Instagram) [perma.cc/A4CP-5YFV].

235. *See* Ariail, *supra* note 1 (arguing that some American companies might choose to endorse White female athletes over Black athletes because of the perceived bias that it is easier to profit off of the look of a "girl next door").

236. *See* Landry & Baker, *supra* note 143, at 31 (suggesting that the success of a team, and the team's performance, is one of the main drivers of the popularity of college sports); *see, e.g.*, Frank Vitovitch, *Report: Wake Forest QB Sam Hartman Likely to Transfer to Notre Dame?*, UHND (Dec. 27, 2022) ("NIL reportedly played a role in Notre Dame losing out on [Western Michigan DT Braden] Fiske just as it did in all of Notre Dame's high-profile losses on the recruiting trail towards the end of the cycle.") [perma.cc/89N4-KKY7].

$900 million from the March Madness Tournament.[237] Hypothetically, if a college basketball player contracts to sell the use of their NIL during the tournament, the athlete's revenue could increase with each advancement. In other words, the team's success drives individual opportunities to profit. Additionally, as this hypothetical suggests, as teams increase their media coverage in playoff games, bowls, tournaments, and championships, student-athletes increase the opportunity for deals.[238]

Currently, male athletes lead the way in NIL compensation.[239] Football and basketball, in particular, dominate NIL activity.[240] According to Opendorse, a leading industry tracker for NIL deals, football currently accounts for 48.8% of gross NIL earnings.[241] Men's basketball accounts for 22.6% and women's basketball ranks third with 11.2%.[242] Every other college sport averages between 0.1% and 2.4% of total NIL compensation.[243] NIL activity also varies between individual men's and women's sports in Division I–III athletics.[244] Across the three NCAA divisions, men's sports account for 67.3% of gross NIL earnings, in contrast to 32.7% for women's sports.[245] Male athletes currently accrue almost *double*

237. *See* Tim Parker, *How Much Does the NCAA Make Off March Madness?*, INVESTOPEDIA (Sept. 13, 2021) (providing the revenue for March Madness) [perma.cc/S5N3-WBME].

238. *See* Blinder, *supra* note 48 (stating that certain students "may start to benefit from team-wide arrangements that could lift earnings for players who draw less individual notice").

239. *See* Associated Press, *Male Athletes Lead Way in NIL Money, According to Third-Party Data*, ESPN (Jan. 27, 2022) ("[Male athletes] lead in total name, image and likeness compensation and have more NIL deals than women, according to third-party data from July 1 through Dec. 31 for some 125,000 athletes.") [perma.cc/SCR4-P85V].

240. *See id.* (noting that NIL opportunities are clearly uneven among genders, sports, and conferences).

241. *NIL Industry Insights, supra* note 49.

242. *Id.*

243. *See id.* (noting that men's sports account for 74.3% of all NIL compensation).

244. *See id.* (providing the differences amongst Division I, II, and III men's and women's sports).

245. *See id.* (listing the percentages across the three NCAA divisions).

the NIL earnings of women, as well as double the department financial support from colleges and universities.[246]

Opendorse also provides the average compensation for athletes per Division: Division I athletes average $2,963 a deal, in comparison to $328 for Division II and $432 for Division III athletes.[247] Industry officials suggest that smaller NIL deals dominate the market.[248] According to companies helping broker agreements for upwards of thousands of student-athletes, most athletes are not even making $1,000 per deal.[249] Keith Carter, the Vice Chancellor for Intercollegiate Athletics at the University of Mississippi, posited that "probably [five] percent of college student-athletes [are] getting these bigger paychecks," while the rest of the population receives the smaller deals.[250]

However, the smaller deals are not the ones that gain the most media attention.[251] Nor are they the bulk of earnings noted in the industry statistics.[252] Instead, the most notorious NIL brand deals involve the leaders in college sports: Division I football and basketball players.[253] For example, Alabama quarterback Bryce

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246. *See* Associated Press, *supra* note 239 ("[Male athletes] lead in total name, image and likeness compensation and have more NIL deals than women, according to third-party data from July 1 through Dec. 31 for some 125,000 athletes."); *see also* Sorbe, *supra* note 227 ("Expenditures highlight an even greater differential between men's and women's athletics programs. Controlling for unallocated and coed expenditures, men's sports enjoy double the department financial support of women's sports, with Division I contributing most to the differential.").

247. *See NIL Industry Insights, supra* note 49.

248. *See* Blinder, *supra* note 48 ("Industry officials expect that small-dollar deals will continue to dominate the list of options for most students, though more may start to benefit from team-wide arrangements that could lift earnings for players who draw less individual notice.").

249. *See NIL Industry Insights, supra* note 49.

250. *See* Blinder, *supra* note 48.

251. *See* Associated Press, *supra* note 239 ("Ohio State said this week that 220 athletes had been paid a total of $2.98 million for 608 reported NIL activities since July 1.").

252. *See id.* (asserting that most schools have balked at releasing details provided by their athletes out of concern over the breakdown because some athletes have reported dealings totaling "eight figures").

253. *See* Chiari, *supra* note 196 ("Hercy Miller, the son of rapper Master P . . . signed a $2 million-dollar name, image and likeness (NIL) deal with an American technology company.").

Young is the highest NIL earner in 2022, with a total valuation of $3.2 million in NIL deals.[254] CJ Stroud, quarterback for the Ohio State Buckeyes, currently holds an NIL valuation of $2.5 million.[255] Caleb Williams generated $2.4 million in NIL revenue after his freshman year at the University of Southern California, in comparison to Hercy Miller, a point guard for Louisville, who signed a $2 million contract before starting his freshman year at Tennessee.[256] Other million-dollar geals include Jaxon Smith-Njgba from Ohio State who made $1.7 million and University of Texas quarterback Quinn Ewers who skipped his senior year in high school in order to sign a $1.4 million deal with GT Sports Marketing.[257] As these deals suggest, the NIL landscape is rapidly developing, and the potential for deals—both large and small—will largely depend on the athlete, sport, and market demand. The next section provides an overview of the public's response to the professionalization of college sports.

C. Public Perception of Professionalizing Intercollegiate Athletes

The NCAA's Interim NIL policy has been the subject of contentious debate.[258] Student-athletes, journalists, and NCAA officials have all taken different sides.[259] Because NIL opportunities are perceived as equal, proponents argue that NILs will benefit every student athlete.[260] The change represents a

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254. *See* Cameron Gerber, *Highest Paid College Athletes in the NIL Era*, ACTION (Oct. 4, 2022) (analyzing the top 15 ranking college football stars and their NIL deals) [perma.cc/FFS2-BUK5].

255. *Id.*

256. *See* Chiari, *supra* note 196 (stating that Miller, "plans to have a bit of fun with the money, telling TMZ sports that he is going to buy a Tesla").

