

Title IX's 50th Anniversary: Time for the NCAA to Step in the Arena and Start Playing by the Rules

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Introduction

“The video that changed the game.”¹ This New York Times tagline refers to the TikTok video that sparked national outrage during the 2021 National Collegiate Athletic Association (NCAA) Women’s Basketball Tournament.² In March 2021, when the world was still shut down due to the COVID-19 pandemic, the NCAA found a way to continue the production of its most profitable event, March Madness.³ In 2021, March Madness contributed over 85% of the NCAA’s \$1.15 billion in revenue.⁴ With millions at stake, and despite business shutdowns and hospitals overflowing, the NCAA decided the show must go on.⁵ To mitigate COVID-19 risks, the

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1. Amelia Nierenberg, *The Video that Changed the N.C.A.A.*, N.Y. TIMES (Mar. 16, 2022), <https://www.nytimes.com/2022/03/16/us/the-video-that-changed-the-ncaa.html> [https://perma.cc/49FU-3PJB].

2. *Id.*

3. This well-known event showcases both the men’s and women’s NCAA Collegiate Basketball Tournaments. *NCAA Announces Further Details for 2021 Division I Men’s Basketball Championship*, NCAA (Jan. 11, 2021), <https://www.ncaa.com/news/basketball-men/article/2021-01-04/ncaa-announces-further-details-2021-division-i-mens-basketball-championship> [https://perma.cc/82YU-6X5K]. The NCAA is a nonprofit organization that was created in 1906 to regulate the rules of college sports. *See Finances*, NCAA, <https://www.ncaa.org/sports/2021/5/4/finances.aspx> [https://perma.cc/LXS4-NKRN]; *Overview*, NCAA, <https://www.ncaa.org/sports/2021/2/16/overview.aspx> [https://perma.cc/FH95-Z9XC].

4. Eben Novy-Williams, *March Madness Daily: The NCAA’s Billion-Dollar Cash Cow*, SPORTICO (Mar. 26, 2022), <https://www.sportico.com/leagues/college-sports/2022/march-madness-daily-the-ncaas-billion-dollar-cash-cow-1234668823/> [https://perma.cc/4AQE-EV8P]; *NCAA Earns \$1.15 Billion in 2021 as Revenue Returns to Normal*, ESPN (Feb. 2, 2022), https://www.espn.com/college-sports/story/_/id/33201991/ncaa-earns-115-billion-2021-revenue-returns-normal [https://perma.cc/6U4B-S8HV].

5. Scott Stump, *Athlete Calls Out Men’s and Women’s Weight Room Disparities*

NCAA held the men's and women's tournaments in separate "bubble" facilities in different cities.⁶ It was during this tournament when Sedona Prince, Oregon women's basketball standout, posted the video that changed the game.⁷

Prince's video, captioned "it's 2021 and we are still fighting for bits and pieces of equality," exposed the disparities between the weight room facilities the NCAA provided the men's and women's basketball teams.⁸ It led other women's basketball players to post their own videos, calling out the differences in tournament gear and meals that the NCAA provided.⁹ Catching the world's attention, these videos caused stars such as Steph Curry, Billie Jean King, and then-Senate Majority leader Chuck Schumer to call out the NCAA for allowing such obvious inequities.¹⁰

With these videos going viral, the NCAA quickly found itself under the microscope of public attention, and other areas of inequity within the NCAA quickly made the news.¹¹ One inequity that came to light was the unit system the NCAA uses to provide monetary compensation to universities that have successful men's basketball programs.¹² This system pays a set dollar amount for every game in the NCAA Tournament that a men's team wins.¹³ In 2022, the NCAA valued one win at \$338,210.96.¹⁴ The NCAA has no such unit

at *March Madness, Sparking Outrage*, TODAY (Mar. 19, 2021), <https://www.today.com/news/viral-video-shows-men-s-women-s-weight-room-disparities-t212338> [<https://perma.cc/4BWM-UH8J>].

6. *Id.*

7. Sedona Prince, TIKTOK (Mar. 2021), <https://www.tiktok.com/@sedonerrr/video/6941180880127888646> [<https://perma.cc/779Y-Q3RM>].

8. *Id.*

9. Madisan Hinkhouse, *Viral Videos Show Differences in Men's and Women's NCAA Tournament Facilities*, KSL SPORTS (Mar. 19, 2021), <https://kslsports.com/455679/womens-ncaa-tournament-facilities/> [<https://perma.cc/2P6G-WTC2>].

10. Stump, *supra* note 5.

11. *NCAA Basketball Won't Have 'True Equity' Until Women's Teams Get Paid Like the Men*, NBC SPORTS: ON HER TURF (Mar. 22, 2022), <https://onherturf.nbcsports.com/2022/03/22/ncaa-basketball-wont-have-true-equity-until-womens-teams-get-paid-like-the-mens/> [<https://perma.cc/NC2C-B9JS>].

12. *Id.*

13. *The NCAA Tournament by the Numbers*, AP NEWS (Mar. 15, 2022), <https://apnews.com/article/march-madness-sports-college-basketball-mens-college-basketball-chris-beard-cfa87a8b8db7710259d22ec11609e23c> [<https://perma.cc/RMD7-FEA5>]. At the end of the tournament, each conference is paid out their unit value, and the conference then disburses that money to the university for what their men's basketball team won. NBC SPORTS: ON HER TURF, *supra* note 11.

14. *The NCAA Tournament by the Numbers*, *supra* note 13.

system in place for the women's tournament,¹⁵ meaning a men's basketball team that wins just one game in the tournament receives over \$300,000 and a women's team that wins the championship receives nothing.

The outrage over these inequities continued well after the 2021 tournament and encouraged a deeper look into the way the NCAA runs its organization.¹⁶ Eventually, the NCAA retained the law firm of Kaplan Hecker & Fink LLP (KHF) to conduct a comprehensive review of gender equity issues present within the NCAA.¹⁷ The comprehensive review consisted of three reports, totaling more than 300 pages addressing the NCAA's contributions to gender inequity in college athletics.¹⁸

This report found that the NCAA's "organizational structure, and culture . . . prioritize . . . men's basketball over everything else in ways that . . . perpetuate gender inequities," and the NCAA's media agreements continue to perpetuate gender inequity, undervaluing women's basketball by as much as \$50 million.¹⁹ Ultimately, this report concluded that the NCAA is the primary reason there are gender inequities in NCAA athletics.²⁰ The NCAA conducting a review of their discriminatory practices may be seen as progress, but without any legal requirements, the NCAA has no obligation to ever change.

Some may question why Title IX does not govern the NCAA's actions, but in a narrow holding in *NCAA v. Smith*, the Supreme Court ruled that Title IX does not apply to the NCAA.²¹ While *Smith* is still good law, recent decisions in lower-court cases use reasoning

15. *Id.*

16. Rachel Bachman, *NCAA Hires Law Firm to Examine Gender-Equity Gaps*, WALL ST. J. (Mar. 26, 2021), <https://www.wsj.com/articles/ncaa-hires-law-firm-to-examine-gender-equity-gaps-11616704229> [<https://perma.cc/QQD4-LPEM>].

