Nonprofit Law's Antidiscrimination Loophole: Applying a Renewed Private Benefit Standard to Name, Image, and Likeness Collectives

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America's rapidly expanding and politically influential nonprofit sector is under increased scrutiny, and nonprofit law has yet to provide answers to critics' burning questions. If the nonprofit sector is born of a democratic commitment to pluralism and community linkages, what do we make of its contributions to plutocracy? If the federal government's subsidization of the nonprofit sector reflects political choices about who and what serves the community benefit, should the sector include groups that actively undermine principles of civil rights? Should institutions be able to exploit the nonprofit legal form to exact discrimination? As the nation undergoes a rethinking of the government's role in enforcing public and private norms, answers to these questions will prove critical.

This Comment aims to move the law one step forward in answering these questions by proposing modifications to the private benefit standard through the case study of nonprofit Name, Image, and Likeness (NIL) collectives. The Supreme Court's landmark ruling in NCAA v. Alston *both facilitated student compensation in collegiate athletics and prompted the growth of over 200 organizations pooling fan and alumni funds for school-specific athletes. These NIL collectives represent a black market for college athletic labor facilitated by weaknesses in nonprofit law. Offering a safe-haven free from the demands of federal antidiscrimination law, the nonprofit sector allows NIL collectives to amass great wealth for a small, disproportionately male subset of private individuals. In addressing this sector, the IRS has missed an opportunity to articulate a more reaching community benefit analysis of nonprofit organizations that reintegrates public policy doctrine principles into nonprofit law. This Comment posits that the IRS should seize the opportunity created by this emerging form of inequality to clarify important elements of the community benefit doctrine*

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and reinvigorate the application of antidiscrimination principles in nonprofit legal enforcement.

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INTRODUCTION

"It's a sweet car. We're looking for some sweet plays on the field," said Ohio State booster and car dealer Rick Ricart, filming a car key–handoff to The Foundation's newest student athlete partner.[1] The Foundation is a Name, Image, and Likeness (NIL) collective—an IRS-approved 501(c)(3) organization[2] that pools donations to pay college athletes in exchange for the use of their NIL rights in brand endorsements and other sponsorship deals.[3] Via a tax-deductible donation, Ricart secured Ohio State its newest wide receiver and the wide receiver a brand-new Dodge Challenger.[4] While The Foundation's student-athlete partners must attend and promote approved charitable events,[5] the organization's website does not disclose any details on athlete compensation or services to charities.[6] Prospective donors, meanwhile, can search the website's "menu" of tax-deductible donation arrangements, including $5,000 for dinner with an athlete, $10,000 for a Friday night team meal, and $25,000 for an athlete promotion.[7] Explaining its 501(c)(3) status, The Foundation notes that "100% of [donor] money goes to Student-Athletes within the Ohio State Football & Men's Basketball programs, in order to help our team stay elite for many years to come, all while they give back to our community!"[8]

The Foundation is but one member of a growing industry of NIL collectives fueling the (predominately men's) college sports

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1. @RickRicart, X (May 8, 2023, 4:06 PM), https://x.com/RickRicart/status/1655665562981203968?s=20 [https://perma.cc/K3MQ-M7FR].

2. I.R.S. Priv. Ltr. Rul. 947 (Rev. 2-2020) (Feb. 15, 2022) (on file with the *Columbia Journal of Law & Social Problems*).

3. *See About Us*, FOUND. [hereinafter FOUND., *About Us*], https://www.thefoundationohio.com/faq/ [https://perma.cc/E7QW-U9D8] (The Foundation focuses its efforts exclusively on football and men's basketball players at The Ohio State University).

4. David A. Fahrenthold & Billy Witz, *How Rich Donors and Loose Rules Are Transforming College Sports*, N.Y. TIMES (Oct. 21, 2023) (on file with the *Columbia Journal of Law & Social Problems*), https://www.nytimes.com/2023/10/21/us/college-athletes-donor-collectives.html.

5. *See* FOUND., *About Us* supra note 3 ("Student athletes will be compensated for participation in charitable events, fundraisers, and functions via appearance fees, meet & greets, and speaking fees, no differently than other celebrities or news media personalities who get paid to give the keynote speech at political or charity dinners.").

6. *See Charities*, FOUND., https://www.thefoundationohio.com/charities/ [https://perma.cc/LS4L-ZCJH].

7. *The Experiences Menu*, FOUND., https://www.thefoundationohio.com/the-experiences-menu/ [https://perma.cc/9HBW-DDEC].