257. *See* Joseph Rios, *Here Are College Football's Biggest and Coolest NIL Deals in 2022*, BEST COLLS. (Jan. 6, 2023) (providing statistics for individual athlete's NIL valuation and brand sponsorships) [perma.cc/56PJ-NAKV]; *see, e.g.*, *See* Rion Martin, *12 Massive NIL Deals in 2021* (Dec. 29, 2021) (stating that Ewers skipped his senior year of high school to enroll early due to his potential to earn $1.4 million a year over three years) [perma.cc/VN88-5UF3].

258. *See infra* Part IV.C.

259. *See infra* Part IV.C.

260. *See* McInerney, *supra* note 220.

welcome departure from the past century of limiting athlete's access to the lucrative college sports market.[261] Several student-athletes, including D'Eriq King, quarterback for the University of Miami, have praised the NCAA's Interim NIL Policy and the opportunities it provides to all students.[262] Others suggest that NIL contracting could have a unique and positive impact on women's sports.[263] Proponents point to two large-figure deals for female athletes. Olivia Dunne, a junior gymnast at Louisiana State University (LSU), will earn at least $2 million in NIL activity by 2023.[264] Additionally, Paige Bueckers, a women's basketball player at the University of Connecticut, is expected to earn upwards of a million a year from her NIL.[265] Despite the success of individual female athletes such as Dunne, Bueckers, Sunisa Lee (Olympic Gymnast at Auburn), and the Cavinder Twins (University of Miami basketball players), the deals are not representative of most NIL deals.[266]

> A football player could receive a free meal in exchange for a Twitter post about a local restaurant. A volleyball player could accept a gift from a makeup brand in exchange for sharing it on Instagram. A field hockey player can use their face and name to recruit young athletes to a skills camp.

261. *See* Martin, *supra* note 257 (noting that while the NCAA raked in upwards of a *billion* dollars, the student-athlete's saw not a penny).

262. *See* Blinder, *supra* note 48 (expressing King's excitement over the business opportunities the NCAA's waiver provides).

263. *See* Marc Edelman, *Women's Athletes Are Big Winners In College Sports' 2021 NIL Reform*, FORBES (Jan. 1, 2022) ("The end result of NIL reform very well could be that athletes in women's sports, where their earning potential is often short-lived, will now be more likely to stay in college rather than need to choose between education and economic opportunity.") [perma.cc/ZS57-ER6V]; *see* Kurt Streeter, *New Endorsements for College Athletes Resurface an Old Concern: Sex Sell*, N.Y. TIMES (Nov. 11, 2022) (arguing that NIL compensation for female athletes rewards traditional feminine desirability over athletic excellence) [perma.cc/8J2Q-A6XW].

264. *See* Streeter, *supra* note 263 (arguing that white heterosexual conventionally beautiful athletes make the most money because they sell sex).

265. *See* Edelman, *supra* note 263 (providing examples of the emerging opportunities for female college athletes).

266. *See NIL Industry Insights, supra* note 49 (providing statistics on the top 100 NIL deals for female college athletes).

In fact, a large number of student-athletes have expressed concern about the perceived fairness of NIL contracts.[267] The Division I Student Athlete Advisory Committee ("SAAC"), an official governing body which represents over 170,000 Division I athletes, expressed the following reservation NCAA's Interim Policy:

> We do not discount the outsized impact and contributions of the top athletes in sports like men's basketball and football – only about two percent of all Division I athletes – which help keep college athletics alive and bring hundreds of thousands of people together over a common love of sports. While these student-athletes are a vital part of this conversation, they cannot be the only part; after all, we represent all 100 percent of Division I student-athletes.[268]

Additionally, the SAAC raised another concern over inherent inequities in NIL legislation:

> No one is talking about how proposals for name, image, and likeness reform – both state and federal – will affect sports other than football and men's basketball or a handful of elite student-athletes in other sports. No one is talking about what the proposals will do for limited resource institutions, historically Black colleges and universities, or international student-athletes.[269]

267. *See* Moore, *supra* note 1 ("While name, image, and likeness represents a new breakthrough in the sports industry and for collegiate athletics, the breakdown of who gets attention and strikes deals is not new.").

268. *See* @Div1SAAC, TWITTER (Oct. 29, 2019, 10:05 AM) (stating that student athletes expressed doubt about the change in policy) [perma.cc/ARK2-T8MS].

269. *See id.* (suggesting that the conflict between amateurism and NIL legislation may jeopardize the goal of Title IX: equal opportunity).

Race, gender, and sexual orientation cannot be ignored as part of NIL opportunity.[270] Most successful moneymakers are white.[271] For female athletes, most are white heterosexual women. [272] Lou Moore, a professor at Grand Valley State University, warns that institutional barriers will keep Black women from getting major contracts for endorsements and commercials.[273] Left unregulated, Moore anticipates that NIL arrangements will mirror professional sports, with the greater revenue-generating sports (predominantly male sports) producing the most NIL profits.[274] The next section addresses the new problem of unequal NIL opportunities.

D. The Problem with the Professionalization of College Sports: Unequal Economic Opportunity for Male and Female Athletes

The commercial market will determine student-athletes potential to profit from their NIL.[275] Institutional spending will also affect the value of a particular student-athlete's brand.[276] Money yields opportunity.[277] With the option to choose athletic programs based on the likelihood of increased NIL profits, schools are incentivized to compete against one another in a "marketing arms race."[278] Already, large schools are commercializing their

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270. *See* Ariail, *supra* note 1 ("It will be relevant if NIL contracts reveal the continued existence of a racial hierarchy, where an athlete's skin color, as well as her perceived gender conformity, is a significant factor in the valuation of her individual brand.").

271. *See* Streeter, *supra* note 263 (identifying race and sexual orientation as crucial distinguishing elements of who are successful in this field).

272. *See* Moore, *supra* note 263 ("Since the ascendance of Black women amateur athletes in post–World War II America, Black women athletes have struggled to get their fair share of endorsements.").

273. *See id.* ("Most [American] companies refuse to believe that Black women can be the face of their business because America has refused to see Black women as everyday Americans like they do their White counterparts.").

274. *See id.* (noting that the smaller scope of Black women athletes' NIL deals was predictable but there is possibility for change).

275. *See supra* Part IV.B.

276. *See supra* Part IV.B.

277. *See* Sorbe, *supra* note 227, at 26 (explaining how money diminishes the efficacy of Title IX).

278. *Id.*

ability to "win games to attract sponsors, private contracts, and commercial popularity."[279] Furthermore, universities are rapidly constructing NIL athletic departments and securing contracts with NIL firms to provide athletes with more resources and expertise in managing both their own brand and the school's brand. Such institutional spending raises a concern with equal opportunity.