17. NCAA GENDER EQUITY REVIEW, <https://ncaagenderequityreview.com/> [<https://perma.cc/NK4V-VXAN>].

18. *See id.* (containing links to the three separate parts of the review: Gender Equity Review Phase I, Media & Sponsorship Addendum, and Gender Equity Review Phase II).

19. KAPLAN HECKER & FINK LLP, NCAA EXTERNAL GENDER EQUITY REVIEW, PHASE I: BASKETBALL CHAMPIONSHIPS 2 (2021), <https://kaplanhecker.app.box.com/s/6fpd51gxk9ki78f8vbhqcqh0b0o95oxq> [<https://perma.cc/9YBM-HXSS>]. *See also* DESSER SPORTS MEDIA, INC., NCAA EXTERNAL GENDER EQUITY REVIEW MEDIA & SPONSORSHIP ADDENDUM 2, 9 (2021), <https://kaplanhecker.app.box.com/s/qz5v7y58srqssky3t0n36osdo3gwzdbt> [<https://perma.cc/DH8U-QVYJ>]. This report is further discussed *infra* Part II.

20. KAPLAN HECKER & FINK LLP, *supra* note 19, at 2.

21. *Inclusion*, NCAA, <https://www.ncaa.org/sports/2022/4/7/celebrate-title-ixs-50th-anniversary.aspx> [<https://perma.cc/CFT3-JUH6>]; 525 U.S. 459 (1999).

that, if applied to the NCAA, could bring the NCAA into the regulatory scope of Title IX without conflicting with *Smith*.²²

Title IX has improved many aspects of college athletics, but its inability to regulate equity in the NCAA remains a core issue for future improvements. Part I of this Article provides a brief history of Title IX and explains how the law and its regulations function. Part II discusses the role the NCAA plays in perpetuating gender inequity. Part III analyzes *NCAA v. Smith*, the Supreme Court decision that determined the NCAA does not have to comply with Title IX,²³ and argues that by using the reasoning from recent district court cases, the NCAA could be brought within the regulatory scope of Title IX. Bringing the NCAA within the regulatory scope of Title IX would legally require the NCAA to alter its current structuring of sports media agreements and increase representation of female athletes in the media.

I. The History of Title IX and the Application of Its Regulations

In the early 1900s, there were very few spaces in which women could participate in competitive events.²⁴ These events were often referred to as ‘play days,’ where women had the opportunity to compete against students at their own college via intramural or sorority matches.²⁵ In the 1920s, opportunities for women to participate in athletics grew but were still constricted by society’s view that a woman’s place was in the home.²⁶ Just prior to the passage of Title IX, only 300,000 women and girls were estimated to be participating in sports at all levels.²⁷ In comparison, there were more than three million boys participating in just high school sports at that time.²⁸

22. See discussion *infra* Part III.A.i.

23. *Smith*, 525 U.S. at 470.

24. Richard C. Bell, *A History of Women in Sport Prior to Title IX*, SPORT J. (Mar. 14, 2008), <https://thesportjournal.org/article/a-history-of-women-in-sport-prior-to-title-ix/> [<https://perma.cc/53BT-9MJS>].

25. *Id.*

26. *Id.* (explaining the values of female sports at that time were for women to “play for play’s sake” and to discourage publicity for these programs).

27. 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/L8DH-ZWJ8>] (including female participants in both high school and college sports).

28. NCAA, THE STATE OF WOMEN IN COLLEGE SPORTS REPORT 15 (2022), https://s3.amazonaws.com/ncaaorg/inclusion/titleix/2022_State_of_Women_in_College_Sports_Report.pdf [<https://perma.cc/WT3R-P9DS>].

Eventually, the fight for equality by both the Civil Rights and feminist movements created the push necessary to enact Title IX legislation.²⁹ On July 1, 1972, President Richard Nixon signed Title IX into law.³⁰ Enacted as part of the Education Amendments to the Civil Rights Act of 1964, Title IX states:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance³¹

This succinct law, only thirty-seven words, provides the legal foundation for protecting students and employees in federally-funded educational institutions from sex discrimination and sexual harassment.³² Though Title IX applies to a variety of areas in education, the law seems best known for its effect on female athletics.³³

At the time Title IX was passed, it was not clear if the law would apply to college athletics.³⁴ The NCAA, which at that time was still the dominating force within college athletics, vehemently opposed the idea of Title IX regulating college athletics.³⁵ In its opposition to Title IX entering the college athletics arena, the NCAA was joined by Senator John Tower (R-Tex.), who quickly proposed the Tower Amendment.³⁶ The Tower Amendment was intended to

29. Bell, *supra* note 24; see Iram Valentin, *Title IX: A Brief History*, 2 HOLY CROSS J.L. & PUB. POL'Y 123, 127 (1997) (“Title IX grew out of the Civil Rights and feminist movements of the late 1950s, 1960s, and early 1970s.”).

30. *Id.* at 126.

31. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (1976).

32. Valentin, *supra* note 29, at 123–24.

33. Maggie Jo Poertner Buchanan, *Title IX Turns 40: A Brief History and Look Forward*, 14 TEX. REV. ENT. & SPORTS L. 91, 91 (2012); Elaine Chamberlain, Hannah Cornett & Adam Yohanan, *Athletics & Title IX of the 1972 Education Amendments*, 19 GEO. J. GENDER & L. 231, 232 (2018); Tom Goldman, *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/C965-9W6G].

34. Crista Leahy, *The Title Bout: A Critical Review of the Regulation and Enforcement of Title IX in Intercollegiate Athletics*, 24 J.C. & U.L. 489, 493 (1998) (discussing the confusion after the passing of Title IX on whether Congress intended it to apply to college athletics).

35. The NCAA at this time was an all-male organization and feared the introduction of female sports would decrease its revenue. Ellen J. Staurowsky, *Title IX and College Sport: The Long Painful Path to Compliance and Reform*, 14 MARQ. SPORTS L. REV. 95, 100 (2003). See Leahy, *supra* note 34, at 493 (“Walter Byers, then NCAA executive director, felt, along with many people, that Title IX stood for the ‘possible doom of intercollegiate athletics.’”).

36. Christine I. Hepler, *A Bibliography of Title IX of the Education Amendments of 1972*, 35 W. NEW ENG. L. REV. 441, 448 (2013).

exempt revenue-producing collegiate sports from being subject to the federal regulation of Title IX.³⁷ Despite political pressure, the Tower Amendment died in the Senate and was replaced by the Javits Amendment.³⁸ The Javits Amendment directed the Department of Health, Education, and Welfare (HEW) to publish regulations implementing Title IX and specifically directed regulations to be made for college athletics.³⁹

Not to be sidelined by their initial loss, the NCAA reapplied its resistance in opposing HEW's proposed regulations for Title IX.⁴⁰ The NCAA went so far as to write to President Gerald Ford, contending that "the HEW concepts of Title IX as expressed could seriously damage if not destroy the major men's intercollegiate athletic programs."⁴¹ Despite the use of presidential persuasion, the NCAA once again lost, and in 1975 HEW issued Title IX regulations for college athletics.⁴²

A. Title IX Regulations

The enactment of Title IX was a great victory in the fight for gender equity, but the sparse language of the law left it unclear who was to adhere to Title IX and what the law would require of those within its governing reach.⁴³

i. Who Must Comply with Title IX

Title IX regulations prohibit "recipients" from engaging in sex discrimination in any "interscholastic, intercollegiate, club or intramural athletics . . ."⁴⁴ The term "recipients" is defined as "any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient . . ."⁴⁵ Federal financial assistance is defined to include a grant or loan, a grant of federal real or personal property, a sale or lease of federal property,

37. *Id.*

38. *Id.* at 449.