8. *See* FOUND., *About Us*, *supra* note 3.

economy. The Supreme Court's landmark ruling in *NCAA v. Alston*[9] facilitated student compensation in collegiate athletics, prompting the creation of over 200 school-specific NIL collectives just two years after the decision.[10] While many post-*Alston* opportunities arose from self-facilitated deals with individual college athletes, the NIL market has since become dominated by the collective model.[11] Nearly half of these NIL collectives have claimed 501(c)(3) status, entitling donors to tax deductions for their purportedly charitable contributions—a benefit unavailable with individual deals.[12] And without formal affiliations to colleges and universities, these collectives can apportion funds to select athletes unhindered by Title IX.[13]

NIL collectives' less-than-charitable nonprofit endeavors have garnered scrutiny and exemplify the sector's capacity to neglect charitability and perpetuate discrimination.[14] NIL collectives represent a black market for college athletic labor facilitated by weaknesses in nonprofit law. NIL collectives, and the discrimination they enable under the guise of the nonprofit form,

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9. 594 U.S. 69 (2021) (holding certain National Collegiate Athletic Association (NCAA) rules denying student-athletes education-related benefits violated the Sherman Act).

10. *See* Andres Castillo, *False Start: Federal Legislation Is Needed to Prevent Name, Image, and Likeness Collectives from Improperly Receiving 501(c)(3) Tax-Exempt Status*, 19 J. BUS. & TECH. L. 173, 176 (2023).

11. *See* John T. Holden et al., *The Collective Conundrum*, 76 OKLA. L. REV. 113, 116 (2023); Kassandra Ramsey, *NIL Collectives—Title IX's Latest Challenge*, 41 CARDOZO ARTS & ENT. L.J. 799, 803 (2023) ("NIL Collectives now account for roughly fifty percent of NIL deals.").

12. *See id.*

13. *See* Ramsey, *supra* note 11, at 803. Title IX is a federal civil rights law passed in 1972, which prohibits gender discrimination in schools, local and state educational institutions, and institutions that receive federal funding. In 1975, the Department of Health, Education, and Welfare passed a federal regulation applying Title IX to athletics, stating, "[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis." 34 C.F.R. § 106.41 (2023). Title IX requires covered entities to provide equal opportunities to men and women athletes, measured by evaluating (1) the benefits and treatment afforded to men's and women's teams, (2) the awarding of athletic scholarships and financial assistance, and (3) whether schools adapt to students' athletic interest and abilities.

14. For more on the critiques of NIL collectives, see generally Kathryn Kisska-Schulze, *Narrowing the Playing Field on NIL Collectives*, 34 MARQ. SPORTS L. REV. 59 (2023) [hereinafter Kisska-Schulze, *Narrowing the Playing Field*] (detailing the argument that NIL collectives violate private benefit doctrine); Ramsey, *supra* note 11 (criticizing NIL collectives' subversion of Title IX).

demonstrates a broader void in the relationship between antidiscrimination law and nonprofit law.

As tax-exempt NIL collectives exemplify, nonprofit law is a confused project. In desperate need of a unifying affirmative principle to justify inclusion, the charitable sector is at risk of being exposed for its increasingly noncharitable endeavors. Nowhere has this concern become more salient than in the case of NIL collectives, where organizations are increasingly leveraging nonprofit law's voids to perpetuate discrimination with government funding. A "political theory of nonprofit enterprise"[15] that revives and affirms an antidiscrimination commitment should therefore be applied to combat the erosion of federal civil rights guarantees in the nonprofit space.[16] To prevent private actors from exploiting this erosion, the IRS should reformulate the private benefit doctrine[17] to take into account community benefit[18] and public policy principles.[19] By articulating a more reaching community benefit analysis of nonprofit organizations that reintegrates public policy doctrine principles into nonprofit law, the IRS can play a meaningful role in enforcing federal civil rights guarantees.

This Comment explores nonprofit law's elusive relationship with civil rights law and urges for the reinjection of public policy principles into the nonprofit sector. Part I reviews the current

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15. *See* Ted Lechterman & Rob Reich, *Political Theory and the Nonprofit Sector*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 172 (W.W. Powell & P. Bromley eds., Stanford Univ. Press 3d ed. 2020) (pointing out the lack of underlying normative theory of the nonprofit sector and describing different possible political theories justifying the charitable exclusion).