Title IX is often dismissed as a nonissue because NIL contracts are primarily between student-athletes and third-party vendors.[280] However, NIL arrangements do not exist in a vacuum. Several parties influence the final contract, including attorneys (personal and university counsel), agents, agencies (with university-provided contracts), and coaches.[281] Therefore, Title IX may be implicated if a school's marketing and promotional services for NIL arrangements are not evenly distributed or negatively impact an athlete's opportunity to participate.[282] What happens, for example, when institutional spending affects the earnings gap between male and female athletes?

Title IX experts have discussed institutional marketing resources and how they are used to promote men's and women's sports programs.[283] Typically, marketing resources are tied to revenue-generating sports (e.g., men's football and basketball).[284] Therefore, greater market-justified expenditures "already afford

279. *Id.* at 14.

280. *See* Dosh, *supra* note 16 (noting the quick dismissal of Title IX by many industry officials).

281. *See supra* Part IV.B.

282. *See* Dosh, *supra* note 16 ("[S]chools must offer equitable treatment of male and female student athletes in the areas of participation, financial aid and the provision of things such as equipment, travel, facilities, scheduling, recruitment, publicity and more. Opportunities need not be identical, but they do have to be equitable.").

283. *See* Sorbe, *supra* note 227, at 13 ("Expenditures highlight an even greater differential between men's and women's athletics programs. Controlling for unallocated and coed expenditures, men's sports enjoy double the department financial support of women's sports, with Division I contributing the most to the differential.").

284. *See* Dosh, *supra* note 16 (suggesting that without limitations, marketing resources will continue to be spent according to revenue generation from male sports).

primarily male sports with rewards like media days, additional marketing, larger spectator accommodation, and greater opportunity for self-promotion."[285] Previously, the Department of Education interpreted Title IX to allow for some market-based discrepancies in institutional spending provided the expenditures were equivalent to sport-specific needs such as: "rules of play, nature/replacement of equipment, rates of injury resulting from participation, and the maintenance/upkeep requirement of [facilities]."[286] As institutions increase promotional and marketing expenditures to account for NIL opportunities, the contemporary issue will be whether "marketing dollars should be spent equitably among men's and women's sports in a fashion that is not directly tied to potential revenue production."[287] Currently, no legislative or judicial precedent exists on whether Title IX will apply in the context of collegiate NIL arrangements.[288] Therefore, the following section provides an overview of Title IX's application to intercollegiate athletics and the provisions for compliance.[289]

V. Title IX and Intercollegiate Athletics

Under Title IX of the Education Amendments of 1972 ("Title IX"),[290]

> No person 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. [291]

285. Sorbe, *supra* note 227, at 2.

286. *Id.* at 5.

287. *Id.*

288. *See id.* ("[C]laims against the publicity have not been seen at the intercollegiate level at this point because the impact of those discriminatory institutional decisions [has] not been experienced directly by the student athletes. With changes to NIL earning potential, the impacts will now directly influence women student athletes.").

289. *See infra* Part V.

290. *See* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*. (prohibiting sex discrimination in any education or program receiving Federal financial assistance).

291. § 1681(a).

Signed into law by President Richard Nixon on June 23, 1972, Title IX prohibits sex discrimination in public high schools and postsecondary institutions.[292] The law was initially established to eliminate inequalities faced by women in academia.[293] Title IX's impact on intercollegiate athletics was largely unintended.[294] The thirty-seven-word statute did not mention athletics.[295] However, within weeks of Title IX's passage, the Department of Education was inundated with questions regarding compliance from schools and their athletic departments.[296] These questions led to decades of policy changes, Dear Colleague Letters, and revised regulations specifically tailored to intercollegiate athletics.[297] As a result, Title IX is a highly complex regulatory scheme.[298] Despite ongoing implementation issues, Title IX has evolved into one of the primary tools for ensuring equality in college sports.[299] To provide the current Title IX compliance framework, the following sections trace the law's legislative history and application to college sports.

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292. *Id.*

293. *See* Schwarz, *supra* note 10, at 634–37 (citing EILEEN MCDONAGH & LAURA PAPPANO, PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS 77–112 (2008)) (discussing the original purpose of Title IX); *see also* Margaret E. Juliano, *Forty Years of Title IX: History and New Applications*, 14 DEL. L. REV. 83, 83 (2013) (stating that the original purpose of Title IX was to avoid the use of federal resources to support discriminatory practices, and to provide individual citizens with effective protection against discrimination).

294. *See* Schwarz, *supra* note 10, at 637 (arguing that Title IX's substantial influence on athletics was unintentional).

295. *See* Peg Pennepacker, *50th Anniversary of Title IX Coming in June of 2022*, NAT'L EDUC. STATE HIGH SCH. ASSN'S (Sept. 8, 2021) ("Title IX is most often identified with promoting opportunities for sports participation for females in athletics yet neither the word "sports" nor the word "athletics" are mentioned in the original 37-word statute.") [perma.cc/885F-23ZQ].

296. *See* Lee Green, *Title IX Compliance – Part I: The Three-Prong Test*, NAT'L FED'N STATE HIGH SCH. ASS'NS (Feb. 8, 2022) (providing each component for the Title IX regulatory framework) [perma.cc/XK9H-VY3B].

297. *Id.*

298. *See id.* (noting that Title IX grabbed a lot of public attention because it was unclear whether Title IX also protected female athletes in the education system from discrimination).

299. *See* Schwarz, *supra* note 10, at 637–638 (providing that Title IX is one of the primary tools used by students and other organizations to fight inequality in athletics).

A. Title IX's Legislative History: The Tower and Javits Amendments

The enactment of Title IX caused considerable consternation in the academic community.[300] The law's brevity and ambiguity resulted in institution's questioning whether the statute's provision on discrimination would apply to individual athletic programs.[301] The NCAA was the first institution to actively seek to prevent the statute from affecting athletics.[302] The NCAA argued that complying with the provision would be burdensome and ultimately detrimental to men's sports, particularly revenue-generating sports like football.[303] As an ironic twist of fate, the NCAA's plea initiated Title IX's application to athletics.

As part of the NCAA's effort to discourage the application of Title IX to intercollegiate athletics, Senator John Tower (R-TX) introduced the Tower Amendment.[304] Senator Tower proposed that Title IX be amended to exempt "intercollegiate athletic activity to the extent that such activity does or may provide gross receipts or donations to the institution necessary to support that activity."[305] In other words, the Tower Amendment would exempt revenue-producing sports (e.g., football) from being regulated by

300. *See* Cohen v. Brown Univ., 991 F.2d 888, 893 (1st Cir. 1993) (describing that the broad proscriptive language of Title IX caused significant unease in higher education).

301. *See id.* ("[F]or many schools, the men's football budget far exceeded that of any other sport, and men's athletics as a whole received the lion's share of dedicated resources— a share that, typically, was vastly disproportionate to the percentage of men in the student body.").

