EQUITY IMPLICATIONS OF PAYING COLLEGE ATHLETES: A TITLE IX ANALYSIS

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Abstract: After fifty years of Title IX, the gap in participation rates between men and women in college athletics has closed significantly. In 1982, women comprised only twenty-eight percent of all National Collegiate Athletic Association (NCAA) college athletes. In 2020, they made up forty-four percent. Despite the progress in participation rates, a substantial gap in resources allocated to men's and women's sports continues to exist. On average, NCAA colleges spend more than twice as much on men's sports as they do on women's. This gap is even greater at schools in the Football Bowl Subdivision (FBS), the most elite level of college athletics. The median FBS institution spends almost three times more on men's athletics than on women's.

This situation may get even worse if colleges are allowed to start paying their athletes, which appears a realistic possibility in the not-too-distant future. Justice Kavanaugh's concurrence in the 2021 Supreme Court decision *NCAA v. Alston* sent a strong signal that prohibitions on paying college athletes most likely violate federal antitrust law. More recently, some states have introduced legislation that would require colleges to compensate athletes in sports generating positive net income for their schools. Although this requirement could rectify the serious inequity of colleges making tens of millions of dollars from their athletes' labor without those athletes sharing in the financial benefits they create, it could also widen the gap in resources colleges invest in men's and women's sports. With very rare exceptions, football and men's basketball are the only college sports that produce more revenue than expenses. Consequently, unless Title IX requires otherwise, the difference in the amount of money that colleges invest in men's and women's sports could grow significantly if those colleges are allowed to compensate male athletes without compensating female athletes.

This Article provides a detailed analysis of whether the current Title IX regulations require equal payments to male and female athletes. It concludes that they do not. Of course, the controlling Title IX regulations were drafted at a time when paying college athletes was not even contemplated, and therefore this result does not comport with the purpose or spirit of Title IX. This Article goes on to argue that the Department of Education should amend the Title IX regulations to

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treat payments to college athletes the same as scholarships. This amendment would require male and female athletes to receive proportionately equal payments for their athletic services. Making this change to ensure equitable treatment of all athletes will advance the purpose of Title IX and help to combat the marketplace bias that hampers the economic growth of women's sports.

INTRODUCTION

College sports are in a period of tremendous change. Since 2015, the college athletics landscape has seen, among other things: an effort by a major Division I football team to unionize;[1] a rule change allowing athletes to reap financial benefits from the use of their name, image, and likeness;[2] the emerging debate over transgender athletes;[3] and the reshuffling of the Power Five conferences, as schools seek to maximize both competition and revenue.[4] Amid all these developments, the Supreme Court's 2021 decision in *NCAA v. Alston*, holding that the National Collegiate Athletic Association (NCAA) violated antitrust law by limiting the amount of education-related benefits schools could grant their athletes, seems relatively minor.[5] After all, the upshot from the decision was that schools may now provide athletes with additional education-related benefits, like computers, science equipment, and musical instruments, along with the costs for tuition, room, and board that were already al-

[1] *See* Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players' Union Bid*, N.Y. TIMES (Aug. 17, 2015), https://www.nytimes.com/2015/08/18/sports/ncaafootball/nlrb-says-northwestern-football-players-cannot-unionize.html [https://perma.cc/4XP4-4TSW] (detailing the Northwestern University football team's attempt to unionize in order to receive bargaining and decision-making power over their safety and health care).

[2] *See* Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx [https://perma.cc/PF54-GYGE] (reporting that the NCAA implemented an interim policy that allowed student athletes to use their "name, image and likeness" to their advantage, a reversal of the NCAA's prior policy that prohibited athletes to benefit from such usage).

[3] *See* Billy Witz, *As Lia Thomas Swims, Debate About Transgender Athletes Swirls*, N.Y. TIMES (Jan. 24, 2022), https://www.nytimes.com/2022/01/24/sports/lia-thomas-transgender-swimmer.html [https://perma.cc/2T7B-Z8AU] (showing how transgender athletes, particularly transgender women who are successful at athletic events, have encountered increased focus and criticism, despite transgender athletes comprising a minor portion of the total number of NCAA athletes).

[4] *See* Alan Blinder, *Power 5? College Sports May Soon Be Dominated by a Mighty 2.,* N.Y. TIMES, https://www.nytimes.com/2022/07/01/sports/power-5-college-sports.html [https://perma.cc/23QQ-RRAB] (July 30, 2022) (highlighting how the decision to move several large football programs into just two different conferences may have significant and unprecedented benefit for the Big Ten and the Southeastern Conference, at the expense of smaller conferences).

[5] 141 S. Ct. 2141, 2166 (2021); *see also In re* NCAA Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1109 (N.D. Cal. 2019) (determining that the NCAA violated the Sherman Act by exercising significant power over college sports and minimizing competition).

lowed.[6] Despite the somewhat limited holding of *Alston*, the case may ultimately prove to be the precursor to the biggest change of all in college sports: a transition to pay-for-play athletics.

Under a pay-for-play system, colleges and universities would be permitted to make direct payments to athletes for their athletic services, with those payments not linked in any way to the athletes' education.[7] Although Justice Gorsuch's unanimous opinion in *Alston* did not expressly address the pay-for-play issue, Justice Kavanaugh, in his concurring opinion, strongly intimated that such a system is a likely future step for college athletics, stating:

> [I]t is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes. And if that asserted justification is unavailing, it is not clear how the NCAA can legally defend its remaining compensation rules.[8]

Justice Kavanaugh's skepticism over the NCAA's justification for prohibiting the direct payment of athletes recognized the very real possibility that college athletics, at least for the revenue-generating sports of football and men's basketball, is headed toward a pay-for-play system.[9] In the immediate wake of *Alston*, the NCAA took the first step in that direction by changing its rules to allow student athletes to receive third-party payments for the use of their name, image, and likeness.[10] Moreover, at least two states have now proposed legisla-

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[6] *See Alston*, 141 S. Ct. at 2150 (citing O'Bannon v. NCAA, 802 F.3d 1049, 1054–55 (9th Cir. 2015)) (showing that new developments in NCAA practices allowed for provision of additional educational-related benefits, in addition to scholarship awards).

[7] *See* THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES: PROCEEDINGS OF THE FIRST ANNUAL MEETING 34 (1906) (prohibiting a student athlete from "represent[ing] a College or University in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession"); NCAA, DIVISION I 2023-24 MANUAL 2 (2023), https://web3.ncaa.org/lsdbi/reports/getReport/90008 [https://perma.cc/YZF7-RMF5] (demonstrating that the prohibition on colleges from paying student athletes for playing sports continues today).

[8] *Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring).

[9] *See id.* (raising concerns about compensation structures for college athletes that may emerge if the NCAA must allow for student athlete compensation in the future).

[10] *See* NCAA, INTERIM NIL POLICY 1 (2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf [https://perma.cc/4HHW-ZPMJ] (implementing a new policy in 2021 that permits student athletes to participate in "NIL [name, image, and likeness] activity," in both states with and without preexisting laws or regulations governing NIL usage, without such activity impacting an athlete's eligibility for athletic sport participation and eligibility for scholarships). Further, the NCAA's new policy allowed for student athletes to engage with professional service providers to promote and implement their NIL activity. *Id.*

tion that would mandate revenue sharing between universities and athletes.[11] Pay for play appears to be just over the horizon.

Many commentators consider a free market for paying players the only equitable system for college athletics, given the amount of money that other stakeholders involved in college sports, particularly coaches, are making.[12] But moving to a free-market, pay-for-play system poses significant legal and practical consequences to the NCAA, colleges, and players, including tax, worker's compensation, labor, and employment law considerations.[13] In addition, a pay-for-play system could further shift the relationship between colleges and their athletes from the educational toward the commercial. Ideally, colleges would focus primarily on advancing the academic development of their students, and athletes would matriculate for educational purposes. Introducing a free-market, pay-for-play system would mitigate the unjustifiable exploitation that now characterizes the relationship between colleges and athletes in revenue-producing sports, but it would also further emphasize the focus on the commercial, rather than the educational, nature of the relationship between colleges and their revenue-producing athletes.

Conceding that it may be unrealistic to "reboot" the relationship between colleges and athletes in big-time sports programs given the amount of money at stake, this Article analyzes one of the significant factors in moving to a market-based, pay-for-play system of college athletics: the application of Title IX. Enacted in 1972, Title IX prohibits discrimination on the basis of sex in education programs and activities that receive federal funds.[14] This extends to college athletic programs.[15] To that end, the regulations enacted under Title IX

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[11] *See* S. 1401, 2022 Leg., Reg. Sess. (Cal. 2022) (proposing that universities be required to create "degree completion fund[s]" for student athletes, where at the completion of their education, athletes would receive the funds, the value of which partially depends on how much revenue their sport generated); S. 306, 125th Gen. Assemb., Reg. Sess. (S.C. 2023) (proposing a requirement for universities to create trust funds for their student athletes, where the gross revenue collegiate sports would serve as funding for the trust fund).

[12] *See, e.g.*, Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/ [https://perma.cc/T3MN-GC9X] (arguing that it is necessary to compensate student athletes to give them adequate voice and power in decision-making regarding their academic performance expectations and compensation).

[13] *See, e.g.*, Marc Edelman, *From Student-Athletes to Employee-Athletes: Why a "Pay for Play" Model of College Sports Would Not Necessarily Make Educational Scholarships Taxable*, 58 B.C. L. REV. 1137, 1161–68 (2017) (discussing ways for colleges to continue paying student athletes without risking their exemption from federal taxes).

[14] *See* 20 U.S.C. § 1681(a) (codifying a prohibition on sex-based educational opportunity disparities, discrimination, and denial of benefits).

[15] *See* Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687(2)(A) (clarifying that Title IX applies to all of higher education institutions' activities, thus including college athletic programs).

require colleges receiving federal funding to give both men and women equal opportunity when it comes to athletics.[16]

Does this mean that if a college pays its male athletes in revenue-producing sports, such as football and men's basketball, then Title IX mandates equal payments to female athletes in non-revenue-producing sports? This Article concludes that current guidance under Title IX does not require equal payments for male and female athletes.[17] The analysis of this issue is complicated and less clear than desirable, however, because regulators drafted the current guidance at a time when paying college athletes was strictly prohibited and simply not contemplated.[18] As a result, Title IX regulations and other authorities presently available do not expressly address the treatment of non-education-related payments to athletes.[19]

Nevertheless, the stronger argument under existing guidance is that Title IX does not require equal payments to male and female athletes because direct payments would most likely establish an employment relationship. Title IX does not require equal payments for employment-related services, even those in the area of athletics.[20] The payment of college coaches provides a clear illustration.[21] Title IX does not require that the male coach of the men's basketball team and the female coach of the women's basketball team receive the same salary.[22] The legal justification for permitting disparate payments to the two coaches is the difference in job responsibilities, including the different ex-

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[16] *See* 34 C.F.R. § 106.41(c) (2023) (setting forth different factors to consider in determining the presence of equal athletic opportunity, such as consideration of different interests, provision of proper resources, training and mentorship, and equitable access to facilities and services, among others).

[17] *See infra* notes 117–156 and accompanying text.

[18] *See* THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES: PROCEEDINGS OF THE FIRST ANNUAL MEETING, *supra* note 7, at 34 (detailing the original By-Laws of the Intercollegiate Athletic Association, which has required college athletes to be amateurs since 1906).

[19] *See* 34 C.F.R. § 106 (failing to address whether colleges or universities are permitted to pay athletes when such payments are not related to the athletes' educations); *see also* Title IX of the Education Amendments of 1972, 44 Fed. Reg. 71413, 71414 (Dec. 11, 1979) (codified at 45 C.F.R. pt. 86) (addressing how universities could comply with Title IX regarding scholarship awards to student athletes, but not addressing compliance with Title IX regarding non-educated-related athlete payments).

[20] *See generally* U.S. DEP'T OF EDUC., OFF. FOR C.R., NONDISCRIMINATION IN EMPLOYMENT PRACTICES IN EDUCATION (2020), https://www2.ed.gov/about/offices/list/ocr/docs/hq53e8.html [https://perma.cc/9BSL-GE2N] (outlining how at federally funded institutions, employers are only required to ensure that there are no pay discrepancies because of someone's sex, but need not provide equal compensation).

[21] *See id.* (demonstrating that Title IX does not mandate universities to pay college coaches equally).

[22] *See id.* (prohibiting employers from creating and implementing practices that cause pay discrepancies because of differences in sex).

pectations for revenue production between men's and women's programs.[23] Applying a similar analysis to the payment of athletes, Title IX would not require that men's and women's basketball players receive the same salary if their college began to pay its athletes.

But what the law currently requires is not necessarily the same as what the law *should* require or what colleges *should* do. It is noteworthy that this issue is coming to the forefront of public attention around the fiftieth anniversary of Title IX.[24] Title IX has had a substantially positive impact on the development of women's sports and has helped close the gap in opportunities for women to participate in athletics.[25] But even with the achievement of Title IX in equalizing participation opportunities, significant disparities persist in the level of investment in women's sports and the revenue that women's sports generate as compared to men's.[26] These continuing disparities are vestiges of the long history of discrimination against women's sports.[27] And although Title

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[23] *See* Alicia Jessop, *The 40th Anniversary of Title IX: The 21st Century Issue of College Coaches' Salaries*, FORBES (June 23, 2012), https://www.forbes.com/sites/aliciajessop/2012/06/23/the-40th-anniversary-of-title-ix-the-21st-century-issue-of-college-coaches-salaries/?sh=1df23b8779ac [https://perma.cc/GEC6-TD9U] (comparing the salaries of men's and women's athletic team coaches in the major NCAA conferences and showing how coaches for men's sports consistently made more money than women's coaches, partially because of the high revenue that certain men's sports, primarily basketball and football, generate for universities).

[24] *See* Remy Tumin, *Fifty Years On, Title IX's Legacy Includes Its Durability*, N.Y. TIMES (June 23, 2022), https://www.nytimes.com/2022/06/23/sports/title-ix-anniversary.html [https://perma.cc/X3PU-2G95] (highlighting the substantial impact that Title IX has had on women's educational opportunities, including a significant increase in sports opportunities for adolescent girls following the bill's passage).

[25] *See id.* (crediting Title IX for expanding athletic opportunities for young girls); *see also Title IX and the Rise of Female Athletes in America*, WOMEN'S SPORTS FOUND. (Sept. 2, 2016), https://www.womenssportsfoundation.org/education/title-ix-and-the-rise-of-female-athletes-in-america/ [https://perma.cc/UB5K-GERK] (showing how presently, around 40% of young girls play sports, as compared to only nearly 4% who played sports before Title IX took effect). At the high school level, about 60% of female teenagers play sports. *See 50 Years of Title IX*, WOMEN'S SPORTS FOUND. (2022), https://www.womenssportsfoundation.org/wp-content/uploads/2022/04/FINAL6_WSF-Title-IX-Infographic-2022.pdf [https://perma.cc/A6MH-M6S3] (attributing the increased participation in high school and collegiate sports to Title IX).

[26] *See* AMY WILSON, TITLE IX 50TH ANNIVERSARY: THE STATE OF WOMEN IN COLLEGE SPORTS 27 (2022), https://s3.amazonaws.com/ncaaorg/inclusion/titleix/2022_State_of_Women_in_College_Sports_Report.pdf [https://perma.cc/2VRZ-NXP9] (showing how, of the total resources that NCAA-affiliated colleges and universities spent on athletics between 2018–19, 44% was invested in men's sports, whereas only 21% of resources was invested in women's sports). The NCAA noted that discrepancies in investment based on gender are most prominent in Division I athletic programs, particularly those with football programs. *Id.* at 27–28; *see also* KAPLAN HECKER & FINK LLP, NCAA EXTERNAL GENDER EQUITY REVIEW: PHASE I: BASKETBALL CHAMPIONSHIPS 8–9 (2021), https://kaplanhecker.app.box.com/s/6fpd51gxk9ki78f8vbhqcqh0b0o95oxq [https://perma.cc/87ZH-MY6N] [hereinafter GENDER EQUITY REVIEW I] (demonstrating how major television broadcasters pay the NCAA less money to air women's sports, as compared to men's sports).

[27] *See generally* WILSON, *supra* note 26.

IX has made advances in some areas, a marketplace bias against women's sports continues to exist.[28] To ameliorate this persistent bias and the resulting revenue disparities between men's and women's sports, this Article argues that the regulations under Title IX should be amended to require proportionately equal payments to male and female athletes, if colleges begin to pay their athletes.[29] This is the system currently in place for athletic scholarships.[30] This Article rejects the argument that the economic marketplace should determine who gets paid if colleges begin to make pay-for-play payments to their athletes. Issues of fairness and equity should outweigh purely financial interests or market considerations when it comes to college athletics.

This Article is not the first to examine the issue of Title IX's impact on the payment of college athletes.[31] It is the first, however, to provide a detailed legal analysis of why the current regulations under Title IX do not require equal pay-for-play payments, while at the same time suggesting regulatory changes to address the discrimination that has persistently hindered the revenue-producing potential of women's sports. Part I of this Article examines both the progress achieved and the disparities that continue to affect women's sports after fifty years of Title IX.[32] Part II provides an in-depth analysis of whether the current guidance under Title IX requires equal payments from colleges to male and female athletes.[33] Part III suggests regulatory changes that would require equal payments to male and female athletes as a means of addressing the discrimination that still prevents women's sports from reaching their full potential in the athletic marketplace.[34]

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[28] *See* GENDER EQUITY REVIEW I, *supra* note 26, at 8–9 (detailing how the NCAA perpetuates a marketplace bias against women's sports by undervaluing their commercial worth and structuring broadcasting contracts to exclusively benefit men's sports).

[29] *See infra* notes 364–410 and accompanying text.

[30] *See* U.S. DEP'T OF EDUC., OFF. FOR C.R., REQUIREMENTS UNDER TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 (2020), https://www2.ed.gov/print/about/offices/list/ocr/docs/interath.html [https://perma.cc/GL6C-MVNA] (requiring federally funded higher education institutions to grant scholarships on a basis proportionately equal to rates of participation in men's and women's sports).

[31] *See, e.g.*, Jeff K. Brown, *Compensation for the Student-Athlete: Preservation of Amateurism*, 5 KAN. J.L. & PUB. POL'Y 147, 151–52 (1996) (exploring the implications of Title IX regulations on a system where colleges could pay student athletes).

[32] *See infra* notes 35–100 and accompanying text.

[33] *See infra* notes 101–363 and accompanying text.

[34] *See infra* notes 364–410 and accompanying text.