39. 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 (2003).

40. Staurowsky, *supra* note 35, at 101.

41. *Id.* at 102 (quoting ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH 101 (1998)). President Ford went on to express this concern to the Senate.

42. Leahy, *supra* note 34, at 495.

43. *Id.* at 493; Bell, *supra* note 24.

44. 34 C.F.R. § 106.41(a) (2020).

45. 34 C.F.R. § 106.2(i) (2020).

or any other contract or arrangement which has a purpose of assisting to pay for an educational program or activity.⁴⁶ Despite these definitions, courts quickly became a battle ground for determining who is a recipient of federal financial assistance.⁴⁷

In our current system of college athletics, athletes play for universities, and nearly every university is required to comply with Title IX.⁴⁸ However, most universities are also members of the NCAA, and the NCAA is the governing body who makes and enforces the rules of college athletics.⁴⁹ By being a member of the NCAA, universities receive the benefit of being part of a competitive national sports organization but must abide by the NCAA's college athletics system.⁵⁰ It was originally clear that universities must follow Title IX regulations, but it was not clear if the NCAA, a nonprofit educational institution that does not receive direct federal funds, must also adhere to Title IX.⁵¹

In 1999, that question was answered. Challenged by a female college athlete, the NCAA battled all the way to the Supreme Court to argue it is not a "recipient" of federal financial assistance and therefore not subject to Title IX requirements.⁵² The Supreme Court held that the NCAA is not a "recipient" of federal financial assistance as defined in the regulations and is, therefore, not subject to Title IX regulations.⁵³ Though the Supreme Court ruled in favor of the NCAA, the Court's decision left the door open for other arguments to be made in holding the NCAA subject to Title IX requirements.⁵⁴ The key components of this decision are discussed further in Part III.

46. 34 C.F.R. § 106.2(g) (2020).

47. *See* *Grove City Coll. v. Bell*, 465 U.S. 555 (1984) (holding that Title IX only applies to the college's financial aid program because it is the only program that benefits from the federal loans students receive); *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 462 (1999) (ruling that the NCAA receiving membership dues from universities who receive federal funding does not make the NCAA a "recipient" under Title IX); *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 603–12 (1986) (determining that airlines are not "recipients" of federal assistance within the scope of the Rehabilitation Act of 1973 for their relationship to air traffic control systems).

48. *Gender Equity / Title IX Important Facts*, NCAA, <https://www.ncaa.org/sports/2013/11/21/gender-equity-title-ix-important-facts.aspx>[<https://perma.cc/TPH6-WRKA>].

49. *Overview*, *supra* note 3.

50. *Id.*

51. *Smith*, 525 U.S. at 462.

52. *Id.*

53. *Id.*

54. *Id.* at 469.

Still good law, the *Smith* decision resulted in the current college framework where a university must adhere to Title IX, but any aspect of college athletics governed by the NCAA is outside the reach of Title IX.⁵⁵

ii. What Title IX Regulations Require

If an organization is subject to Title IX, the regulations require that entity to provide scholarship programs for female athletes if they offer them to male athletes,⁵⁶ equal opportunities for female athletes, and equal treatment of male and female athletes.⁵⁷ To determine if an entity provides ‘equal opportunities,’ the regulations list the following factors to be considered: (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; and (10) publicity.⁵⁸

Within three years of the publication of regulations, the Office of Civil Rights (OCR), responsible for administering and enforcing Title IX regulations,⁵⁹ received hundreds of Title IX discrimination complaints from student-athletes.⁶⁰ Experiencing difficulty applying the regulations to the complaints, the OCR recognized the need for clarification on how the regulations should be applied to an athletic program.⁶¹ Subsequently, in 1979 the OCR issued a Policy Interpretation that clarified and explained how an institution is to equitably meet the regulation’s factors.⁶²

55. Leigh Ernst Friestedt, *Title IX vs. NCAA: A Gameplan for Championship Equity*, 25 VAND. J. ENT. & TECH. L. 307, 311 (2023).

56. 34 C.F.R. § 106.37(c) (2020).

57. *Id.*

58. *Id.* In applying these factors, the regulations state that they will be “considered” in determining if “equal opportunities” are provided. 34 C.F.R. § 106.41(a) (2020).

59. Chamberlain, Cornett & Yohanan, *supra* note 33, at 233.

60. Leahy, *supra* note 34, at 496.

61. *Id.* at 496–97.

62. Due to this Article’s focus on the publicity factor, the primary focus will be on how the Policy Interpretation directs a consideration of factors two through ten, rather than a discussion of the three-part test for factor one. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. No. 239 (VII)(B)(2) (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86); Jill K. Johnson, *Title IX and Intercollegiate*

To determine whether an institution is in compliance with factors two through ten, the Policy Interpretation requires the OCR to compare the “availability, quality and kinds of benefits, opportunities, and treatment” athletes of both sexes receive.⁶³ The Policy Interpretation emphasizes that identical treatment is not required *only* if the disparate treatment is balanced out by favorable treatment with respect to another factor.⁶⁴ This emphasis means that an entity is not violating Title IX if women’s athletics receive fewer advertising posters than men’s athletics but receive more online promotions.

The Policy Interpretation goes on to specify facts the OCR is to consider when assessing compliance for each factor.⁶⁵ With respect to publicity, the Policy Interpretation directs the OCR to look at the availability and quality of sports information personnel, the access to publicity resources for men’s and women’s programs, and the “quantity and quality of publications and other promotional devices featuring men’s and women’s programs.”⁶⁶

The Policy Interpretation also identifies three additional factors the OCR will investigate to make an overall, broader determination of compliance with Title IX.⁶⁷ The broader factors are:

- (1) whether the policies of an institution are discriminatory in language or effect; (2) whether disparities of a substantial and unjustified nature exist in the benefits, treatment, services, or opportunities afforded male and female athletes in the institution’s program as a whole; or (3) whether disparities in benefits, treatment, services, or opportunities in individual segments of the program are substantial enough in and of themselves to deny equality of athletic opportunity.⁶⁸

An affirmative answer to any of these factors may allow the OCR to find an institution in noncompliance with Title IX, regardless of whether the institution is in compliance with the specific factors listed.⁶⁹

Athletics: Current Judicial Interpretation of the Standards for Compliance, 74 B.U. L. REV. 553, 566 (1994).

63. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. No. 239 at (VII)(B)(2).

64. *Id.* (meaning that if a women’s team received lesser quality media posters than a men’s team but had more social media coverage than the men’s team, the disparate treatment could be considered balanced out).