302. *See* Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 MARQ. SPORTS L. REV. 11, 20 (2003) (asserting that the NCAA, the College Football Coaches Association, and other organizations that represented the interests of men's sports testified in front of Congress and attempted to amend Title IX).

303. *See id.* at 21 (maintaining that certain members of Congress wanted to protect college football from Title IX's perceived impact on men's sports).

304. *See* Schwarz, *supra* note 10, at 639 (detailing Senator Tower's attempt to separate Title IX from college sports).

305. *See id.* (explaining NCAA's effort to use Congressional influence to defend their cause by preventing Title IX to apply to athletes).

requirements of equality.[306] Surprisingly, other senators expressed considerable vitriol against the proposed amendment.[307] Senator Birch Bayh (D-IN), for example, condemned the Tower Amendment; stating that Title IX was necessary to provide women with solid legal protection from persistent, pernicious discrimination.[308] Additionally, Representative Patsy T. Mink (HI) gave a scathing remark of the Senator Tower's position, "the implication is that sex discrimination is acceptable when someone profits from it and the moneymaking proposition should be given congressional absolution from Title IX."[309] Representative Mink articulated Congress's intention to ensure equal educational opportunities for men and women, regardless of revenue production.[310]

Following Senator Tower's proposal, Senator Jacob Javits (R-NY) proposed an alternative amendment: the Javits Amendment.[311] The Javits Amendment expressly aligned Title IX with intercollegiate sports.[312] The Javits Amendment required the Department of Health, Education, and Welfare ("Department of Education")[313] to amend the Education Amendments of 1972 to

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306. *See* Women's Sports Foundation, *History of Title IX*, (Aug. 13, 2019) (describing the purpose of the Tower Amendment) [perma.cc/X669-6UQ6].

307. *See* Schwarz, *supra* note 10, at 639 (describing Congress's response to the Tower Amendment).

308. *See id.* (detailing Senator Bayh's contention that persistent discrimination perpetuates second-class citizenship for American women).

309. *See Sex Discrimination Regulations: Hearings Before the House Subcomm. on Post-Secondary Educ. of the Comm. on Educ. & Labor,* 94th Cong. 166 (1975) (Statement of Rep. Mink) (providing more criticism for Senator Tower's Amendment by pointing out the flaw that sex discrimination is only acceptable when someone profits from it).

310. *See id.* at 167 (representing Mink's comments before the House Subcommittee).

311. *See* Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484 (1974) (codified in 20 U.S.C. §§ 1681–1688 (2021)) (stating the purpose of the Javits Amendment to Title IX).

312. *See id.* (applying Title IX to college sports).

313. The Department of Health, Education, and Welfare (HEW) is now the Department of Education. The Department of Education assumed responsibility for the enforcement of Title IX upon its creation in 1979. The remainder of this Note will insert the Department of Education for what was formerly known as

include, with respect to intercollegiate athletic activities, "reasonable provisions considering the nature of particular sports."[314] Congress passed the Javits Amendment in 1974.[315] In doing so, Congress asserted Title IX's coverage of gender equity in intercollegiate athletics.[316]

Even though the Javits Amendment permanently applied Title IX to athletics, the Amendment ultimately failed to provide schools with sufficient clarification as to what "reasonable provisions" entailed or guidelines for compliance.[317] Therefore, in 1975 the Department of Education's Office of Civil Rights ("OCR") promulgated a final regulation for the statute.[318]

B. 1975 Regulation: Title IX's Official Application to Athletics

Under the OCR's 1975 Regulation[319] ("Regulation"), intercollegiate athletics are governed by Title IX in the following manner:

> [N]o personal shall on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise

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HEW. *See* Samuels & Galles, *supra* note 302, at 13 (providing the history of the Department of Education).

314. *See* Schwarz, *supra* note 10, at 639–40 (describing the Javits Amendment); *see, e.g.*, Sorbe, *supra* note 227, at 4 (arguing that the qualifiers for 'the nature of particular sports' allowed market-based demands necessitating differing expenditure levels between sports while allowing for compliance).

315. *See* Schwarz, *supra* note 10, at 639 (noting the passage of the Javits Amendment).

316. *See id.* at 640 (providing Congress's intent to bring all sports into the discussion of equality, by requiring that the needs for both men's and women's sports be adequately met).

317. *See id.* (pointing out the ultimate lack of clarification the Javits Amendment provided).

318. *See id.* (providing the context of OCR's 1975 Regulation).

319. *See* 40 Fed. Reg. 24, 218 (June 4, 1975) (codified at 34 C.F.R. § 106) (establishing the 1975 Regulation). The original Title IX regulations were published at 45 C.F.R. § 86. However, when the Department of Education assumed control over Title IX, the regulations were republished at 34 C.F.R. § 106. *See* Dep't of Educ. Organization Act, Pub. L. No. 96-98, 93 Stat. 669 (1979), codified at 20 U.S.C. §§ 3401–3510.

> be discriminated against in any *interscholastic, intercollegiate, club or intramural athletics* offered by a recipient [of federal funds], and no recipient shall provide any such athletics separately on any such basis.[320]

The Regulation includes additional guidance on certain issues in collegiate athletics such as comparability of facilities,[321] financial assistance,[322] gender issues,[323] and athletic opportunities.[324] Ultimately, the Regulation proposes three areas compliance under Title IX. The first tenet concerns proportional allocation of scholarships to male and female student-athletes.[325] Any financial aid related to athletics must be distributed on an equitable basis.[326] The second tenet requires the equitable treatment of male and female athletes.[327] The OCR released eleven categories of benefits the Department considers in determining compliance, including uniforms, facilities, travel benefits, access to quality coaching, housing, dining services, nature of publicity and marketing services, game scheduling, academic tutoring, and institutional support and recruiting services.[328] The third tenant requires the institution to provide men and women enrolled at the

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320. *See* 34 C.F.R. § 106.41 (emphasis added) (noting that Title IX changed to add protection against sexual discrimination in athletics).

321. *See* § 106.33 (2013) ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.").

322. *See* § 106.37 (providing that any institution handing out financial assistance must do so on a basis independent of the student's gender).

323. *See* § 106.41 (expressing the need for equal opportunities in athletics and providing a test to assist schools in this evaluation).

324. *See* § 106.41 (containing the section on general application of the statute, application to separate sports teams for men and women, and equal opportunity).

325. *See* Green, *supra* note 296 (addressing the first of three compliances under Title IX).

326. *Id.* (stating that the first compliance under Title IX deals with the fact that the amount of scholarship money a male and female student-athlete receives should not be different).

327. *Id.* (addressing the second compliance under Title IX).

