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Notes and Comments

THE SUPREME COURT GETS THE BALL ROLLING: *NCAA V. ALSTON* AND TITLE IX

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ABSTRACT—Student-athlete compensation has been a consistent topic of controversy over the past few years, as critics question the legitimacy of the NCAA's notion of amateurism and proponents favor the status quo. The Supreme Court decision in *NCAA v. Alston* has only served to intensify the debate, opening the door to alternative compensation structures. Despite a unanimous ruling in favor of the athletes, the limited holding of the case has only produced further questions. In his scathing concurrence, Justice Kavanaugh raises one such question: how does a student-athlete compensation structure comply with Title IX? This Comment seeks to address that question by analyzing two possible compensation regimes and their compatibility with Title IX.

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INTRODUCTION

Shawne Alston—a 235-pound, 5′11″ former running back for the West Virginia Mountaineers—might be one of the biggest names in college sports, and not for his football talent.[1] Alston, now thirty-one years old, played football for the Mountaineers from 2009 to 2012 while pursuing a bachelor's degree in criminology and investigations at West Virginia University.[2] For Alston, a college athletics scholarship was like a golden ticket.[3] But despite receiving a full scholarship, during his four years in school Alston struggled to pay for basic necessities and often went to bed hungry.[4]

Unfortunately, his situation is not uncommon. A 2020 study by the Hope Center for College, Community, and Justice reported that 24% of

[1] *Shawne Alston 2012 Football Roster*, W. VA. UNIV. ATHLETICS, https://wvusports.com/sports/football/roster/shawne-alston/6959 [https://perma.cc/YV76-YNML].

[2] *Id.*

[3] *See* Ben Strauss, *Ex-Athlete's Battle for Scholarship Upgrades: 'I Feel Like I Helped My Brothers,'* N.Y. TIMES (Feb. 12, 2017), https://www.nytimes.com/2017/02/12/sports/a-football-scholarship-is-a-full-ride-but-it-doesnt-mean-a-free-one.html [https://perma.cc/S2C7-37LP] ("Shawne Alston's family did not have much money when he was growing up in a rough part of Newport News, Va. . . . Football was always Alston's escape.").

[4] *Id.*

National Collegiate Athletic Association (NCAA) Division I[5] college athletes had experienced food insecurity in the past thirty days, and nearly 14% had experienced homelessness in the last year.[6] Although college athletes are not barred from seeking concurrent employment under current NCAA eligibility rules,[7] employment is a practical impossibility for many. The average college athlete spends anywhere between thirty and forty-four hours a week on their sport, balancing workouts, games, and travel requirements against full class schedules.[8] With little time to spare, most must rely on scholarships as their primary source of financial aid. Despite bringing fame, popularity, and revenue to their schools, college athletes historically have been barred by the NCAA from profiting off their own athletic success.[9]

This struck Alston as unfair. "[F]or a lot of us, a full-ride scholarship wasn't really a full ride. I'd be on the field and see all the revenue we were bringing in, and I had teammates who couldn't pay to go home and visit their

[5] The NCAA is a governing body for intercollegiate athletics in the United States that divides schools and their athletics programs into three divisions by level of competition and availability of resources, with Division I having the largest student bodies and athletic budgets. *See* Justin Berkman, *What Are NCAA Divisions? Division 1 vs 2 vs 3*, PREPSCHOLAR (Oct. 23, 2021, 11:27 AM), https://blog.prepscholar.com/what-are-ncaa-divisions-1-vs-2-vs-3 [https://perma.cc/G4PB-4WPR].

[6] *See* SARA GOLDRICK-RAB, BRIANNA RICHARDSON, & CHRISTINE BAKER-SMITH, THE HOPE CTR. FOR COLL., CMTY., & JUST., HUNGRY TO WIN: A FIRST LOOK AT FOOD AND HOUSING INSECURITY AMONG STUDENT-ATHLETES 2 (2020), https://hope4college.com/wp-content/uploads/2020/04/2019_StudentAthletes_Report.pdf [https://perma.cc/Q97W-P74B]. Rates of homelessness and food insecurity for college athletes at Division II schools and two-year colleges (where fewer students receive full scholarships) were even higher than those of Division I college athletes. *Id.* Additionally, in 2012, when Alston was a senior in college, "more than 80 percent of football and men's basketball players in top conferences, like the Big Ten and Southeastern conferences, lived below the poverty line" and the average athletic scholarship left 85% of on-campus athletes below the federal poverty line. *See* Strauss, *supra* note 3; RAMOGI HUMA & ELLEN J. STAUROWSKY, NAT'L COLL. PLAYERS ASS'N, THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORT 4 (2011).

[7] NAT'L COLLEGIATE ATHLETIC ASS'N, 2021-22 NCAA DIVISION I MANUAL, art. 12.4 (2021) [hereinafter NCAA DIVISION I MANUAL]; NAT'L COLLEGIATE ATHLETIC ASS'N, SUMMARY OF NCAA ELIGIBILITY REGULATIONS – NCAA DIVISION I 10 (June 7, 2021) [hereinafter NCAA ELIGIBILITY REGULATIONS], https://ncaaorg.s3.amazonaws.com/compliance/d1/2021-22/2021-22D1Comp_SummaryofNCAARegulations.pdf [https://perma.cc/ZQ2C-S4D4].

[8] *Academics*, NAT'L COLL. PLAYERS ASS'N (July 31, 2019), https://www.ncpanow.org/legislation-policies-resources/academics [https://perma.cc/4XH5-THT8].

[9] According to NCAA bylaws, college athletes are not eligible to participate in their sport if they have ever "[t]aken pay, or the promise of pay, for competing in that sport," or "[u]sed [their] athletic skill for pay in any form in that sport." Before the policy changed in 2021, NCAA bylaws stated that college athletes would lose eligibility if "after collegiate enrollment, [they] accept[ed] any pay for promoting a commercial product or service or allow[ed] [their] name or picture to be used for promoting a commercial product or service." NCAA ELIGIBILITY REGULATIONS, *supra* note 7, at 2; *see also* NCAA DIVISION I MANUAL, *supra* note 7, art. 12.1.2 (enumerating multiple forms of compensation that would destroy a college athlete's eligibility).

families."[10] In 2014, Alston challenged the status quo. Joined by former University of California women's basketball player Justine Hartman, Alston initiated an antitrust action against the NCAA, targeting the eligibility rules that limited college-athlete compensation.[11] Acting on behalf of a class of men's and women's college football and basketball players, Alston and Hartman's antitrust action, *NCAA v. Alston*, found its way to the U.S. Supreme Court.[12]

In June 2021, seven years after Alston and Hartman had commenced their action and nearly a decade after Alston had last put on a Mountaineers jersey, the Court struck down the NCAA's cap on student-athlete education-related benefits.[13] The ruling was met with many reactions, including a major response from the NCAA, which loosened some but not all of its college-athlete compensation restrictions.[14] But academic benefits are just one form of student-athlete compensation; the debate over college-athlete pay is far from over.

In the past few decades, the growth of the modern college-athletics industry has spawned controversy over college-athlete compensation. Some scholars and the NCAA have argued for maintaining the status quo and not paying athletes.[15] But other scholars and a growing number of the general

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[10] Strauss, *supra* note 3.

[11] Sarah Eberspacher & Martin D. Edel, *National Collegiate Athletic Association v. Alston*, NAT'L L. REV. (June 21, 2021), https://www.natlawreview.com/article/national-collegiate-athletic-association-v-alston [https://perma.cc/23QV-QGHB].

[12] 141 S. Ct. 2141 (2021).

[13] *Id.* at 2162. Education-related benefits are remittances like "computers, science equipment, musical instruments and other items not currently included in the [cost of attendance] but nonetheless related to the pursuit of various academic studies," tutoring costs, and post-eligibility scholarships. *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1251 (9th Cir. 2020) (quoting *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1088 (N.D. Cal. 2019)).

[14] Press Release, NCAA, NCAA Adopts Interim Name, Image and Likeness Policy (June 30, 2021), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy [https://perma.cc/TP7E-T3NT]. Though the NCAA now allows athletes to receive compensation for use of their name, image, and likeness, it still prohibits pay for play. *Id.*

[15] *See, e.g.*, Cody J. McDavis, Comment, *The Value of Amateurism*, 29 MARQ. SPORTS L. REV. 275, 339–40) (arguing for maintaining amateurism in college sports to preserve educational values and maximize access to sports for college students); Chrissy Clark, *NCAA Players Already Get Paid. It's Called Free Tuition*, FEDERALIST (Aug. 8, 2019), https://thefederalist.com/2019/08/08/ncaa-players-already-get-paid-its-called-free-tuition/ [https://perma.cc/7USN-GBNC]; *see also* Brief for Amicus Curiae National Federation of State High School Associations in Support of Petitioner at 12, NCAA v. Alston, 141 S. Ct. 2141 (2021) (No. 20-512) (arguing that removing amateurism requirements for college sports will negatively impact the experiences of high-school athletes).

public want change.[16] *Alston*'s historic ruling has validated this desire, spurring discussion of possible adjustments to the entire college-athlete compensation structure.

In addition to the question of *whether* college athletes should be paid remains the issue of *how*. Among a variety of possibilities,[17] two main compensation structures have garnered significant attention from advocates of a college-athlete pay regime and lawmakers: (1) giving college athletes employee status and paying them salaries through their universities or the NCAA, and (2) name, image, and likeness (NIL) compensation through endorsements and brand deals.

As lawmakers contemplate the best avenue for college-athlete compensation, a major hurdle remains: Title IX compliance. Any proposed student-athlete compensation model must comply with Title IX of the Education Amendments to the Civil Rights Act of 1964, which protects individuals from sex discrimination in education programs. In the world of college athletics, Title IX aims to create equal opportunity and treatment for male and female athletes.[18] With different compensation models for college athletes on the horizon, schools must consider which compensation model best complies with Title IX's mandates.