16. This erosion has become increasingly salient under the second Trump administration, demonstrating the potential for nonprofit law to manipulated to fracture rather than affirm civil rights. *See e.g.,* LAW.'S COMM. FOR C.R ., *Civil Rights Groups Sue Trump Administration to Challenge Anti-DEI Executive Orders on Behalf of Nonprofit Serving Diverse Group of Women in the Skilled Trades* (Feb. 26, 2025), https://www.lawyerscommittee.org/civil-rights-groups-sue-trump-administration-to-challenge-anti-dei-executive-orders-on-behalf-of-nonprofit-serving-diverse-group-of-women-in-the-skilled-trades/ [https://perma.cc/VJ5Y-U4LT].

17. The private benefit doctrine refers to the nonprofit sector's prohibition of organizations that further non-incidental private benefits. *See* Treas. Reg. § 1.501(c)(3)-1(d)(2)(ii). This requirement emerges from the notion that nonprofit organizations must be organized and operated for certain exempt purposes. I.R.C. § 501(c)(3).

18. Community benefit refers to an articulation of charitability used primarily in the context of nonprofit hospitals. *See infra* notes 39–45 and accompanying text.

19. "Public policy" refers to a requirement emerging from Bob Jones Univ. v. United States, 461 U.S. 574, 607 (1983) that organizations pass an affirmative test of supplying a public benefit and a negative test of not violating clearly established public policy. *See infra* Part I.C.

doctrinal separation between nonprofit law's private benefit principles and public policy–antidiscrimination commitment. Part II considers mechanisms for reinvigorating antidiscrimination law within the nonprofit sector and proposes a multi-factored private benefit analysis that incorporates public policy principles. Part III then applies that analysis to NIL collectives as a case study to demonstrate how reinvigorating the relationship between antidiscrimination law and nonprofit law can prevent the subversion of federal civil rights law under the nonprofit form.

I. THE PRESENT DOCTRINAL VOID BETWEEN THE PRIVATE BENEFIT RULE AND PUBLIC POLICY ANALYSIS

The confounding inclusion of questionably charitable and unquestionably discriminatory organizations in America's expanding 501(c)(3) industry is a symptom of a larger identity-based disorientation in the nonprofit sector.[20] Nonprofit law constructs itself according to what it is *not* and therefore lacks an affirmative underlying justification for the charitable exemption.[21] The private benefit rule is no exception. The private benefit rule—a corollary to the rule that nonprofits should serve the public benefit—is the same, declaring what examples of serving private interests looks like but never defining what serving the *public* means.[22]

This negative construction of the nonprofit industry has roots in the 20th century. The U.S. nonprofit industry grew explosively in the 1960s due to the collapse of a highly discretionary regime

20. *See* Lechterman & Reich, *supra* note 15 (describing the lack of affirmative political theory uniting the nonprofit sector); *see also* Pascale Joassart-Marcelli, *For Whom and for What? Investigating the Role of Nonprofits as Providers to the Neediest*, *in* THE STATE OF NONPROFIT AMERICA (Lester M. Salamon ed., Brookings Inst. Press 2012) (exploring the limited extent to which the nonprofit sector serves anti-poverty goals).

21. For possible affirmative visions that might unite the nonprofit sector, see Lechterman & Reich, *supra* note 15. Nonprofit law overwhelmingly places negative constraints on organizations instead of positive articulations of what a nonprofit *should* be. *See, e.g.*, 26 U.S.C. § 501(c)(3) ("[N]o part of the net earnings of which inures to the benefit of any private shareholder or individual . . . no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office. . . .").

22. *See* 26 U.S.C. § 501(c)(3) ("[N]o part of the net earnings of which inures to the benefit of any private shareholder or individual. . . .").

that frequently denied 501(c)(3) status.[23] Incorporation as a nonprofit transitioned from a "privilege granted upon discretionary review" to "a right to be obtained upon demand."[24] While this departure from judge-based discretionary review eliminated arbitrariness and bias, front-end enforcement on nonprofit incorporation all but disintegrated.[25] The termination of judicial oversight resulted in a "collapse of limitations of permissible purposes" that the IRS and state attorneys general have not "compensated for by strengthened enforcement efforts" after incorporation.[26] But because there are substantial obstacles to post-incorporation enforcement, "oversight [has become] more theoretical than deterrent . . . ."[27] Altogether, these features create a nonprofit sector that is notorious for its lack of an affirmative vision of the charitable purposes underlying the industry.[28]

This Part analyzes how the negative analysis inherent in the private benefit rule emerged and compares its features with the lesser-known community benefit rule that applies to nonprofit hospitals. It then explores the relationship between antidiscrimination principles and nonprofit law, explaining the doctrinal void separating these two negative requirements—private benefit and public policy—from an affirmative vision of what it means to be charitable.