328. *Id.* (stating that the second compliance under Title IX deals with eleven categories that describes how treatments, services, and benefits male and female student-athletes receive should not be different).

school with equal athletic opportunity to participate.[329] The last component, equal opportunity to participate, is predominantly viewed as the true purpose of Title IX.[330] Therefore, the Regulation provides that in determining whether equal opportunities to participate are available, the Department of Education will consider, among other factors, "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes."[331]

Despite the in-depth clarification the Regulation provides on the first and second areas of athletics,[332] public and legal concern arose in response the lack of guidance on the third area of compliance: equal athletic opportunity to participate.[333] After issuing the Regulation, the Department of Education received over one hundred complaints against institutions of higher education.[334] Most of the complaints centered on "whether a school had provided 'enough' sports opportunities for female student-athletes."[335] As a result, the OCR decided to issue a Policy

329. *See* Samuels & Galles, *supra* note 302, at 13 (providing the essential components of the 1975 Regulations).

330. *See* Cohen v. Brown Univ., 991 F.2d 888, 897 (1st Cir. 1993) ("Equal opportunity to participate lies at the core of Title IX's purpose.").

331. *See* Samuels & Galles, *supra* note 302302, at 13–14 (stating that the third and final compliance under Title IX deals with equal opportunity for both male and female student-athletes to participate in the sport in which they want to play).

332. *See* Schwarz, *supra* note 10, at 642 (stating that § 106.41(c) "gives the most guidance regarding what schools should consider for compliance"); *see also* 34 C.F.R. § 106.41(c) (providing the list of factors for equitable treatment, including equipment and supplies, locker rooms, facilities, practice areas, scheduling of games and practices, medical and training services, publicity, and assignment and compensation of coaches).

333. *See* Samuels & Galles, *supra* note 302, at 14 (noting that the HEW received hundreds of discrimination complaints concerning the meaning of equal opportunity).

334. *See* Schwarz, *supra* note 10, at 642 ("By mid-1978, HEW had received 'nearly 100 complaints alleging discrimination in athletics against more than [fifty] institutions of higher education.'").

335. *See id.* (noting that there were concerns about whether female student-athletes had the freedom to choose to play the sport they wanted to and whether schools were doing anything to make that happen).

Interpretation to clarify the meaning of equal opportunity in intercollegiate athletics.[336]

C. 1979 Policy Interpretation: The Importance of Equal Participation in College Sports

In its 1979 Policy Interpretation[337] ("Policy Interpretation"), the Department of Education provides factors and standards for determining whether an institution's athletics programs comply with Title IX.[338] The Policy Interpretation reiterates the three components of Title IX compliance: proportional scholarships,[339] equitable treatment,[340] and effective accommodation to provide equal athletic opportunity for members of both sexes. [341] Like the Regulation, the Policy Interpretation specifically provides guidance on the third requirement.[342]

The Policy Interpretation includes a three-prong test to determine equal athletic opportunity to participate.[343] The three-prong test is the hallmark of interpreting and deciding equal opportunity under Title IX.[344] Under the test, equal opportunity is assessed according to:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers *substantially proportionate* to

336. *See* Samuels & Galles, *supra* note 302, at 14 (expressing the reasons for issuing a policy interpretation).

337. *See* Policy Interpretation, 44 Fed. Reg. 71,413 (Dec. 11, 1979) (providing additional guidance on Title IX compliance).

338. *See id.* (clarifying the purpose of the 1979 Policy Interpretation).

339. *See* 44 Fed. Reg. at 71,415 (providing the requirement of proportionality in athletic scholarships).

340. *See* 44 Fed. Reg. at 71,415–17 (providing the requirement of equal benefits and opportunities).

341. *See* 44 Fed. Reg. at 71,417–18 (stating the requirement of equal athletic opportunity).

342. *See* Samuels & Galles, *supra* note 302, at 14 (discussing the purpose of the 1979 Policy).

343. *See id.* (establishing the three-prong test).

344. *See* Schwarz, *supra* note 10, at 643 (proclaiming that the three-prong test is the benchmark for determining equal opportunity under Title IX).

> their respective enrollments; or (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a *history and continuing practice* of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or (3) Where the members of one sex are under-represented among intercollegiate athletes, and the institution cannot show a continuing practice or program expansion such as that cited above, whether it can be demonstrated that the *interests and abilities* of members of that sex have been *fully and effectively accommodated* by the present program.[345]

In other words, institutions have three separate ways to provide athletes with equal opportunity: (1) substantial proportionality; (2) a history and continuing practice of program expansion; or (3) full and effective accommodation of program opportunities.[346] Institutions are only required to meet one of the three prongs to maintain Title IX compliance.[347]

The three-prong test remained as administrative guidance until the First Circuit's decision in *Cohen v. Brown University*.[348] In *Cohen*, the First Circuit determined that the three-prong test had the force and effect of law, "because the [Department of Education's] rendition stands upon a plausible, if not inevitable, reading of Title IX, we are obligated to enforce the regulation."[349] Today, almost every case brought against the NCAA includes an analysis of equal opportunity under the three-prong test. [350]

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345. *See* 44 Fed. Reg. 71,413–71,418 (Dec. 11, 1979) (outlining the three-prong test).

346. *See* Schwarz, *supra* note 10, at 644 (asserting that equal opportunity can be achieved in one of three ways).

347. *See id.* (providing that compliance can be maintained with one prong).

348. *See* Cohen v. Brown Univ., 991 F.2d 888, 896–97 (1st Cir. 1993) (affording substantial deference to the 1979 Policy Interpretation).

349. *See id.* at 899 (determining that the three-prong test was a matter of law because it draws its essence from Title IX).

350. *See* Schwarz, *supra* note 10, at 643 (asserting that the Department of Education created the three-prong test to articulate the meaning of equal

The question today is whether equal opportunity to participate in sports under Title IX covers equal opportunity to participate in sports-related activities, such as NIL deals and transactions. Currently, no federal or judicial guidance exists to answer this question. Therefore, schools are largely left in the dark on whether institutional spending or involvement in an athlete's NIL activity triggers any of the three components of Title IX compliance. Because the Title IX framework centers around equal opportunity to participate, Part VI will evaluate intercollegiate NILs under the three-prong test.[351] The following section, Part VII, will discuss Title IX's two other components, athletic scholarship aid and other athletic benefits.[352]

VI. Title IX Compliance in the Era of NIL Contracts

Title IX promotes equality of opportunity. In intercollegiate athletics, Title IX requires schools to provide men and women enrolled at the institution with equal athletic opportunity to participate. The OCR, as well as courts, primarily use the three-prong test to determine compliance.[353] This section analyzes each prong of the test in relation to NILs.[354]

A. The Relationship between NIL Activity and Equal Athletic Opportunity under Title IX's Three-Prong Test

In order to comply with the tenet of equal opportunity under Title IX, institutions must meet one of the following three prongs: (1) substantial proportionality; (2) a history and continuing practice of expanding sports participation for women; or (3) full and effective accommodation of the athletic interests for women

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opportunity in athletics); *see Cohen*, 991 F.2d at 897 (arguing that the three-prong test determining effective accommodation is the most important test for compliance, because an institution can violate Title IX even if it meets the "financial assistance" and "athletic equivalence" standards).