I. PROGRESS UNDER TITLE IX, YET INEQUALITIES PERSIST

Title IX has had a major impact on the level of participation in women's sports over the statute's fifty-year history.[35] At the college level, women's participation has increased substantially since Congress enacted the statute in 1972.[36] NCAA records indicate that approximately thirty thousand women participated in college sports in 1971–72, including recreational sports.[37] By 2020–21, the number of women participating in competitive NCAA sports (i.e., not including recreational sports) increased to slightly more than 219,000, a 631% increase from 1971.[38] The number of women participating in college sports in 1971 was just 18% the number of male participants.[39] In 2021, it was 79%.[40] Even with this progress, however, women's participation rates in col-

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[35] *See* WILSON, *supra* note 26, at 15 (showing a steady increase, following the enactment of Title IX, in female participation in high school sports). The National Federation of State High School Associations reported that from 2018–19, 3,402,733 girls participated in sports. *See id.* (presenting statistics from 2018–19 as the most recent years for which comparable data are available from the National Federation of State High School Associations, due to the COVID-19 pandemic).

[36] *See id.* at 17 (highlighting how since the enactment of Title IX in 1972, there has been an increase in opportunities for women to participate in championship sports in the NCAA).

[37] *See* NCAA, NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 227 (2021), https://ncaaorg.s3.amazonaws.com/research/sportpart/2021RES_SportsSponsorshipParticipationRatesReport.pdf [https://perma.cc/PL63-PZAX] (showing that from 1971–72, there were 29,977 women involved in college sports). That same year, over 170,000 men participated in college sports. *See id.* The NCAA did not keep detailed annual statistics on sports participation until 1981. *See id.* at 4 (stating that prior to 1981, the NCAA only gathered participation statistics every five years). This figure also includes participants in recreational sports. *See id.* (explaining that prior to 1981, the NCAA included recreational sports in its reports). It is still useful, however, in providing a historical context for the level of women's participation in college sports. In 1981–82, the first year that the NCAA kept detailed statistics, approximately 74,000 women participated in NCAA sports. *Id.* at 8. To compare, just under 170,000 men participated in NCAA sports during that same time period. *Id.* at 7.

[38] *See id.* at 86, 227 (showing how 219,177 girls played sports from 2020–21, whereas only 29,977 girls played college sports from 1971–72, including recreational programs). Approximately 279,000 men participated in NCAA sports in 2020–21. *See id.* at 85 (showing how 278,988 men played college sports during the time period). Girls' participation in high school sports also increased significantly with the enactment of Title IX. In 1971–72, before Title IX, approximately 294,000 girls participated in high school sports. NAT'L FED'N OF STATE HIGH SCH. ASS'NS, 2018–19 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY 54 (2019), https://www.nfhs.org/media/1020412/2018-19_participation_survey.pdf [https://perma.cc/X2ZD-8NS7] (presenting data on girl's, boy's, and total participation rates in sports). In 2018–19, that number increased to more than 3.4 million girls. *Id.*

[39] *See* NCAA, *supra* note 37, at 227 (showing the gender discrepancy in participation rates in collegiate sports from 1971–72).

[40] *See id.* at 85–86 (showing how the gender discrepancies in collegiate sports participation narrowed by 2021, with about 219,000 women participating in sports as compared to about 279,000 men). Similar increases in girls' participation rates also occurred at the high school level. In 1971, the number of girls participating in high school sports amounted to only 8% of the number of boys participating. Neil Paine, *What 50 Years of Title IX Has—and Hasn't—Accomplished*, FIVETHIRTYEIGHT (June 1, 2022), https://fivethirtyeight.com/features/paine-title-ix/ [https://perma.cc/JL38-QRKQ]. By 2019, that number had risen to 75%, marking the progress in gender equality in sports since the passage of Title IX. *Id.*

lege athletics still lag behind men's participation rates.[41] In NCAA schools, the total enrollment of undergraduate students is 10% more women than men.[42] Nevertheless, women make up just under 44% of all NCAA athletes.[43] Several factors may influence the proportionately low participation rate of women in college athletics, including a historical emphasis on men's rather than women's sports.[44] Whatever the reason, the figures indicate that great progress has been made, but women still have not achieved full parity with men in athletic participation levels.[45]

Of course, participation rates are not the only metric of equality. Title IX has been much less effective at equalizing investments in women's sports.[46] As Part II explains, the regulations under Title IX require colleges to award athletic scholarships "in proportion to the number of students of each sex participating in . . . intercollegiate athletics."[47] To that end, athletic scholarship funding is relatively close between men and women.[48] At the NCAA Division I level, female athletes receive eighty-eight percent of the total scholarship funding provided to male athletes.[49] This mirrors the participation rate of female athletes at Division I schools compared to male athletes.[50]

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[41] *See* NCAA, *supra* note 37, at 85–86 (demonstrating how despite significant progress in participation rates, there are currently still fewer women participating in college sports than men); *see also* Paine, *supra* note 40 (noting that there are still fewer girls participating in high school sports than boys).

[42] *See* WILSON, *supra* note 26, at 17 (reporting how at NCAA-participating schools, women comprise about 55% of the student body, whereas men comprise about 45% of the student body).

[43] *See id.* (showing how despite higher female undergraduate enrollment, women still comprise only about 44% of participation rates in collegiate athletics).

[44] *See, e.g.*, Paine, *supra* note 40 (demonstrating that prior to Title IX's enactment, there were considerably fewer opportunities for girls to play sports). Further, women's sports do not receive the same levels of funding as certain men's sports. *See id.* (noting that colleges structurally prioritize resource allocation to expensive men's sports).

[45] *See id.* (noting that despite significant achievements in gender equity in sports, at the high school level, for instance, girls still do not participate in sports at the same level as boys). This trend is also seen at the collegiate level. *See id.* (noting that in Division I schools, for instance, women participate in sports at about 88% the rate of men).

[46] *See id.* (showing how NCAA universities and colleges spend less on women's sports than men's regarding coach compensation, recruiting efforts, and scholarships).

[47] *See* 34 C.F.R. § 106.37(c)(1) (2023) (requiring that financial assistance be proportionately equal between sexes).

[48] *See* WILSON, *supra* note 26, at 27 (showing how in Division I schools, as of 2018–19, female athletes receive 45% of scholarship funds, whereas men receive 52% of scholarship funds, with the remaining 3% of funds either going to co-educational sports or remaining unallocated).

[49] *See* Paine, *supra* note 40 (showing that in 2016, there was a 0.88 ratio of female athletic scholarship funding to male athletic scholarship funding).

[50] *See id.* (noting that in 2016, at Division I schools, 88% of female athletes participated, compared to male athletes).

Outside of scholarship funding, however, spending on women's sports lags significantly compared to men's sports.[51] As the NCAA disclosed in its fiftieth anniversary report on Title IX, at the Division I level: total spending allocated to women's sports is 48% of that allocated to men's; recruiting expenditures are 39% of those of men's; head coaches' salaries for women's sports are only 41% of the salaries for head coaches in men's sports; and assistant coaches' salaries for women's sports are 37% of those of assistant coaches in men's sports.[52] The disparity in spending on women's sports is allowed to persist because Title IX only requires "equal athletic opportunity" with regard to these types of expenditures, not the mandated proportionally equal spending required for scholarships.[53] As the NCAA has explained, Title IX only requires that schools use resources and funding to ensure all athletes receive equitable treatment, but does not mandate schools to spend equally on athletic programs.[54]

The disparity in spending on men's and women's sports is starkest at Division I Football Bowl Subdivision (FBS) institutions, which constitute the most competitive level of college athletics.[55] The grossly inadequate spending on women's sports at FBS schools results largely from the substantial amounts invested in football, an expensive sport that traditionally only male athletes have played.[56] At FBS schools, expenditures on women's athletics comprise only a fraction of the spending on men's:

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[51] *See* WILSON, *supra* note 26, at 27 (showing how at Division I schools, men's sports receive 71% of funding for both coaches and recruiting); *see also* Linda Jean Carpenter & R. Vivian Acosta, *Title IX—Two for One: A Starter Kit of the Law and a Snapshot of Title IX's Impact*, 55 CLEV. ST. L. REV. 503, 507 (2007) (explaining the rationale for Title IX's lack of requiring equal expenditures on men's and women's sports other than for financial aid provided to athletes).

[52] *See* WILSON, *supra* note 26, at 27 (displaying, by comparison, greater spending on men's than women's sports teams at Division I schools across categories of total spending, head coach salary spending, recruiting expenses, and assistant coaches' salaries).

[53] *Compare* 34 C.F.R. § 106.41 (2023) (requiring federally funded schools to provide "equal athletic opportunity" for individuals to play sports, regardless of gender), *with id.* § 106.37 (requiring federally funded schools to provide proportionately equal athletic scholarships based on gender participation rates in a particular sport).

[54] *See* WILSON, *supra* note 26, at 27 (explaining why schools are allowed to spend more on men's athletic programs than women's programs without violating Title IX).

[55] *See id.* (noting that the gender discrepancies in spending and resource allocation are most profound at Division I schools, aside from spending on scholarships); *see also Full List of Division 1 Football Teams: Find the Right Fit for Your Goals*, NCSA COLLEGE RECRUITING, https://www.ncsasports.org/football/division-1-colleges [https://perma.cc/V8Q3-CXU7] (explaining how the Football Bowl Subdivision of Division 1 schools is the most elite and competitive football division in the NCAA).

[56] *See* WILSON, *supra* note 26, at 25 (showing that in 2018–19, Division I FBS institutions allocated approximately 62% of their overall resources for men's sports on football, 18% on basketball, and 20% on the other remaining men's sports combined). In 2020–21, 29,460 out of a total of 99,950 Division I male athletes played football, but the NCAA reported no female athletes or teams playing Division I football that year. *See* NCAA, *supra* note 37, at 85–86 (providing a breakdown of total participants in NCAA sports based on sport and gender).

Table 1: Median Expenditures at FBS Schools[57]

Type of Expenditure	Allocation of Resources (Female as % of Male)
Athletic Scholarships	78%
Total Athletic Expenses	38%
Recruiting Expenses	34%
Head Coach Salaries	32%
Assistant Coach Salaries	30%

In 2018–19, the median budget for men's athletic programs at FBS institutions ($38.6 million) was almost three times the budget for women's athletic programs ($13.0 million).[58] And although the proportionate difference in total athletic expenditures budgeted for women's and men's sports has remained relatively constant over the last ten years, the difference in actual dollars budgeted to men's and women's programs has widened as overall spending has increased.[59] The gap in spending between men's and women's athletic programs at the median FBS institution in 2008–09 was $12.7 million, whereas in 2018–19, it was $25.6 million.[60]

Spending disparities are much less pronounced at Division I schools that do not have football programs.[61] In fact, scholarship spending for women exceeds that for men at Division I schools without a football program.[62] Even at these schools, however, all other categories of spending are greater for men's athletics than for women's, as shown below:

[57] *See* WILSON, *supra* note 26, at 28 (comparing resource allocation between men's and women's sports teams at Division I FBS institutions). Although the approximate figures in Table 1 demonstrate a troubling lack of investment in women's sports, they are an improvement when compared to earlier years. *See id.* at 7 (showing that in 1991, female athletic programs at NCAA institutions received only 23% of the total operating budget and only 17% of all recruiting funds).

[58] *See id.* at 32 (showing how this gap has increased substantially since 2008–09, when the difference between median total expenses for men's athletics programs ($20.3 million) was only $12.7 million more than women's athletics programs ($7.6 million)).

[59] *See id.* (demonstrating how despite the consistently proportionate spending on men's and women's sports, from 2008–09 to 2018–19, spending on men's sports increased by $18.3 million, whereas spending on women's sports only increased by $5.4 million).

[60] *Id.*

[61] *See id.* at 29 (highlighting how Division I schools without football teams spend more equitably on sports between genders).

[62] *See id.* (displaying that Division I schools without football teams actually allocate more financial resources to scholarships for female athletes than male athletes).

Table 2: Median Expenditures at Division I Non-Football Schools[63]

Type of Expenditure	**Allocation of Resources (Female as % of Male)**
Athletic Scholarships	130%
Total Athletic Expenses	89%
Recruiting Expenses	68%
Head Coach Salaries	61%
Assistant Coach Salaries	82%

Despite the higher scholarship spending on female athletes at Division I non-football schools, the median budget for men's athletic programs at these schools was about seven percent higher than that of women's programs in 2019—$6.4 million compared to $6.0 million.[64] Thus, although football greatly exacerbates the spending gap between men's and women's athletic programs, that gap still exists even at schools without football programs.[65] In other words, football programs are a major source of the unequal spending between men's and women's sports, but are not the only source.[66]

This disparity in spending on women's sports is consistent with a long history of discrimination against women's athletics.[67] From its inception in 1906 until 1981, the NCAA did not hold championships in women's sports.[68] After the enactment of Title IX, the NCAA fought to minimize the law's impact on men's sports.[69] Initially, the NCAA supported the effort by Senator John Tower of Texas to exempt revenue-producing sports from Title IX re-

[63] *See id.*(comparing resource allocation, across various types of expenses, between men's and women's sports).

[64] *Id.* at 29, 33.

[65] *See id.* (showing how NCAA non-football schools allocate more total resources to men's athletic teams, as compared to women's teams).

[66] *See id.* (demonstrating that even in schools that do not have football programs, there remains a trend where schools still spend more money on men's sports programs than women's).

[67] *See generally* NCAA, *supra* note 37 (demonstrating how NCAA men's sports have had higher participation and sponsorship rates since the 1980s, compared to women); Paine, *supra* note 40 (discussing women's severe to moderate underrepresentation in sports with the passage of Title IX).

[68] *See* WILSON, *supra* note 26, at 40 (noting that 1981–82 was the first year the NCAA funded women's sports and championships); *see also* Ass'n for Intercollegiate Athletics for Women v. NCAA, 558 F. Supp. 487, 492–93 (D.D.C. 1983) (setting out the history of the NCAA's involvement in women's sports and detailing how the NCAA divisions implemented women's sports championships), *aff'd*, 735 F.2d 577 (D.C. Cir. 1984).

[69] *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, 19–21 (2003) (noting that after Title IX took effect, the NCAA, among other organizations, urged Congress to scale back Title IX because of concerns that the bill would have a negative impact on men's sports programs).

quirements.[70] When that failed, the NCAA sued the Department of Health, Education, and Welfare, challenging the validity of the Title IX regulations.[71] Before resolution of that lawsuit, however, the NCAA member schools voted to sponsor championships in women's sports, partially out of concern that failing to do so would constitute a violation of the statute.[72] Ironically, when the NCAA finally entered the realm of women's sports in 1981, the effect was to wrest control from the Association for Intercollegiate Athletics for Women, a governance organization that women coaches and administrators established in 1971 to fill the void caused by the NCAA's initial disinterest in women's sports.[73]

Even after the NCAA assumed governance over women's intercollegiate sports, the treatment of female athletes as "second-class" citizens continued.[74] For instance, one can easily find stories of women's teams having to iron numbers on t-shirts to create their own uniforms or travel by dilapidated buses to games in the early years of Title IX.[75] Although those days are mostly over,

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[70] *See id.* at 19 (showing how there were efforts to curtail the reach of Title IX by excluding revenue-producing sports). Senator John Tower sponsored an amendment to Title IX in 1974 that would have exempted revenue-producing sports, namely men's football and basketball, from the statute. *Id.* That amendment was eventually compromised, however, and became the so-called Javits Amendment that called for regulations with "reasonable provisions considering the nature of particular sports." *See* Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (codified as amended at 20 U.S.C. § 1681); *see also* Fred C. Davison, *Carrying Title IX Too Far*, N.Y. TIMES (Dec. 3, 1978), https://www.nytimes.com/1978/12/03/archives/carrying-title-ix-too-far-issue-is-equal-access-fair-treatment-for.html [https://perma.cc/MR6S-GC4M] (publishing the University of Georgia president's perspective on the Tower Amendment, that Congress initially intended to put revenue-producing sports beyond the scope of Title IX).

[71] *See* NCAA v. Califano, 622 F.2d 1382, 1385 (10th Cir. 1980) (reversing the lower court's decision and determining that the NCAA had standing to represent its members in a challenge to the Title IX regulations); *see also* WILSON, *supra* note 26, at 6 (highlighting the NCAA's lawsuit in challenging Title IX to show the initial resistance to the regulations); Ellen J. Staurowsky, *Title IX and College Sport: The Long Painful Path to Compliance and Reform*, 14 MARQ. SPORTS L. REV. 95, 100–04 (2003) (providing a succinct history of the NCAA's resistance to Title IX, including John Tower's push to curtail Title IX, the NCAA's involvement in lobbying against the statute, and its efforts to bring cases that would limit Title IX's reach).

[72] *See Ass'n for Intercollegiate Athletics for Women*, 558 F. Supp. at 491–92 (stating that, starting in 1978, "various member institutions [of the NCAA] began offering measures to enable the NCAA to accommodate women's championships, motivated, in part, by the apprehensions of some that a failure to do so might be regarded as illegal discrimination").

[73] *See* Ellen J. Staurowsky, *"A Radical Proposal": Title IX Has No Place in College Sport Pay-for-Play Discussions*, 22 MARQ. SPORTS L. REV. 575, 585–87 (2012) (discussing how the Association for Intercollegiate Athletics for Women (AIAW), which governed women's college athletics before the NCAA, had a more educational focus than the NCAA); *see also* WILSON, *supra* note 26, at 6 (explaining that the NCAA's involvement in women's sports led the AIAW to shut down in 1982).

[74] *See generally* WILSON, *supra* note 26 (depicting the slow progress and remaining challenges for women's sports).

[75] *See* In Their Court, *A Sporting Chance*, NBC NEWS, at 22:00 (May 9, 2022), https://www.nbcnews.com/podcast/in-their-court/sporting-chance-their-court-episode-1-n1295130 [https://perma.cc/H6SC-57PA] (discussing the treatment of women athletes in the early days of Title IX).

second-class treatment still continues, as evidenced in 2021 when University of Oregon basketball player Sedona Prince posted a TikTok video highlighting the difference in weightlifting equipment provided for participants in the women's NCAA basketball tournament as compared to the men's tournament.[76] The video first showed a single set of dumbbell weights provided for the women, followed by an extensive array of weightlifting equipment for the men.[77] The video went viral, sparking a public outcry and leading the NCAA to engage an outside law firm to undertake an External Review of the gender equity of its basketball tournaments, as well as its championships in other sports.[78]

The External Review found that "woven into the fabric of the NCAA is a pressure to increase revenue."[79] By increasing its revenue, the NCAA could "maximize funding distributions" to member schools.[80] The External Review further found that the pressure for revenue "led the NCAA to prioritize Division I men's basketball over women's basketball in ways that create, normalize, and perpetuate gender inequities."[81] Moreover, the External Review concluded that the NCAA allocates more resources and funding to profitable championships to maximize its financial returns, and that only certain men's championships, including men's basketball, ice hockey, lacrosse, and wrestling, are profitable from the NCAA's perspective.[82] Of the championships the NCAA manages, men's basketball is the largest revenue producer of all, and therefore the NCAA invested significantly more money and attention in this

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[76] Sedona Prince (@sedonerrr), TIKTOK (Mar. 18, 2021), https://www.tiktok.com/@sedonerrr/video/6941180880127888646?lang=en [https://perma.cc/Z2YP-AP22] (displaying one set of weights in a corner for the women's team in the NCAA championship tournament, as compared to the more extensive sets of weights and workout room for the men's teams).