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[16] *See, e.g.*, C. Peter Goplerud III, *Pay for Play for College Athletes: Now, More Than Ever*, 38 S. Tex. L. Rev. 1081, 1105 (1997) (connecting the compensation of college athletes to their overall welfare); David A. Grenardo, *The Continued Exploitation of the College Athlete: Confessions of a Former College Athlete Turned Law Professor*, 95 OR. L. REV. 223, 229 (2016) (comparing the rules for compensating college coaches with compensation rules for college athletes to show athletes should be compensated); Abigail Johnson Hess, *Majority of College Students Say Student-Athletes Should Be Paid, Survey Finds*, CNBC (Sept. 11, 2019, 12:53 PM), https://www.cnbc.com/2019/09/11/student-athletes-should-get-paid-college-students-say.html [https://perma.cc/V7MJ-KMXY]; Alex Silverman, *From Name, Image and Likeness to Pay for Play, Americans Increasingly Support Compensation for College Athletes*, MORNING CONSULT (June 29, 2021, 4:07 PM), https://morningconsult.com/2021/06/29/nil-college-athletes-compensation/ [https://perma.cc/M4YQ-83TN] (showing the upward trend in support for college athletes profiting from use of name, image, and likeness from 2018 to 2021, and showing that public opinion is shifting in favor of college athletes receiving pay for play).

[17] *See, e.g.*, William W. Berry, III, *Amending Amateurism: Saving Intercollegiate Athletics Through Conference–Athlete Revenue Sharing*, 68 ALA. L. REV. 551, 573 (2016) (arguing for a revenue-sharing system in which conferences share revenues with revenue-generating sports); Michael N. Widener, *Compensating Collegiate Athletes in "Store Credit,"* 47 U. MEM. L. REV. 431, 435 (2016) (suggesting athletes should be paid "store credit;" essentially, a cash stipend that can be used for college athletes' life expenses like travel, clothing, and insurance).

[18] *Title IX Frequently Asked Questions*, NCAA, https://www.ncaa.org/sports/2014/1/27/title-ix-frequently-asked-questions.aspx [https://perma.cc/G2QP-54FJ]. To comply with Title IX, educational institutions must meet requirements in three categories: participation, financial assistance, and equal treatment. Participation and financial-assistance requirements are based on proportionality—meaning that colleges must provide participation opportunities and financial assistance in proportion to the makeup of the college's student body. For example, if a school has 40% female students, then the athletic department must be made up of approximately 40% female athletes and must provide 40% of financial assistance to female athletes. *See infra* Section III.A.

While many scholars have provided justifications and proposed solutions for college-athlete compensation, few have addressed the compatibility of these contemplated pay structures with Title IX—and none have done so following *Alston*.[19] Because *Alston* narrowly ruled on education-related benefits, it left the questions of alternative forms of college-athlete compensation and Title IX compliance unanswered. Post-*Alston* scholarship has yet to provide an answer as well. In her Note *The Dawn of a New Era*, Amanda Jones suggests various compensation solutions for student athletes but points out that the question of Title IX compliance remains.[20] This Comment seeks to fill that gap in the literature as the first piece to address the compatibility of the two most prominent existing college-athlete compensation models with Title IX legislation in light of *Alston* and post-*Alston* developments.

Part I of this Comment begins by discussing the reasons college athletes have historically been unpaid. It follows with a discussion of case law leading to the *Alston* decision and a discussion of *Alston* itself. Part II explores the commercialization of college athletics and its connections to unpaid college-athlete labor. It also includes a discussion of the two prominent models of college-athlete compensation: NIL compensation and student-athlete-employee status. Finally, Part III analyzes these two prominent models' compatibility with current Title IX legislation, concluding that the NIL compensation model is preferable and more compatible with Title IX than the student-athlete-employee model.

I. AMATEURISM, *BOARD OF REGENTS*, AND *ALSTON*

Before becoming the multibillion-dollar enterprise it is today, intercollegiate athletics started as a nonmonetized competition in 1852 when rowing crews from Harvard and Yale met for a race across Lake

[19] *See, e.g.*, Alicia Jessop & Joe Sabin, *The Sky Is Not Falling: Why Name, Image, and Likeness Legislation Does Not Violate Title IX and Could Narrow the Publicity Gap Between Men's Sport and Women's Sport Athletes*, 31 J. LEGAL ASPECTS SPORT 253, 258 (2021) (arguing that NIL compensation and legislation does not violate Title IX, but not evaluating student-athlete-employee status). In their 2021 article, Professor Ray Yasser and graduate student Carter Fox argue college athletes should be able to capitalize off their NIL, in part because it could eliminate Title IX concerns in terms of college-athlete compensation. Yasser and Fox's article was published pre-*Alston* and does not consider the Court's final decision, or any post-*Alston* developments like the NCAA's interim NIL policy or the NLRB's memorandum on the employee status of college athletes. Ray Yasser & Carter Fox, *Third-Party Payments: A Reasonable Solution to the Legal Quandary Surrounding Paying College Athletes*, 12 HARV. J. SPORTS & ENT. L. 175, 199 (2021).

[20] Amanda L. Jones, Note, *The Dawn of a New Era: Antitrust Law vs. the Antiquated NCAA Compensation Model Perpetuating Racial Injustice*, 116 NW. U. L. REV. 1319, 1363 (2022).

Winnepesaukee.[21] Since then college sports have grown immensely, transforming in size, scope, and popularity.[22]

As college athletics spread, so did the need for regulation. The NCAA was created in 1906 in response to public outcry over the brutal—and sometimes fatal—nature of college football competitions.[23] In the face of this brutality, the purpose of the NCAA was to "regulate the rules of college sport and protect young athletes."[24]

But over the past century, this regulatory power has grown significantly. The NCAA now regulates every aspect of the student-athlete experience, from recruitment to academic performance requirements to ethical conduct and beyond.[25] Most notable is the regulation of eligibility—the athlete's ability to compete in their sport. Eligibility relies on academic compliance and, critically, amateurism, the oft-debated "bedrock principle" of college athletics.[26]

The principle of amateurism, once a steadfast barrier to college-athlete compensation, has become a crumbling defense in the wake of *Alston*. This Part charts the development of the concepts of amateurism and the "student athlete" and the courts' treatment of these concepts.

A. Amateurism and the "Student Athlete"

An amateur athlete is one who pursues a sport on an unpaid basis.[27] In contrast, those who are paid for their athletic performances are considered

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[21] *See* Guy Lewis, *The Beginning of Organized Collegiate Sport*, 22 AM. Q. 222, 224 (1970), https://history.msu.edu/hst329/files/2015/05/LewisGuy-TheBeginning.pdf [https://perma.cc/5XQS-D4LQ].

[22] *History*, NCAA, https://www.ncaa.org/sports/2021/5/4/history.aspx [https://perma.cc/2MC3-A6BC]; Maggie Mertens, *50 Years of Title IX: How One Law Changed Women's Sports Forever*, SPORTS ILLUSTRATED (May 19, 2022), https://www.si.com/college/2022/05/19/title-ix-50th-anniversary-womens-sports-impact-daily-cover [https://perma.cc/6YK4-UJSL]; Eben Novy-Williams, *March Madness Daily: The NCAA's Billion-Dollar Cash Cow*, SPORTICO (March 26, 2022, 9:00 AM), https://www.sportico.com/leagues/college-sports/2022/march-madness-daily-the-ncaas-billion-dollar-cash-cow-1234668823/ [https://perma.cc/BY9Y-3ARC] (stating that the NCAA made $1.16 billion in 2021).

[23] *Id.* ("During the 1904 season alone, there were 18 deaths and 159 serious injuries on the field.").

[24] *Id.* The NCAA was also created to prevent the federal government from stepping in by concentrating the regulatory power within an independent organization. Ed Sherman, *NCAA Hopes to Avoid Government 'Intrusion,'* CHI. TRIB. (Aug. 4, 1991, 12:00 AM), https://www.chicagotribune.com/news/ct-xpm-1991-08-04-9103250767-story.html [https://perma.cc/DM9W-TY6S].

[25] NCAA ELIGIBILITY REGULATIONS, *supra* note 7.

[26] EDDIE COMEAUX, INTRODUCTION TO INTERCOLLEGIATE ATHLETICS 322 (2015).

[27] *See Amateurism*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011), https://www.ahdictionary.com/word/search.html?q=amateurism [https://perma.cc/ZG6R-J798].

professional athletes.[28] In the NCAA, amateur status is not a choice for the athlete—it is a requirement.[29] Although the NCAA has always preserved a "clear line of demarcation between intercollegiate athletics and professional sports,"[30] over the years it has manipulated the concept of amateurism to fit its needs.[31] While compensating college athletes was originally forbidden, gradually, the NCAA allowed for certain payments like financial aid, tuition costs, fees, and room and board.[32] This evolution is epitomized by the creation of the NCAA's signature term: the "student-athlete."[33]

The power in the name student athlete is two-fold—rhetorical and legal. Rhetorically, the term is purposefully structured: "student" first, "athlete" second, reflecting the NCAA's desire for these athletes to be viewed primarily as students.[34] It is also deliberately ambiguous—as Pulitzer-prize winning author Taylor Branch puts it:

> College players were not students at play (which might understate their athletic obligations), nor were they just athletes in college (which might imply they were professionals). That they were high-performance athletes meant they could be forgiven for not meeting the academic standards of their peers; that

[28] *See id.*; *Professional*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011), https://www.ahdictionary.com/word/search.html?q=professional [https://perma.cc/9PZA-EQR7]; *see also* Jones, *supra* note 20 (noting that the NCAA does not allow its athletes to receive financial benefits or valuable prizes).