351. *See infra* Part VI.

352. *See infra* Part VII.

353. *See supra* Part V.C.

354. *See infra* Part VI.A.

enrolled at the schools.[355] Substantial proportionality requires a school's ratio of female athletic participation to be equal to the ratio of female enrollment.[356] For example, if a school has an enrollment rate that is fifty percent female and fifty percent male, the athletic participation rates must be fifty-fifty. Although numerically equal proportionality is ideal, courts have not given adequate guidelines for what level of disparity is acceptable.[357] The OCR generally accepts a "difference of less than five percent as being within the 'safe harbor' of proportionality."[358]

The second prong evaluates whether a school has shown a history and continuing practice of expanding athletic opportunities for women.[359] The benchmark is satisfied if a university can show that it continually expands athletic opportunities in an ongoing effort to meet the needs and interests of women enrolled at the school.[360] Finally, the third prong considers the full and effective accommodation of the athletic interest and abilities of women in a particular sport.[361] Schools must encourage women to participate in athletics by monitoring their interest in certain sports and "fully

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355. *See* Schwarz, *supra* note 10, at 644 (complying with Title IX depends on an institutions ability to meet *only one* prong of the three-prong test).

356. *See id.* ("[A]ssistance should be available on a substantially proportional basis to the number of male and female participants in the institutions athletic program.").

357. *See* Roberts v. Col. State Bd. of Agric., 998 F.2d 824, 830 (10th Cir. 1993) (noting that while "we agree with the district court that a 10.5% disparity between female athletic participation and female undergraduate enrollment is not substantially proportionate," but failing to provide an acceptable level of disparity).

358. *See* Green, *supra* note 296.

359. *See* Schwarz, *supra* note 10, at 644–45 (providing that an institution must be "demonstrably responsive to the developing interest and abilities of" women interested in sports).

360. *See* Cohen v. Brown Univ., 991 F.2d 888, 898 (1st Cir. 1993) ("The second and third parts of the accommodation test recognize that there are circumstances under which, as a practical matter, something short of this proportionality is a satisfactory proxy for gender balance.").

361. *See* Neal v. Bd. of Trustees, 198 F.3d 763, 768–69 (9th Cir. 1999) (noting that in passing Title IX, Congress intended "to remedy discrimination that results from stereotyped notions of women's interests and abilities").

and effectively" accommodating that interest as soon as it arises.[362] The OCR characterizes the third prong as an affirmative effort to engage in student interest, account for ability, and provide for the opportunity to participate in varsity athletics.[363] Predictably, the third prong is often considered to be the most difficult prong to comply with.[364] To satisfy the test, an institution must offer every program for which there is "sufficient interest, ability, and competition to form a team for the underrepresented sex."[365]

It is unclear whether the OCR or courts would choose to analyze an athlete's ability to participate in NIL opportunities under the three-prong test. The three-prong test focuses on expanding and ensuring equal athletic opportunities for both sexes. Whereas NIL arrangements involve expenditures of institutions for athletic-related opportunities as well as an athlete's personal ability to engage in commercial enterprises. Although both involve opportunity, the question is whether it is the same form covered under Title IX. Despite this ambiguity, schools necessarily need to satisfy the component of equal participation to comply with Title IX. Therefore, it is important to analyze whether any of the three-prongs are triggered by NIL activity.

Regarding substantial proportionality, no studies have been conducted on whether intercollegiate NIL opportunities affect female and male enrollment or participation rates. Despite a lack of data, larger universities (Power 5 level) are reporting trends of increased interest from incoming athletes and transfers because of NIL opportunities and donor collectives.[366] Donor collectives have

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362. *See* Schwarz, *supra* note 10, at 645 (describing compliance with the three-prong test).

363. *See* Policy Interpretation, 44 Fed. Reg. 71,412, 71, 418 (Dec. 11, 1979) (providing the third requirement of compliance under the three-prong test).

364. *See* Schwarz, *supra* note 10, at 645 (stating that the wording of the third prong is exceedingly vague).

365. *See* Sorbe, *supra* note 227, at 7 (describing prong three).

366. *See* Ross Dellenger, *Big Money Donors Have Stepped Out of the Shadows to Create 'Chaotic' NIL Market*, SPORTS ILLUSTRATED (May 2, 2022) ("[H]igh-level boosters are privately or publicly using name, image and likeness deals to bankroll their teams, attempting to outbid one another for talent and creating a new arms race in college sports.") [perma.cc/9RN4-9MK4].

replaced the under-the-table recruiting inducement market by outwardly pledging support and resources to athlete's who attend certain institutions, like Miami, Texas A&M, Tennessee, USC, and Texas.[367] NIL deals are used to entice player movement.[368] Overall though, there is a lack of data on whether *more* players are being induced to enroll and whether schools are experiencing an imbalance in the enrollment and participation of male and female athletes. However, even if an institution were to receive an increase in male athletes, due to the promotional services and benefits provided for NIL deals, institutions could still manage to comply with the first prong if (1) the disparity in participation remains within two to five percent (upwards of less than ten percent) of enrollment rates; [369] or (2) the institution complies with either of the following two prongs.

Upon Title IX's passing, most schools looked to the second prong for compliance.[370] Today, few universities regularly expand their women's athletic programs. [371] Instead, as the cost of athletics increases, schools are more likely to *decrease* their program sizes to shave costs.[372] In light of this, it is unlikely that NILs will substantially impact whether a school is or is not already in

367. *See* Richard Johnson, *Year 1 of NIL Brought Curveballs, Collectives and Chaos. Now What?,* SPORTS ILLUSTRATED (Jul. 12, 2022) (noting that schools that do not have a collective are behind the curve in the NIL arms race) [perma.cc/M2D8-3XXE].

368. *Id.* ("If there is to be any regulation in the space, the likeliest avenue would be something to curtail collectives operating recruiting inducements.").

369. *See* Sorbe, *supra* note 227, at 6 (suggesting that determination for prong one is made on a case-by-case basis, but some professionals recommend keeping the disparity within two to five percentage points).

370. *See* Schwarz, *supra* note 10, at 645 (noting that because every school was experiencing an exponential increase in women's athletic programs after Title IX, almost every school could point to evidence of a continuing practice of expansion).

371. *See* Cohen v. Brown Univ., 991 F.2d 888, 898 (1st Cir. 1993) ("[T]he recent boom in Title IX suits suggests that, in an era of fiscal austerity, few universities are prone to expand athletic opportunities.").