[77] *Id.*

[78] *See* Billy Witz, *Her Video Spurred Changes in Women's Basketball. Did They Go Far Enough?*, N.Y. TIMES (Mar. 15, 2022), https://www.nytimes.com/2022/03/15/sports/ncaabasketball/womens-march-madness-sedona-prince.html [https://perma.cc/MLP3-74NJ] (discussing how Sedona Prince's TikTok video prompted the NCAA to solicit an independent party to conduct a gender review of NCAA practices).

[79] *See* KAPLAN HECKER & FINK, NCAA EXTERNAL GENDER EQUITY REVIEW: PHASE II 2 (2021), https://kaplanhecker.app.box.com/s/y17pvxpap8lotzqajjan9vyye6zx8tmz [https://perma.cc/7BLN-XAZK] [hereinafter GENDER EQUITY REVIEW II] (relying on its Phase I evaluation of the NCAA and finding that several NCAA practices contribute to gender inequality in college athletics). The Phase II evaluation focused on how the NCAA allocated more resources to supposedly lucrative championships at the expense of other championships. *Id.*

[80] *Id.*

[81] *Id.*

[82] *See id.* (concluding that the NCAA is incentivized to allocate more resources to profitable sports, which contributes to gender inequality because the most revenue-producing championships involve mostly men's sports). This conclusion of the External Review is sadly reminiscent of the statement by scholar Ellen Staurowsky in 2003 that "[b]ecause primacy is afforded to the revenue-generators, and the revenue-generators are overwhelmingly male, the strictures of Title IX are tolerated but not embraced." Staurowsky, *supra* note 71, at 110.

sport than other championships, including women's basketball.[83] Because of the proximity in timing between the men's and women's basketball championships and the fact that they involve the same sport, the grossly disparate benefits and opportunities offered to the participants in the two tournaments was particularly salient and clearly demonstrated the broader inequity between men's and women's sports.

As the External Review explained, "for sports in which one championship is viewed as producing significantly more revenue than its gender counterpart, stark differences in spending and staffing emerge, leading to inequitable student-athlete experiences in those championships."[84] Although the External Review found that the NCAA spends more on women's than men's championships in volleyball and gymnastics, the average spending per athlete at NCAA championships, aside from basketball, in 2018–19 was $4,285 for male athletes and only $2,588 for female athletes.[85]

The External Review also found that the NCAA substantially undervalues the media rights to the women's championship basketball tournament.[86] CBS Broadcasting and Turner Broadcasting pay the NCAA an average of $1.1 billion each year to air the Division I Men's Basketball Championship.[87] At the same time, ESPN pays the NCAA only $34 million per year to broadcast championships in twenty-nine other NCAA sports, including women's basketball.[88] According to an expert analyst engaged for the External Review, the women's Division I Basketball Champion on its own will have an estimated annual value between $81 million and $112 million as of 2025, much more

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[83] *See* GENDER EQUITY REVIEW II, *supra* note 79, at 91 (showing how the men's basketball championship is the central source of revenue for the NCAA, but criticizing this reality for going against the goals of Title IX and gender equity). The NCAA lacks financial control over the football national championship. *See* Brandon Marcello, *Why the NCAA Doesn't Control College Football and Never Will*, 247SPORTS (July 23, 2020), https://247sports.com/Article/-Why-1984-Supreme-Court-ruling-explains-why-NCAA-does-not-control-college-football-amid-coronavirus-COVID-19-pandemic-149461659/ [https://perma.cc/79FS-4RSM] (explaining how the NCAA lost contracts with major football programs to the College Football Association, which would broadcast major games nationally).

[84] GENDER EQUITY REVIEW II, *supra* note 79, at 7.

[85] *See id.* at 7–8 (observing how the NCAA spent about $1,700 more on resources for participants in men's Division I championships than women's); *see also id.* at 10 (noting that in 2018–19, the NCAA spent $2,229 more per participant in the championships for the men-only sports of football and wrestling than for the women-only sports of "beach volleyball, bowling, field hockey, and rowing").

[86] *See* GENDER EQUITY REVIEW I, *supra* note 26, at 8–9 (comparing the contracts that the NCAA retains with CBS Broadcasting and Turner Broadcasting for men's sports coverage to ESPN for women's coverage to show the stark disparity in valuation of the men's and women's basketball championships).

[87] *See id.* (demonstrating how CBS and Turner collectively pay a significant amount of money to the NCAA to air the men's basketball championship, as well as to promote the NCAA's "corporate sponsor program" that contributes to all of the NCAA's ninety championships).

[88] *See id.* (noting that the ESPN contract only amounts to about 4.5% of the amount that CBS and Turner pay to air the men's basketball championship alone).

than ESPN pays the NCAA to broadcast that plus championships in twenty-eight additional sports.[89]

Moreover, the revenue distribution model that the NCAA uses places much greater value on a school's performance in men's basketball than in any other sport.[90] This leads to greater investment in men's sports than women's.[91] Under the NCAA's revenue distribution model, revenue is allocated among Division I conferences based exclusively on the conference's performance at the men's basketball championship.[92] No weight is given to performance at the women's basketball championship or the championship of any other sport. This, of course, motivates Division I athletic programs to allocate greater resources to men's basketball than to any women's sport.[93] Stated simply, universities underinvest in women's sports, and the NCAA significantly undervalues them.[94]

In 1992, the NCAA Gender Equity Task Force defined gender equitable athletic programs as "when the participants in both the men's and women's sports programs would accept as fair and equitable the overall program of the other gender."[95] It is difficult to imagine that the participants in either men's or women's collegiate athletic programs would accept as "fair and equitable" the fact that men's sports receive nearly three times the funding provided to women's sports, that per-athlete spending is thousands of dollars more on the men's side than on the women's side both at the university-level and at NCAA championships, and that the NCAA's revenue distribution model is based entirely on the performance of men's sports with no consideration for the performance of women's teams.[96] The disparity of investment between men's and women's

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[89] *Id.* at 9, 69–70.

[90] *See id.* at 91–92 (showing how the NCAA's calculation for distributing revenue is heavily dependent on schools' participation and performance in the NCAA men's basketball championships). Critically, the NCAA does not control distribution of profits related to the Division I football championship. *See* Marcello, *supra* note 83 (explaining how the NCAA does not govern football championships).

[91] *See* GENDER EQUITY REVIEW I, *supra* note 26, at 92 (showing how a significant portion of collegiate athletic revenue distributions come from the NCAA's "Basketball Performance Fund," which encourages universities to invest more heavily in men's basketball to receive more funding because there is no NCAA funding based upon the success of women's basketball programs).

[92] *Id.* at 10.

[93] *Id.*

[94] *Id.*

[95] *See* WILSON, *supra* note 26, at 2 (citing the NCAA Gender Equity Task Force's 1992 description of gender equity to set the foundation for a report on the NCAA and gender equity).

[96] *See supra* note 57 and accompanying text (showing how women's sports receive only 38% of the funding that men's sports receive); GENDER EQUITY REVIEW II, *supra* note 79, at 7–8 (highlighting the NCAA's unequal spending on college athletes, based on gender, where each male athlete received close to $1,700 more than each female athlete); WILSON, *supra* note 26, at 33 (showing how the Football Champion Subdivision (FCS) of Division I NCAA universities have expenses, on aver-

sports is simply too substantial to be considered fair and, consequently, fails the NCAA's own test for gender equity.

In light of these existing inequalities, the prospect of even greater disparities resulting from direct payment by universities to male athletes, but not to female athletes, seems contrary to the very purpose of Title IX.[97] Senator Birch Bayh, one of the sponsors of Title IX, summarized that purpose by stating that Congress intended for Title IX to establish "equality of education," thereby ensuring "that our daughters will have the same opportunities as our sons."[98]

Based on the lack of investment in women's sports compared to men's, the goal of Title IX is not being achieved. At present, the nation's daughters do not have the same opportunities as its sons.[99] And as the next Part explains, the existing regulations under Title IX may further exacerbate the inequality between men's and women's college sports by permitting unequal pay-for-play payments from institutions to male and female athletes for their athletic services.[100]

II. A ROADMAP TO TITLE IX

The substance of Title IX consists of only thirty-seven words, stating that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[101] Congress enacted Title IX in 1972 as an amendment to the Higher Education Act of 1965.[102] From the general language of Title IX, details as to its interpretation and implementation are provided in regulations and a policy interpretation issued by the Department of Health, Education, and Welfare

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age, of $8.7 million for men's sports as compared to $5.2 million for women's sports); GENDER EQUITY REVIEW I, *supra* note 26, at 91–92 (analyzing how the NCAA's practice in rewarding schools with successful men's basketball programs puts women's sports teams at a financial disadvantage by disincentivizing universities from investing in their programs).

[97] *See* WILSON, *supra* note 26, at 5 (introducing a report on the NCAA and gender equity by focusing on congressional intent in enacting Title IX to "expand[] access and opportunities for girls and women").

[98] *Title IX: Building on 30 Years of Progress: Hearing Before the S. Comm. on Health, Educ., Lab. & Pensions*, 107th Cong. 23 (2002) [hereinafter *Title IX Hearing*] (statement of Sen. Birch Bayh). As the U.S. Supreme Court has stated, the objectives of Title IX are two-fold: first, "to avoid the use of federal resources to support discriminatory practices," and second, "to provide individual citizens effective protection against those practices." *See* Cannon v. Univ. of Chi., 441 U.S 677, 704 (1979) (explaining that Congress wanted Title IX to achieve these two similar, but distinct goals).

[99] *See Title IX Hearing*, *supra* note 98, at 23 (presenting the idea that Title IX was intended to provide equal opportunity to both men and women from an early age); WILSON, *supra* note 26, at 27–30 (highlighting how despite advances in spending on women's sports, colleges continue to allocate more financial resources to men's sports, particularly at Division I schools).

[100] *See infra* notes 101–363 and accompanying text.

[101] 20 U.S.C. § 1681(a).

[102] Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (1972).

(HEW), the predecessor to the Department of Education.[103] HEW issued the first Title IX regulations (Regulations) in 1975,[104] and then in 1979 published a policy interpretation (Policy Interpretation).[105] The Regulations state that their purpose is to implement the provisions of Title IX and its goal of eliminating sex-based discrimination in educational settings.[106] The Policy Interpretation states that its purpose is to "clarif[y] the obligations which recipients of Federal aid have under Title IX to provide equal opportunities in athletic programs," as required by the Regulations.[107] Given the prevalence of federal financial assistance in higher education, every major university in the United States is subject to Title IX and, consequently, subject to the Regulations and the Policy Interpretation.[108]

Although the Regulations and Policy Interpretation prohibit "discrimination under any academic, extracurricular . . . or other education program or activity," it is difficult to discern what this means in the context of payments from colleges to athletes unrelated to athletes' educational development.[109] As previously mentioned, one reason for the difficulty is that the NCAA strictly enforced an amateurism requirement until 2021, when the NCAA changed its policy to allow college athletes to benefit financially from the use of their name, image, and likeness.[110] Because of the NCAA's previous strict adherence to the concept of amateurism, the Regulations and Policy Interpretation do not expressly address the treatment of non-education-related payments from

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[103] *See* Title IX of the Education Amendments of 1972, 44 Fed. Reg. 71413, 71413–14 (Dec. 11, 1979) (codified at 45 C.F.R. pt. 86) (providing clarification on key provisions of Title IX that reflect many of the concerns and questions that colleges raised after Title IX's enactment); *see also* 45 C.F.R. § 86 (2023) (providing additional regulations related to Title IX by defining its scope). The Department of Education was established as a separate federal department in 1979. *See* Department of Education Organization Act, Pub. L. No. 96-88, § 301(a)(3), 93 Stat. 668, 677–78 (1979) (codified at 20 U.S.C. § 3441(a)) (transferring the responsibilities of the Health, Education, and Welfare Department to the Department of Education).

[104] *See* 45 C.F.R. § 86.1 (1975) (noting that the regulation would take effect in July 1975).

[105] *See* Title IX of the Education Amendments of 1972, 44 Fed. Reg. at 71413 (noting how the Title IX Policy Interpretation took effect in December 1979).

[106] 34 C.F.R. § 106.1 (2023) (codifying the goal to remove sex-based discrimination from educational settings that receive federal financial aid).

[107] Title IX of the Education Amendments of 1972, 44 Fed. Reg. at 71413, 71415.

[108] *See* U.S. DEP'T OF EDUC., OFF. OF C.R., TITLE IX AND SEX DISCRIMINATION (2021), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [https://perma.cc/67JD-E7MR] (stating that more than five thousand postsecondary institutions are subject to Title IX).

[109] *See* 34 C.F.R. § 106.31(a) (creating specific provisions of Title IX that more broadly apply the prohibition on gender discrimination to any academic setting or extracurricular activity).

[110] *See supra* notes 7–10 and accompanying text (describing that the NCAA's longstanding policy was to prohibit payments to college athletes, only until 2021 when the NCAA updated its guidance to allow for college athletes to profit off their images and likeness).

colleges to athletes.[111] Regulators had no reason to contemplate the concept of pay-for-play at the time they created this guidance.

That said, the Regulations, read in conjunction with the Policy Interpretation, treat non-education-related payments from colleges to athletes more like employment-related payments than scholarships.[112] As a result, the Regulations and Policy Interpretation do not mandate proportional equality for pay-for-play payments colleges make to their male and female athletes.[113] Understanding this conclusion requires a detailed examination of the Policy Interpretation and the Regulations. Section A below examines whether the Title IX Regulations relating to athletic scholarships apply to pay-for-play payments.[114] Section B of this Part then analyzes whether college athletes should be considered employees under the common law and statutes other than Title IX, specifically the Fair Labor Standards Act and the National Labor Relations Act.[115] Finally, Section C uses the analysis from Section B to determine whether the Regulations require that male and female athletes, if treated as employees, receive proportionately equal pay-for-play payments.[116]

A. The Athletics Provisions of Title IX Regulations (Subpart D)

Subpart D of the Regulations expressly addresses Title IX's application to the provision of athletic scholarships.[117] Under Subpart D, if a college awards athletic scholarships, it must ensure that male and female athletes receive those scholarships "in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics."[118] The Policy Interpretation provides more detail about the proportionality requirement for athletic scholar-

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[111] *See supra* notes 7–10 and accompanying text (demonstrating how the NCAA prohibited any form of payment to college athletes until 2021); *see also* 45 C.F.R. pt. 86 (1975) (establishing Title IX regulations and provisions, but not mentioning payment of college athletes); Title IX of the Education Amendments of 1972, 44 Fed. Reg. at 71413, 71415 (providing clarifying guidance to colleges and universities in complying with Title IX, but not addressing the issue of paying college athletes).

[112] *See infra* notes 117–156 and accompanying text (discussing this analysis).

[113] *See* U.S. DEP'T OF EDUC., *supra* note 30 (showing that to comply with Title IX, colleges and universities only have to provide equal, not identical, opportunities to athletes of different genders); *see also* Title IX of the Education Amendments of 1972, 44 Fed. Reg. at 71413, 71414 (requiring colleges and universities to provide equal ability for students to participate in college sports, including with regard to scholarship allocations); 34 C.F.R. § 106.41(a) (focusing on providing equal opportunity for participation in programs and avoiding sex-based discrimination).

[114] *See infra* notes 117–156 and accompanying text.

[115] *See infra* notes 157–314 and accompanying text.

[116] *See infra* notes 315–363 and accompanying text.

[117] 34 C.F.R. § 106.37(c).

[118] *Id.*

ships.[119] It summarizes the Regulations' requirements regarding athletic scholarships by stating that colleges must provide athletic scholarships "on a substantially proportional basis" to male and female athletes.[120] The Policy Interpretation further clarifies that the Department of Education will assess a university or college's compliance with Title IX by performing a financial comparison of the scholarship money provided to men's and women's teams to ensure the aid is "substantially proportional" to participation rates.[121] In particular, the Department of Education determines compliance with this substantially proportional standard by dividing the amount of scholarship funding provided to each sex by the number of athletes of that sex, and then comparing the results.[122]

As the Policy Interpretation further clarifies, the substantially proportional requirement does not mandate "a proportionate number of scholarships for men and women or individual scholarships of equal dollar value."[123] Instead, the requirement "mean[s] that the total amount of scholarship aid made available to men and women must be substantially proportionate to their participation rates."[124] Moreover, a university may comply with the substantially proportional requirement even if there are slight differences between calculations for men's and women's sports, so long as those differences arise from "legitimate, nondiscriminatory factors" such as higher cost of tuition for out-of-state students.[125]

Put succinctly, the Regulations and Policy Interpretation require universities to allocate proportionately the total amount of scholarship dollars to male and female athletes based on their participation rates, with some minor variation permitted due to factors such as in-state or out-of-state residency of schol-

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[119] *See* Title IX of the Education Amendments of 1972, 44 Fed. Reg. at 71414 (providing detailed clarification to colleges and universities on how to comply with Title IX provisions in their athletic programs with regard to athletic scholarships and aid, providing proper equipment and resources, and meeting the athletic interests of students).

[120] *See id.* (demonstrating that the core requirement for athletic scholarships is that they are "substantially proportional" between male and female athletes).

[121] *Id.* at 71415 (outlining how the Department of Education aims to ensure compliance with the "substantially proportional" requirement).

[122] *Id.*

[123] *Id*.

[124] *Id.*

[125] *Id.* (noting that colleges and universities that issue financial aid disproportionately between male and female athletes, due to higher expenses for out-of-state students, will remain in compliance with Title IX provisions as long as universities are not "disproportionately limit[ing] the availability of out-of-state scholarships to either men or women"); *see also* Melanie Hanson, *Average In-State vs. Out-of-State Tuition*, EDUC. DATA INITIATIVE, https://educationdata.org/average-in-state-vs-out-of-state-tuition [https://perma.cc/GN5R-S2EC] (Apr. 28, 2022) (showing how out-of-state tuition at U.S. public colleges and universities was approximately, on average, $17,000 more annually compared to in-state tuition).

arship athletes.[126] To demonstrate what all this means, if 45% of the athletes at a college are female and 55% are male, then 45% of the total amount of athletic scholarship funding that the college grants should go to female athletes and 55% to male athletes.[127] In effect, Title IX requires a college to make proportionately equal scholarship investments in its male and female athletes.[128] Thus, the average scholarship award for female athletes should be approximately equal to the average scholarship award for male athletes. This is the rule for scholarship awards. The question is whether that same rule also extends to pay-for-play payments.