[29] *See* John Niemeyer, *The End of an Era: The Mounting Challenges to the NCAA's Model of Amateurism*, 42 PEPP. L. REV. 883, 887 (2015); *see also* NCAA DIVISION I MANUAL, *supra* note 7, art. 2.9 ("Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student athletes should be protected from exploitation by professional and commercial enterprises.").

[30] *See* NCAA DIVISION I MANUAL, *supra* note 7, art. 1.3.1; s*ee* Chaz J. Gross, Note, *Modifying Amateurism: A Performance-Based Solution to Compensating Student-Athletes for Licensing Their Names, Images, and Likenesses*, 16 CHI.-KENT J. INTELL. PROP. 259, 264 (2017) ("Since its inception, the NCAA has prohibited students from receiving compensation for their participation in collegiate athletics.").

[31] Kristin R. Muenzen, *Weakening It's* [sic] *Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 259–61 (2003) (comparing the notion of amateurism in 1906 at the NCAA's inception to other definitions adopted by the NCAA throughout the twentieth century).

[32] *Id.*

[33] The NCAA first adopted the term "student-athlete" following a workmen's compensation suit filed by the widow of a football player who died from a head injury received while playing for the Fort Lewis A&M Aggies. *See* Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/.

[34] *Frequently Asked Questions About the NCAA*, NCAA, https://www.ncaa.org/about/frequently-asked-questions-about-ncaa ("The association's belief in student-athletes as students first is a foundational principle."); *see also* Molly Harry, *Abolish the Term "Student-Athlete,"* DIVERSE (July 29, 2020), https://www.diverseeducation.com/sports/article/15107434/abolish-the-term-student-athlete ("If we can work to rid higher education of racist athletics building names, mascots, and logos, we can abolish this demeaning and degrading term designed to subdue this unique student population.").

> they were students meant that they did not have to be compensated, ever, for anything more than the cost of their studies.[35]

In the years since its creation, the term student athlete has been used in conjunction with the notion of amateurism to shield the NCAA from legal challenges.[36] This shield has been effective; courts generally have not extended college athletes "the rights and protections of labor and employment laws," because "case law differentiates between amateur and commercial enterprises."[37] Even given the monopolistic hold the NCAA has over college sports, the concepts of the student athlete and amateurism have long been the crux of the NCAA's insulation from antitrust challenges.[38]

B. NCAA v. Board of Regents

Despite criticism, the NCAA has escaped judicial scrutiny for its amateurism policy. Through the early and mid-twentieth century, courts tended to be dismissive of challenges to the NCAA's rules on amateurism.[39] But in 1984, the NCAA's power was tested in the Supreme Court case *NCAA v. Board of Regents*.[40]

Board of Regents involved a challenge to the NCAA's television plan limiting the number of college football games that could be televised in a year.[41] The Court simultaneously ruled that the television plan violated antitrust laws and acknowledged the "revered tradition of amateurism in

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[35] Branch, *supra* note 33; *see also* Liz Clarke, *The NCAA Coined the Term "Student-Athlete" in the 1950s. Its Time Might Be Up.*, WASH. POST (Oct. 28, 2021, 9:00 AM), https://www.washingtonpost.com/sports/2021/10/27/ncaa-student-athlete-1950s/ (describing the use of term as a "no man's land between student and employee" detached from reality).

[36] *See, e.g.*, Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 497 (2008) (discussing areas of law in which "the myth of amateurism" shields athletic programs and the NCAA from regulation); Branch, *supra* note 33 (addressing the NCAA's use of the term student athlete as a legal defense).

[37] *Id.* at 499. In 2015, the National Labor Relations Board dismissed a petition from Northwestern University football players seeking to unionize as university employees on grounds of inadequate jurisdiction, essentially punting the issue of whether student athletes are employees. *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/C6UP-XRAT].

[38] Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 74–75 (2006).

[39] *See* Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 337 (2007) (stating that federal judges did not want to interfere with the perceived legitimacy of amateurism and fair competition in NCAA athletics, instead focusing on the NCAA's alleged noncommercial objectives).

[40] 468 U.S. 85 (1984).

[41] *Id.* at 85.

college sports."[42] The Court also expressed that "preserv[ing] the character and quality of the 'product'" required that college athletes not be paid, and went on to describe the importance of the role of the NCAA in upholding this "tradition."[43]

But because the Court's legal question in *Board of Regents* was about the antitrust implications of the NCAA's television plan, lower courts struggled with whether the Court's language on the NCAA's amateurism policy was binding precedent or mere dicta.[44] A circuit split emerged. On one side, the courts in the Third, Sixth, and Seventh Circuits gave varying degrees of antitrust immunity to the NCAA's amateurism policy. On the other, courts in the Ninth Circuit considered the language on amateurism in *Board of Regents* with caution, typically finding it nonbinding.[45]

C. NCAA v. Alston

In June 2021, the Supreme Court reached a critical decision in the argument for student-athlete compensation in *NCAA v. Alston*. Arising from the Ninth Circuit, the case followed on the heels of other important challenges brought against the NCAA by college athletes across the country.[46] Shawne Alston and his co-plaintiffs, tired of the oppressive NCAA compensation restrictions, argued that the NCAA violated federal antitrust law by limiting payment in exchange for athletic services.[47] In a unanimous opinion written by Justice Gorsuch, the Supreme Court rejected the NCAA's reliance on the *Board of Regents* language on amateurism, deeming it

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[42] *Id*. at 120.

[43] *Id*. at 102.

[44] Lazaroff, *supra* note 39, at 339; Leading Case, *supra* note 40, at 472. *Compare* Berger v. NCAA, 843 F.3d 285, 291 (7th Cir. 2016) (using *Board of Regents* language on amateurism to support a decision that college athletes at the University of Pennsylvania were not entitled to minimum wage compensation), *with* O'Bannon v. NCAA, 802 F.3d 1049, 1063 (9th Cir. 2015) (concluding that the *Board of Regents* discussion of amateurism and compensation restrictions was mere dicta).

[45] *Id*. at 39; Sam C. Ehrlich, *A Three-Tiered Circuit Split: Why the Supreme Court Was Right to Hear* NCAA v. Alston, 32 J. LEG. ASPECTS SPORTS 1, 3, 59 (2022) (analyzing the split interpretations of *Board of Regents* and arguing that three main tiers of interpretation in circuit courts have resulted in varying degrees of antitrust scrutiny across circuits).

[46] *See, e.g.*, *O'Bannon*, 802 F.3d at 1049 (challenging the validity of the NCAA's NIL compensation structure); Agnew v. NCAA, 683 F.3d 328, 332 (7th Cir. 2012) (challenging NCAA rules that cap the number of scholarships given per team and prohibit multi-year scholarships).

[47] NCAA v. Alston, 141 S. Ct. 2141, 2151 (2021). Although the plaintiffs in *Alston* initially argued in district court against all compensation restrictions, the district court narrowed its focus only to limitations on education-related in-kind (i.e., noncash) benefits, and the Ninth Circuit and Supreme Court followed suit. *See In re* Nat'l Collegiate Athletic Assoc. Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019).

insufficient as the basis for avoiding antitrust scrutiny.[48] Finding that the NCAA did not maintain a consistent definition of amateurism, the Court determined that it was not allowed to engage in price-fixing schemes in determining compensation and benefits for its athletes.[49] As such, the Court held that the NCAA violated antitrust laws by limiting the amount of education-related benefits student athletes can receive.[50]

The Court's ruling resolved the circuit split that *Board of Regents* engendered by adopting the Ninth Circuit's earlier interpretations and confirming that the Court's commentary on the "revered tradition of amateurism" was nonbinding on the issue of student-athlete compensation restrictions.[51] Despite the importance of the *Alston* decision, however, the Court left untouched the contentious issue of athlete pay, narrowly focusing instead on noncash benefits related to education, like paid internships, school supplies, and scholarships for graduate school.[52] In doing so, the Court acknowledged that "[s]ome will think the district court did not go far enough" in limiting the focus of the case to restrictions on education-related benefits.[53]

Justice Kavanaugh agreed that the holding was limited. In his concurrence, he questioned the legality of the remaining restrictions on compensation for college athletes and pointed out a variety of unresolved questions.[54] Critically, he questioned how any resulting compensation regime might comply with Title IX.

While restricted to education-related benefits, *Alston* has broad implications for other forms of compensation. *Alston* overruled nearly forty years of precedent, altering the way courts consider the legality of the

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[48] *Alston*, 141 S. Ct. at 2157–58 ("Whether an antitrust violation exists necessarily depends on a careful analysis of market realities. If those market realities change, so may the legal analysis. When it comes to college sports, there can be little doubt that the market realities have changed significantly since 1984." (citations omitted)).

[49] *Id.* at 2166.

[50] *Id*.

[51] *Id.* at 2157–58.

[52] Ishan K. Bhabha & Katherine Hamilton, NCAA v. Alston*: The Dawn of a New Era for US College Sports?*, JENNER & BLOCK (June 23, 2021), https://jenner.com/system/assets/publications/21049/original/NCAA_v._Alston_The_Dawn_of_a_New_Era_for_US_College.pdf?1624463108 [https://perma.cc/94BY-7XXM].

[53] *Alston*, 141 S. Ct. at 2166.

[54] *Id.* at 2168 (Kavanaugh, J., concurring) ("How would paying greater compensation to student athletes affect non-revenue-raising sports? Could student athletes in some sports but not others receive compensation? How would any compensation regime comply with Title IX? If paying student athletes requires something like a salary cap in some sports in order to preserve competitive balance, how would that cap be administered? And given that there are now about 180,000 Division I student athletes, what is a financially sustainable way of fairly compensating some or all of those student athletes?").

NCAA's eligibility restrictions.[55] As Justice Kavanaugh forewarned, the limited scope of *Alston* has only intensified the battle for college-athlete pay by casting doubt on the NCAA's preservation of the student-athlete and leaving questions open on the legality of the body's remaining compensation rules.[56] Yet the NCAA stands firm in its argument for maintaining amateurism, as it has for decades.[57] The Court has left the goal untended—reform of college-athlete pay is near.