372. *See* Schwarz, *supra* note 10, at 652 ("[C]ourts have repeatedly held that schools may comply with Title IX by cutting teams if they do not want to or cannot spend infinite amounts of money on their athletic programs in pursuit of satisfying another prong of the test.").

compliance with this prong.[373] If anything, NILs might improve a schools' chance to comply with the second prong due to the amount of revenue NIL deals might provide to certain programs.[374] For example, if NIL opportunities incentivize athletes to enroll at a certain university, the increased participation rate could provide additional revenue to distribute to other women's programs or motivate the university to maintain compliance under prong one by increasing opportunities for women to participate. Additionally, if NILs have a beneficial impact on women's athletics, schools might begin to provide more women's programs because athletes with NIL deals can afford more of the cost.[375] Ironically, unequal economic opportunities created by NILs have the potential to either have a neutral effect on Title IX compliance under the second prong, or a positive effect: ensuring compliance.

The third prong considers the full and effective accommodation of the athletic interest and abilities of women in a particular sport.[376] It is likely that prong three represents the most important mechanism for determining compliance with Title IX in the context of NILs. Female athletes could argue that their interests and abilities are not being fully and effectively accommodated due to disproportionate institutional engagement.[377] However, there is no guidance over whether accommodation means more than just the opportunity to participate in a varsity athletic sport. Under the three-prong test, if a sports program is created or maintained sufficient to women's interest in the sport, the existence of the program could satisfy prong three. The provision's vagueness does not provide guidance

373. *See* Sorbe, *supra* note 227, at 7 ("Today, only six percent of collegiate programs are meeting test two.").

374. *See* Johnson, *supra* note 367 ("Collectives, through their outspoken sponsors and big money amounts, have seized the headlines and by perception have come to define what NIL is to the public because football drives the bus in college sports.").

375. *See supra* Part IV.C.

376. *See* Green, *supra* note 296.

377. *See, e.g.*, Johnson, *supra* note 367 ("A recently published NCAA survey of nearly 10,000 athletes across all three divisions found that 49% of athletes needed resources on those topics and 40% needed help navigating NIL. As you might expect, well-resourced schools are doing just fine.").

on what an institution must do beyond creating the program. However, in the chance that a university fails to meet the standards of accommodation under prong three, they can remain in compliance with Title IX if they satisfy either the first or the second prong.

Ultimately, the three-prong test focuses on equal opportunity to *participate* in intercollegiate athletics rather than athletics-related activity.[378] As provided above, NIL activity—either from the perspective of institutional spending, or an athlete's ability to engage in NIL deals—will either have no substantial effect on compliance with any of the three prongs; or it will increase the likelihood of compliance under the second prong. Given that compliance depends on meeting only *one* of the prongs, it is likely that universities will maintain compliance with Title IX even if male and female athletes are provided with disproportionate resources and NIL opportunities.

The next section will discuss whether the other two components of Title IX compliance, equal athletic scholarship aid or benefits, will play a larger role in the future of Title IX regulations.

VII. The Future of Intercollegiate Athletics

Title IX's requirement of the equal opportunity to participate in college sports historically leveled the playing field for college athletes.[379] The concept of equal opportunity today goes beyond athletic participation. In the context of NILs, equality involves equal economic opportunities. If men's sports continue to dominate NIL activity and institutional expenditures, "men participating in intercollegiate athletics [will receive] greater advantages than women."[380] By increasing institutional marketing expenditures, expanding spectator accommodations, and providing more opportunities for self-promotion, higher profile athletes can earn

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378. *See supra* Part V.C.

379. *See* Sorbe, *supra* note 227, at 25 (describing the past benefits of Title IX on intercollegiate athletics).

380. *Id.*

greater financial rewards.[381] Consequently, certain athletes (e.g., female or Black female athletes) will be adversely affected by unequal economic opportunities if college sports become driven by revenue generation and profit margins.[382]

This Note suggests a school's compliance with the three-prong test for equal athletic opportunity will likely not be affected by NIL activity or institutional spending.[383] Therefore, the following sections include recommendations for how to create a future of college sports that ensures equal economic opportunity.

A. Contemporary Guidance on Measuring Economic Expenditures under Title IX's Requirement of Equitable "Publicity"

Equal athletic participation is only one of three components of Title IX compliance.[384] The law also requires institutions to provide equivalent benefits, opportunities, and treatment to athletic participants of both sexes.[385] The OCR, in their 1975 Regulation, provided a non-exhaustive list of factors the agency would consider in evaluating equal opportunity under equal treatment.[386] Most of the factors concern equal facilities, equipment and supplies, and training.[387] Relevant to NILs is the factor of publicity, marketing, and media services.[388] The specific compliance factors include sports information personnel, sports program-related publications,

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381. *See id.*; *see also* Johnson, *supra* note 367 ("Two women athletes from a school in Illinois say their schools haven't really provided them with any resources to navigate NIL and some of the things associated with it, including taxes and financial literacy.").

382. *See e.g.,* Ariail *supra* note 1 ("[I]t will be relevant if NIL contracts reveal the continued existence of a racial hierarchy, where an athlete's skin color, as well as her perceived gender conformity, is a significant factor in the valuation of her individual brand.").

383. *See supra* Part VI.A.

384. *See supra* Part V.B.

385. *See* Schwarz, *supra* note 10, at 643 (describing the 1979 Policy Interpretation).

386. *See* Policy Interpretation, 44 Fed. Reg. 71, 412 (Dec. 11, 1979) (listing the non-exhaustive factors).

387. *See id.* (providing the factors to consider when determining equitable treatment).

388. *See id.* (explaining § 106.41(c)(10)).

and other publicity resources for the athletics program.[389] In the past, typical red flags included "greater efforts to publicize [male athletes] to media outlets, more elaborate game programs for [men's] teams, or more extensive publicity events" at men's games like bands and halftime entertainment.[390] However, publicity has never been the aim of any major Title IX lawsuits.[391] Therefore, there are few, if any, secondary legislative materials, or examples of judicial interpretations on the factor.

The current NIL marketplace value of male and female athletes "reflects the historically under-resourced treatment of women's sports with regard to the institution's promotion, publicity, and recruiting efforts."[392] It is imperative that colleges and universities assess whether they are providing an equal proportion of services and benefits to male and female athletes.[393] This assessment should consider promotional resources, general education on brand-building and NIL management,[394] and NIL opportunities.[395]

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389. *See* Lee Green, *Title IX Compliance – Part II: The Eleven Areas of Other Athletics Benefits*, NAT'L FED'N STATE HIGH SCH. ASS'NS (Mar. 14, 2022) (providing the laundry list of factors the OCR considers for equitable treatment of athletics and benefits) [perma.cc/DWZ5-AWJX].

390. *Id.*

391. *See id.* (arguing that claims against the publicity factor have not been seen at the intercollegiate level because student-athletes have never had a right to the compensation that marketing or publicity now provides to certain athletes).