Subpart D of the Regulations contains two provisions potentially relevant to this question.[129] First, the Regulations state that, aside from certain exceptions, including an exception for athletic scholarships, "in providing *financial assistance* to any of its students, a [college] shall not[,] [o]n the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate."[130] Subpart D does not expressly define the term "financial assistance," making it difficult to determine whether pay-for-play payments would constitute the type of payments subject to this provision.[131] More generally, the Regulations define "[f]ederal financial assistance" as "[a] grant or loan" or an "arrangement" with a purpose of providing "assistance to any education program or activity."[132]

But this definition refers to funds, services, or other benefits that the federal government provides to colleges or universities for the advancement of the institutions' educational programs.[133] Consequently, the definition does not on its face apply to non-education-related payments from colleges directly to ath-

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[126] *See* Title IX of the Education Amendments of 1972, 44 Fed. Reg. at 71415 (explaining how schools can provide more money to out-of-state students because of higher tuition costs without violating Title IX, as long as the different allocation of resources is not due to an athlete's gender).

[127] *See* U.S. DEP'T OF EDUC., *supra* note 30 (providing, by way of example, that "if 60[%] of an institution's intercollegiate athletes are male, the total amount of aid going to male athletes should be approximately 60[%] of the financial aid dollars the institution awards").

[128] *See id.* (requiring that schools provide financial assistance for athletes in a manner that is proportionate to gender-participation rates in athletic programs).

[129] *See* 34 C.F.R. §§ 106.37(a)(1), 106.38(b) (2023).

[130] *Id.* § 106.37(a)(1) (emphasis added).

[131] *See id.* (prohibiting colleges from providing different amounts of scholarships per sex, but not explicitly defining which activities are considered "financial assistance"); *see also id.* § 106.30 (providing no definition of "financial assistance").

[132] *Id.* § 106.2(g).

[133] *Id.* (determining that for a benefit to be "[f]ederal financial assistance," there must be a correlation between the funds and activities that are directed at a college's educational programs). For instance, the provision on grants and loans requires that those grants or loans are used for building or improving college property, or providing scholarships or payments to students of a particular university. *Id.*

letes in consideration for their athletic services (i.e., pay-for-play payments).[134] For example, assume that a college leased surplus vehicles to the federal government in an arms-length transaction and that this transaction had no relation to the college's educational program; the college entered it solely for the purpose of making a profit. The lease payments from the federal government would not constitute "[f]ederal financial assistance" under the definition applicable to Subpart D.[135] Likewise, non-education-related payments from colleges to athletes, made with the intent of compensating an athlete for athletic services performed and revenue generated for the college, most likely do not constitute financial assistance under the Regulations.[136] Instead, these payments are part of a quid pro quo commercial transaction between the college and the athlete, separate from the educational aspects of the athlete's college experience.[137] In effect, the student is performing a service for the college, such as playing in a revenue-generating basketball game, and the college is compensating the student for the commercial value of that service.[138]

This understanding of financial assistance, per Subpart D of the Regulations, is further supported by a statement in the Policy Interpretation.[139] In discussing the proportionality requirement for scholarship awards, the Policy Interpretation states that "the distribution of non-grant assistance," particularly "work-related aid or loans," is also subject to the proportionality requirement.[140] The examples of financial assistance provided in the Policy Interpretation are substantively different from pay-for-play payments because work-

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[134] *See id.* (narrowly defining "[f]ederal financial assistance" as instances where there is a connection to an educational program, not where there are non-education payments).

[135] *See id.* (showing that if there is not a connection to a university's educational program, then the financial assistance, such as a lease, would not be within the scope of "[f]ederal financial assistance").

[136] *See id.* (demonstrating that non-education related payments, which are outside the realm of advancing a college's education programs, are not within the scope of "[f]ederal financial assistance").

[137] *See, e.g.*, Leonard Armato, *Pay for Play Is Alive in College Sports and Free Agency Has Arrived*, FORBES (Dec. 16, 2022), https://www.forbes.com/sites/leonardarmato/2022/12/16/pay-for-play-is-alive-in-college-sports-and-its-time-to-realize-that-free-agency-has-arrived/?sh=6d7a7315638e [https://perma.cc/LJX7-HQ8Y] (arguing that, per the pay-for-play system, colleges should compensate student athletes with the fair market value of their contributions to the schools and their athletic programs).

[138] *See id.* (observing how the pay-for-play system would reflect the transactional nature of the services that athletes are already providing to their universities and athletic programs).

[139] *See* Title IX of the Education Amendments of 1972, 44 Fed. Reg. 71413, 71415 (Dec. 11, 1979) (showing how when the federal government provides aid in a manner other than a grant, compliance with Title IX provisions will still be evaluated to determine whether the non-grant aid is proportionately equal between sexes).

[140] *Id.* (explaining that "[a] disproportionate amount of *work-related aid or loans* in the assistance made available to the members of one sex, for example, could constitute a violation of Title IX") (emphasis added).

related aid and loans are typically limited by the requirement that they advance an athlete's educational goals.[141] Work-study, for example, often allows a student to study while working or involves work activities related to the student's academic program.[142] Moreover, education loans typically include provisions limiting the use of the funds to education-related expenses.[143] Pay-for-play payments, on the other hand, are commercial in nature because they are in exchange for athletic performance services with no direct connection to the athlete's education.[144] In a free-market system, athletes would be able to use pay-for-play payments for any purpose, educational or otherwise.[145] Thus, the provision applying Title IX to financial assistance in Subpart D of the Regulations does not appear to cover pay-for-play payments.[146] Although the Supreme Court has stated that Title IX should be interpreted broadly, characterizing arms-length, commercial payments for services unrelated to the athlete's education as financial assistance under Subpart D of the Regulations extends this phrase beyond its reasonable meaning.[147]

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[141] *See id.* (applying Title IX provisions to work-related aid and student loans, among other categories of financial assistance); *see also Federal Work-Study Jobs Help Students Earn Money to Pay for College or Career School*, FEDERAL STUDENT AID, https://studentaid.gov/understand-aid/types/work-study [https://perma.cc/9ZZP-EW5V] (explaining that students can work part-time to earn money solely to pay for education expenses). *But see* Armato, *supra* note 137 (showing how under a pay-for-play system, universities would compensate student athletes for the fair market value of their athletic abilities and contributions to universities).

[142] *See Federal Work-Study Jobs Help Students Earn Money to Pay for College or Career School, supra* note 141 (providing that "[t]he Federal Work-Study Program emphasizes employment in civic education and work related to your course of study whenever possible"). Other rules and limitations apply to the work-study system, distinguishing it from a free-market, commercial relationship between college and athlete, as would be the case with pay-for-play payments. *See id.* (noting that student workers are limited in the number of hours they can work under work-study).

[143] *See, e.g.*, *Master Promissory Note*, FEDERAL STUDENT AID, https://studentaid.gov/mpn/subunsub/demo/agreements [https://perma.cc/UP43-AWD8] (showing a typical loan document, including a provision where applicants must certify that "I will use the loan money I receive only to pay for my authorized educational expenses for attendance at the school that determined I was eligible to receive the loan, and I will immediately repay any loan money that is not used for that purpose").

[144] *See* Nw. Univ., 362 N.L.R.B. 1350, 1365 (2015) (determining that, in the context of Division I college football, the athletic requirements of football players receiving scholarships are not an essential part of their academic requirements, and although football participation may provide "great life lessons," the relationship between football player and institution "is an economic one" rather than "primarily an academic one").

[145] The ability to use pay-for-play payments for any purpose contrasts with the limits imposed on education loans. *See supra* note 143 and accompanying text (explaining how the Master Promissory Note limits scholarship funding to cover only educational expenses).

[146] *See* 34 C.F.R. § 106.37(a)(1) (2023) (requiring that universities receiving financial assistance comply with the provisions of Title IX).

[147] *See* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) ("[I]f we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language." (quoting United States v. Price, 383 U.S. 787, 801 (1966), *superseded by statute*, Civil Rights Restoration Act of 1987, 100 Pub. L. No. 259, 102 Stat. 28)).

In addition, paragraph (a) of 34 C.F.R. § 106.37 indicates that even if pay-for-play payments could be considered financial assistance, the payments would not necessarily require the same proportionality between male and female athletes that is required of scholarships.[148] The relevant provision states: "*Except as provided in paragraph[] . . . (c) of this section* . . . a [college] shall not[,] [o]n the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate . . . ."[149] Paragraph (c) sets forth the proportionality requirement for athletic scholarships.[150] If paragraph (a) requires proportionality for all forms of financial assistance, why set out a separate paragraph, specifically requiring proportionality for athletic scholarships? The separate paragraph for athletic scholarships indicates different treatment for scholarships as compared to other forms of financial assistance.[151]

To summarize, although the Regulations do not define financial assistance, it is likely that the term does not include pay-for-play payments because of their quid pro quo nature and their potential lack of a relationship to an athlete's educational development.[152] In addition, if pay-for-play payments do constitute a form of financial assistance, the structure of the Regulations appears to treat such payments differently from athletic scholarships, which require proportional benefits between male and female athletes.[153]

The second provision in Subpart D that may bear on Title IX's treatment of pay-for-play payments prohibits colleges that hire students from contravening Subpart E of the Regulations, which addresses employment.[154] Therefore, if pay-for-play payments create an employment relationship, the Regulations provide that the employment-related provision of Subpart E, rather than the

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[148] *See* 34 C.F.R. § 106.37(a) (distinguishing the proportional equality rule of 34 C.F.R. § 106.37(c), which applies to scholarships, from the general rule of 34 C.F.R. § 106.37(a), which applies to other forms of financial assistance).

[149] *Id.* (emphasis added).

[150] *Id.* § 106.37(c) (requiring colleges and universities to ensure proportionate scholarship amounts for men and women's sports teams to remain in compliance with Title IX).

[151] *See id.* § 106.37(a), (c).

[152] *See supra* notes 130–151 and accompanying text (demonstrating how the specific provisions of the Title IX regulations do not define financial assistance, although general definitions of the term appear elsewhere in the statute). Although Subpart D does not specifically define financial assistance, the Regulations clearly require a correlation between the provision of funds and serving an educational purpose. *See* 34 C.F.R. § 106.2(g) (providing five general categories of what "[f]ederal financial assistance" means, all relating to an underlying educational purpose).

[153] *See supra* notes 140–152 (analyzing the language and structure of the Regulations and determining that because only athletic scholarships must be proportionate to gender participation in sports, the Regulations would treat pay-for-play payments differently).

[154] *See* 34 C.F.R. § 106.38(b) (extending Title IX protections and requirements to instances where colleges and universities employ their students).

athletic-related provisions of Subpart D, would apply.[155] To assess the potential impact of this provision, one must consider two issues: (1) whether athletes receiving pay-for-play payments from their universities should be classified as employees; and (2) if so, whether Subpart E of the Regulations requires proportionate pay-for-play payments between male and female athletes. These issues are addressed in Sections B and C of this Part, respectively.[156]

B. Whether Athletes Are Employees

Although Subpart E of the Regulations prohibits "discrimination in employment," it does not define employment or provide any guidance about what constitutes an employment relationship.[157] To date, courts and agencies have reached different determinations when considering whether college athletes are employees, depending on the legal context of the question.[158] These previous decisions provide some guidance on the issue, but pay-for-play payments could also have a major impact on the ultimate determination of whether athletes should be considered employees for purposes of Title IX. Subsection 1 of this Section addresses whether athletes would be employees under the Fair Labor Standards Act (FLSA).[159] Next, Subsection 2 similarly analyzes athletes' employment status under the National Labor Relations Act (NLRA).[160] Finally, Subsection 3 discusses whether student athletes would satisfy common-law standards for an employee.[161]

1. The Employment Question Under the Fair Labor Standards Act

In 2016, in *Berger v. NCAA*, the U.S. Court of Appeals for the Seventh Circuit held that college athletes are not employees within the context of the

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[155] *See id.* (showing how Subpart D of the Regulations would not cover employment issues); *see also id.* § 106.51 (creating specific provisions regarding Title IX's applicability to employment relationships).

[156] *See infra* notes 157–362 and accompanying text.

[157] *See* 34 C.F.R. § 106.51 (exemplifying the specific subsection of the Title IX Regulations focused on sex-based discrimination in work settings, without defining the scope of employment).

[158] *Compare* Berger v. NCAA, 843 F.3d 285, 293 (7th Cir. 2016) (concluding that because participation in college sports is extracurricular, the drafters of the Fair Labor Standards Act (FLSA) would not have considered college athletes to be employees of their schools), *with* Johnson v. NCAA, 556 F. Supp. 3d 491, 501 (E.D. Pa. 2021) (holding that the extracurricular nature of college sports does not mean the FLSA would prohibit categorizing college athletes as employees of their schools), *and* Johnson v. NCAA, No. 19-5230, 2021 WL 6125095, at *3–4 (E.D. Pa. Dec. 28, 2021) (granting a motion for interlocutory appeal in finding a valid question over whether college athletes could be employees of their schools per the FLSA).

[159] *See infra* notes 162–230 and accompanying text.

[160] *See infra* notes 231–286 and accompanying text.

[161] *See infra* notes 287–314 and accompanying text.

FLSA.[162] More recently, however, the U.S. District Court for the Eastern District of Pennsylvania refused to dismiss an FLSA claim brought by current and former athletes against their colleges and the NCAA in *Johnson v. NCAA*, allowing the possibility that athletes may be employees under the FLSA.[163] The district court's decision in *Johnson* is currently on appeal to the Third Circuit.[164] *Berger* and *Johnson* were decided in the context of the FLSA, rather than Title IX. Nevertheless, the courts' reasoning across the two cases provides useful insight about the role of athletics in the life of Division I athletes, which may prove dispositive in determining the employment status of athletes under Title IX.

As previously stated, in *Berger*, the Seventh Circuit concluded that athletes are not employees, as the FLSA defines them.[165] Under the FLSA, every employer must pay its employees a minimum wage.[166] The FLSA defines "employee" as "any individual employed by an employer,"[167] which the *Berger* court aptly characterized as "an unhelpful and circular" definition.[168] The FLSA further defines "employ" as "to suffer or permit to work."[169] Thus, as the *Berger* court explained, for an individual to be considered an employee under the FLSA, they "must perform 'work' for an 'employer.'"[170] The court also noted that "work" lacks its own definition in the FLSA.[171]

The Seventh Circuit in *Berger* opted not to use the multi-factor tests that courts typically apply to determine employee status in other contexts.[172] Ra-

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[162] *See* 843 F.3d at 293 (determining that the government did not intend to include athletes within the scope of employees under the FLSA).

[163] *See* 556 F. Supp. 3d at 501 (holding that the NCAA could not rely on traditional principles of amateurism in college athletics to justify not considering athletes to be employees of colleges or universities).

[164] *See* Johnson v. NCAA, No. 19-5230, 2021 WL 6125095, at *4 (E.D. Pa. Dec. 28, 2021) (granting an interlocutory appeal to determine whether college athletes can be considered employees pursuant to the FLSA).

[165] 843 F.3d at 293.

[166] 29 U.S.C. § 206(a)(1)(C) (setting the federal hourly minimum wage at $7.25 and requiring that employers provide employees this salary).

[167] *Id.* § 203(e)(1).

[168] 843 F.3d at 290.

[169] 29 U.S.C. § 203(g).

[170] 843 F.3d at 290.

[171] *Id*.

[172] *Id.* at 290–91 (acknowledging that there are several multi-factor tests to determine employee status, but declining to follow them because they did not properly reflect the student-athlete relationship with colleges and universities). Different multi-factor tests have developed, depending on the particular question at issues. *See, e.g.*, Glatt v. Fox Searchlight Pictures, 811 F.3d 528, 535–36 (2d Cir. 2015) (applying a "primary beneficiary [multi-factor] test" to student internships); *In re* Rent-A-Car Wage & Hour Emp. Pracs. Litig., 683 F.3d 462, 468 (3d Cir. 2012) (reviewing a multi-factor test for joint employment disputes); Donovan v. DialAmerica Mktg., 757 F.2d 1376, 1383–85 (3d Cir. 1985) (reviewing a multi-factor test for independent contractor classification).

ther, the Seventh Circuit affirmed the district court's decision that the approach for determining who qualifies as an employee under the FLSA should be flexible.[173] The court explained its refusal to use the multi-factor tests because in certain contexts, including college athletics, those tests "fail to capture the true nature of the relationship" connecting the putative employer and employee.[174] Rather than apply a multi-factor test, the *Berger* district court stated that it had to "examine[] the economic reality of the alleged employment relationship" to decide whether an employer-employee relationship existed.[175] In the context of college athletics, the Seventh Circuit said that the "long-standing tradition [of amateurism in college sports] defines the economic reality of the relationship between student athletes and their schools."[176] Moreover, due to this reality, the court stated that the athletes' proposed multi-factor test failed as it did not "capture the true nature of [that] relationship."[177]

In assessing the economic reality of the relationship between college athletes and their universities, the *Berger* court considered the Department of Labor's Field Operations Handbook (FOH) as persuasive authority.[178] The Wage and Hour Division of the Department of Labor publishes the FOH to "provide[] [Department] investigators and staff with interpretations of statutory provisions . . . and general administrative guidance."[179] In providing that guidance, the FOH distinguishes between students engaged in extracurricular activities that primarily benefit the student (non-employees) and those who engage in work-study (employees).[180] The Seventh Circuit highlighted that the FOH specifically states that participating in extracurricular activities is insufficient to make a college student an employee under the FLSA.[181] The FOH provides that:

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[173] *Berger*, 843 F.3d at 291.

[174] *Id.*

[175] *Id.*

[176] *Id.* (citing NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984)) (showing how traditional notions of amateurism have played a major role in how the NCAA approaches and defines its eligibility requirements).

[177] *Id.* at 290–91 (citing *Glatt*, 811 F.3d at 536–37) (rejecting the appellants' argument for the court to incorporate a multi-factor test similar to the approach and test for student interns).

[178] *Id.* at 292 (reviewing the Field Operations Handbook as useful precedent and guidance for determining whether the FLSA considers student athletes to be employees).

[179] *Id.* (citing U.S. DEP'T OF LAB., WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK (2017) [hereinafter FOH], https://www.dol.gov/agencies/whd/field-operations-handbook [https://perma.cc/VZ2Q-BB3H]).

[180] *Id.* (citing FOH, *supra* note 179) (explaining that the FOH created a distinction between extracurricular and work activities for students).

[181] *Id.* (quoting FOH, *supra* note 179, § 10b24(a)) (noting how subsection (a) of the FOH specifies that extracurricular activity involvement generally does not constitute employment under the FLSA).