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23. Before the 1950s, judges and bureaucrats in many states engaged in a discretionary process for reviewing nonprofit charters. In the 1950s, a combination of student and scholar contempt, newfound commitment to values of pluralism, and orientation on incorporation as freedom of expression resulted in the collapse of discretionary enforcement at the incorporation stage. *See* NORMAN I. SILBER, A CORPORATE FORM OF FREEDOM: THE EMERGENCE OF THE MODERN NONPROFIT SECTOR 145 (2001). After this transformation, "[m]uch criticism focused on the ease with which charities receive and maintain tax exemptions, and donors could keep their charitable deductions. During the 1990s, only twenty to thirty organizations per year actually lost their tax-exempt status." *Id.*

24. *Id.* at 105.

25. *See id.* at 147.

26. *Id.* at 146.

27. JAMES J. FISHMAN ET AL., NONPROFIT ORGANIZATIONS: CASES & MATERIALS 226 (6th ed. 2021) (reviewing how staffing problems contribute to a lack of state attorney general oversight of the nonprofit sector).

28. *Id.* at 143 (noting that after the fall of the discretionary regime, "[t]here were no practical legal restraints on the permissible ends of endeavor within the nonprofit form").

A. THE ORIGINS OF THE PRIVATE BENEFIT RULE: A NEGATIVE ANALYSIS

The private benefit doctrine refers to the requirement that nonprofits cannot serve a substantial private benefit to be considered "charitable" under 501(c)(3).[29] Charities derive tax-exempt status from being "organized and operated *exclusively* for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition or for the prevention of cruelty to children or animals."[30] From this seemingly positive operational test, the IRS views non-incidental private benefits as an indication that organizations are not organized and operated exclusively for exempt purposes.[31] The affirmative requirement also arises from the common law rule that charitable trusts must serve "unselfish" purposes benefiting "a sufficiently indefinite charitable class."[32]

While the term "private benefit" is absent from Internal Revenue Code, the doctrine reflects IRS and judicial interpretations of Treasury Regulation § 1.501(c)(3)-1(d)(1)(ii), which notes: "An organization is not [exempt] unless it serves a public rather than private interest . . . [and] is not organized or operated for the benefit of private interests . . . ."[33] An organization conferring substantial private benefits cannot pass the 501(c)(3) operational test.[34] Although 501(c)(3) uses the term "exclusively," treasury regulations provide that organizations must engage "primarily" in activities furthering one or more exempt purpose.[35] The IRS further elaborated on the private-benefit rule in a 1987 General Counsel Memorandum, which provided, "[a]n organization is not described in section 501(c)(3) if it serves a private interest more than incidentally. . . ."[36] The Memorandum explains qualitative and quantitative metrics for evaluating whether a private benefit activity is incidental. Incidental activities are "a necessary concomitant of the activity which

29. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii).
30. I.R.C. § 501(c)(3) (emphasis added).
31. *See* I.R.S. Gen. Couns. Mem. 39,598 (Jan. 23, 1987) [hereinafter IRS Memo 39,598].
32. RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (2003).
33. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii).
34. *See* FISHMAN ET AL., *supra* note 27, at 465.
35. Treas. Reg. § 1.501(c)(3)-1(c)(1).
36. IRS Memo 39,598, *supra* note 31.

benefits the public at large" and are "substantial after considering the overall public benefit conferred by the activity."[37]

B. THE AFFIRMATIVE TEST FOR NONPROFIT HOSPITALS

Uniquely, in the context of nonprofit hospitals, the IRS departed from the negative analysis of private benefit and established an affirmative rationale for tax exemption: the community benefit rule. In 1969, the IRS articulated the "community benefit standard" outlined in Revenue Ruling 69-545,[38] identifying several factors relevant to the determination of whether a hospital qualifies for tax exemption:

> (1) "Operating an emergency room open to all, regardless of ability to pay;"
> (2) "Maintaining a board of directors drawn from the community;"
> (3) "Maintaining an open medical staff policy;"
> (4) "Providing hospital care for all patients able to pay, including those who pay their bills through public programs such as Medicaid and Medicare;"
> (5) "Using surplus funds to improve facilities, equipment, and patient care;"
> (6) "Using surplus funds to advance medical training, education, and research."[39]