65. *Id.* at (VII)(B)(3).

66. *Id.* at (VII)(B)(3)(i)(3).

67. Johnson, *supra* note 62, at 569.

68. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. No. 239 at (VII)(B)(5).

69. Johnson, *supra* note 62, at 569–70.

B. Application of the Publicity Factor to Rutgers University

To understand how the OCR applies the factors, it is useful to review the OCR compliance review of Rutgers University conducted in 2015.⁷⁰ The review determined that Rutgers University was not complying with Title IX with respect to the following components: travel and per diem allowances; locker room, practice, and competitive facilities; publicity; and support services.⁷¹ Assessing compliance with publicity, the OCR considered: “(a) availability and quality of sports information personnel [SIP]; (b) access to other publicity resources for men’s and women’s programs; and (c) quantity and quality of publications and other promotional devices featuring men’s and women’s programs.”⁷²

For consideration (a), the OCR examined the number of SIPs assigned to each team, the SIPs’ qualifications, and the SIPs’ prior work experiences.⁷³ The OCR found that the disparity in number of SIPs assigned, favoring men’s teams, was justified due to which sports had more televised games.⁷⁴ However, the SIPs assigned to men’s teams had more post-graduate experience, and the OCR determined this disparity was not justified.⁷⁵

For consideration (b), OCR reviewed the university’s website dedicated to athletics, the quality and quantity of information posted to each team’s section of the website, and each team’s local and national TV coverage.⁷⁶ Rutgers University had all of their football games, and twenty-two men’s basketball games, nationally televised.⁷⁷ Additionally, both the football and men’s basketball teams had a nationally televised show.⁷⁸ In comparison, the women’s basketball team only had eight games nationally televised and no TV shows.⁷⁹ The university attempted to justify these discrepancies by claiming lack of control over what games TV programs chose to stream and arguing that the revenue certain teams produce for the university justifies any discrepancies.⁸⁰ The OCR responded that, while the university may not control television

70. Letter from Timothy C.J. Blanchard, Office of Civil Rights, to Robert Barchi, President, Rutgers University (NJ) (July 28, 2015).

71. *Id.*

72. *Id.* at 41.

73. *Id.* at 42.

74. *Id.* at 44.

75. *Id.*

76. *Id.* at 42–43.

77. *Id.*

78. *Id.*

79. *Id.* at 41.

80. *Id.* at 43.

broadcasting decisions, the university does have control over campus productions and live streaming.⁸¹ Importantly, the OCR determined that even if the university's inequities were not for discriminatory purposes, the university has "an obligation under Title IX to . . . market and promote interest in all of their teams equivalently."⁸²

Finally, for consideration (c), the OCR examined team-related publications, such as posters, game-day programs, and media guides.⁸³ The OCR found that the football team was the only team provided with game-day programs, more men's teams were provided media guides and billboard advertising, and more men's teams were provided dance teams and cheerleaders at games.⁸⁴ The OCR determined that these disparities were not justified, and taken into account with considerations (a) and (b), Rutgers University was in violation of its duty to provide "equal athletic opportunities to students of both sexes with respect to publicity."⁸⁵

The OCR's Title IX review of Rutgers University ultimately found unequal benefits with respect to some factors, while finding no unequal treatment or benefit with respect to other factors.⁸⁶ In weighing all the factors, the OCR determined that the number and significance in disparities favoring men's teams "resulted in a lack of equal opportunity for female athletes, in violation of the regulation implementing Title IX."⁸⁷ This review shows how the OCR looks closely at each factor and that even seemingly small disparities in some areas can be enough to find a school out of compliance. Importantly, this review demonstrates that the OCR takes seriously an institution's obligation to female athletes.

II. The NCAA's Contribution to the Inequity of College Athletics

With more than 1,000 universities that are NCAA members and more than 500,000 NCAA athletes,⁸⁸ the NCAA very clearly has

81. *Id.* at 44.

82. *Id.*

83. *Id.* at 43.

84. *Id.*

85. *Id.* at 44.

86. *Id.* at 48. The OCR found Rutgers University provided unequal benefits for travel and per diem allowances; locker room, practice, and competitive facilities; publicity; and support services, but found compliance for provision of equipment and supplies, scheduling of games and practice times, medical and training facilities and services, and recruitment.

87. *Id.*

88. *Overview, supra* note 3.

controlling power over the college athletics market. The NCAA's dominance is so pervasive and formidable that it has been compared to a cartel.⁸⁹ This reality has produced a college athletics system that requires universities to adhere to Title IX regulations but does not require the NCAA, the controlling authority of the system, to adhere to any such rules. The result is a world of college athletics founded on inequity.

The NCAA, from the very beginning, was an organization focused solely on the advancement of men's athletics and has frequently been reluctant to advance women's sports.⁹⁰ For example, it took seventy-five years after the NCAA was founded and an additional ten years after Title IX was passed for the NCAA to sponsor a women's championship event.⁹¹ Further, the NCAA has historically prohibited women's basketball from using the 'March Madness' slogan for their tournament.⁹² The 'March Madness' brand was only allowed to be used for the NCAA Men's Basketball Championship.⁹³ It was only after the NCAA was criticized for its inequitable treatment during the 2021 women's tournament, that the NCAA allowed the 'March Madness' branding and marketing to be used for the women's tournament.⁹⁴

The NCAA's historic opposition to Title IX has not stopped the organization from promoting the historic law.⁹⁵ The NCAA website highlights the NCAA's commitment to gender equity and celebrates the successes of Title IX.⁹⁶ There is even a website dedicated to Title IX on the NCAA page that promotes the achievements of the law and provides resources to help universities adhere to Title IX requirements.⁹⁷ The hypocrisy of the NCAA's celebration of Title IX

89. James V. Koch & Wilbert M. Leonard, *The NCAA: A Socio-Economic Analysis: The Development of the College Sports Cartel from Social Movement to Formal Organization*, 37 AM. J. OF ECON. & SOCIO. 225, 225–26 (1978).

90. KAPLAN HECKER & FINK LLP, *supra* note 19, at 1–2.

91. *Id.*

92. Alex Azzi, *NCAA: March Madness Branding Will Be Used for Women's Tournament*, NBC SPORTS: ON HER TURF (Sept. 29, 2021), <https://www.nbcsports.com/on-her-turf/news/ncaa-march-madness-branding-will-be-used-for-womens-tournament> [<https://perma.cc/6R9Y-VZFM>].

93. *Id.*

94. *Id.*

95. The NCAA's website speaks of its dedication to gender equality and promotes the progress athletics have seen since Title IX was passed, yet it makes no obvious mention of the NCAA itself not being subject to Title IX requirements. *See Inclusion, supra* note 21; *Gender Equity and Title IX*, NCAA, <https://www.ncaa.org/sports/2016/3/2/gender-equity-and-title-ix.aspx> [<https://perma.cc/A6Q3-FMRR>].

96. *Id.*

97. *Title IX at 50 Years*, NCAA, <https://www.ncaa.org/sports/2017/6/19/title-ix->

and purported commitment to gender equity is best understood in light of the results of the recent gender equity review of the NCAA.