II. THE COMMERCIALIZATION OF COLLEGE ATHLETICS AND MODELS FOR COMPENSATION

Some background on the commercialization of college athletics is critical to understanding arguments for college-athlete pay reform. Despite the excuse of amateurism the NCAA uses to justify not paying college athletes, in reality, college athletics is a highly commercialized venture. In 2019 alone, the NCAA generated $1.12 billion in revenue, with $867.5 million derived from television and marketing rights.[58] Most of the revenue comes from football and basketball, predominantly from Men's March Madness, the annual college basketball championship tournament.[59] March Madness is the NCAA's largest source of income, producing an estimated 82% of the organization's earnings.[60] The NCAA reports that around 60% of all revenue each year goes directly to Division I conferences and member institutions,[61] with the remainder distributed across Division II and Division

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[55] *See* Matthew J. Mitten, *NCAA Student-Athlete Eligibility Rules: From Post*-Board of Regents *Per Se Legality to Post*-Alston *Rule of Reason Legal Uncertainty*, 13 HARV. J. SPORTS & ENT. L. 1, 2 (2021) (arguing that *Alston* has broad implications and the potential for unintended adverse consequences, including the invitation of future litigation on the legality of the NCAA's remaining student-athlete eligibility rules).

[56] *Id.*

[57] *See* Billy Witz, *N.C.A.A. Is Sued for Not Paying Athletes as Employees*, N.Y. TIMES (Nov. 6, 2019), https://www.nytimes.com/2019/11/06/sports/ncaa-lawsuit.html [https://perma.cc/FQ58-5MJV] (discussing various legal challenges to the NCAA's amateurism model).

[58] William Allen, *How Much Does the NCAA Make from March Madness? Where Does the Money Go?*, AS (March 17, 2022, 5:46 PM), https://en.as.com/en/2022/03/17/other_sports/1647510236_306039.html [https://perma.cc/P7Q9-RLDF]. Across all three divisions, athletic departments generated $10.6 billion in revenue. Jo Craven McGinty, *March Madness Is a Moneymaker. Most Schools Still Operate in Red.*, WALL ST. J. (Mar. 12, 2021, 5:30 AM), https://www.wsj.com/articles/march-madness-is-a-moneymaker-most-schools-still-operate-in-red-11615545002 [https://perma.cc/FP37-N74H].

[59] McGinty, *supra* note 58.

[60] Allen, *supra* note 58.

[61] *Distributions*, NCAA, https://www.ncaa.org/about/resources/finances/distributions [https://perma.cc/8MX8-XG6F].

III, and applied towards general administrative expenses.[62] Yet under NCAA rules, little revenue goes directly to student athletes, who cannot be compensated beyond scholarships, certain cost-of-attendance payments,[63] and—following *Alston*—education-related benefits.[64]

Meanwhile, the NCAA has no issue with distributing revenues directly to its own employees. In 2019, NCAA president Mark Emmert took home a salary of $2.9 million.[65] Other top NCAA officials were compensated in the millions as well.[66] NCAA employees are not the only ones benefiting—college athletics is lucrative for coaches too. Unconstrained by the amateurism requirements that bind their players, football coaches and men's basketball coaches can be extraordinarily well-compensated.[67] For example, University of Alabama's Nick Saban made $9.75 million for leading the school's football team in 2021.[68] Yet the players have been shut out from making any money beyond their scholarships in accordance with the principle of amateurism and the NCAA's own bylaws.[69]

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[62] *Where Does the Money Go?*, NCAA, https://www.ncaa.org/about/where-does-money-go [https://perma.cc/5D94-QF2Q].

[63] NCAA DIVISION I MANUAL, *supra* note 7, art. 15.01.6.

[64] NCAA v. Alston, 141 S. Ct. 2141, 2166 (2021). It is important to note how strict these compensation restrictions are. One former athlete describes his experience: "[A]s an alumnus, I could not buy a Rice college basketball player who interned at my law firm a five-dollar Subway sandwich while she was at work because doing so would violate NCAA rules." Grenardo, *supra* note 16, at 229.

[65] Steve Berkowitz, *NCAA President Mark Emmert Credited with $2.9 Million in Total Pay for 2019 Calendar Year*, USA TODAY (July 19, 2021, 8:04 PM), https://www.usatoday.com/story/sports/college/2021/07/19/ncaa-mark-emmert-total-pay-2019/8015855002/ [https://perma.cc/2J86-FZP5]. This compensation did not go without criticism. *Id.* (quoting Sen. Marsha Blackburn, R-Tenn., criticizing the president: "Mark Emmert grew his wealth while he cut corners for his employees and cheated his players out of name, image, and likeness").

[66] *Id.* (showing that then-chief operating officer, Donald Remy, received $1.7 million and executive vice president, Stan Wilcox, received nearly $1.4 million).

[67] *See, e.g.*, Samuel Stebbins, *College Coaches Dominate List of Highest-Paid Public Employees with Seven-Digit Salaries*, USA TODAY (Sept. 23, 2020, 7:00 AM), https://www.usatoday.com/story/money/2020/09/23/these-are-the-highest-paid-public-employees-in-every-state/114091534/ [https://perma.cc/VQK3-FMZP] (noting that in about two-thirds of states, the highest paid public employees were college-sports coaches); *see also* Law v. NCAA, 134 F.3d 1025, 1028–29 (10th Cir. 1998) (prohibiting the NCAA from restricting coaches' earnings as a matter of antitrust law).

[68] Michael Casagrande, *Nick Saban Again Nation's Highest Paid College Football Coach*, AL.COM (Oct. 14, 2021, 2:21 PM), https://www.al.com/alabamafootball/2021/10/nick-saban-again-nations-highest-paid-college-football-coach.html [https://perma.cc/XPG6-DFUC]. College sports coaches also have no restrictions on what they may make from their name, image, and likeness. *See, e.g.*, Reggie Wade, *Legendary Coach Nick Saban Teams with the Aflac Duck for New Ad Campaign*, AOL, (Aug. 21, 2019, 12:00 AM), https://www.aol.com/news/legendary-coach-nick-saban-teams-with-the-aflac-duck-for-new-ad-campaign-040028054.html [https://perma.cc/DY5P-AFAJ].

[69] Prior to the amendment of the amateurism bylaw in 2021, student athletes were required to relinquish the right to benefit from their NIL and turn over commercial control to the NCAA to maintain eligibility. *See* Jessop & Sabin, *supra* note 19, at 253–54.

These regulations have been the subject of much scrutiny for years.[70] Many scholars criticize the NCAA and universities for exploiting underprivileged athletes with little bargaining power.[71] As one former college athlete turned law professor points out, "[c]ollege athletes produce the excitement and revenue of college athletics by performing, at times, incredible physical feats under enormous pressure and scrutiny . . . [a]ll the while . . . risk[ing] serious injury and their long-term health."[72] These critiques all seek change to the current structure. This Part discusses the two main compensation models relevant to college athletes: NIL compensation and student-athlete-employee status.

A. Name, Image, and Likeness as a Model for College-Athlete Compensation

Name, image, and likeness (NIL) are the three components comprising the right of publicity—the right for individuals to profit off their own names and personas.[73] Like other forms of compensation, the NCAA has historically prevented athletes from cashing in on their NIL.[74] In effect, prior to *Alston*, athletes could not receive third-party compensation because of their status as a college athlete—prohibiting endorsements, brand deals, and

[70] *See* Ralph D. Russo, *NCAA's Emmert: It Is Time to Decentralize College Sports*, AP (July 15, 2021), https://apnews.com/article/sports-business-college-sports-63d1739ab77795561b705a8fec31dcae [https://perma.cc/5T6E-CRVL] ("The NCAA's rules and regulations have long been criticized and court challenges have been mounting in recent years.").

[71] *See, e.g.*, Jones, *supra* note 20, at 1323 ("[The] controversy over whether college athletes should be paid . . . is driven by concerns regarding fair compensation of labor; unjust restrictions on student athletes' ability to earn money; and universities, conferences, and organizations taking advantage of underprivileged student athletes."); Grenardo, *supra* note 16, at 245 ("[S]imply paying for all of the athlete's college expenses fails to compensate players fairly at major college programs who generate billions of dollars of revenue."); Joshua B. Opila, Note, *Pay the Piper, and Also the Punter: An Analysis of the College-Athlete Compensation Movement*, 30 S. CAL. INTERDISC. L.J. 529, 529 (2021) ("While the school rakes in the cash, the player does not see a dime. All the while, he risks his own body—which is often the source of his future livelihood—to earn high revenues for the university."). In particular, Amanda Jones argues that the decades of compensation restrictions imposed on college athletes are acutely harmful to Black male student athletes. Jones shows that Black student athletes make up 56% of Division I basketball players and 49% of Division I football players. She argues that the compensation restrictions have resulted in a transfer of wealth from revenue-earning athletes to mostly white coaches and administrators and advocates for student-athlete unionization. Jones, *supra* note 20, at 1337–38.

[72] Grenardo, *supra* note 16, at 225–26.

[73] Jessop & Sabin, *supra* note 19, at 253.