These factors are not considered dispositive, and at times, courts have demanded even more to demonstrate community benefit.[40] The IRS itself has admitted that evaluation of community benefit has proven difficult in the context of nonprofit hospitals.[41] In 2010,

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37. *Id*.
38. *See* Rev. Rul. 69-545 (1969).
39. *See Charitable Hospitals—General Requirements for Tax-Exemption Under Section 501(c)(3),* IRS [hereinafter IRS, *Charitable Hospitals Requirements*], https://www.irs.gov/charities-non-profits/charitable-hospitals-general-requirements-for-tax-exemption-under-section-501c3 [https://perma.cc/RN8Y-PSQK] (Aug. 20, 2024).
40. *See, e.g.*, Geisinger Health Plan v. Comm'r, 985 F.2d 1210 (3d Cir. 1993) (ruling a hospital in an underserved rural area primarily benefited its own organization rather than the community); *see also* IHC Health Plans, Inc. v. Comm'r, 325 F.3d 1188, 1198 (10th Cir. 2003) (finding organizations must supply an additional "plus" beyond the conferral of healthcare products or services to the community).
41. *See* IRS, IRS EXEMPT ORGANIZATIONS (TE/GE) HOSPITAL COMPLIANCE PROJECT FINAL REPORT (Feb. 12, 2009), https://www.irs.gov/pub/irs-tege/frepthospproj.pdf [https://perma.cc/W83Z-L5MY].

Congress heeded these concerns by enacting I.R.C. § 501(r) to articulate a more coherent community benefit standard.[42] It requires nonprofit hospital facilities to conduct a "community needs assessment" at least once every three years which incorporates input from people representing the community's broad interests, among other transparency-enhancing requirements.[43] In its annual Form 990, nonprofit hospitals must articulate how they have served the needs outlined in the assessment.[44] In 2014, the IRS promulgated final regulations interpreting § 501(r), offering extensive details about how to comply with the new restrictions aimed at operationalizing service of the community benefit.[45]

Outside of the healthcare context, such detailed factors have not been articulated to reign in powerful industries shown to operate for the private benefit.[46] Rather, the IRS has typically incorporated the substantial private benefit prohibition into its application of the operational test.[47] Weighing facts and circumstances, the IRS evaluates whether an organization's nonexempt purposes are quantitatively and qualitatively incidental, or substantial.[48] It is through this application of the operational test that the IRS has critiqued nonprofits like NIL collectives, calling into question their exclusive organization and operation for *charitable* purposes.[49]

So far, the critique of organizations with questionably charitable goals has centered the private benefit analysis[50] in its negative evaluation of what nonprofits ought *not* to do. This is a missed opportunity.[51] A revitalization of the private benefit doctrine to incorporate an antidiscrimination commitment and an

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42. Pub. L. No. 111–148, § 9007(c), 124 Stat. 119, 857 (2010).
43. *Id.*
44. *See id.*
45. *See* T.D. 9708 (2014) (adding Treas. Reg. §§ 1.501(r)-0–(r)-7).
46. *See* IRS, *Charitable Hospitals Requirements*, *supra* note 39 (clarifying the community benefit test applies in the context of "tax-exempt hospitals").
47. *See generally* Memorandum from Lynne A. Camillo, Deputy Associate Chief Counsel to Stephen A. Martin and Lynn Brinkley, AM 2023-004 (May 23, 2023) [hereinafter IRS Memo AM 2023-004], https://www.irs.gov/pub/lanoa/am-2023-004-508v.pdf [https://perma.cc/E9JW-9KBU].
48. *See id.*; *see also* B.S.W. Grp., Inc. v. Comm'r, 70 T.C. 352, 356–57 (1978); Est. of Haw. v. Comm'r, 71 T.C. 1067, 1079 (1979); Ky. Bar Found., Inc. v. Comm'r, 78 T.C. 921, 923–24 (1982); Christian Manner Int'l, Inc. v. Comm'r, 71 T.C. 661, 668 (1979).
49. IRS Memo AM 2023-004, *supra* note 47.
50. *See id.*
51. *See infra* Part III.C.

affirmative vision of community benefit would both (a) revive the dormant public policy doctrine and (b) deliver a political theory of the nonprofit sector that protects civil rights.