> As part of their overall educational program, public or private schools . . . may permit or require students to engage in activities in connection with dramatics, student publications, glee clubs, bands, choirs, debating teams, radio stations, intramural and *interscholastic athletics* and other similar endeavors. Activities of students in such programs, conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution, are not work of the kind contemplated by [the FLSA] and do not result in an employer-employee relationship between the student and the school.[182]

The Seventh Circuit accepted the FOH's distinction between students who participate in extracurricular activities, such as intercollegiate athletics, which the court said do not create an employer-employee relationship, and those who engage in work-study, which constitutes an employer-employee relationship. Other examples of an employer-employee relationship that the court recognized are students who "work at food service counters or sell programs or usher at athletic events, or who wait on tables or wash dishes in dormitories in anticipation of some compensation."[183] According to the court, college athletics do not implicate an employer-employee relationship because students voluntarily choose to become involved in college sports, and "the long tradition of amateurism in college sports, by definition, shows that student athletes—like all amateur athletes—participate in their sports for reasons wholly unrelated to immediate compensation."[184] In summarizing its view, the *Berger* court stated

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[182] FOH, *supra* note 179, § 10b03(e) (emphasis added).

[183] *Berger*, 843 F.3d at 293 (quoting FOH, *supra* note 179, § 10b24(b)) (determining that there was a clear distinction between employment contexts and extracurricular activities, regardless of whether the extracurricular activities were student-led).

[184] *Id.* The *Berger* court relied on the same "economic reality" test that it applied in *Vanskike v. Peters*. *Id.* at 291. *Vanskike* involved a prison inmate's FLSA challenge, seeking compensation for "'forced labor' as a janitor [and] kitchen worker," among other occupations, while incarcerated. 974 F.2d 806, 806 (7th Cir. 1992). The Seventh Circuit in *Vanskike* declined to apply a multi-factor test to determine employer-employee status between the Department of Corrections (DOC) and its inmates. *Id.* at 808 (noting that employment status should be determined by analyzing the "totality of circumstances," rather than applying a specific test). Rather, the court applied the "economic reality" test and concluded that "the relationship between the DOC and a prisoner is far different from a traditional employer-employee relationship, because (certainly in these circumstances) inmate labor belongs to the institution." *Id.* at 809 (citing Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1331 (9th Cir. 1991) (Rymer, J., concurring)). The NCAA has been criticized for relying on *Berger* and, in turn, on *Vanskike*, as treating college athletes the same as inmates because they labor without adequate compensation from their institutions. Matthew Santoni, *NCAA Urges 3rd Circ. to Rule College Athletes Not Employees*, LAW360 (June 1, 2022), https://www.law360.com/articles/1498525/ncaa-urges-3rd-circ-to-rule-college-athletes-not-employees [https://perma.cc/L3GU-BUZW] ("The NCAA contends that playing NCAA sports is a special circumstance on par with being a convicted criminal sentenced

that under the FLSA, there is a difference between student athletes playing a sport and "work."[185]

Contrary to the result in *Berger*, the district court in *Johnson* allowed for the possibility that athletes may be employees by denying a motion to dismiss FLSA claims that current and former Division I athletes brought against their schools.[186] In response, the athletes' schools argued that the athletes failed to state a claim because they were not employees of the schools under the FLSA.[187] The district court, applying an "economic reality" test, denied the schools' motion to dismiss for several reasons.[188] First, the court relied on the Supreme Court's decision in *Alston* to reject the argument that the NCAA's tradition of amateurism meant that students could not be employees.[189] As the *Johnson* court explained, "the [athletes' schools] engage in the circular reasoning that they should not be required to pay Plaintiffs a minimum wage under the FLSA because Plaintiffs are amateurs," based on the long-established tradition of not paying college athletes.[190] In effect, the court reached the logically sound conclusion that not paying a putative employee under the FLSA does not necessarily render the FLSA inapplicable.[191]

The court in *Johnson* then turned to the Department of Labor's FOH and considered the same provision that the Seventh Circuit found to support its

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to involuntary servitude under the 13th Amendment 'slavery loophole.'" (quoting athletes' attorney Paul McDonald)).

[185] 843 F.3d at 293 (holding that despite the significant time and energy student athletes contribute to their university athletic programs, their participation does not constitute "work," given the established precedent that college athletes are unpaid, thereby minimizing any realistic expectation of compensation).

[186] *See* Johnson v. NCAA, 556 F. Supp. 3d 491, 512 (E.D. Pa. 2021) (determining that the plaintiffs met the standard to demonstrate a plausible allegation that student athletes were employees pursuant to the FLSA). The plaintiffs, a group of student athletes, sued five schools, arguing that their participation in college athletics entitled them to compensation from the schools. *Id.* at 495. The plaintiffs also sued the NCAA and other Division I universities, which they did not attend, under a joint employer theory. *Id.* The court denied the NCAA's motion to dismiss, finding the joint employer theory potentially applicable. *Id.* & n.1.

[187] *Id.* at 499 (presenting the legal and factual background of the allegations against the athletes' schools, and showing how the schools argued that the complaint did not lay out a sufficient claim because there was no feasible argument that student athletes were employees under the FLSA).

[188] *Id.* at 495, 500 (stating that "[t]he test of employment under the [FLSA] is one of 'economic reality'" (quoting Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 301 (1953))). The district court subsequently denied the schools' motion to dismiss. *Id.* at 512.

[189] *Id.* at 501 (explaining that prior precedent regarding amateurism and NCAA rules did not require courts to deny the possibility that student athletes could be compensated (citing NCAA v. Alston, 141 S. Ct. 2141, 2157 (2021)); *see Alston*, 141 S. Ct. at 2157 (determining that the *Board of Regents* decision did not bind future courts into prohibiting student athlete compensation (citing NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984))).

[190] 556 F. Supp. 3d at 501.

[191] *See id.* (holding that amateurism traditions do not automatically render the FLSA inapplicable to college athletes).

conclusion in *Berger* that college athletes are not employees.[192] In *Johnson*, the court noted that according to the FOH, for activities such as sports to be extracurricular activities, their purpose must be primarily to benefit students as a component of the overall education the school provides.[193] Importantly, the court found this provision not to control the determination of the athletes' status as employees because Division I college athletics are not conducted primarily for the benefit of the athletes.[194] The court reached this conclusion based on the plaintiffs' allegations that they dedicate upwards of thirty—and in the case of football players, more than forty—hours each week to their sports.[195] This time commitment took priority over academics, as some athletes could not take courses that conflicted with their athletic endeavors.[196] This, in turn, prevented those athletes from pursuing certain majors.[197]

In addition, the *Johnson* court considered the significant financial benefit that athletics programs provide to the NCAA and its member institutions. The court examined fiscal data from 2018 and noted that the NCAA had total revenues of over one billion dollars.[198] In addition, schools in the Power Five conferences reported median revenues of $97 million.[199] The court in *Johnson* concluded that the millions of dollars that Division I schools collect from their

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[192] *Id.* at 506 (relying on the FOH to determine that with regard to Division I sports, because the main beneficiary of an athlete's participation is generally the school, these sports would not be considered extracurricular); *see* Berger v. NCAA, 843 F.3d 285, 293 (7th Cir. 2016) (relying on the FOH's distinction between "work" and "extracurricular" activities to conclude that student athletes are not employees (citing FOH, *supra* note 179, §§ 10b24(a), 10b03(e))).

[193] 556 F. Supp. 3d at 502 (citing FOH, *supra* note 179, § 10b03(e)).

[194] *Id.* at 506 (determining that Division I athletics could plausibly constitute work because colleges and universities are the main beneficiaries of athletic participation). The court relied on several aspects of the complaint that helped draw this distinction between Division I athletics and other extracurricular activities. *Id.* at 505 (showing how colleges and universities could dictate players' academic schedules to accommodate practices, thereby prohibiting athletes from pursuing particular academic courses, reinforcing the notion that players' academic experiences were not being prioritized).

[195] *Id.* at 505 (highlighting the significant time commitment that colleges and universities demanded of student athletes in Division I athletic programs, particularly of football players).

[196] *Id.* (observing how colleges and universities with athletes in Division I sports programs required athletes to schedule their courses and academics around their sports commitments). The court observed how these restrictions on course offerings affected student athletes' academic experiences in a limiting manner. *Id.* (highlighting how particular universities would only allow students to miss athletic commitments if a practice overlapped with a core course, but did not excuse absences from class if a practice overlapped with a particular major course, thereby limiting student athletes from certain majors).

[197] *Id*.

[198] *Id*. at 505–06 (analyzing the financial data of the NCAA's 2018 and 2016 financial reports, and noting that the NCAA disclosed that Power Five schools had median revenues of $97,276,000; FCS schools had median revenues of $17,409,000; and non-football schools had $16,018,000 in median revenues). One of the defendants in *Johnson*, Villanova University, had revenues of almost $49 million in one year. *Id*.

[199] *Id.* at 505.

athletics programs may well outweigh the more theoretical and character-developing benefits such as discipline, leadership, and time management that athletes experience from participating in those programs.[200]

Finally, the court applied a multi-factor test that the Second Circuit previously established, known as the *Glatt* test, to determine whether college athletes are employees under the FLSA or are more like unpaid interns outside the statute's protection.[201] In effect, the *Glatt* test seeks to determine whether the student or the institution is the primary beneficiary of the student's activity.[202] Of the seven factors the *Glatt* test considers, the court found that two factors indicated that athletes are the primary beneficiaries of their athletic activities, three factors weighed in favor of finding the institution the primary beneficiary, and two factors were neutral.[203] Consequently, the court concluded that under the *Glatt* test, there was a sufficient basis that student athletes were employees of their universities.[204] In sum, the court in *Johnson* found that the athletes had adequately alleged claims under the FLSA and rejected the schools' argument that college athletes are necessarily not employees.[205]

In considering the different reasoning and results in *Berger* and *Johnson*, the court's analysis in *Berger* seems antiquated, even though the opinion dates back to only 2016.[206] First, *Berger*'s reliance on the "long-standing tradition [of amateurism]" is misplaced, particularly in light of the Supreme Court's more recent decision in *Alston*.[207] In *Alston*, the Court held that the NCAA

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[200] *Id.* at 505–06 (determining that the plaintiffs plausibly alleged that colleges and universities were operating athletic programs for their own financial benefit, not for the primary benefit of their athletes).

[201] *Id.* at 509 (explaining the "primary beneficiary test" from *Glatt* (citing Glatt v. Fox Searchlight Pictures, 811 F.3d 528, 536 (2d Cir. 2015))).

[202] *See id.* (focusing on economic realities and whether interns receive compensation or other tangible benefits from employers to reflect the value of their work).

[203] *Id.* at 509–10 (explaining that the *Glatt* factors are: (1) whether there is a clear understanding that employers will not pay interns; (2) whether there is a strong correlation between an intern's training and their education; (3) whether the intern receives credit or schoolwork as part of their internship; (4) whether the internship defers to a student's academic obligations and schedule; (5) whether the internship is limited in time; (6) whether an intern assists paid employees, as opposed to performing the work instead of employees; and (7) whether there is an understanding that an internship does not guarantee subsequent full-time employment with the employer). The court applied each of the seven factors to college athletes and determined that factors three, four, and six weighed in favor of finding athletes to be employees, factors one and seven weigh against athletes as employees, and factors two and five were neutral in finding an employment relationship. *Id.* at 512.

[204] *Id.* (citing *Glatt*, 811 F.3d at 537).

[205] *Id.* (determining that there was enough of a factual and legal basis for the student athletes to plausibly claim employment status for purposes of the FLSA).

[206] *See generally* Berger v. NCAA, 843 F.3d 285 (7th Cir. 2016).

[207] *Compare id.* at 291 (using amateurism principles as the defining factor in the relationship between colleges and athletes), *with* NCAA v. Alston, 141 S. Ct. 2141, 2158 (2021) (determining that

could not use the shield of amateurism to protect itself against antitrust claims for prohibiting education-related benefits to college athletes.[208]

The NCAA in *Alston* argued that the very violation of the Sherman Antitrust Act that the plaintiffs alleged, an agreement to not compensate athletes beyond a specified threshold, was the essence of the NCAA's "product."[209] Stated differently, the NCAA contended that to allow the provision of education-related benefits above the existing permitted threshold would undermine the particular product the NCAA offered to the public—amateur sports.[210] The Supreme Court rejected this argument, with the Justices unanimously deciding that the claim of amateurism could not insulate the NCAA from antitrust laws.[211] The Court stated that "a party can [not] relabel a restraint [on trade prohibited by the antitrust laws] as a product feature and declare it 'immune from [antitrust] scrutiny.'"[212] Justice Kavanaugh echoed this point in more colorful terms in his concurrence:

> Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.[213]

The Seventh Circuit's acceptance of the "long tradition of amateurism" in *Berger* sounds very much like the NCAA's argument, which the Supreme Court rejected, in *Alston*.[214] In effect, the Seventh Circuit justified its decision not to consider athletes as employees entitled to a minimum wage because colleges and universities have for decades not treated athletes as employees entitled to a

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the NCAA cannot use amateurism traditions as an automatic defense against challenges regarding athlete compensation (citing NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984))).

[208] 141 S. Ct. at 2158.

[209] *Id.* at 2162–63 (highlighting how the NCAA equated its "product," for purposes of the Sherman Act, to amateurism, thereby claiming that the district court took away the NCAA's core "product" in reconceptualizing amateurism).

[210] *Id.*

[211] *Id.* at 2162–63, 2166 (determining that relying on amateurism principles was insufficient to claim the district court amended the NCAA's "product" for purposes of the Sherman Act).

[212] *Id.* at 2163 (quoting Am. Needle, Inc. v. NFL, 560 U.S. 183, 199 n.7 (2010)).

[213] *Id.* at 2169 (Kavanaugh, J., concurring).

[214] *Compare* Berger v. NCAA, 843 F.3d 285, 293 (7th Cir. 2016) (relying on established amateurism norms in college sports to support a finding that student athletes are not employees), *with Alston*, 141 S. Ct. at 2158 (majority opinion) (determining that amateurism traditions do not insulate the NCAA from claims that college athletes are employees (citing NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984))).

minimum wage.[215] The challenged characteristic of college athletics—non-payment of athletes—is what the universities and NCAA contend is the distinguishing and defining feature of its product.[216] As in *Alston*, however, the fact that universities have potentially violated the FLSA for decades should not insulate them from allegations that they have violated the statute.

In addition, the *Berger* court's reasoning that "student athletes–like all amateur athletes–participate in their sports for reasons wholly unrelated to immediate compensation" completely ignores the economic reality of athletic scholarships.[217] This shortsightedness by the Seventh Circuit may have resulted from the particular plaintiffs involved in *Berger*; they were non-scholarship athletes on the University of Pennsylvania's women's track and field team.[218] For many scholarship athletes, though, the motivation for participating in college athletics includes the very substantial benefit of a scholarship.[219] With tuition and other attendance-related costs exceeding seventy thousand dollars per year for the highest-priced colleges and universities, the benefit of this significant form of compensation undoubtedly factors into the decision by many athletes to participate in college sports.[220]

Finally, as the court in *Johnson* pointed out, the *Berger* court seemed to ignore some aspects of the language in the FOH in reaching the broad conclusion that college sports are a non-compensatory extracurricular activity, rather than a form of work.[221] In particular, the FOH characterizes extracurricular activities not establishing an employer-employee relationship as those "conducted primarily for the benefit of the participants as a part of the educational

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[215] *See Berger*, 843 F.3d at 293 (reasoning that because amateurism is so deeply engrained in college sports, college athletes do not expect to earn money by playing sports, thereby justifying the schools' decision to not compensate college athletes).

[216] *Alston*, 141 S. Ct. at 2152 (observing how the NCAA argued that amateurism was the central aspect of NCAA sports).

[217] *See* 843 F.3d at 291, 293 (citing Vanskike v. Peters, 974 F.2d 806, 809–10 (7th Cir. 1992)).

[218] *Id.* at 289; *see also id.* at 294 (Hamilton, J., concurring) (noting that the University of Pennsylvania does not provide scholarships to athletes).

[219] *See Benefits to College Student-Athletes*, NCAA (2023), https://www.ncaa.org/sports/2014/1/3/benefits-to-college-student-athletes.aspx [https://perma.cc/4N3H-UVB6] (listing ten different advantages for participating in college sports, including scholarship awards). Of course, other reasons exist for playing college sports, including enjoyment of the sport, health benefits, developing discipline and leadership skills, and camaraderie. *Id.*

[220] *See* Jessica Learish, *The 50 Most Expensive Colleges in America, Ranked*, CBS NEWS, https://www.cbsnews.com/pictures/the-50-most-expensive-colleges-in-america/ [https://perma.cc/UU33-TG3A] (Aug. 3, 2022) (reporting how the National Center for Education Statistics found all of the top 50 most expensive universities exceeded $70,000 in tuition, fee, and residential costs).

[221] Johnson v. NCAA, 556 F. Supp. 3d 491, 506–07 (E.D. Pa. 2021).

opportunities provided to the students by the school or institution."[222] When comparing the benefits that each party receives—the lessons of hard work for the athletes and tens of millions of dollars for the institutions—it seems relatively clear which party is the primary beneficiary.[223] In essence, college sports' shift from pastime to big time factors into the assessment that athletes should now be considered employees, even if they were not in the past. As Justice Kavanaugh described in his *Alston* concurrence, "the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year," with those revenues "flow[ing] to seemingly everyone except the student athletes."[224] Justice Kavanaugh rightfully criticized this result, noting that these athletes, "many of whom are African American and from lower-income backgrounds," ultimately earn nothing, whereas others benefit richly from the existing system of college athletics.[225]

The *Johnson* decision did not conclusively determine that college athletes are employees.[226] The court simply denied the defendants' motion to dismiss.[227] And, as previously mentioned, the case is currently on appeal to the Third Circuit, which may ultimately agree with the Seventh Circuit's decision in *Berger*.[228] That seems unlikely though, given the Supreme Court's more recent recognition in *Alston* that college athletes have been generating extraordinary amounts of revenue for their institutions, with relatively little in return.[229] Thus, the economic realities of the relationship between colleges and student athletes have changed over time, as colleges have started to generate millions of dollars from the efforts of their athletes.[230] Consequently, future courts will likely find that athletes come within the FLSA's definition of "employee."

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[222] *Id.* at 502 (quoting FOH, *supra* note 179, § 10b03(e)) (showing how the FOH provided guidance to universities on what activities would amount to an employer-employee relationship between a school and a student).

[223] *See* NCAA v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring) (highlighting the fact that college athletes create immense revenues for universities).

[224] *Id.* (criticizing the fact that university officials, including coaches and NCAA executives, earn high salaries, whereas student athletes are not compensated for their labor).

[225] *Id.*

[226] *See* 556 F. Supp. 3d at 512 (determining only that there was a sufficiently plausible claim that athletes could be employees of their schools pursuant to the FLSA).