In response to the continued outrage from the 2021 tournament, the NCAA retained KHF to conduct a comprehensive review of gender equity issues in the NCAA.⁹⁸ The conclusion of the report was clear: the structure and internal systems of the NCAA are the *primary* reason that there are gender inequities in NCAA athletics.⁹⁹ Specifically, the design of the NCAA is such that its sole priority is to maximize and capitalize on Division I Men's Basketball Championships (MBCs).¹⁰⁰ The broadcast agreements, sponsorship contracts, and distribution of revenue are all made to prioritize MBCs.¹⁰¹ This design creates and normalizes gender inequities and, further, the NCAA does not have a system in place to identify or address these inequities.¹⁰²

KHF retained Desser Sports Media (DSM) to review and report on the NCAA's media and sponsorship rights (Media Report).¹⁰³ The Media Report labels the NCAA Women's Division I Basketball Championship (WBC) as "one of the most valuable U.S. sports media properties."¹⁰⁴ Between 2015 and 2019, the WBC Championship Game has increased its property rating by 28% while male athletic events such as the World Series, the Super Bowl, the MBC Championship Game, and the NBA Finals have all seen a decrease in property rating by up to 30%.¹⁰⁵ In 2021, the WBC saw an increase of 9% in viewership as compared to a 14% decrease in viewership for the MBC.¹⁰⁶ The Media Report concludes that the WBC is becoming more competitive, attracting more fans and viewers, and increasing social media following¹⁰⁷—all of which are contributing to the positive cycle of increasing exposure.¹⁰⁸

Despite the growing interest and viewership in the WBC, the NCAA has bundled the WBC's media rights with twenty-nine other

at-50-years.aspx [<https://perma.cc/J5GB-UA2F>].

98. NCAA GENDER EQUITY REVIEW, *supra* note 17.

99. KAPLAN HECKER & FINK LLP, *supra* note 19, at 1–2.

100. *Id.* at 7–10.

101. *Id.*

102. *Id.*

103. DESSER SPORTS MEDIA, INC., *supra* note 19.

104. *Id.* at 7.

105. *Id.* at 21.

106. *Id.* at 7.

107. *Id.* at 29. UConn guard Paige Bueckers, the first freshman to ever win the AP National Player of the Year, has more followers on Instagram than twenty of the 2021 Men's Final Four starters combined.

108. *Id.* at 31–32.

championship sports.¹⁰⁹ By doing this, the NCAA has effectively undervalued the WBC by more than \$50 million.¹¹⁰ This bundling agreement has not only perpetuated the difference in value between the WBC and MBC but has also resulted in fewer streaming opportunities and less promotion for the WBC.¹¹¹ For example, entertainment companies CBS and Turner Broadcasting System control the sponsorship rights for both the WBC and MBC but only the broadcasting rights for MBC.¹¹² This structure encourages CBS/Turner to create sponsorship opportunities for only MBC, as it would increase broadcasting revenue.¹¹³ The Media Report concludes that this system has resulted in the streaming of the MBC to look and feel different—with advertisements including celebrities and programming that features the college basketball players, their families, and their stories.¹¹⁴ Additionally, this contract model makes it more difficult for sports fans to watch the WBC. A sports fan is required to purchase an ESPN account to view the WBC, whereas a sports fan can stream the MBC for free off the NCAA website.¹¹⁵ This lack of live streaming for the WBC is attributed to the NCAA providing a smaller staff and budget for the women's tournament.¹¹⁶

Even with this report detailing the NCAA's direct creation of and contribution to gender inequity in college athletics, without the NCAA being subject to Title IX, there is no legal avenue to hold the NCAA responsible for their actions.

109. *Id.* at 9.

110. *Id.* at 2, 9. The NCAA's current media rights for the WBC deal, as bundled with twenty-nine other championships, is worth \$34 million per year, and the report estimates that WBC alone is going to be worth \$81 to 112 million per year beginning in 2025.

111. *Id.* at 37–38. Originally negotiated in 2001 and renewed in 2011, this deal is set to expire in August 2024. See Joe Reedy, *NCAA Women's TV Rights Could Have a Different Look*, AP NEWS (Apr. 7, 2022), <https://apnews.com/article/march-madness-entertainment-business-sports-college-sports-4e966ea9c49a0405b7f464f36a4d2a90> [<https://perma.cc/82NR-287A>].

112. DESSER SPORTS MEDIA, INC., *supra* note 19, at 9.

113. *Id.*

114. *Id.*

115. See *id.* at 25; compare *March Madness Live (D1 MBB)*, NCAA, https://www.ncaa.com/march-madness-live/watch?cid=ncaa_mml_nav_men [<https://perma.cc/R386-Q6Y7>] (highlighting the option for sports fans to watch the men's tournament for free via live streaming), with *March Madness (D1 WBB)*, NCAA, https://www.ncaa.com/womens-di-championship?mml=1&cid=ncaa_mml_nav_women [<https://perma.cc/UZ9C-3C37>] (containing no such live streaming option for the women's basketball tournament).

116. DESSER SPORTS MEDIA, INC., *supra* note 19, at 9.

III. Recent District Court Decisions Could Bring the NCAA Within Title IX Regulatory Scope Consistent with Supreme Court Precedent

While Title IX has set the legal landscape to create progress in female athletics, the current state of college athletics is far from a system of equity.¹¹⁷ This result is primarily because the controlling organization of college athletics can perpetuate inequity without being held to the legal standards its very own members must abide by. Recent decisions in two lower court cases use reasoning that, if applied to the NCAA, could bring the NCAA into the regulatory scope of Title IX without conflicting with *Smith*.¹¹⁸

A. Case Law Legal Framework

i. *Smith v. NCAA*

In 1999, Renee Smith, the plaintiff, claimed the NCAA violated Title IX by discriminating against her on the basis of sex.¹¹⁹ Smith argued that because the NCAA receives monetary payments from federally funded member institutions (universities), the NCAA financially benefits from federal financial assistance.¹²⁰ This indirect federal financial assistance, Smith argued, should bring the NCAA into the regulatory scope of Title IX.¹²¹ The question before the Supreme Court was whether Title IX applies to a private organization that does not receive federal money directly but receives payments from entities that themselves receive federal financial assistance.¹²²

In 1984, the Supreme Court had previously considered whether an entity that indirectly receives federal financial assistance is governed by Title IX.¹²³ In *Grove City College v. Bell*, the Court considered if Title IX applied to a college that does not accept any direct federal financial assistance but enrolls students who receive federal education grants.¹²⁴ The *Grove City* Court dismissed the claim that only institutions who apply for federal aid

117. *See supra* Part II.

118. *See infra* Part III.A.i.

119. Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 462 (1999) (arguing the NCAA granted more waivers from eligibility restrictions to male postgraduate athletes than to female athletes). Smith was a *pro se* litigant. *Id.* at 459.

120. *Id.* at 465.

121. *Id.*

122. *Id.*

123. *Id.* at 466; *see* *Grove City Coll. v. Bell*, 465 U.S. 555 563–70 (1984); *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 603–12 (1986).