[74] *See* NCAA DIVISION I MANUAL, *supra* note 7, art. 12.1.2; Jessop & Sabin, *supra* note 19, at 253 ("An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport... if he [u]ses athletic skill (directly or indirectly) for pay in any form in that sport." (alterations in original) (internal quotation marks omitted) (quoting NCAA DIVISION I MANUAL, *supra* note 7, art. 12.1.2)).

other forms of NIL licensing.[75] Yet hypocritically, the NCAA reserved the right to an athletes' NIL for use by the NCAA, member schools, and conferences.[76] Players were required to sign over this right in exchange for eligibility, allowing the NCAA to use their names, pictures, and fame for any revenue-driving initiative the organization deemed fit.[77] The calls from athletes opposing the NCAA's compensation restrictions on NIL have been numerous—arising in court challenges,[78] letters to senators,[79] and on social media.[80] And college athletes are not alone. The media, fans, professional athletes, and legislators have joined college athletes in their crusade against the NCAA's policies.[81]

The State of California was the first to take action in response to the growing pressure, adopting the Fair Pay to Play Act in 2019, which permits student athletes to use their NIL to be paid.[82] Many states quickly followed with their own legislation, specifically prohibiting the NCAA and athletic conferences from making rules preventing players from benefiting from their NIL.[83] To date, twenty-eight states have passed similar NIL laws, with several others actively pursuing such legislation.[84]

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[75] *See* Mark Emmert, *If College Athletes Could Profit Off Their Marketability, How Much Would They Be Worth? In Some Cases, Millions*, USA TODAY (Oct. 9, 2019, 9:16 AM), https://www.usatoday.com/story/sports/college/2019/10/09/college-athletes-with-name-image-likeness-control-could-make-millions/3909807002/ [https://perma.cc/E2NR-CAAJ].

[76] Leslie E. Wong, Comment, *Our Blood, Our Sweat, Their Profit: Ed O'Bannon Takes On the NCAA for Infringing on the Former Student-Athlete's Right of Publicity*, 42 TEX. TECH L. REV. 1069, 1089 (2010).

[77] *Id.*

[78] *See, e.g.*, O'Bannon v. NCAA, 802 F.3d 1049, 1052 (9th Cir. 2015).

[79] *See* Ross Dellenger, *Group of ACC Athletes Urge Congress to Pass National NIL Law*, SPORTS ILLUSTRATED (Sept. 23, 2021), https://www.si.com/college/2021/09/23/acc-athletes-letter-congress-nil [https://perma.cc/U583-9H7M].

[80] *See* Laurel Wamsley, *Before March Madness, College Athletes Declare They Are #NotNCAAProperty*, NPR (Mar. 18, 2021, 4:42 PM), https://www.npr.org/2021/03/18/978829815/before-march-madness-college-athletes-declare-they-are-notncaaproperty [https://perma.cc/2P99-FL5M] (describing a protest led by college athletes against the NCAA's NIL compensation restrictions on Twitter).

[81] *See* Tyrone Thomas, Keith Carroll, Randy K. Jones & Aaron Fenton, *A Crescendo of Calls for Student-Athletes' Right to Play and Get Paid*, BLOOMBERG LAW (Mar. 16, 2020, 3:01 PM), https://news.bloomberglaw.com/us-law-week/insight-a-crescendo-of-calls-for-student-athletes-right-to-play-and-get-paid [https://perma.cc/46RM-TQ35].

[82] Jack Kelly, *Newly Passed California Fair Pay to Play Act Will Allow Student Athletes to Receive Compensation*, FORBES (Oct. 1, 2019, 12:36 PM), https://www.forbes.com/sites/jackkelly/2019/10/01/in-a-revolutionary-change-newly-passed-california-fair-pay-to-play-act-will-allow-student-athletes-to-receive-compensation/?sh=5d4f96d957d0#5e3641ab57d0 [https://perma.cc/H4RT-WVU8].

[83] Jessop & Sabin, *supra* note 19, at 256.

[84] Jarrett Varsik, Madison Hiegel & Jeffrey Parry, *Tracker: Name, Image and Likeness Legislation by State*, BUS. COLL. SPORTS (June 17, 2022), https://businessofcollegesports.com/tracker-name-image-

Following *Alston* and the resultant legal and political pressure, the NCAA was forced to reimagine its NIL policies.[85] Nine days after the June 2021 ruling, the NCAA adopted an interim NIL policy, suspending its prohibition on college athletes receiving benefits from their name, image, and likeness for all sports and athletes.[86] However, the policy is "temporary," and remains in effect only until federal legislation or new NCAA regulations are adopted.[87] It remains uncertain which will come first; both the House and the Senate have introduced several bills that have yet to make it off the floor.[88] A House subcommittee held its first hearing on NIL in September 2021, hearing from players, coaches, NCAA president Mark Emmert, and others urging a solution to the patchwork of state NIL legislation.[89] As for action from the NCAA, the organization is uncharacteristically awaiting guidance from the federal government before making any decisions of its own.[90]

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and-likeness-legislation-by-state/ [https://perma.cc/7FDF-WRJ4]. Note, however, that while many states have passed NIL legislation, not every law is effective immediately; rather, many will take effect within the next five years. For example, New Jersey's NIL bill does not go into effect until 2025. *Id.*

[85] *See* Alan Blinder, *College Athletes May Earn Money from Their Fame, N.C.A.A. Rules*, N.Y. TIMES (Sept. 29, 2021), https://www.nytimes.com/2021/06/30/sports/ncaabasketball/ncaa-nil-rules.html [https://perma.cc/XS8W-GUBE].

[86] Press Release, *supra* note 14.

[87] *Id.*

[88] *See* Rudy Hill & Jonathan D. Wohlwend, *College Athletes Now Allowed to Earn Money from Use of Their Name, Image, and Likeness*, NAT'L L. REV. (Mar. 16, 2021), https://www.natlawreview.com/article/college-athletes-now-allowed-to-earn-money-use-their-name-image-and-likeness [https://perma.cc/Y9AK-D8RG] (noting that members of Congress have expressed support for a federal bill addressing NIL issues). Introduced in the Senate in 2021, the College Athlete Economic Freedom Act seeks to "establish name, image, likeness, and athletic reputation rights for college athletes," yet to date, no further action has been taken. S. 238, 117th Cong. (2021); *see also* Amateur Athletes Protection and Compensation Act, S. 414, 117th Cong. (2021) (proposing to set "standards relating to compensation for the use of the names, images, and likenesses of amateur intercollegiate athletes and to provide protections for amateur intercollegiate athletes").

[89] *See* Emily Caron & Michael McCann, *NCAA Returns to Swamped Congress Seeking NIL, Antitrust Help*, SPORTICO (Oct. 1, 2021, 10:00 AM), https://www.sportico.com/leagues/college-sports/2021/ncaa-still-waiting-congress-federal-nil-bill-1234642992/ [https://perma.cc/A3N8-5KZX]. Others who testified at the hearing suggested that federal NIL legislation should be based on the following principles: "treating college athletes as students first, ensuring equity in the treatment of men and women as employees, and addressing resource discrepancies among different institutions." Marie Carrasco, *Congress Weighs In on College Athletes Leveraging Their Brand*, INSIDE HIGHER EDUC. (Oct. 1, 2021), https://www.insidehighered.com/news/2021/10/01/congress-holds-hearing-creating-federal-nil-law [https://perma.cc/W7V3-NYDW]

[90] Caron & McCann, *supra* note 89.

B. The Student Athlete Employee as a Model for College-Athlete Compensation

A second possible compensation structure is one in which athletes are paid by their universities or the NCAA, becoming "student athlete employees." Historically, college athletes have not been recognized as employees in the public or private sector, and the NCAA has long argued that its athletes are not employees. However, the argument for making college athletes employees of their institutions is gaining momentum.[91] Proponents point to the number of hours athletes dedicate to their sports, the fallacy of the label "student athlete," and the enormous revenues athletes generate for their schools and the NCAA as justification for employee status.[92]

The National Labor Relations Board (NLRB), the regulatory body that governs labor relations in the private sector, agrees. In a nonbinding memorandum published in September 2021, the NLRB argued that student athletes at private universities are employees under the National Labor Relations Act (NLRA) and set forth a path for athlete unionization.[93] This position displaces the NLRB's 2015 stance, in which it refused to determine whether Northwestern University football players attempting to unionize were "employees" under the NLRA.[94] The September 2021 memorandum also goes so far as to conclude that some "Players at Academic Institutions" are currently misclassified by the NCAA as student athletes and instead

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[91] *See* William O. Kessler, *He Shouldn't Have to Eat Ramen: A Modest Pay-for-Play Proposal for NCAA Student-Athletes Participating in Traditionally Profitable Sports*, 3 WILLAMETTE SPORTS L.J. 56, 57 (2006) (arguing that student athletes should be classified as employees of their school if they play football or men's basketball). In 2019, a football player alleged that the NCAA and the PAC-12 were his employers because they "prescribe[ed] the terms and conditions under which student-athletes perform services." Dawson v. NCAA, 932 F.3d 905, 908 (9th Cir. 2019).

[92] *See* Jamie Nicole Johnson, Note, *Removing the Cloak of Amateurism: Employing College Athletes and Creating Optional Education*, 2015 UNIV. ILL. L. REV. 959, 987–91 (2015) (arguing that the "student" label is a guise and the focus for student athletes is instead on athletic performance, evidenced by the time commitment); *see also* Marc Edelman, *21 Reasons Why Student-Athletes Are Employees and Should Be Allowed to Unionize*, FORBES (Jan. 30, 2014, 10:11 AM), https://www.forbes.com/sites/marcedelman/2014/01/30/21-reasons-why-student-athletes-are-employees-and-should-be-allowed-to-unionize/?sh=480979768d05 [https://perma.cc/H4GL-YL8B] (arguing that the time commitment of student-athletes to their sports and the revenue generated by the NCAA, among others, are reasons to classify student athletes as employees).

[93] Memorandum from Jennifer Abruzzo, Gen. Counsel, Nat'l Lab. Rels. Bd., to All Reg'l Dirs., Officers-in-Charge, and Resident Officers, Nat'l Lab. Rels. Bd. (Sept. 29, 2021).