392. *See NILs and Title IX Executive Summary*, THE DRAKE GRP. (Oct. 12, 2021) (declaring that schools must fix their promotion, publicity, and recruiting inequities critical to the NIL monetization for the success of college female athletes and must not use third parties to evade their Title IX obligations) [perma.cc/3KNX-BD4A].

393. *See id.* ("Colleges and universities must assess whether they are providing an equal percentage of male and female athletes (not teams) with equal publicity and promotion benefits and must undertake equal recruiting efforts.").

394. *See id.* (expressing concern that universities are providing education on brand-building, financial literacy, or information related to applicable NCAA rules to athletes in a potentially disproportionate manner).

395. *See id.* (stating that athletes must be treated equally if the institution (a) introduces athletes to prospective third-party NIL sponsors; (b) contributes or receives any consideration from the NIL agreement; (c) enters into a co-licensing or group licensing agreement with athletes; or (d) reviews, advises, or discusses an athlete's NIL contract).

To facilitate schools in this determination, it will be necessary for OCR to release contemporary guidance on equitable treatment in light of NIL spending and opportunities. This Note suggests the OCR should adopt a proportional requirement for the following areas of institutional spending: (1) the quality and availability of sports information personnel who oversee NIL deals or NIL education; (2) access to publicity resources from booster collectives, NIL partnerships, or marketing departments; and (3) quantity and quality of publications and promotional devices.[396]

Under the first factor, the OCR could consider (a) the number of personnel and administrators hired to facilitate and educate NIL deals; (b) the quality of the services provided to the men's and women's teams; and (c) whether the program initiatives cover every program at the university i.e., whether each student-athlete has access to communications or sports information personnel. Currently, the "highest-ranking communications or sports information employee is usually assigned to the football and/or men's basketball" programs.[397] Under new guidance, schools would be required to equalize the services provided to men's and women's teams.

Under the second factor, a university would not need to provide the same benefits to male and female athletes. Instead, the promotion and marketing would simply need to be equitable.[398] As this Note has stated, universities are currently increasing their NIL marketing services by establishing contracts with NIL-specific agencies, as well as implementing multi-step NIL programs. The second factor would require universities to have equivalent efforts to "publicize, promote, and market" men's programs and women's programs.[399]

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396. *See* Dosh, *supra* note 16 (expressing a potential analysis of equitable treatment in the context of NIL-specific program initiatives).

397. *See id.* (researching several departments, such as UConn, Louisville, University of Michigan, University of Oregon, and the University of Kansas to determine that each institution designates the highest-ranking communications official to football and men's basketball).

398. *See id.* ("Title IX policy interpretations clearly point to the need for equitable promotion/marketing for both men's and women's programs.").

399. *Id.* (describing a potential third factor for claims under "publicity").

Compliance under the third factor would involve a determination of promotional devices for student-athletes. For example, it would include an analysis of whether athletes were provided with equivalent opportunities to participate in media days, utilize university publications, and provided with available software—like UNC's INFCLR program—to cultivate their social media platforms.[400] The third factor would determine whether the programs provide equivalent benefits to male and female athletes.[401]

This three-step analysis of publicity is unprecedented, but so is the issue of unequal economic opportunity for student-athletes. Additional guidance on how colleges can provide services equitably to male and female athletes is required for Title IX to remain effective in the NIL era of college sports.

VIII. Conclusion

The NCAA's decision to suspend its 115-year prohibition on NIL compensation opened the doors for student-athletes to benefit financially from a diverse array of NIL arrangements. The NCAA's decision was a long-time coming. Student-athletes have generated profits for the NCAA at the expense of their time, sweat, and physical bodies for over a century without receiving compensation for their efforts.[402] Despite the incredible opportunity these deals provide, the commercialization of students exacerbates already present economic inequities between male and female athletic programs, and male and female athletes.[403] Today, athletic

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400. *See, e.g.*, *North Carolina Going All-In on INFLCR on NIL+ Tech*, INFLCR, (Sept. 10, 2020) (providing details on UNC's partnership with an NIL program and matchmaker) [perma.cc/5V7P-PVSW].

401. *See id.* ("That would mean looking at the size of publications, number of pages, quality of paper, color [versus] Black and white and other such considerations.").

402. *See* Fresh, *supra* note 29, at 165 (stating that the NCAA funnels billions of dollars towards paying millionaire coaches, building upscale stadiums, and funding television ads, while not paying the athletes that bring in the crowds and provide their labor).

403. *See* Sorbe, *supra* note 227, at 26 (providing that the current market and valuation of spectator appeal reinforces existing gender inequities by funneling more resources to revenue-generating men's sports).

scholarship aid and athletic benefits fail to comply with Title IX at every level of college sports.[404] NIL compensation will heighten this disparity.[405] Thus, college sports are at an inflection point in Title IX policymaking: will policymakers value the need to ensure equal economic opportunity amongst student-athletes or will the "commercialization and athletics arms races continue to swallow the rule of gender equity in athletics?"[406] If the NIL marketplace is left unguided and unregulated, the economic gap between male and female student-athletes will only widen. Therefore, additional guidance on equitable economic opportunity is necessary to support the continued efficacy of Title IX in the new NIL era of college sports.[407]

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404. *See* Vanesha McGee, *Title IX Funding Gap Widens for Women's Sports: NCAA Report*, BEST COLLS. (Aug. 19, 2022) ("Women receive 40% or less of college athletics funding, according to the NCAA's study, Division I athletic departments fund men's sports twice at a rate of women's.") [perma.cc/3N5C-TZ5J]; *see also* Brooke Kruhm, *How Can Athletes Afford the School of Their Dreams*, ASM SCHOLARSHIPS (Apr. 27, 2022) (providing that male athlete's receive between 58–88% of all athletic scholarships despite the fact that women make up 54% of the student body) [perma.cc/35S8-T6LX]; *see also* Kenny Jacob et al, *These 20 Universities Stiffed Female Athletes the Most on Scholarships. We Asked Them Why*, USA TODAY (Aug. 17, 2022) (stating that of the 107 public football schools in the U.S., only 32 complied with Title IX's scholarship aid requirement; two of which, Boise State University and Georgia State University, openly admitted to being out of compliance) [perma.cc/A8JH-P96W].

405. *See NIL Insights July 1, 2021, to November 30, 2022*, *supra* note 49 (providing that 74.3% of all NIL compensation, expected to reach over $1.4 billion in July 2023, is paid to male athletes).

406. *Id.*

407. *See, e.g.*, *NILs and Title IX Executive Summary*, *supra* note 392 ("There is a distinction between the valuation of media rights or NIL agreements that are dictated by the marketplace and not controlled by the institution and the institution's efforts to provide equal publicity, promotion, recruiting, and exposure" to male and female athletes.").