[227] *Id.*

[228] *See supra* note 164 and accompanying text (demonstrating that the Third Circuit decided to hear arguments to determine whether college athletes should be considered employees).

[229] *See supra* note 224 and accompanying text (highlighting the significant pay discrepancies between university executives and college athletes).

[230] *See Alston*, 141 S. Ct. at 2148–51 (majority opinion) (exploring the history of American college athletics and showing how the industry has expanded and seen more profits, particularly in regard to the formation of the NCAA and its immense revenues).

2. The Employment Question Under the National Labor Relations Act

The question of whether college athletes are employees under the NLRA was addressed in great detail in a March 2014 decision involving an effort by some members of the Northwestern University football team to unionize.[231] Before taking a vote on unionization, the Regional Director of the National Labor Relations Board (NLRB) released a decision analyzing whether Northwestern football players were employees.[232] If employees, the athletes would be eligible to vote on unionization.[233] If not, the unionization provisions of the NLRA would not apply to them, and they would not be allowed to vote on unionization.[234]

In assessing the question of employee status, the Regional Director explained that section 2(3) of the NLRA unhelpfully states that "the term 'employee' shall include any employee."[235] With essentially no statutory guidance about the meaning of the term, the Regional Director noted that the Supreme Court has stated that "it is necessary to consider the common law definition of 'employee'" to assess employment status for purposes of the NLRA.[236] In turn, the common law, as reflected in the NLRB's past decisions and relying on both Supreme Court precedent and the Restatement of Agency, has defined an employee as "a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment."[237] In applying this standard, the Regional Director concluded that football players who received scholarships were employees of Northwestern because they were performing services in exchange for compensation and were under the university's control.[238]

In applying the common-law standard for determining employee status, the Regional Director initially determined that Northwestern football "players perform[ed] valuable services for their Employer," giving two reasons for this

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[231] *See* Nw. Univ., 362 N.L.R.B. 1350, 1350 (2015) (explaining how in 2014, a Regional Director for the NLRB determined that pursuant to the NLRA, football players at Northwestern University are employees of the university).

[232] *Id*.

[233] *Id.* at 1351–52 (citing NLRB v. Town & Country Elec., 516 U.S. 85, 89 (1995)) (showing that an employer-employee relationship was necessary for a vote on unionization).

[234] *Id.*

[235] *Id.* at 1362.

[236] *Id.* at 1362–63 (citing *Town & Country Elec.*, 516 U.S. at 94).

[237] *See id.* at 1363 (first citing Brown Univ., 342 N.L.R.B. 483, 490 n.27 (2004), *overruled by* Trs. of Columbia Univ., 364 N.L.R.B. 1080 (2016); and then citing RESTATEMENT (SECOND) OF AGENCY § 2(2) (AM. L. INST. 1958)).

[238] *Id.* (stating that "players receiving scholarships to perform football-related services for the Employer [Northwestern University] under a contract for hire in return for compensation are subject to the Employer's control and are therefore employees within the meaning of the [NLRA]").

statement.[239] The first reason was the amount of revenue the football team brought in to the school: $235 million from 2003–12.[240] Second, the Regional Director cited the reputational boost and significant increase in alumni donations that would result from a successful football program.[241] The Regional Director also characterized the increase in student applications stemming from a successful football program as a valuable service that football players provided to their schools.[242]

As to the issue of compensation, the Regional Director determined that Northwestern University was compensating its football players for their work on the team by providing them with academic scholarships.[243] The Regional Director noted that the scholarships are worth up to $76,000 each year, giving each athlete over $250,000 in compensation from the university over the course of their football career.[244] Moreover, although the Regional Director acknowledged the lack of formal payment for players, he also noted that players still gain considerable economic benefits from their collegiate football careers.[245] The Regional Director further stated that athletes received scholarships from the university pursuant to a "tender."[246] The tender, which each player must sign before the receipt of scholarship benefits, is essentially an employment contract between the school and athlete that explains how long and under what conditions the school will compensate each athlete.[247] In effect, the tender reflects the quid pro quo nature of the scholarship—the university provides a material economic benefit to the athletes in exchange for their performance of athletic services for the university.

On the issue of employer control, the Regional Director discussed in significant detail how the university dictated the athletes' daily activities, sometimes scheduling football-related activities from 5:45 in the morning until 10:30 at night, when the football team mandated that the athletes go to bed.[248] The university provided players with hour-by-hour itineraries setting out their

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[239] *Id.*

[240] *Id.*

[241] *Id.*

[242] *Id.*

[243] *Id.* (explaining that Northwestern's scholarships amounted to compensation because they covered student athletes' tuition and other academic-related costs, such as fees, housing, and school supplies).

[244] *Id.*

[245] *Id.*

[246] *Id.* (explaining that "tender" is the mechanism through which universities, like Northwestern, provide compensation to their student athletes).

[247] *See id.* (observing that the tender is very important to student athletes because the NCAA rules bar outside employment for student athletes, so the tender covers important provisions related to how athletes pay for school, housing, and food).

[248] *Id.* at 1363–64.

daily schedules for training, eating, studying, receiving medical treatment, and watching game videos, among other activities.[249] On a broader level, the Regional Director found that football players spent fifty to sixty hours per week engaged in football activities during training camp, and forty to fifty hours per week during the season.[250] Even in the off-season, football players would typically devote twenty to twenty-five hours per week to football activities.[251] In addition, coaches had to grant players approval before the players could do any of the following: "(1) make their living arrangements; (2) apply for outside employment; (3) drive personal vehicles; (4) travel off campus; (5) post items on the Internet; (6) speak to the media; (7) use alcohol and drugs; and (8) engage in gambling."[252]

As with the athletes involved in the *Johnson* litigation, the Northwestern players' football obligations interfered with their academic pursuits, as they were not able to take certain courses due to conflicts with their practices.[253] In addition, the travel requirement for games sometimes caused players to miss classes.[254] Therefore, due to the extensive time commitment and prioritization of football in the players' schedules, the Regional Director concluded that scholarship football players were not primarily students, but rather employees under common law and, consequently, under the NLRA.[255]

Northwestern appealed the Regional Director's decision to the NLRB.[256] In August 2015, the Board issued a decision declining to exercise jurisdiction over the Northwestern football team's unionization efforts.[257] The Board made clear that in declining jurisdiction, it was not deciding the athletes' employment status one way or the other.[258] Rather, the Board declined jurisdiction because it found that exercising jurisdiction "would not promote stability in

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[249] *Id.* (explaining the intensity of the time commitment to the football program for Northwestern University football players, given that every hour of each day during training season was dedicated to, and under the control of, the football program).

[250] *Id.* at 1364.

[251] *Id.* at 1360.

[252] *Id.* at 1364.

[253] *See id.* at 1361 (highlighting the experience of a Northwestern University football player, Kain Colter, who noted that the football program would not permit athletes to take non-required courses that interfered with football commitments, thereby prohibiting him from pursuing prerequisite courses needed for medical school admission).

[254] *Id.* at 1364 (explaining how travel requirements of the football program clearly showed that athletics often superseded the importance of academics).

[255] *Id.* at 1365 (quoting Brown Univ., 342 N.L.R.B. 483, 488 (2004), *overruled by* Trs. of Columbia Univ., 364 N.L.R.B. 1080 (2016)) (reasoning that football players faced extensive time commitments, which exceeded their academic time commitments).

[256] *See id.* at 1350 (noting that Northwestern challenged the Regional Director's decision on the basis that athletes receiving scholarship awards should not be viewed as employees of the university).

[257] *Id.*

[258] *Id.* at 1355.

labor relations."[259] The Board reached this conclusion because state employers are expressly excluded from the NLRA. [260] Of the 125 colleges and universities that participate in FBS football, at the highest level of college competition and the level at which Northwestern participated, "all but [seventeen] are state-run institutions" over which "the Board cannot assert jurisdiction."[261] In addition, of the fourteen-member Big Ten Conference, Northwestern was the only private school.[262]

Consequently, the Board expressed concern over the competitive imbalance that might result if some schools' athletes were allowed to unionize and bargain for different working conditions than those for athletes at other schools.[263] One of the primary purposes for the existence of the NCAA is to standardize the rules governing intercollegiate athletic competitions.[264] The different standards that might result from only some teams having the opportunity to unionize would potentially undermine the level playing field required for fair athletic competition.[265] To avoid this, the Board stated that it would "not effectuate the policies of the [NLRA]" for the Board to exercise jurisdiction in the case, even if the football players were in fact employees under the Act.[266] Consequently, the Board decided to decline to assert jurisdiction.[267]

Despite the NLRB's non-decision on the issue of athletes' employee status in the *Northwestern* case, more recent guidance from the NLRB's General Counsel indicates that college athletes are likely to be considered employees under the NLRA. In September 2021, NLRB General Counsel Jennifer Abruzzo issued a memorandum (Memo) to NLRB Regional Directors that gave updated guidance on her position that certain types of collegiate athletes are employees under the NLRA.[268] The Memo went so far as to state that even refer-

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[259] *Id.* at 1352.

[260] *Id.* at 1354.

[261] *Id.*

[262] *Id.* at 1351.

[263] *Id.* at 1354 (expressing concern that if the Board exercised jurisdiction in this case, its decision would be inapplicable to public institutions, which comprised the majority of NCAA and FBS schools).

[264] *See id.* at 1353 (noting that colleges and universities wanted to have uniform guidelines to oversee athletic programs and competitions).

[265] *Id.* at 1354 (highlighting the adverse consequences, namely instability and non-uniformity, if the NLRB were to exercise jurisdiction in this case).

[266] *Id.* at 1356.

[267] *Id*.

[268] *See generally* Memorandum from Jennifer A. Abruzzo, Gen. Couns., NLRB, to all Reg'l Dirs., Officers-in-Charge & Resident Officers (Sept. 29, 2021) [hereinafter Abruzzo Memo]. Throughout the memo, Abruzzo used the term "Player" rather than "student-athlete" based on her position that "the term [student-athlete] was created to deprive those individuals of workplace protections." *Id.* at 1 n.1 (citing, among other sources, Molly Harry, *A Reckoning for the Term "Student-Athlete,"* DIVERSE (Aug.

ring to college athletes as "student-athletes" may itself constitute a violation of the NLRA, because it could cause the athletes to think that they do not come within the statute's protection.[269]

The Memo explained that despite the NLRB's decision to not assert jurisdiction in *Northwestern University*, no authority precludes a determination that college athletes are employees under the NLRA.[270] In determining employer-employee status, the Memo stated that "common-law agency rules" were the proper standard to apply.[271] The common-law standard holds that "an employee includes a person 'who perform[s] services for another and [is] subject to the other's control or right of control.'"[272] Moreover, if an individual receives payment for these services, that strongly suggests they are an employee.[273]

With those standards controlling, the Memo stated that the law supports the determination that football players receiving scholarships at top Division I programs are employees of their universities under the NLRA.[274] The Memo cited several reasons for reaching this conclusion, including the nature of the relationship between athletes and universities, the recognition that scholarships constitute a form of compensation, and the degree of control that colleges and universities have over players.[275] The Memo analyzed each of these factors as follows:

- Nature of relationship: Football players perform services for their university that generate millions of dollars of profit, burnish the university's

26, 2020), https://www.diverseeducation.com/sports/article/15107633/a-reckoning-for-the-term-student-athlete [https://perma.cc/BYQ7-FQZB]).

[269] *Id.* at 4 & n.12 (showing the negative implications of classifying players as student-athletes, where players believe that because they are student-athletes, they are not entitled to compensation and labor protections that are otherwise granted to employees (citing, among other sources, *Level Playing Field: Misclassified* (HBO documentary broadcast Sept. 21, 2021))).

[270] *Id.* at 3–4 (affirming the NLRB's decision to use common-law definitions of "employee" to interpret the statutory language of the NLRA).

[271] *Id.* at 3 (citing Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1082–83 (2016)).

[272] *Id.* (quoting Bos. Med. Ctr. Corp., 330 N.L.R.B. 152, 160 (1999)).

[273] *Id.* (quoting *Bos. Med. Ctr. Corp.*, 330 N.L.R.B. at 160).

[274] *Id.* The Memo limited this statement to "scholarship football players at Division I FBS private colleges and universities" because it considered scholarships to constitute a form of payment to players. *Id.* In addition, the NLRA "expressly excludes state and local governments from the Board's jurisdiction." *Id.* at 8 n.33. Consequently, the Memo did not address football players at public universities. *See id.* at 3 (addressing employment status at private universities only). Nevertheless, the application of the common-law test for employer-employee status would apply equally to athletes at public institutions for purposes other than NLRA jurisdiction, such as determination of employment under Title IX. *See id.* at 8 n.33 (referring to only the NLRB as exempt from exercising jurisdiction over employment status at public institutions).

[275] *Id.* at 3–4.

reputation, and increase both student applications and alumni contributions;[276]

- Compensation: Football players at some of the most expensive universities receive compensation in the form of tuition and various other benefits, amounting up to seventy-six thousand dollars annually;[277]
- NCAA control: The NCAA directs several aspects of the relationship between players and their universities, including how many hours the players may practice, scholarship eligibility, grade requirements, and the amount of compensation players may receive;[278]
- University control: The university, through its football coaching staff, regulates almost every aspect of a player's life, in some instances providing daily itineraries that dictate where the player should be and what the player should do for every hour of the day.[279]

All these factors led the General Counsel to conclude that Division I football players who receive scholarships are employees.[280] That conclusion would be further bolstered by pay-for-play payments directly from universities to athletes, as the common law considers the presence of a "material inducement" relevant in determining employee status.[281]

The Memo also noted that other legal and social changes that have occurred since the Board's decision in *Northwestern* support the position that college athletes are employees.[282] In particular, the Memo stated that the Supreme Court's decision in *Alston* acknowledged that perceptions of amateurism for college athletes have shifted considerably, and thus rejected the idea that the NCAA is permanently allowed to not pay its athletes.[283] The Memo cited commentators who have interpreted courts' scaling back of NCAA restrictions on athlete compensation as a sign that students will likely be considered em-

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[276] *Id.* at 3.

[277] *Id.*

[278] *Id.*

[279] *Id.* at 4.

[280] *Id.* (considering each of the factors listed and determining that athletes receiving scholarships at Northwestern unequivocally would be employees under § 2(3) of the NLRA).

[281] *See* RESTATEMENT OF EMPLOYMENT LAW § 1.02 cmt. e (AM. L. INST. 2015) (stating that "[t]he absence of compensation or other material inducement is a condition of volunteer status"); *see also infra* notes 307–314 and accompanying text (discussing this issue).

[282] Abruzzo Memo, *supra* note 268, at 5–7 (discussing the important developments since the NLRB's decision pertaining to Northwestern football players, concerning NCAA regulations, collective action efforts, and the law).

[283] *Id.* at 5 (showing that despite the fact that the *Alston* decision did not change the NCAA athlete compensation structure, there was still an important shift in the Court's attitude toward paying college athletes).

ployees under applicable labor laws.[284] In addition, the Memo described the NCAA's suspension of its prohibition against athletes' profiting from the use of their name, image, and likeness (NIL) as further evidence of the move away from amateurism and towards a commercial employer-employee relationship.[285] Specifically, the Memo stated that "[t]he freedom to engage in far-reaching and lucrative business enterprises" through NIL deals renders college athletes more similar to their professional counterparts, who are employees of their teams and at the same time allowed to seek individual profit from their fame.[286]

Thus, although the NLRB itself has yet to make a final determination about the employment status of college athletes for purposes of the NLRA, there is strong and recent indication that administrators at the NLRB (at least one Regional Director and the General Counsel) take the position that scholarship athletes are employees. This conclusion would be further supported if universities paid athletes for their athletic services.

3. The Employment Question Under the Common Law (Restatement) Standard

With no direct guidance from Title IX about how to determine employment status, it is reasonable to consider the law as it has developed under other statutes, like the FLSA and the NLRA.[287] Ultimately, however, it is likely that a court will look to the common law to assess employment status under Title IX. Much of the common-law analysis has already been discussed above, particularly in the context of the NLRB Regional Director's and General Counsel's focus on the degree of control that universities exert over their athletes' lives.[288] A few points, though, are worth revisiting.

The most important factor in determining employee status is the degree of control that a purported employer may exercise over a putative employee.[289] This is reflected in the Third Restatement of Agency, which provides that "an employee is an agent whose principal controls or has the right to control the

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[284] *Id.* (quoting Alex Blutman, *The Strike Zone*—NCAA v. Alston, ONLABOR (June 22, 2021), https://onlabor.org/the-strike-zone-ncaa-v-alston/ [https://perma.cc/DLF9-3RV4]).

[285] *Id.* at 6 (citing Hosick, *supra* note 2) (arguing that the NCAA's decision to allow players to profit off their image signals that the athletes are more akin to employees).

[286] *Id.*

[287] *See supra* notes 162–230 and accompanying text (exploring Title IX's statutory language and related Policy Interpretation and Regulations, and ultimately determining that there is no express statutory or regulatory answer as to whether college athletes would be employees under Title IX).

[288] *See supra* notes 231–286 and accompanying text (analyzing different common-law cases that touch on the question of employment status for college athletes).

[289] *See* RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (AM. L. INST. 2006) (highlighting the level of control over another as a key indicator of an employment relationship).

manner and means of the agent's performance of work."[290] The Comment to section 7.07 of the Restatement provides more detail about the factors to consider in determining whether an employer-employee relationship exists.[291] These factors include, in addition to the degree of control the principal may exert over the agent's work, whether the principal supervises the agent, whether the principal provides resources for the agent to perform work, and how the principal compensates the agent.[292] The Comment's statement that "all employers retain a right of control, however infrequently exercised," further reflects the primacy of the control factor.[293]

The extent of control a college may exert over the manner and means of an athlete's athletic performance will, of course, vary significantly depending on many factors: the sport, the level of competition (Division I versus Division III, for example), whether the athlete receives a scholarship, and the personality of the coach, to name a few.[294] That said, for scholarship athletes performing at the highest level of college competition, the institution, through its coaches, has an astonishing ability to control the manner and means of the athlete's performance.[295]

The NLRB Regional Director's 2014 *Northwestern* decision described in significant detail the degree of control that college athletic programs may exert over their athletes, as discussed above.[296] Even before that decision, however, a 2006 law review article examined the extent of control that Division I athletic programs exercise over their athletes' lives.[297] Arguing that college athletes in revenue-producing sports such as Division I football and men's basketball should be considered employees for purposes of the NLRA, the article noted that universities are able to exercise more control over their athletes than over any other university employee.[298] Through interviews with current and former football and men's basketball players at Division I and I-A schools, the article found that football players dedicated around fifty-three hours, conservatively,

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[290] *Id.*

[291] *Id.* at cmt. f.