124. *Grove City Coll.*, 465 U.S. at 558.

are subject to Title IX regulation, concluding that the language of Title IX contains “no hint” of intent to differentiate between direct and indirect forms of federal assistance.¹²⁵ The *Grove City* Court also noted that students used federal aid that was specifically marked for that educational purpose.¹²⁶ Summarizing that Title IX applies to entities that receive both direct and indirect forms of federal financial aid, the *Grove City* Court determined that a college qualifies as an “indirect” recipient of federal financial assistance when it accepts students who receive federal education grants.¹²⁷

In 1986, the Supreme Court again considered who qualifies as a recipient of federal financial assistance when assistance is received indirectly.¹²⁸ In *United States Department of Transportation v. Paralyzed Veterans*, airport operators received federal aid for airport construction, and the question before the Supreme Court was whether the airlines, who used the airports constructed by use of federal funds, were indirect recipients of the federal aid.¹²⁹ In its analysis, the *Paralyzed Veterans* Court took a contractual approach and emphasized that “recipients” are those in the position to either accept or reject federal funds in considering whether to assume a law’s obligations.¹³⁰ The Court stated, “Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient’s acceptance of the funds triggers coverage under the nondiscrimination provision.”¹³¹

Next, the *Paralyzed Veterans* Court differentiated between an entity that “receives” federal aid versus one that merely benefits from federal aid.¹³² The *Paralyzed Veterans* Court explained that the college in *Grove City* was an indirect recipient of federal aid, because there was an expectation that the colleges were to receive the federal aid indirectly due to how it was designated.¹³³ The

125. *Id.* at 564.

126. *Id.*; see also *Smith*, 525 U.S. at 468 (comparing the earmarked purpose of the federal funds in *Grove City* to those in *Smith*).

127. *Id.*

128. *Paralyzed Veterans*, 477 U.S. at 604. This case involved the Rehabilitation Act of 1973 rather than Title IX. Section 504 of the Rehabilitation Act protects individuals from discrimination in employment based on their disability. *Fact Sheet*, OFF. OF C.R., <https://www.hhs.gov/sites/default/files/ocr/civilrights/resources/factsheets/504.pdf> [<https://perma.cc/7FXK-DG2J>].

129. *Paralyzed Veterans*, 477 U.S. at 603.

130. *Id.* at 606.

131. *Id.* at 605.

132. *Id.* at 618 n.11.

133. *Id.* The Court explains that the unusual disbursement pattern of the federal aid—grants to students to be used at the colleges—and the legislative history caused

Paralyzed Veterans Court distinguished the present case from *Grove City* by noting that the airlines were not in the position to accept or reject the federal aid, and the airlines were only economically benefiting from the federal aid provided for airport construction, not indirectly receiving the federal aid themselves.¹³⁴

Utilizing the above reasoning from *Grove City* and *Paralyzed Veterans*, the *Smith* Supreme Court summarized, “Entities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not.”¹³⁵ Distinguishing the case before it from precedent, the *Smith* Court concluded that while NCAA receives dues from members who receive federal aid, there is no evidence that “NCAA members paid their dues with federal funds earmarked for that purpose.”¹³⁶ For that reason, the *Smith* Court held that the NCAA does not qualify as a recipient of federal assistance and is not subject to Title IX regulations.¹³⁷ However, the *Smith* Court made clear that it was only answering the narrow question in front of it, leaving open other avenues through which to argue the NCAA a recipient of federal financial assistance.¹³⁸

ii. Recent District Court Decisions Utilize a Federal Tax Exemption to Bring Private Entities Within the Regulatory Scope of Title IX

In *Buettner-Hartsoe v. Baltimore Lutheran High School Association*, plaintiffs allege Baltimore Lutheran High School violated Title IX by failing to address plaintiffs’ allegations of sexual assault by male students.¹³⁹ The plaintiffs argue that because the defendant is an educational private organization that files for a federal tax exemption under 26 U.S.C. § 501(c)(3), the defendant is a recipient of federal financial funds, and therefore subject to Title IX requirements.¹⁴⁰ Noting that the Supreme Court has yet to address whether filing a tax-exempt status qualifies as federal financial assistance under Title IX, the *Buettner-Hartsoe* court

the court to recognize indirect federal aid.

134. *Id.* at 607–08.

135. Nat’l Collegiate Athletic Ass’n v. Smith, 525 U.S. 459, 468 (1999).

136. *Id.* (explaining that there was no evidence that the NCAA members paid NCAA dues with federal aid money that had been given with that explicit intention in mind).

137. *Id.* at 469.

138. *Id.*

139. No. RDB-20-3132, 2022 WL 2869041, at *1 (D. Md. July 21, 2022).

140. *Id.* at *3.

considered, first, how the Supreme Court has treated tax exemptions and, second, the policy rationales of having a tax exemption trigger Title IX regulation.¹⁴¹

In 1983, the Supreme Court discussed tax exemptions in two cases.¹⁴² In *Regan v. Taxation with Representation*, the Supreme Court contemplated the purpose and scope of tax exemptions for 501(c)(3) organizations.¹⁴³ The *Regan* Court determined that a tax exemption functions similarly to a cash grant because it deducts the amount an organization would have to directly pay on its income.¹⁴⁴ In *Bob Jones University v. United States*, the Supreme Court held that a tax exempt institution must serve and align with the public interest.¹⁴⁵ The *Bob Jones* Court explained that for an organization to receive a 501(c)(3) tax exemption, the institution's purpose must not conflict with the "common community conscience" and must not undermine any public benefit the institution provides the community.¹⁴⁶

The policy rationale behind Title IX was described by the Supreme Court in *Cannon v. University of Chicago*: "First, Congress wanted to avoid the use of federal resources to support discriminatory practices . . . [and] wanted to provide individual citizens effective protection against those practices."¹⁴⁷

Applying this Supreme Court precedent to the private nonprofit high school, the *Buettner-Hartsoe* Court held that a 501(c)(3) tax exemption equates to federal financial assistance under Title IX.¹⁴⁸ The *Buettner-Hartsoe* Court reasoned that equating a tax exemption to federal financial assistance under Title IX not only aligns with the function of tax exemptions explained in *Regan* but also follows the policy interests discussed in *Bob Jones* and *Cannon*.¹⁴⁹

141. *Id.* at *3–*4.

142. *See* *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983); *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983).

143. 461 U.S. at 544.

144. *Id.* (determining that a tax exemption functions as a cash grant, the Supreme Court recognized that a tax exemption is then a form of a Congressional subsidy).

145. 461 U.S. at 592 (denying tax-exempt status to private schools with racially discriminatory practices).

146. *Id.*

147. 441 U.S. 677, 704 (1976) (holding that Title IX, like Title VI, has an implied private right of action).

148. *Buettner-Hartsoe*, 2022 WL 2869041, at *15 n.9 (qualifying a 501(c)(3) tax exemption as federal financial assistance because Title IX shares common objectives with Title VI, and a tax exemption functions as a cash grant).