[94] The NLRB dismissed the petition without touching on the issue of whether student athletes should be classified as employees. *See* Strauss, *supra* note 37. Not only did the NLRB decline to determine the status of the Northwestern football players, but it also declined to assert jurisdiction over the matter altogether. *See* Press Release, Nat'l Lab. Rels. Bd., Board Unanimously Decides to Decline Jurisdiction in Northwestern Case (Aug. 17, 2015), https://www.nlrb.gov/news-outreach/news-story/board-unanimously-decides-to-decline-jurisdiction-in-northwestern-case [https://perma.cc/NFY9-GPCP].

should receive protection as employees under the law.[95] In the memorandum, Jennifer Abruzzo, the NLRB's General Counsel, vowed to "pursue an independent violation of . . . the Act where an employer misclassifies Players at Academic Institutions as student-athletes," finding support for her decision in Justice Kavanaugh's *Alston* concurrence.[96]

While the memorandum does not change the current employment status of college athletes, it does invite college athletes to unionize.[97] The NCAA predictably opposed the NLRB's stance, vehemently denying student-athlete-employee status in a public response.[98] The NLRB memorandum signals changing times,[99] but it leaves a major question unanswered: does student-athlete-employee status comply with Title IX?[100]

III. THE NIL MODEL OF COLLEGE-ATHLETE COMPENSATION IS COMPATIBLE WITH TITLE IX

In his concurrence in *Alston*, Justice Kavanaugh raises a question critical to the compensation debate: how can college-athlete pay comport with current Title IX legislation?[101] Title IX broadly forbids educational

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[95] Abruzzo, *supra* note 93, at 4.

[96] *Id.* at 5.

[97] Following the memorandum's release, the National College Players Association (NCPA) filed a charge with the NLRB against the NCAA and member schools alleging unfair labor practices. Yet a ruling on the issue could take upwards of eighteen months, meaning that for now the NLRB has not ruled on the issue. *See* Ross Dellenger, *NCPA Takes Next Step Towards College Athletes Being Classified as Employees*, SPORTS ILLUSTRATED (Feb. 8, 2022), https://www.si.com/college/2022/02/08/ncaa-student-athletes-vs-employees-debate-big-step [https://perma.cc/X5FE-KKAV].

[98] *NCAA Statement on NLRB General Counsel Memo*, NCAA (Sept. 29, 2021, 5:35 PM), https://www.ncaa.org/about/resources/media-center/news/ncaa-statement-on-nlrb-general-counsel-memo [https://perma.cc/U35Y-BE2L] (stating that the NCAA "firmly believe[s] that college athletes are students who compete against other students, not employees who compete against other employees").

[99] *See, e.g.*, Dennis Dodd, *Classifying College Athletes as Employees, NLRB Memo Sets Stage for Further NCAA Destabilization*, CBS SPORTS (Sept. 29, 2021, 5:52 PM), https://www.cbssports.com/college-football/news/classifying-college-athletes-as-employees-nlrb-memo-sets-stage-for-further-ncaa-destabilization/ [https://perma.cc/S2HF-J6K9] (quoting former U.S. Congressman Tom McMillen as stating that "[w]ith all this stuff coming down, this very well could be evolution toward compensatory rights").

[100] The NLRB memorandum leaves a variety of other questions unanswered as well. For example, it is unclear what this means for public institutions, since the NLRB's jurisdiction only extends over private employers, yet the memorandum suggests the possibility of extending jurisdiction over some public institutions. Additionally, some have questioned the assumptions that underlie the opinion. *See, e.g.*, Martin D. Edel, *Are Student-Athletes Employees or Students? The NLRB General Counsel Issues Non-Binding Guidance*, GOULSTON & STORRS (Oct. 6, 2021), https://www.goulstonstorrs.com/publications/are-student-athletes-employees-or-students-the-nlrb-general-counsel-issues-non-binding-guidance/ [https://perma.cc/N9XA-PTNY] (arguing that the General Counsel erroneously relied on her own opinion rather than on facts to reach the conclusion the NLRB should reverse its Northwestern University decision from only five years earlier).

[101] NCAA v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring).

institutions that receive federal funding from discriminating on the basis of sex.[102] When college athletes are compensated, complications under Title IX may arise. Of the two compensation models contemplated for college-athlete pay, the NIL compensation model is preferable and more consistent with Title IX than the student-athlete-employee model. This Part introduces Title IX as it relates to college athletics. It then analyzes the compatibility of the student-athlete-employee model and the NIL model with Title IX, concluding that the NIL method is more compatible with the statute's requirements.

A. The Relationship Between Title IX and College Athletics

Congress enacted Title IX of the Education Amendments in June of 1972.[103] The law, which is an amendment to the Civil Rights Act of 1964, prohibits discrimination on the basis of sex by any educational institution that receives federal funding.[104] Specifically, the law provides 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."[105] Because the NCAA is a regulatory body for intercollegiate athletics, not an educational institution, it is not covered by Title IX.[106] Only educational institutions that receive federal funding are bound by that law.

In 1975, the Department of Health, Education, and Welfare (which later gave rise to the Department of Education) clarified by way of federal regulation that Title IX applied to college athletics.[107] Even further, the

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[102] 20 U.S.C. § 1681(a).

[103] Jessop & Sabin, *supra* note 19, at 259.

[104] Janet P. Judge & Cameryn A. Mercurio, *Title IX and Its Application to Intercollegiate Athletics*, *in* COLLEGE AND UNIVERSITY LAW MANUAL, ch. 11 (2d ed. 2021). Title IX was drafted by Congresswoman Patsy Mink, who was motivated to write the bill after being denied admission to medical school because she was a woman. Joined by other women with similar experiences of discrimination in education, Mink broke down historical barriers to educational opportunity for millions of women. Prior to the enactment of Title IX, only 300,000 girls nationwide participated in high school sports. Today, more than 3.5 million do. *See* Kate Stringer, *No One Would Hire Her. So She Wrote Title IX and Changed History for Millions of Women. Meet Education Trailblazer Patsy Mink*, THE74 (March 1, 2018), https://www.the74million.org/article/no-one-would-hire-her-so-she-wrote-title-ix-and-changed-history-for-millions-of-women-meet-education-trailblazer-patsy-mink/ [https://perma.cc/5UPF-89FM].

[105] 20 U.S.C. § 1681(a).

[106] *See* NCAA v. Smith, 525 U.S. 459, 468–70 (1999) (finding that Title IX coverage did not extend to the NCAA notwithstanding that its member institutions benefited from federal financial assistance); *see also* Maggie Mertens, *The Title IX Loophole that Hurts NCAA Women's Teams*, ATLANTIC (Apr. 1, 2021), https://www.theatlantic.com/culture/archive/2021/04/march-madness-could-spark-title-ix-reckoning/618483/ [https://perma.cc/79J2-URJF] (discussing the discrepancies between men's and women's basketball teams at the 2020 championship tournaments hosted by the NCAA).

[107] Jessop & Sabin, *supra* note 19, at 261.

Department issued a policy interpretation called *Title IX and Intercollegiate Athletics* in 1979, demarcating three categories related to college athletics to which Title IX applies: student interests and abilities, financial assistance, and athletic benefits and opportunities.[108] Student interests and abilities relates to the "selection of sports and levels of competition available to members of both sexes."[109] While this category has important implications for participation in college athletics,[110] it is not as relevant to the analysis of athlete compensation and Title IX as are the two remaining categories.

1. Financial Assistance

The financial-assistance category has historically regulated the scholarships that student athletes can receive. Schools "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."[111] This does not require a school to give the same number of scholarships or distribute the same value of scholarships to female and male athletes. Instead, the requirement is proportionality.[112] For example,

> [I]f men account for 60% of a school's intercollegiate athletes, the Policy Interpretation presumes that—absent legitimate nondiscriminatory factors that may cause a disparity—the men's athletic program will receive approximately 60% of the entire annual scholarship budget and the women's athletic program will receive approximately 40% of those funds.[113]

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[108] Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979).

[109] *Id.*

[110] Participation requirements determine the number and selection of male and female athletic teams an institution offers, typically in proportion to the rates of enrollment of the respective sexes in an institution's total student body. To determine whether participation opportunities are equally available to both sexes, courts typically apply a three-part test to determine a school's compliance with the "student interests and abilities" category of Title IX coverage. *See* Jessop & Sabin, *supra* note 19, at 261–62 (describing the tripart test); *see also* Sarah Pruitt, *How Title IX Transformed Women's Sports*, HISTORY (June 11, 2021), https://www.history.com/news/title-nine-womens-sports [https://perma.cc/Q8PL-RC9F] (quoting Professor Karen Hartman as asserting that "[p]articipation rates for women have exploded every single year since Title IX was passed in 1972").

[111] 34 C.F.R. § 106.37 (2022).

[112] Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,414 ("Pursuant to the regulation, the governing principle in this area is that all such assistance should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program."); *see also Title IX Frequently Asked Questions*, *supra* note 20 ("[F]emale and male student-athletes receive athletics scholarship dollars proportional to their participation.").

[113] Letter from Mary Frances O'Shea, Nat'l Coordinator for Title IX Athletics, U.S. Dept. of Educ., to Nancy S. Footer, Gen. Counsel, Bowling Green State Univ. (July 23, 1998), https://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html [https://perma.cc/7H68-GRXZ].

The Department of Education takes into consideration "nondiscriminatory" factors that might result in discrepancies in scholarship amounts for men and women.[114] For example, a discrepancy resulting from higher tuition costs for out-of-state students at a public institution might be a legitimate nondiscriminatory reason for unequal scholarship distribution. The Department might also consider whether scholarships are distributed unevenly to "further a sport's program development."[115] However, blatant disproportionality absent a legitimate nondiscriminatory factor is not allowed.