[292] *Id.*

[293] *Id.*

[294] *See supra* notes 274–279 (focusing on Division I FBS schools to show how these schools, in particular, exert significant control over their student athletes).

[295] *See* Nw. Univ., 362 N.L.R.B. 1350, 1358 (2015) (showing how coaches can exercise an astonishing degree of control over the daily activities of student athletes, using itineraries and other means).

[296] *See supra* notes 248–252 and accompanying text (focusing on how coaches and schools can oversee nearly every aspect of a college athlete's life).

[297] *See generally* Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71 (2006).

[298] *Id.* at 97 (showing the level of control universities have over athletes as support for the conclusion that athletes in Division I sports are employees of their universities).

to football each week when playing at home.[299] The time commitment was even greater when games are away.[300]

In addition to the significant time commitment, because of the regimented practice schedule, athletes were unable to take afternoon academic courses.[301] Therefore, they were "commonly foreclosed from certain classes and majors."[302] Nevertheless, universities required athletes to take full, twelve-credit academic loads each term, and to spend up to ten hours per week in study halls mandated by their coaches.[303] In providing significant detail about the demands on college football players' time throughout the year, not just during the sports season, the article's authors demonstrated how Division I football players sacrifice their time, their academic options, and much of their personal freedom in exchange for the opportunity to play their sport.[304] The authors concluded that coaches wield "plenary control over" their athletes' lives.[305]

Of course, a counterargument to the characterization of athletes as employees is the one that the Seventh Circuit adopted in *Berger*: that sports are not "work" and, thus, athletes are volunteers participating in extracurricular activities rather than employees engaged in work.[306] Section 1.02 of the Restatement of Employment Law squarely addresses this issue when it defines a volunteer as someone who provides "uncoerced services" without "material inducement."[307] Although athletes may be uncoerced in the sense of not being "compelled to perform services by law, physical coercion, or pressure by the recipient" of the services, that does not mean they are volunteers.[308] Today's scholarship athletes and those in the future who receive substantial pay-for-play payments from their universities clearly receive a "material inducement," as the Restatement uses that phrase.[309] Comment (e) to section 1.02 states that "[m]aterial inducement includes the promise of any type of material gain . . .

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[299] *Id.* at 98–99.

[300] *Id.* at 101 (explaining that for away games, players are additionally required to spend significant time traveling to games throughout the weekend).

[301] *Id.* at 100.

[302] *Id.*

[303] *Id.* & n.129.

[304] *Id.* at 104–05 (noting that football programs go so far as to dictate what students may not put into their bodies (e.g., alcohol and tobacco) and to strongly encourage the consumption of performance-enhancing products (e.g., creatine)).

[305] *Id.* at 105.

[306] *See* Berger v. NCAA, 843 F.3d 285, 293 (7th Cir. 2016) (holding that because of the traditional amateur characteristic of college sports, college athletes were not employees pursuant to the FLSA).

[307] *See* RESTATEMENT OF EMPLOYMENT LAW § 1.02 (AM. L. INST. 2015) (noting that lack of payment to an individual is a key factor in determining volunteer, as opposed to employment, status).

[308] *See id.* at cmt. c.

[309] *See id.* at cmt. e (detailing examples of material inducement, including compensation or special benefits).

important to a reasonable person in the individual's circumstances."[310] An athletic scholarship, which may exceed seventy-five thousand dollars in value each year, is almost certainly the type of benefit that is "important to a reasonable person."[311] This is even more so the case if the athlete receives additional direct payments, either because they are mandated by a court (should the plaintiffs prevail in cases like *Johnson*) or because the NCAA continues to loosen its compensation restrictions and allows universities to pay athletes for their services.

Examples of non-material inducements that the Restatement of Employment provides are substantially different from a seventy-five thousand dollar scholarship or significant pay-for-play payments.[312] For example, the Restatement states that "[t]he provision of a modest free lunch at the workplace" does not amount to a material inducement.[313] Of course, the significant value of full athletic scholarships and direct payments for athletic services differs greatly from the de minimis value of "a modest free lunch."[314] Therefore, under the common-law standard, as reflected in the Restatement of Agency and the Restatement of Employment, scholarship athletes and athletes who in the future receive direct payments from their universities should be considered employees for purposes of Title IX.

C. The Employment Provisions of Title IX Regulations (Subpart E)

As mentioned in the discussion about the athletics provisions of the Regulations under Title IX (Subpart D),[315] "[a] recipient which employs any of its students shall not do so in a manner which violates Subpart E of th[e] [Regulations]."[316] In light of the analysis above regarding the employment status of athletes, this Article now turns to Subpart E of the Regulations to determine the implications of employment on whether Title IX (or other applicable law) mandates equal payments by universities to their male and female athletes.

Unlike Subpart D, which requires "equal athletic opportunity" for each sex with respect to athletics, Subpart E does not require "equal employment opportunity."[317] Instead, Subpart E states that employers receiving federal

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[310] *Id.*

[311] *See id.*

[312] *See id.* (noting, for example, that reimbursing employees for expenses incurred from performing a job would not be considered material inducement).

[313] *Id.*

[314] *See id*.

[315] *See supra* notes 117–156 and accompanying text.

[316] 34 C.F.R. § 106.38(b) (2023).

[317] *Compare id.* § 106.41 (requiring Title IX institutions to ensure that athletics participants have equal opportunity to play sports, regardless of sex), *with id.* § 106.51(a)(2) (determining that in regard to employment, employers cannot discriminate because of sex).

funds must make employment decisions "in a nondiscriminatory manner" and not limit employees due to their sex.[318] Subpart E also states that it applies to pay rates, alternative types of compensation, and changes to compensation.[319] More specifically with respect to compensation, Subpart E states that employers receiving federal funds may not pay lower wages to employees of a particular sex "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[320] The same provision of Subpart E prohibits "distinctions in rates of pay or other compensation" on the basis of sex.[321]

As the Office of Civil Rights has explained, Subpart E's general prohibition against "distinctions in rates of pay or other compensation" was based on Equal Opportunity Commission guidelines to ensure consistency with Title VII provisions of the Civil Rights Act.[322] The more specific prohibition against unequal pay for work requiring "equal skill, effort, and responsibility" was taken directly from and is identical to the standard set forth in the Equal Pay Act (EPA).[323] Consequently, case law under Title VII[324] and under the EPA[325] is relevant in assessing compliance with Title IX's compensation-related requirements.[326] In fact, because the protections under Title IX and those other statutes are duplicative, plaintiffs typically bring claims of employment discrimination under Title IX, Title VII, or the EPA.[327] Moreover, courts have held that "EPA standards apply to Title VII discrimination claims of 'unequal pay for equal work,'" the type of claim that would result from universities paying their male and female athletes differently.[328] Consequently, an unequal pay claim under Title IX essentially results in an analysis identical to a claim under

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[318] *Id.* § 106.51(a)(2).

[319] *Id.* § 106.51(b)(3) (extending the ban on employer discrimination in educational settings to rates and forms of compensation for educational employees).

[320] *Id.* § 106.54(b).

[321] *Id.* § 106.54(a).

[322] Memorandum from Harry M. Singleton, Assistant Sec'y for C.R., U.S. Dep't of Educ., to William H. Thomas, Reg'l C.R. Dir., U.S. Dep't of Educ. 1 (June 27, 1983) [hereinafter Singleton Memo] (noting that there was a deliberate intention to ensure that § 106.54(a) of this Regulation was consistent with Title VII of the Civil Rights Act).

[323] *See id.* (showing that there was a similar effort to ensure that this provision of Subpart E of the Title IX Regulations remained consistent with the EPA).

[324] 42 U.S.C. § 2000e.

[325] 29 U.S.C. § 206(d).

[326] *See* Singleton Memo, *supra* note 322, at 2 (stating that "Title VII case law should be used in interpreting [34 C.F.R.] § 106.54(a) and case law established under the [EPA] in applying [34 C.F.R.] § 106.54(b)").

[327] *See id*.

[328] *See, e.g.*, Price v. N. States Power Co., 664 F.3d 1186, 1191, 1195 (8th Cir. 2011) (affirming the district court's determination that EPA standards apply to Title VII discrimination claims of "unequal pay for equal work").

the EPA. Under the EPA, an employer may justify differences in pay by demonstrating that those differences are "based on any factor other than sex."[329] One such factor that courts have found to justify disparate payments in EPA litigation is revenue production, both within and outside the context of athletic employment.[330]

For example, in 1973, in *Hodgson v. Robert Hall Clothes, Inc.*, the U.S. Court of Appeals for the Third Circuit held that "economic benefit to the employer" is a factor, apart from sex, that justifies salary differences.[331] In *Robert Hall*, the Secretary of Labor sued Robert Hall, a clothing store that compensated its male employees at a higher rate than its female employees.[332] According to the court, only male salespeople worked in the men's clothing department, and only female salespeople worked in the women's clothing department because of concern that forcing members of the opposite sex to interact in the context of selling clothes could cause embarrassment due to the potential for physical contact.[333] The court noted that there was a higher profit margin in the men's department than in the women's department because the merchandise was generally more expensive and of a higher quality.[334] As a result, the men's department consistently displayed higher sales volume and gross profit.[335] The company explained the wage disparity between its male and female salespeople by pointing to certain economic factors, such as the fact that the men's department generated more revenue than the women's department.[336]

In considering whether the company's disparate payments to male and female employees were based on a factor "other than sex," the Third Circuit determined that the "economic benefits to an employer can justify a wage differential."[337] Thus, even though the male and female employees were performing the same kind of work—both were selling clothing—the payment scheme Robert Hall used did not violate the EPA.[338] The court explained that if two employees perform work of the same type, but one employee makes higher

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[329] 29 U.S.C. § 206(d)(1).

[330] *Id.* The following analysis under the EPA draws significantly from the author's previous article analyzing the pay dispute between the U.S. Women's National Soccer Team (USWNT) and the U.S. Soccer Federation (USSF). *See* Andrew J. Haile, *An Even Playing Field: The Goal of Gender Equity in World Cup Soccer*, 98 OR. L. REV. 427, 440 (2020) (introducing the background of the USWNT's EPA claim against the USSF).

[331] 473 F.2d 589, 595 (3d Cir. 1973).

[332] *Id.* at 591–92 (noting that the clothing store consistently paid male sales employees a higher base salary and commission rates).

[333] *Id.* at 592.

[334] *Id.* at 590.

[335] *Id.* at 591.

[336] *Id.* at 592.

[337] *Id.* at 594.

[338] *Id.* at 598.

profit for the employer, paying the higher-profit employee more does not violate the EPA.[339] The court reasoned that in the case of Robert Hall, the higher profitability of the men's department permitted higher pay for the employees of that department.[340] Paying the male employees of the men's department higher compensation did not create different compensation rates based on sex, but rather on "reasoned business judgment" regarding which department had higher profitability.[341]

Courts have also recognized the relevance of an employee's economic impact on the employer in the athletic context. Female coaches who receive lower pay than their male counterparts have often challenged their salaries.[342] For instance, in 1994, in *Stanley v. University of Southern California*, the U.S. Court of Appeals for the Ninth Circuit rejected the EPA claim brought by Marianne Stanley, the former head coach of the University of Southern California's (USC) women's basketball team.[343] The women's team enjoyed more post-season success than the men's team during Coach Stanley's four-year tenure.[344] Nevertheless, the court reasoned that the higher revenue from the men's basketball team warranted the university to pay the men's basketball coach more money than the women's coach.[345] Over Coach Stanley's four years at USC, the women's basketball team generated revenue of $50,262.[346] During that same period, the men's team brought in revenue of $4,725,784.[347]

The court also rejected Coach Stanley's arguments that this difference in revenue resulted from unequal marketing efforts by the school and from gender discrimination by sports fans.[348] Regarding the marketing argument, the court determined that USC's decision to invest marginally more money into marketing the men's basketball team "demonstrates, at best, a business decision to allocate USC resources to the team that generates the most revenue."[349] The Ninth Circuit also agreed with the district court that the university could

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[339] *Id.* at 595 ("It might take no more effort or skill to sell two different pairs of ten dollar shoes; but if the employer makes a four dollar profit on one pair as opposed to a two dollar profit on the other, the Secretary [of Labor] apparently allows a higher commission rate.").

[340] *Id.* at 597.

[341] *Id.*

[342] See, for example, *Stanley v. University of Southern California*, 13 F.3d 1313 (9th Cir. 1994), discussed below.

[343] *Id.* at 1323.

[344] *Id.* at 1322 n.2.

[345] *See id.* at 1318, 1323 (choosing to not specify how much less the women's team coach made than the men's team coach, stating only that "the district court reviewed Coach Raveling's [the men's team coach's] employment contract *in camera*").

[346] *Id.* at 1322 n.1.

[347] *Id.*

[348] *Id.* at 1323.

[349] *Id.*

not be held responsible for societal preferences to watch men's sports over women's sports.[350] For all these reasons, the court rejected Coach Stanley's EPA claim.[351] This result is not limited to *Stanley*, as other courts have reached the same result in lawsuits involving female coaches whose teams produce less revenue than teams led by male coaches.[352]

One final example, outside the sports context, illustrates the relevance of revenue generation in salary determination, even if the plaintiff's job performance is strong. In 1999, in *Sobol v. Kidder, Peabody & Co.*, the U.S. District Court for the Southern District of New York affirmed an arbitration panel's finding of no EPA violation. [353] In *Sobol*, the plaintiff contended that she received lower compensation than other managing directors at her investment banking firm, but the court found that factors "other than sex" explained the compensation disparity.[354] In particular, these factors included "profitability, market value, revenue generation, client relationships, product development abilities, product knowledge, leadership abilities and corporate citizenship."[355] Elizabeth Sobol headed Kidder, Peabody's utility industry group, which the defendant called "a relatively slow-paced, unprofitable industry group."[356] In contrast, other groups at the firm, such as the mergers and acquisitions (M&A) group, were more active and revenue-generating.[357] The defendant justified the pay differential between the plaintiff and other managing directors based on profitability, explaining that deals coming from the utility industry group were not profitable. They were, in fact, "loss leaders," whereas deals coming from the M&A group were much more lucrative.[358]

The court accepted the employer's justification for the pay inequality.[359] According to the *Sobol* court, an employer that compensates some employees

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[350] *Id.*

[351] *Id*.

[352] *See, e.g.*, Bartges v. Univ. of N.C. at Charlotte, 908 F. Supp. 1312, 1323 (W.D.N.C. 1995), *aff'd*, 94 F.3d 641 (4th Cir. 1996) (granting summary judgment against a female assistant women's basketball and softball coach because "men's basketball is the most marketable and largest revenue producing sport at UNCC"); Deli v. Univ. of Minn., 863 F. Supp. 958, 961 (D. Minn. 1994) (rejecting disparate pay claims by women's gymnastics coach based on "evidence . . . that the three teams [used for comparison purposes] enjoy[ed] significantly greater spectator attendance and generate[d] substantially more revenue for the University than the women's gymnastics team"), *abrogated by* Egerdahl v. Hibbing Cmty. Coll., 72 F.3d 615 (8th Cir. 1995).

[353] 49 F. Supp. 2d 208, 221 (S.D.N.Y. 1999).

[354] *Id.* at 222–23.

[355] *Id.* at 215.

[356] *Id.* at 213, 215.

[357] *Id.* at 215.

[358] *Id.*

[359] *Id.* at 221.

more than others for generating higher profits is not in violation of the EPA.[360] The court noted that the plaintiff had compared herself to a group of bankers in the profitable M&A practice group, which generated significant profits for the firm, unlike the plaintiff's utility industry group.[361] Thus, even if the plaintiff had performed high quality work, the industry group she led was less profitable than other industry groups, thereby justifying her lower compensation without violating the EPA.[362]

Based on this case law, it appears highly likely that a court considering a Title IX claim for unequal compensation brought by female athletes against their university would reject the claim if the university were paying men in revenue-producing sports but not paying women because their sports do not generate revenue. The claim for equal pay-for-play payments from a university to its male and female athletes under Title IX falls short under the following analysis: (1) direct payments from the university to its athletes are not scholarships, but rather commercial transactions that create an employer-employee relationship; and (2) universities, as employers, are not required to provide proportionally equal payments to male and female athletes under Title IX, as indicated in the EPA case law, because of the revenue disparities between men's and women's sports.

In sum, Title IX does not require equal pay-for-play payments from universities to their male and female athletes. That said, allowing universities to pay only male athletes will further exacerbate the existing inequality between men's and women's sports. It will also more deeply entrench the higher value placed on men's sports. For these reasons, the next Part discusses why and how the Title IX Regulations should be amended to treat pay-for-play payments in the same way that scholarships are currently treated, requiring proportionally equal payments from universities to their male and female athletes.[363]

III. Moving Forward: Seeking to Meet the Goal of Title IX

Paying male but not female athletes would further hamper the realization of Title IX's goal "that our daughters will have the same opportunities as our

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[360] *Id.* at 220 (citing Sprague v. Thorn Ams., Inc., 129 F.3d 1355, 1364 (10th Cir. 1997)) (finding it "permissible to pay female assistant manager less than male assistant managers where female's department produced less than 10% of revenues produced by males' departments")); *see also* Byrd v. Ronayne, 61 F.3d 1026, 1034 (1st Cir. 1995) (affirming the dismissal of a discriminatory pay claim given the employer's affirmative defense that one attorney brought in substantially more clients and revenue than the plaintiff).

[361] *Sobol*, 49 F. Supp. 2d at 220.

[362] *Id*.

[363] *See infra* notes 364–410 and accompanying text.

sons."[364] By paying only male athletes, female athletes would not have the same opportunity as their male counterparts to receive compensation for their athletic abilities.[365] Also, considering the NCAA's own test for gender equity, which looks at whether athletes would view the other gender's resources and program as "fair and equitable," it seems extremely unlikely that athletes of either gender would consider "fair and equitable" a situation where universities pay only athletes of the other gender.[366]

For these reasons, policymakers should not end their analysis with the conclusion that current Title IX Regulations permit unequal payments to male and female athletes. Instead, policymakers should amend the Regulations to treat pay-for-play payments like scholarships and mandate proportionately equal payments between the sexes. This could be easily achieved, at least from a drafting perspective. The Department of Education should amend the Regulations to include a new term: "athletic service payments." The Regulations should define "athletic service payments" as "payments from a recipient [i.e., a college or university receiving federal financial assistance] to an athlete in consideration for the athlete's performance of athletic services." The Regulation addressing scholarships should then be amended, as follows, to treat athletic service payments the same as scholarships:

> 34 C.F.R. § 106.37(c). Athletic scholarships and athletic service payments. (1) To the extent that a recipient awards athletic scholarships, ~~or~~ grants-in-aid, or athletic service payments, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.[367]

The Department of Education would need to make conforming changes throughout the Title IX Regulations to ensure consistent treatment of scholarships and athletic service payments, but the task of amending the language of the Regulations to give these two forms of consideration the same treatment would be relatively simple.