149. *Id.* at *5 (explaining that "[e]nforcing the mandates of Title IX in schools with 501(c)(3) status aligns with and protects the principal objectives of Title IX . . .").

In *E.H. v. Valley Christian Academy*, the Court considered the same question as in *Buettner-Hartsoe*, whether a tax-exempt status equates to federal financial assistance under Title IX.¹⁵⁰ The plaintiff, a female athlete, was restricted from participating on her high school football team whenever her team played against Valley Christian Academy.¹⁵¹ She alleged a Title IX violation, claiming Valley Christian Academy's 501(c)(3) tax exemption qualifies as federal financial aid under Title IX.¹⁵²

Noting the lack of Supreme Court precedent on treating tax exemptions as federal financial assistance under Title IX, the *Valley Christian* court looked to the plain purpose of Title IX.¹⁵³ The *Valley Christian* court stated that Title IX's purpose is to eliminate discrimination in programs that benefit from federal financial assistance, and the distinction as to the exact form of federal funds received by a program is immaterial.¹⁵⁴ From this somewhat brief analysis, the *Valley Christian* court concluded that a tax-exempt status equates to a federal financial benefit and brings that institution into the regulatory scope of Title IX.¹⁵⁵

While the courts in *Buettner-Hartsoe* and *Valley Christian* held that a tax exemption counts as federal financial assistance under Title IX, the district court in *Johnny's Icehouse v. Amateur Hockey Association* held differently.¹⁵⁶ In its decision, the *Johnny's Icehouse* court described the listed forms of federal financial assistance in the Title IX regulations as comprehensive and noted that tax exemptions were not included in that list.¹⁵⁷ The *Johnny's Icehouse* court went on to characterize the list as only including direct transfers of money.¹⁵⁸ With minimal analysis, the *Johnny's Icehouse* court concluded that a tax exemption is not a "direct

150. *Id.* at *17; *E.H. v. Valley Christian Acad.*, 616 F. Supp. 3d 1040 (C.D. Cal. 2022).

151. *Valley Christian*, 616 F. Supp. 3d at 1044.

152. *Id.* at 1056.

153. *Id.* at 1050.

154. *Id.* at 1050 (citing *McGlotten v. Connally*, 338 F. Supp. 448, 461 (D.D.C. 1972)).

155. *Id.* at 1056.

156. 134 F. Supp. 2d 965, 971 (N.D. Ill. 2001) (holding that the Amateur Hockey Association is not subject to Title IX regulations because of its tax status).

157. *Id.* at 971–72; see 34 C.F.R. § 106.2(g) (2020).

158. *Id.* at 969–70, 972. The court engaged in a contract analysis, similar to the one in *Paralyzed Veterans*, asserting that an entity has a choice to accept the federal aid and commit to the law's obligations. The court's analysis for this portion of the opinion is simply a cite to *Paralyzed Veterans*, summarizing that *Paralyzed Veterans* excluded entities that merely benefit economically from the reach of Title IX. See *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 606–07 (1986).

transfer” of money and not a form of federal financial assistance under Title IX.¹⁵⁹

B. The NCAA’s Tax Exemption Should Subject the Organization to Title IX Regulations

Despite producing \$1.15 billion in revenue,¹⁶⁰ the NCAA files as a nonprofit under § 501(c)(3) of the Internal Revenue Code.¹⁶¹ Filing for 501(c)(3) status should be considered federal financial assistance under Title IX, as set out in *Buettner-Hartsoe* and *Valley Christian*. While the court in *Johnny’s Icehouse* reached a different conclusion, the decision lacked substantive analysis. The discussion in *Johnny’s Icehouse* on federal financial assistance consisted of brief, conclusory statements, stating only that Title IX’s listed forms of federal financial assistance consist of “direct transfers of federal money” and that a tax exemption “just does not equate to such direct transfers.”¹⁶² This decision lacked substantive reasoning and failed to address Supreme Court treatment of tax exemptions. The breadth of Supreme Court case law analysis and reasoning utilized in *Buettner-Hartsoe’s* decision makes the holding in *Buettner-Hartsoe* more persuasive.

First, in *Regan*, the Supreme Court ruled that a tax exemption functions like a cash grant,¹⁶³ therefore qualifying the NCAA tax exemption as federal financial assistance.¹⁶⁴ Second, qualifying the NCAA’s tax exemption as federal aid aligns with the Supreme Court’s precedent on policy considerations for tax exemptions. A tax-exempt institution must serve and align with the public interest and should not conflict with the “common community conscience.”¹⁶⁵ Additionally, Congress wants to prevent federal resources from being used to support discriminatory practices.¹⁶⁶ So while the NCAA serves a public interest in providing college athletes athletic opportunities, any benefit it provides is undermined by the organization’s contribution to gender inequities in college athletics.¹⁶⁷ Finally, by allowing the NCAA to receive a federal tax

159. 134 F. Supp. 2d at 972.

160. *NCAA Earns \$1.15 Billion*, *supra* note 4.

161. See CROWE LLP, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION CONSOLIDATED FINANCIAL STATEMENTS, NCAA (Aug. 31, 2021).

162. *Id.*; *Johnny’s Icehouse*, 134 F. Supp. 2d at 972.

163. *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983).

164. 34 C.F.R. § 106.2(g) (2020). The regulation defines one form of federal financial assistance as “[a] grant or loan of Federal financial assistance . . .” *Id.*

165. *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983).

166. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1976).

167. KAPLAN HECKER & FINK LLP, *supra* note 19.

exemption and avoid Title IX requirements, federal resources are being used to support and perpetuate discriminatory practices.

Applying the contractual methodology utilized in *Paralyzed Veterans* strengthens this argument because the NCAA has a choice in accepting federal funds.¹⁶⁸ The NCAA can decide to continue to file for a 501(c)(3) tax exemption but adhere to Title IX, or the NCAA can pay the entirety of their federal taxes but continue to avoid Title IX legal obligations. Utilizing this legal argument avoids conflicting with *Smith* precedent but still brings the NCAA within the regulatory scope of Title IX.

*C. Applying the Title IX Publicity Factor to the NCAA's
College Basketball Tournament*

If the NCAA were subject to Title IX regulations, it is reasonable to expect that there would be many changes in the way the NCAA operates. One of the more important changes would be in the NCAA's publicity for female athletics, specifically in the way the NCAA contracts the TV rights for women's basketball. The NCAA currently bundles the WBC with twenty-nine other sports.¹⁶⁹ This bundling agreement has led to the NCAA grossly undervaluing women's basketball and resulted in fewer streaming and promotional opportunities for the WBC.¹⁷⁰ Applying the publicity factor of Title IX to the NCAA would create progress in achieving more equitable publicity for WBC.

Title IX compliance for publicity is to be assessed by examining the availability and quality of sports information personnel, the access to publicity resources for men's and women's programs, and the "quantity and quality of publications and other promotional devices featuring men's and women's programs."¹⁷¹ The Media Report stated that men's basketball has substantially more staff to run and plan the MBC and attributes the lack of streaming opportunities for the WBC to "a smaller staff and budget."¹⁷² When looking at the access to publicity resources and quality of promotional devices, the Media Report found that due to the way the NCAA structures its contracts for the WBC and MBC, the WBC

168. United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 605 (1986) ("[T]he recipient's acceptance of the funds triggers coverage under the nondiscrimination provision.")