2. Athletics Benefits and Opportunities

The final category to which Title IX applies—athletic benefits and opportunities—relates to the various benefits and opportunities interconnected with college-sport participation. The regulation includes a list of ten nonexclusive factors that indicate whether equal benefits and opportunities are met:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
(2) The provision of equipment and supplies;
(3) Scheduling of games and practice time;
(4) Travel and per diem allowance;
(5) Opportunity to receive coaching and academic tutoring;
(6) Assignment and compensation of coaches and tutors;
(7) Provision of locker rooms, practice and competitive facilities;
(8) Provision of medical and training facilities and services;
(9) Provision of housing and dining facilities and services;
(10) Publicity.[116]

But Title IX also takes other factors into consideration, like support services and recruiting.[117] As with financial assistance, expenditures in this category need not be equal. Instead, the Department of Education requires equivalency in terms of "availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes."[118] Legitimate and justifiable nongender reasons may account for discrepancies in benefits and opportunities. For example, consider the costs of a male football player's

[114] Jessop & Sabin, *supra* note 19, at 263.
[115] *Id.*
[116] 34 C.F.R. § 106.41(c).
[117] *Title IX Frequently Asked Questions*, *supra* note 18.
[118] Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979).

protective equipment compared to a female soccer player's shin guards.[119] Although it is perhaps more subjective than financial assistance, the athlete benefits and opportunities category under Title IX can pose problems in the context of athlete compensation.

B. The Compatibility of Athlete Compensation Models with Title IX

Part II discussed the two model solutions for college-athlete compensation that have garnered significant attention from scholars and lawmakers: student athlete employees and NIL compensation. While both seek to pay college athletes, the models differ in structure and Title IX compatibility. The student-athlete-employee model makes college athletes employees of their universities, while the NIL model does not alter the working relationship between athletes and their universities. Instead, the NIL model allows college athletes to utilize their NIL to acquire compensation from third parties.

1. The Student-Athlete-Employee Model of Compensation is Less Compatible with Title IX

Currently, under federal and state law, college athletes are not considered employees of the NCAA or of their universities. But this may be changing. As discussed in Section II.B, the NLRB has taken a new stance on college-athlete classification in a September 2021 memorandum, seeking to define student athletes as employees.[120] In the memorandum, NLRB general counsel Jennifer Abruzzo argues that some student athletes at private institutions should be deemed employees of their universities and colleges.[121] Abruzzo suggests a theory of joint-employer status by which the NCAA and a student's school will jointly employ student athletes.[122]

Abruzzo focuses her analysis on football players and other "similarly situated" players,[123] resulting in some ambiguities as to which athletes would be employees. Whether this definition includes female and male athletes of less financially successful ("minor") sports also remains unclear.

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[119] *Title IX Frequently Asked Questions*, *supra* note 18.

[120] The same classification may soon be available to college athletes at public universities. *See* College Athlete Right to Organize Act, S. 1929, 117th Cong. (2021) (proposing amendment of the NLRA to include in the definition of "employee" any college athlete who receives any form of direct compensation from their school, if the compensation requires participation in an intercollegiate sport).

[121] *See* Abruzzo, *supra* note 93, at 1, 3.

[122] *See id.* at 9 n.34 (noting that "because Players at Academic Institutions perform services for, and [are] subject to the control of, the NCAA and their athletic conference, in addition to their college or university" the general counsel will consider some cases under a joint-employer theory of liability).

[123] *Id.* at 2.

Furthermore, the NLRB only asserts jurisdiction over private universities.[124] As a result, any action it pursues in accordance with this memo will primarily impact private universities rather than public universities, which are governed by state employment regulations.[125]

Yet Abruzzo does not rule out the possibility of pursuing joint-employer status between the NCAA and athletic conferences.[126] Thus, it is possible that the NLRB could exert jurisdiction over athletic conferences with members that are public institutions—which adds even further uncertainty to the question of who may qualify as an employee. While Congress has taken no official action to amend the NLRA, nor has the NLRB acted on Abruzzo's memorandum, the overall trend is clear—movement away from the term student athlete and towards employee status.

While influential as guidance, the NLRB memorandum is nonbinding. However, allowing college athletes to be employees of their universities introduces allocation and funding challenges. If student athletes become employees and are paid by their colleges, the institutions must comply with Title IX, which requires equality in financial assistance. And because Title IX defines athletic-based financial aid broadly,[127] student-athlete salaries would likely be classified comparably to student-athlete scholarships.

As employers, schools would be required to determine and allocate an "equilibrium" salary for their athletes that complied with the financial assistance proportionality requirement of Title IX.[128] If female athletes accounted for 50% of the student-athlete population, they would get 50% of the student-athlete salaries, even though it is major men's sports—in particular, men's basketball and football—that tend to earn the majority of revenue for their schools' athletics programs.[129] Under a student-athlete-

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[124] *Jurisdictional Standards*, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/jurisdictional-standards [https://perma.cc/5TYL-3A8A] ("[T]he Board's jurisdiction is very broad and covers the great majority of non-government employers . . . .").

[125] *Id.*

[126] Abruzzo, *supra* note 93, at 9 n.34 ("[I]t may be appropriate for the Board to assert jurisdiction over the NCAA and an athletic conference, and to find joint employer status with certain member institutions, even if some of the member schools are state institutions.").

[127] Judge & Mercurio, *supra* note 104.

[128] *See* 34 C.F.R. § 106.37.

[129] *See Finances of Intercollegiate Athletics Database*, NCAA, https://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics-database [https://perma.cc/8MRP-PJXY] (showing that of all Division I sports, both male and female, only men's basketball and football earned a positive net revenue in 2019). But this is not to say that the popularity gap between women's and men's sports reflects the relative success or popularity of individual male and female programs. *See* Yasser & Fox, *supra* note 19, at 194 (describing the longstanding popularity and success of the University of Connecticut women's basketball program in comparison to the men's basketball program).

employee model, to comply with Title IX, schools would need to shift money from these revenue-generating sports to less financially successful teams.

Yet schools would likely feel pressured to reinvest the money generated by major sports back into those teams via salaries to those players.[130] This perhaps would be fairer to those athletes, who would not be required to "share" the revenue generated by the success of their teams. However, doing so would adversely affect other sports[131] and be noncompliant with Title IX because it would not adequately apportion financial assistance between male and female athletes.

Perhaps this could be remedied by Abruzzo's joint-employer theory. A school could provide its athletes with a minimal base salary, if it had the means to do so, and the NCAA could supplement the rest. Alternatively, the NCAA could be the sole salary provider. Since the NCAA is not bound by Title IX, it would not have to apportion financial aid between male and female athletes as required of individual schools.[132] This could allow college athletes in revenue-generating sports to be compensated, but at the expense of others; those in women's sports and non-revenue-generating men's sports could go unpaid. Even so, external pressures are growing for the NCAA to adopt and enforce Title IX on its own—even though it is currently not required to do so by law.[133] Many have lambasted the NCAA for its recent failures in gender equity;[134] if the organization were to take on employer status, it seems likely that these criticisms would intensify.

Even setting aside distributional issues, the source of a student-athlete-employee salary is not guaranteed. Despite the colossal revenues received by the NCAA and some universities, most individual schools actually spend more than they earn.[135] For example, in 2019, only 25 of 351 Division I

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[130] *See* Yasser & Fox, *supra* note 19, at 199 ("[I]f the member schools were required to pay college athletes directly, Title IX would be directly implicated because member schools would likely offer heftier financial aid packages to athletes in 'money' sports than those offered to athletes in 'Olympic' sports.").

[131] Mechelle Voepel, *Title IX a Pay-for-Play Roadblock*, ESPN (July 15, 2011), https://www.espn.com/college-sports/story/_/id/6769337/title-ix-seen-substantial-roadblock-pay-play-college-athletics [https://perma.cc/A9NN-7DKY].

[132] *See* NCAA v. Smith, 525 U.S. 459, 468–70 (1999); Yasser & Fox, *supra* note 19, at 199.

[133] *NCPA Calls On NCAA to Abide By and Enforce Title IX Amid March Madness Tournament Discrimination Against Female Athletes*, NCPA (Mar. 20, 2021), https://www.ncpanow.org/news/releases-advisories/ncpa-calls-on-ncaa-to-abide-by-and-enforce-title-ix-amid-march-madness-tournament-discrimination-against-female-athletes [https://perma.cc/KYT7-ZENH].

[134] *See, e.g.*, Ross Dellenger, *Lawmakers Slam NCAA for Failing to Address Disparity in Men's and Women's Sports*, SPORTS ILLUSTRATED (Mar. 15, 2022), https://www.si.com/college/2022/03/15/ncaa-tournament-college-sports-gender-equity-congress-title-ix [https://perma.cc/AZ4N-MM7C] (reporting that three U.S. senators criticized NCAA president Mark Emmert for "inadequate progress" on gender equality).

[135] McGinty, *supra* note 58.

athletic departments generated positive revenue.[136] This leaves very little, if anything at all, for schools to provide salaries for their student athletes. For the minority of schools that earn net-positive revenue, it would necessarily be shared among revenue-generating and non-revenue-generating athletes to comply with Title IX, leading to markedly smaller payouts for all athletes. Furthermore, the introduction of a student-athlete salary could increase the cost of attendance for nonathletes. One study found that a changed NCAA compensation policy could result in as much as a 7.4% increase in cost of attendance.[137] It could very well be too costly for colleges to implement a student-athlete-employee system at all.[138]

2. The NIL Model of Compensation Is More Compatible with Title IX

In comparison to a student-athlete-employee system, an NIL compensation model more effectively solves the issue of athlete pay and is more compatible with Title IX. First, this model mitigates the sourcing compensation issue. Rather than schools or the NCAA providing compensation to athletes, third parties will step in. And because these third parties are not educational institutions, they are not bound by Title IX.[139] Some argue that under an NIL model, schools get to avoid the responsibility of compensating athletes.[140] But recall from the last Section that many schools do not actually profit from their athletic programs, and thus would not be able to pay their athletes at all. The NIL model alleviates pressure on athletic departments that operate in the red.