The more difficult aspect of such a change would be convincing opponents that amending the Regulations is desirable from a policy perspective.

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[364] *See Title IX Hearing*, *supra* note 98, at 23.

[365] *See id.*

[366] *See* WILSON, *supra* note 26, at 2 (highlighting the NCAA Gender Equity Task Force's 1992 definition of gender equity, which analyzed whether a player would perceive another team's resources and program to be "fair and equitable").

[367] *See* 34 C.F.R. § 106.37(c) (2023) (showing that the current statutory language states: "To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics").

The primary objection likely to be made against the proposed change is that economics, not gender bias, drives the difference in payments between male and female athletes, and that athlete payments should reflect the market demand for their services.[368] There are several responses to this argument, including that gender bias underlies the different economic circumstances of men's and women's sports.[369] Before reaching the issue of marketplace bias, which detrimentally affects women's sports, however, it is important to recognize the regulatory context of the proposed change. In particular, it is notable that the Title IX Regulations already disregard pure economic considerations when it comes to scholarships.[370]

Title IX demands proportionate scholarship awards between male and female athletes, even if men's and women's sports do not generate comparable amounts of revenue.[371] A specific example illustrates this reality. The University of Michigan's football team generated over $131 million in revenue in 2021–22, the last year for which figures are publicly available.[372] That same year, the football team had approximately $52 million of expenses, netting an income of almost $79 million.[373] The total revenue that all women's sports teams generated at the University of Michigan in 2021–22 was about $2.8 million, with expenses at almost $30 million.[374] This means that, in the aggregate, women's sports at the University of Michigan lost more than $27 million in 2021–22.[375] The net income (revenue minus expenses) for all men's sports at the University of Michigan that same year, including football and men's basketball, was approximately $74.4 million.[376] Despite the fact that women's sports at the university lost $27 million, and men's sports generated profits of over $74 million, Title IX requires that male athletes and female athletes share proportionately in the total amount of athletic scholarship funds awarded by the Universi-

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[368] *See, e.g.*, Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1321 (9th Cir. 1994) (determining that there was no EPA violation when the University of Southern California paid the women's and men's basketball coaches differently because the men's coach had more extensive promotional requirements, which created significantly more profits for the university than the women's basketball team).

[369] *See, e.g.*, GENDER EQUITY REVIEW I, *supra* note 26, at 8–9 (detailing how the NCAA is partially responsible for the more restricted economic status of women's sports by undervaluing their airing time).

[370] *See* 34 C.F.R. § 106.37(c) (requiring proportional equality between scholarships for male and female athletes).

[371] *See id.*

[372] *University of Michigan-Ann Arbor,* Search Within *Equity in Athletics Data Analysis*, U.S. DEP'T OF EDUC., https://ope.ed.gov/athletics/#/institution/details [https://perma.cc/4EAU-EY3A].

[373] *Id.*

[374] *Id.* (showing that women's teams at the University of Michigan-Ann Arbor generated a total revenue of $2,821,878 and had costs of $29,738,224).

[375] *Id.*

[376] *Id.* (showing that the men's sports teams had a collective total revenue of $158,518,501, with total expenses of $84,124,713, amounting to a $74,393,788 overall profit in 2021–22).

ty of Michigan.[377] The Regulations mandate this result, and it is entirely consistent with the university's purpose and mission.

The purpose of educational institutions like the University of Michigan is not to maximize revenue. The University of Michigan, and almost every other major university in the United States, receives significant tax benefits because it is a non-profit entity organized for educational purposes.[378] Consequently, the typical considerations of the for-profit marketplace do not and should not apply to universities. They serve purposes greater than profit maximization, and one of those purposes is advancing equity in our society.[379] Moreover, the University of Michigan describes its mission as "serv[ing] the people of Michigan and the world through preeminence in creating, communicating, preserving and applying knowledge, art, and academic values, and in developing leaders and citizens who will challenge the present and enrich the future."[380] The academic value of equitable treatment for both men and women is advanced by mandating proportionately equal athletic scholarship funding for both sexes.[381]

The equal opportunity approach that Title IX currently takes with regard to non-scholarship expenditures, including recruiting expenditures and coaches' salaries, has led to significantly unequal outcomes between men's and women's sports.[382] Specifically, after fifty years of Title IX, the most athletically competitive universities spend only thirty-eight cents on women's sports for every dollar they spend on men's.[383] The inequity of this situation is plain to any fair-minded observer. At the same time, the proportionate spending requirement for scholarships has led to much more equitable results.[384] FBS schools spend almost eighty cents on female athletes' scholarships for every

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[377] *See* 34 C.F.R. § 106.37(c) (2023) (requiring equitable athletic scholarship provisions for male and female athletes); *see also* UNIV. OF MICH., DIVERSITY, EQUITY & INCLUSION EXECUTIVE SUMMARY 4 (2016), https://diversity.umich.edu/wp-content/uploads/2016/10/executive-summary.pdf [https://perma.cc/2JHN-TA6L] (aiming to create an equitable campus as a core university goal).

[378] *See* I.R.C. § 501(c)(3) (showing that institutions like the University of Michigan constitute federally exempt organizations for tax purposes because they meet one possible criteria for being organized with the intent to serve an educational purpose).

[379] *See* UNIV. OF MICH., *supra* note 377, at 2 (showing that equity was a key goal for the University of Michigan by creating a five-year equity plan).

[380] *Mission*, OFF. OF PRESIDENT, UNIV. OF MICH., https://president.umich.edu/about/mission/ [https://perma.cc/Q3U3-S7DS].

[381] *See id.*

[382] *See* 34 C.F.R. § 106.41(c) (requiring institutions to provide equal opportunities to athletic participants); *see also supra* note 57 and accompanying text (comparing athletic program expenditures for men's and women's teams, showing that schools allocate considerably more resources to men's sports teams).

[383] *See supra* note 57 and accompanying text (reflecting the difference in expenditures between women's and men's sports teams).

[384] *See* 34 C.F.R. § 106.37(c) (requiring proportional equality for athletic scholarships).

dollar spent on male athletes' scholarships.[385] Although not complete parity, this is much better than the disparate spending resulting from the equal opportunity standard applied to non-scholarship expenditures.[386] Applying the proportionately equal standard currently required of scholarships to pay-for-play payments would likewise produce much more equitable results than allowing payments only to male athletes.

In addition, a major reason for the disparate economic results between men's and women's sports is the ingrained bias many sports consumers hold against women's sports, what I have called in other parts of this Article marketplace bias.[387] Ultimately, the level of viewership drives the value of television contracts, which constitute a major source of revenue in college and professional sports.[388] The bias against women's sports is just one component of a much broader bias against women, not only in the United States, but globally.[389] Examples of historical discrimination against women's sports in the United States are numerous and have been described in detail in both academic and popular press articles.[390] Thankfully, Title IX and societal pressures have reduced the most egregious forms of overt, intentional discrimination against women's sports.[391] Even so, systematic discrimination persists.[392]

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[385] *See supra* note 57 and accompanying text.

[386] *See* 34 C.F.R. § 106.41(c) (creating a general requirement for "equal opportunity" for male and female athletes).

[387] *See, e.g.*, GENDER EQUITY REVIEW I, *supra* note 26, at 8–9 (showing how the NCAA contributed to marketplace bias against women's sports by undervaluing their worth for broadcasting, therefore incentivizing schools to focus attention and resources to their men's sports teams).

[388] *Id.* (highlighting the importance of viewership for broadcasting contracts and a team's value).

[389] *See generally* U.N. WOMEN & U.N. DEP'T OF ECON. & SOC. AFFS., PROGRESS ON THE SUSTAINABLE DEVELOPMENT GOALS: THE GENDER SNAPSHOT 2022 (2022), https://www.unwomen.org/sites/default/files/2022-09/Progress-on-the-sustainable-development-goals-the-gender-snapshot-2022-en_0.pdf [https://perma.cc/E6RS-FTRP] (noting remaining gaps in global gender equality, concerning poverty, education, clean water, health care, and well-being).

[390] *See generally* JAIME SCHULTZ, WOMEN'S SPORTS: WHAT EVERYONE NEEDS TO KNOW (2018); *see also* Sarah Mervosh & Christina Caron, *8 Times Women in Sports Fought for Equality*, N.Y. TIMES (Mar. 8, 2019), https://www.nytimes.com/2019/03/08/sports/women-sports-equality.html [https://perma.cc/7RDC-Q23T] (highlighting different stories of women who advocated for equality in sports, such as Kathrine Switzer, who was the first woman to run the Boston Marathon, despite an official's attempt to stop her during the race).

[391] *See, e.g.*, Morning Edition, *Title IX Revolutionized Female Athletics but Advocates Say It's Been a Constant Fight*, NPR (June 23, 2022), https://www.npr.org/2022/06/23/1106967002/title-ix-revolutionized-female-athletics-but-advocates-say-its-been-a-constant-f [https://perma.cc/VR5E-NTEX] (showcasing different stories of women and girls who, prior to Title IX, experienced clear, overt barriers to sports participation because there was no requirement that they be given an equal opportunity to participate).

[392] *See supra* note 57 and accompanying text (showing that despite the requirement that schools provide equal opportunity, there is no requirement for equal expenditures on sports, thereby resulting in disproportionate spending on men's sports).

For example, in addition to the disparities discussed in the NCAA's Title IX Fiftieth Anniversary Report, women's sports receive only a fraction of the television coverage given to men's sports.[393] For three decades, scholars from Purdue University and the University of Southern California have tracked how much coverage women's and men's sports receive from television programs and highlight shows.[394] The most recent iteration of their thirty-year longitudinal study, examining media coverage in 2019, showed that women's sports received 5.1% of the sports coverage on Los Angeles-area TV news programs and 5.7% of the coverage on ESPN's SportsCenter.[395] Moreover, these figures may have artificially inflated the coverage of women's sports because they included coverage of the U.S. Women's National Soccer Team's (USWNT) World Cup victory in 2019.[396] The Women's World Cup occurs only once every four years. If coverage of the USWNT were removed from this calculation, the local Los Angeles television coverage of women's athletics would have been only 4.0% of all sports coverage, and SportsCenter's coverage would have decreased from 5.7% to just 3.1%.[397] These figures are typical for the proportion of coverage of women's sports.[398]

The NCAA men's and women's basketball tournaments provide a good comparison between the coverage of men's and women's sports because the tournaments occur at the same time of year and are similar in format.[399] In March 2019, ESPN's SportsCenter program had twenty-seven stories about the men's tournament, for a total time of two hours, thirteen minutes, and ten seconds.[400] That same year, SportsCenter had two stories about the women's tournament, for a total time of three minutes and forty-three seconds.[401] In other words, the women's tournament received less than three percent of the cover-

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[393] *See generally* WILSON, *supra* note 26; *see also* Cheryl Cooky, LaToya D. Council, Maria A. Mears & Michael A. Messner, *One and Done: The Long Eclipse of Women's Televised Sports, 1989–2019*, 9 COMMC'N & SPORT 347, 352 (2021) (showing that in 2019, ESPN's SportsCenter program allocated just 5.7% of its total airtime to women's sports).

[394] *See* Cooky et al., *supra* note 393, at 347 (introducing the research results from the past three decades and noting that men's sports still receive the vast majority of television coverage).

[395] *Id.* at 352 (displaying that from 1989–2019, Network News increased airtime for women's sports by only 0.1%, and SportsCenter only began airing women's sports in 1999, gradually increasing from 2.2% to 5.7% over twenty years).

[396] *See id.* at 351–52 (observing a trend of a spike in coverage during the Women's World Cup).

[397] *Id.* at 352–53.

[398] *Id.* at 353 (noting that once the World Cup coverage was excluded from the calculation, the final coverage statistics were on par with previous years over the thirty-year study).

[399] *Id.* at 357 (reasoning that it is beneficial to compare the two tournaments because their similarities in timing and structure reduce the number of other external reasons for different amounts of television coverage).

[400] *Id.* at 358.

[401] *Id.*

age given to the men's tournament by SportsCenter.[402] With such paltry coverage, it is not surprising that the women's tournament has much more difficulty cultivating a fan base.

So, which comes first, the media's lack of coverage of women's sports or the public's lack of interest in viewing women's sports (compared to men's sports)? Of course, the two are interrelated. Significant counterexamples to the general primacy of men's sports demonstrate that women's sports can achieve broad viewership, if given the opportunity.[403] This is illustrated most readily in the popularity of some women's Olympic sports.[404] Prior to the 2021 Summer Olympic Games in Tokyo, survey respondents indicated greatest excitement for women's gymnastics, followed by women's aquatics, men's aquatics, and women's track and field.[405] Despite higher viewership for men's sports outside the Olympics, viewers expressed a preference for watching women's Olympic events over men's.[406] In addition, the on-field and commercial success of the USWNT illustrates that the viewing public is willing to watch and follow women's sports if they get to know the players. The USWNT has enjoyed public praise and significant financial success over the last twenty-four years, as the sports-watching public got to know Mia Hamm and Julie Foudy in the early days, followed by Megan Rapinoe and Alex Morgan more recently. National pride in the team's on-field success has also played a major role in the team's popularity.[407]

Numerous factors often drive fans to watch sports, including a sense of connection to a team or its players, excitement over competitive rivalries, and pride in the achievements of a team.[408] Those factors can apply just as much to

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[402] *Id*.

[403] *See, e.g.*, Brigid Kennedy, *Americans Are Reportedly More Excited to Watch Women's Olympics Events Than Men's*, THE WEEK (July 12, 2021), https://theweek.com/olympics/1002509/americans-are-reportedly-more-excited-to-watch-womens-olympics-events-than-mens [https://perma.cc/447X-GXYW] (showing that almost 60% of viewers wanted to watch women's gymnastics as opposed to men's (citing Kathryn Lundstrom, *Americans Who Plan to Watch the Olympics Are Most Excited About Women's Sports*, ADWEEK (July 12, 2021), https://www.adweek.com/convergent-tv/americans-that-plan-to-watch-the-olympics-are-most-excited-about-womens-sports/ [https://perma.cc/3SEA-XDNA])).

[404] *See id*.

[405] Caitlin Mullen, *Viewers Agree: Women Are the Ones to Watch This Olympics*, BIZWOMEN (July 14, 2021), https://www.bizjournals.com/denver/bizwomen/news/latest-news/2021/07/viewers-agree-women-olympics.html [https://perma.cc/R95A-D3PJ] (noting how for certain sports, viewers are more interested in women's events); *see also* Kennedy, *supra* note 403 (comparing interest levels for men's and women's gymnastics, track, and water sports).

[406] Kennedy, *supra* note 403 (citing Lundstrom, *supra* note 403).

[407] *See* Theo Hewson Betts, *Why the USWNT Is So Good—and So Popular*, IMPETUS (Jan. 22, 2023), https://impetusfootball.org/2023/01/22/why-the-uswnt-is-so-good-and-so-popular/ [https://perma.cc/HKR8-W2GD] (explaining how on-field success has propelled the USWNT's popularity).

[408] *See* Erin Blakemore, *Watching Live Sports in Person May Be Good for You, Researchers Say*, WASH. POST (Mar. 26, 2023), https://www.washingtonpost.com/health/2023/03/26/sports-fan-health-

women's sports as to men's. At present, however, structural barriers such as the exclusive use of the performance of men's basketball teams to determine the allocation of profits from the NCAA to athletic conferences and a lack of media coverage for women's sports send a clear signal to the viewing public that women's sports are less compelling and should take a secondary role in the athletics ecosystem.[409] It is no wonder that women's sports lack the same level of interest from the general public when at the highest level of college athletics, women's sports receive only thirty-eight percent of the investment in men's sports.[410] These disparities will continue and most likely widen unless women's sports are valued appropriately and female athletes are given greater prominence. Mandating parity in pay-for-play payments from colleges to their athletes is one way to move closer to achieving both goals. It will also move our society one step closer to reaching full equality for female athletes. To allow payments to only male athletes, as Title IX currently does, will continue to limit the significant progress that has been made during the last fifty years under the statute.

CONCLUSION

Starting with the enactment of Title IX in 1972, there has been great progress in leveling the opportunities for women to participate in college athletics. Although overall participation rates for women still lag slightly behind men, the gap has closed substantially. But the difference in the amount of money that colleges invest in women's athletics, as compared to men's, is still significant. Apologists for the great disparity in spending between men's and women's college sports will argue that the much higher net income that men's sports generate justifies this difference. But that difference in income is the result of a long history of discrimination against women's sports, illustrated by the fact that the NCAA agreed to govern women's sports almost seventy years after it became the governing body for men's sports. The bias against women's

benefits/ [https://perma.cc/5GV8-7YEF] (showing that live sports can help people feel connected to their community and has social benefits (citing Helen Keyes et al., *Attending Live Sporting Events Predicts Subjective Wellbeing and Reduces Loneliness*, 10 FRONTIERS IN PUB. HEALTH 1 (2023))); *see also* Cory Stieg, *Sports Fans Have Higher Self-Esteem and Are More Satisfied with Their Lives (Whether Their Teams Win or Lose)*, CNBC MAKE IT, (July 23, 2020), https://www.cnbc.com/2020/07/23/why-being-a-sports-fan-and-rooting-for-a-team-is-good-for-you.html [https://perma.cc/87EW-GC9B] (detailing that people watch sports because they want to be connected to others and have a sense of loyalty to their teams).

[409] *See supra* notes 86–89 and accompanying text (showing the effect of the NCAA's undervaluation for women's sports); *see also supra* notes 393–398 and accompanying text (analyzing the significant disparities in women's athletic media coverage as compared to men's).

[410] *See supra* note 57 and accompanying text (highlighting how much more money was spent on men's athletics at Division I FBS schools).

sports is further ingrained through the continued disproportionate media coverage of men's sports. The lack of media coverage for women's sports sends the implicit message that women's sports are not worthy of our time and attention. In essence, the second-class status of women's sports is the result of historical prejudice perpetuated by modern-day media, which shapes consumer preferences.

The second-class status of women's sports will be further exacerbated if colleges are allowed to pay their athletes and are permitted to limit those payments to athletes in income-generating sports. Due to a marketplace bias that is the product of historical discrimination, generally only men's sports generate net income. As a result, if market forces are allowed to control, colleges will only make pay-to-play payments to their male athletes. Because Title IX was drafted at a time that did not contemplate the payment of college athletes, it does not expressly address the treatment of payments from colleges to their athletes. Rather than employing a market-based approach or even the equal opportunity standard that has resulted in NCAA women's sports receiving less than half of the investment made in men's sports, the Regulations under Title IX should be amended to treat pay-for-play payments the same as athletic scholarships. This would require proportionately equal payments between male and female athletes and would signal that women's athletics are worthy of both our attention and our investment.