169. DESSER SPORTS MEDIA, INC., *supra* note 19, at 9.

170. *Id.* at 8–9.

171. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. No. 239 at (VII)(B)(3)(i).

172. DESSER SPORTS MEDIA, INC., *supra* note 19, at 8–9.

has fewer live streaming opportunities and promotional devices.¹⁷³ The KHF report concluded that “the men’s tournament feel[s] like a professional sporting event, while the women’s championship lags far behind.”¹⁷⁴

Just based on this brief analysis of the NCAA and comparing it to the OCR’s review of Rutgers University, it is reasonable to expect that the NCAA would be found in violation of Title IX’s publicity requirements. The NCAA’s lack of streaming opportunities for female athletes and the overall lower quality production for the women’s tournament compared to the men’s clearly meet, and surely exceed, the disparities seen in the Rutgers University review.¹⁷⁵

However, a comprehensive review on the NCAA would still require the assessment and weighing of *all* the Title IX factors to determine the NCAA’s compliance with Title IX.¹⁷⁶ The findings of KHF’s comprehensive NCAA report, however, state that the NCAA is the *primary* reason there are gender inequities in NCAA athletics,¹⁷⁷ which indicates the NCAA is still likely to be found in violation of Title IX.

While the NCAA may try to justify these disparities as out of their control, as Rutgers University did,¹⁷⁸ the OCR has stated that an entity has an “obligation under Title IX to not only react to interest in their most popular teams, but also to market and promote interest in all of their teams equivalently.”¹⁷⁹ The fact that the NCAA is undervaluing women’s basketball by \$50 million further weakens any of the NCAA’s justifications because if they contracted women’s basketball TV agreements at their market value, the NCAA would have more money to contribute to quality streaming and promotion.

Increasing the media representation of female athletics might also lead to other positive changes, such as improving diversity.¹⁸⁰

173. *Id.*

174. KAPLAN HECKER & FINK LLP, *supra* note 19, at 9.

175. Compare *supra* Part II of this Article (explaining just a few, of the many, results on how the NCAA contributes to gender inequity in college athletics), with *supra* Part I.B of this Article (analyzing the OCR’s Title IX publicity review on Rutgers University).

176. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. No. 239 at (VII)(B)(2).

177. See KAPLAN HECKER & FINK LLP, *supra* note 19.

178. Letter to Rutgers University, *supra* note 70, at 44. Rutgers University attempted to justify the inequity in publicity between male and female athletics by claiming a lack of control over what games TV stations stream and publicize. *Id.*

179. *Id.*

180. See Margie Warrell, *Seeing Is Believing: Female Role Models Inspire Girls to*

Since the passage of Title IX, there has been a 545% increase in the percentage of women participating in college sports,¹⁸¹ but despite this growth, only 32% of the women participating in athletics identify as “minority” women.¹⁸² From 2001 to 2020, there has only been a 9% increase in female athletes that identify as “minority” women.¹⁸³ This data shows that while female participation in sports has increased tremendously since 1972, there is still a need for the college athletic world to become more inclusive and representative of our nation’s population. Applying Title IX to the NCAA would be an important step in addressing the ongoing lack of diversity. Specifically, increasing media representation of current female athletes may influence young girls to participate in athletics and increase the diversity in the next generation of college athletes.¹⁸⁴

Holding the NCAA accountable to Title IX regulations would certainly create improvement, but there is no guarantee that Title IX regulation would solve every problem. The Title IX regulations are not all-encompassing; they do not regulate every area in which the NCAA contributes to gender discrimination. For example, there is no financial factor in Title IX—meaning the current NCAA unit system, paying only the men’s basketball teams for tournament wins, would likely not be impacted by Title IX.¹⁸⁵ Additionally, Title IX regulations require a weighing of *all* listed factors, meaning that finding inequality in just one factor does not automatically constitute a Title IX violation.¹⁸⁶ Despite this uncertainty, making the NCAA regulated by Title IX would certainly be a step in the right direction and foster equitable change in college athletics.

Think Bigger, FORBES (Oct. 9, 2020), <https://www.forbes.com/sites/margiewarrell/2020/10/09/seeing-is-believing-female-role-models-inspire-girls-to-rise/?sh=5e0d040d7bf9> [<https://perma.cc/UVJ9-CX7K>]; see generally Melissa S. Kearney & Phillip B. Levine, *Role Models, Mentors, and Media Influences*, 30 FUTURE OF CHILDREN 83 (2020) (reporting that targeted media messaging can promote positive youth development by shaping young children’s attitudes and behaviors, as well as by increasing exposure to positive role models).

181. Donna de Varona, *Amazing Things Happen When You Give Equal Funding to Women in Sports*, WORLD ECON. F.: GENDER INEQUALITY (Aug. 25, 2016), <https://www.weforum.org/agenda/2016/08/sustaining-the-olympic-legacy-women-in-sports-and-public-policy/> [<https://perma.cc/QT2D-8D7R>].

182. THE STATE OF WOMEN IN COLLEGE SPORTS REPORT, *supra* note 28, at 13.

183. *Id.* at 20 (going from 23% in 2001 to 32% in 2020).

184. See Warrell, *supra* note 180; see generally Kearney & Levine, *supra* note 180.

185. There is no Title IX factor relating to how much money an entity gives to specific teams, making it doubtful the NCAA would be forced to create a similar unit system for women’s basketball.

186. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. No. 239 at (VII)(B)(2).

Conclusion

When Title IX was passed, women were fighting for a chance to compete in athletics.¹⁸⁷ Fifty years of Title IX has achieved success in providing opportunities for women to compete,¹⁸⁸ but participation is not enough. The 2021 NCAA Women's Basketball Tournament exposed how much inequity there still is in college athletics and brought to public attention what has been happening for years: the NCAA prioritizing men's athletics to the detriment of female athletes.

The NCAA has been able to escape responsibility for such actions due to a Supreme Court decision in 1999 that determined the NCAA is not subject to Title IX regulations.¹⁸⁹

However, this Supreme Court decision left room for other arguments to hold the NCAA accountable to Title IX.¹⁹⁰ Using the reasoning of recent district court decisions, the NCAA could be held accountable to Title IX through the NCAA's 501(c)(3) tax status. This accountability would place an obligation on the NCAA to work towards improving its policies and would specifically require the NCAA to reassess its organization and approach to media, TV contracts, and its operation of March Madness.

Female college athletes deserve the publicity and promotion their male counterparts receive, and young girls deserve the opportunity to watch these athletes—role models that look just like them—compete in the sport they love. With the fiftieth anniversary of Title IX having just passed, now is the time to make the NCAA step into the Title IX arena and play by the rules.

187. Pruitt, *supra* note 27.

188. Goldman, *supra* note 33.

189. *See Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999).

190. *Id.* at 469 (holding that other possible arguments “do not bear on the narrow question we decide today—whether an entity that receives dues from recipients of federal funds is for that reason a recipient itself.”).