The NIL model provides a way for athletes to break past their universities' budgetary constraints, and it has already proven to be profitable. College athletes across the country have taken advantage of the NCAA's interim NIL policy.[141] Within a year of implementing the new policy, the NIL market is on pace to provide athletes with more than $500 million in

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[136] Also note that all 25 were members of the Football Bowl Subdivision. *Id.*

[137] Willis A. Jones, *Can NCAA Policy Effect* [sic] *Student Costs? Evidence from the 2015 Adoption of Student-Athlete Cost of Attendance Stipends*, 93 J. HIGHER EDUC. 56, 72 (2022).

[138] Nathan Boninger, *Antitrust and the NCAA: Sexual Equality in Collegiate Athletics as a Procompetitive Justification for NCAA Compensation Restrictions*, 65 UCLA L. REV. 754, 758 (2018); *see* Voepel, *supra* note 131 (arguing that employment for college athletes would "compel[] schools to pay all athletes, which would bankrupt most of them").

[139] *See* 20 U.S.C. §§ 1681–1688; *see also* Yasser & Fox, *supra* note 19, at 199 ("[T]hird parties would not trigger Title IX scrutiny because they are not educational institutions.").

[140] *See* Jones, *supra* note 20, at 1351.

[141] *See* Sharon Epperson & Erica Wright, *Top College Athletes Strategize How to Turn Their 'Brand' into Financial Gains with New Sponsorship Deals*, CNBC (Nov. 16, 2021, 12:55 PM), https://www.cnbc.com/2021/11/16/how-top-college-athletes-monetize-their-brand-with-sponsorship-deals.html [http://perma.cc/6YXG-5KCA].

compensation collectively.[142] Further, the allocation concerns that arise under the profit-sharing requirements of a student-athlete-employee model are nullified by NIL compensation. Schools that would otherwise be pressured into directing salaries to revenue-generating sports will not face this issue in an NIL model. Rather, NIL compensation is performance-based, allowing athletes to reap the benefits of their own success by making money from endorsements and sponsorships that rely on their own name, image, and popularity.[143]

Because third parties are not bound by Title IX, some may worry that gender inequity will prevail under an NIL model. However, female athletes have had much success with the new NIL policies, as a growing list of athletes cash in on their fame.[144] For example, University of Connecticut women's basketball player Paige Bueckers has the potential to earn an estimated $382,000 per year from NIL deals.[145] Other female college athletes have taken advantage of the new NIL policies as well, like Stanford golfer Rose Zhang, who became the first-ever student athlete to sign an NIL deal with Adidas.[146] Even athletes who are not as well-known have been able to

[142] Third parties willing to pay athletes for their talent are numerous and their pockets are deep. Big names like Taco Bell and American Eagle have already reached deals with athletes for upwards of six figures. Some football and basketball stars have even assembled seven-figure NIL endorsement portfolios. *See* Ira Boudway & Kim Bhasin, *Bloomin' Onions, Dodge Durangos, and Six-Figure Paydays: College Athletes Finally Make Some Cash*, BLOOMBERG (Mar. 18, 2022, 4:00 AM), https://www.bloomberg.com/news/features/2022-03-18/ncaa-nil-deals-help-college-athletes-get-paid [https://perma.cc/T723-D4J5]; Alex Scarborough, *Sources: Alabama Crimson Tide QB Bryce Young Has Already Signed More than $800K in NIL Deals*, ABC NEWS (July 29, 2021, 9:39 AM), https://abcnews.go.com/Sports/sources-alabama-crimson-tide-qb-bryce-young-signed/story?id=79142075 [https://perma.cc/P8VE-QWWX].

[143] *See* Matt Norlander, *Kansas Players Set to Cash In Thanks to NIL, Potentially Setting a Model for Future NCAA Title-Winning Teams*, CBS SPORTS (Apr. 14, 2022, 1:15 PM), https://www.cbssports.com/college-basketball/news/kansas-players-set-to-cash-in-thanks-to-nil-potentially-setting-a-model-for-future-ncaa-title-winning-teams/ [https://perma.cc/CH7U-3P7G].

[144] *See* Sophie Chen, *Female Athletes Who Have Cashed In on NIL Deals*, JUST WOMEN'S SPORTS (Oct. 12, 2021) https://justwomenssports.com/female-athletes-who-have-cashed-in-on-nil-deals/ [https://perma.cc/B86T-QYL7] (listing various female college athletes who have taken advantage of the new NIL policies, like Lexi Sun, volleyball player for the University of Nebraska who signed a sponsorship deal with REN Athletics, and the Cavinder twins, basketball players for Fresno State who signed a sponsorship deal with Boost Mobile).

[145] *See* Nick DePaula, *UConn's Paige Bueckers Has Name, Image, Likeness Deal*, ESPN (Nov. 10, 2021), https://www.espn.com/womens-college-basketball/story/_/id/32598842/uconn-paige-bueckers-name-image-likeness-deal [https://perma.cc/Y7TW-CGRJ].

[146] Emma Hruby, *Stanford Golf Star Becomes the First Athlete to Sign NIL Deal with Adidas*, JUST WOMEN'S SPORTS (May 31, 2022), https://justwomenssports.com/ncaa-stanford-golf-rose-zhang-adidas-athlete/ [https://perma.cc/BD25-KY6V].

make money from their name and status.[147] Thus, athletes from both revenue-generating and non-revenue-generating sports can earn money off their individual NIL,[148] unbound by the revenue-sharing structures and budget constraints of the student-athlete-employee model.

While third-party NIL deals do not implicate Title IX, school or conference NIL deals might trigger the statute based on the form and distribution structure. For example, after *Alston*, the athletic department at the University of Nebraska launched a program providing NIL guidance, education, and resources for its athletes to help them maximize their earning potential.[149] This likely falls somewhere under the third prong of Title IX's application to athletics—benefits and opportunities—and thus must be equivalent in kind, quality, and availability for both male and female athletes.[150] Schools with these programs should be careful to provide these benefits to athletes in such a way that complies with the proportionality requirements of Title IX.

Although the NIL model is profitable and compatible with Title IX, its practical implementation is in disarray. Following the NCAA's announcement of its interim policy, states began passing their own NIL laws,[151] leading to disparate and disjunctive outcomes across the country. Not every state has passed NIL legislation, and even for those that have the laws do not go into effect until a year or more after they are enacted.[152] The NCAA's interim policy also directs schools to make their own NIL rules.[153] Therefore, college athletes across the country have varying rights to NIL compensation based on the schools they attend and the states in which they reside. The patchwork of state legislation, combined with differing school, conference, and NCAA policies "will likely produce scenarios in which certain types of businesses can contract with student-athletes in some states

[147] Kaufman & Canoles, *NIL Market Creates New Opportunity for "Non-Revenue" Sports and Regional Endorsers*, JD SUPRA (June 8, 2022), https://www.jdsupra.com/legalnews/nil-market-creates-new-opportunity-for-4073866/ [https://perma.cc/ZQ6Z-H6DR]. *But see* Robert O'Connell, *For the College Athletes Who Aren't Stars, Making Money off Their Image Is a Job*, WASH. POST (Sept. 7, 2021, 5:00 AM), https://www.washingtonpost.com/sports/2021/09/07/nil-money-college-athletes-non-stars/ [https://perma.cc/B5BY-P255] (discussing the difficulties that athletes in non-revenue-generating sports face in building their personal brand to garner NIL deals).

[148] Yasser & Fox, *supra* note 19, at 200 (noting that third-party payment systems let non-revenue-generating athletes "capitalize on their NIL the same way 'money' sport athletes would").

[149] *Nebraska to Launch Industry-Leading NIL Program: #NILbraska*, HUSKERS (June 3, 2021, 1:29 PM), https://huskers.com/news/2021/6/3/athletics-nebraska-to-launch-industry-leading-nil-program-nilbraska.aspx [https://perma.cc/X9EZ-LLZC].

[150] *See supra* Section III.A.2.

[151] *See* Varsik et al., *supra* note 84.

[152] *Id.*

[153] Press Release, *supra* note 14.

but not in others,"[154] creating persistent equity concerns. The interim policy, and the asymmetrical NIL compensation model it creates, will remain in effect until the NCAA adopts new rules or federal legislation is adopted.[155]

Despite the current lack of uniformity, the NIL compensation model is still preferable to the student-athlete-employee model because it is compliant with Title IX and has already proven successful. The model also avoids friction with allocation concerns, as universities under the NIL model are not required to decide how to allocate salaries among college athletes. The budgetary constraints that bind most college athletic departments and hinder athletes from earning salaries under the student-athlete-employee system will not prevent athletes from receiving rightful compensation.

CONCLUSION

The Supreme Court's decision in *NCAA v. Alston* opened the door to a larger discussion of college-athlete compensation. But as Justice Kavanaugh notes in his concurrence, the possibility of major changes to the current college-athlete compensation structure generates many questions about practical implementation. While the NIL model is imperfect under the current patchwork legislation across the country, the model may ultimately pave a way to ensure college athletes are rightly compensated while also maintaining a fair compensation system among all athletes. Therefore, Congress should enact legislation to standardize and protect the NIL rights of college athletes across the country. By providing a uniform set of rules for college athletes in different conferences, states, and institutions to abide by, our congresspeople have an opportunity to even the playing field. The ball is in their court.

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[154] Skyler Hicks, *What Brands Can Expect from College Sports' Ever Evolving NIL Landscape*, NAT'L L. REV. (Jan. 20, 2022), https://www.natlawreview.com/article/what-brands-can-expect-college-sports-ever-evolving-nil-landscape [https://perma.cc/BG84-N65E]; *see also* Liz Clarke, *State-by-State Rating System Gives College Recruits Road Map to Evaluate NIL Laws*, WASH. POST (Oct. 21, 2021, 12:34 PM), https://www.washingtonpost.com/sports/2021/10/21/name-image-likeness-laws-state-rankings/ [https://perma.cc/P8MW-5NB6] (describing the "patchwork of state laws" governing NIL as "the Wild West" and "uncharted terrain").

[155] Press Release, *supra* note 14.