C. THE RISE AND FALL OF NONPROFIT LAW'S ANTIDISCRIMINATION COMMITMENT: *BOB JONES* AND THE PUBLIC POLICY DOCTRINE

Outside of the private benefit doctrine, courts have historically construed the "charitable" requirement to disqualify organizations from 501(c)(3) status if they operate for purposes that are either illegal or contrary to clearly established public policy.[52] This public policy doctrine was first applied in *Bob Jones University v. United States*,[53] a case involving overt racial discrimination at a private university. *Bob Jones* relied on statutory interpretation rather than constitutional law, but later constitutional challenges to the doctrine's implementation have narrowed its scope and rendered its application all but obsolete.[54] As a result, "widespread discriminatory practices" by nonprofits have gone under-recognized and remain tax-subsidized.[55] This subpart investigates why the public policy doctrine, in its underutilized form, has seen limited application to address sex discrimination, particularly discrimination resulting in a disparate impact.

Bob Jones, a 1983 decision that revoked the tax-exempt status of two private schools with overt racially discriminatory admissions policies, invited both promise and panic. The Supreme Court's analysis centered on statutory interpretation of 501(c)(3) in accordance with Congress' "unmistakable" intent to meet common law definitions of charity.[56] Noting that "exemptions are justified on the basis that the exempt entity confers a public benefit," the Court interpreted the public policy limitation as a

52. *See* Rev. Rul. 71-447 (1971) ("All charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy.").

53. 461 U.S. 574, 586 (1983).

54. Richard L. Schmalbeck, *Bob Jones and the Public Policy Doctrine, 35 Years Later* 5–6 (Nat'l Ctr. for Philanthropy & L. Conf., N.Y.U., Oct. 25, 2018).

55. *See* Nicholas A. Mirkay, *Is it "Charitable" to Discriminate?: The Necessary Transformation of Section 501(C)(3) into the Gold Standard for Charities,* 2007 WIS. L. REV. 45, 48 (2007).

56. Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983).

corollary of the public benefit principle.[57] In doing so, the Court required organizations to affirmatively supply a public benefit and not violate clearly established public policy.[58]

The Court reasoned that "all taxpayers are affected" by the Government's choice to award tax-exempt status, thereby establishing a large class of "indirect and vicarious 'donors'" in the public.[59] The institution's purpose, therefore, "must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred."[60] Ultimately, the Court concluded that racially-discriminatory private educational institutions violate "a firm national policy to prohibit racial segregation and discrimination in public education."[61] *Bob Jones* appeared to affirm "in sweeping language" that taxpayer money could not be used to endorse purposes that contravene the public interest.[62]

Despite these appearances, the Court intentionally limited its holding.[63] To cabin fear of broad IRS discretion, the Court recharacterized the common law requirement by emphasizing "these sensitive determinations should be made only where there is no doubt that the organization's activities violate *fundamental* public policy."[64] The Court thus hinged its analysis on the reprehensibility of racial discrimination in education and projected a consensus among the political branches on racial discrimination policy.[65] Justice Powell would have favored an even narrower ruling. In concurrence, he cautioned against the majority holding's "broader implications"—expanding IRS authority and hinging tax-exemption on the public benefit theory.[66] According to Powell,

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57. *Id.* at 591 ("A corollary to the public benefit principle is the requirement, long recognized in the law of trusts, that the purpose of a charitable trust may not be illegal or violate established public policy. In 1861, this Court stated that a public charitable use must be 'consistent with local laws and public policy.'") (quoting Perin v. Carey, 65 U.S. 501, 501 (1860)).

58. *See* Schmalbeck, *supra* note 54, at 5–6.

59. *Bob Jones*, 461 U.S. at 591.

60. *Id.* at 592.

61. Bob Jones Univ. v. United States, 461 U.S. 574, 593 (1983).

62. *See* Neal Devins, *Bob Jones University v. U.S.: A Political Analysis,* 1 J.L. & POL. 403, 414 (1984).

63. *Id.* at 419 ("Under these circumstances, the Court may have desired it best to keep the focus of the case narrow and the language as to the evils of racial discrimination universal.").

64. *Id.* (emphasis added).

65. *Id.* at 417.

66. Bob Jones Univ. v. United States, 461 U.S. 574, 606–07 (1983) (Powell, J., concurring).

fundamental public policy doctrine articulated in this way demands conformity and threatens the pluralism distinctive of the nonprofit sector.[67] Powell would have preferred the Court accept the IRS's construction of the Code as a legitimate use of discretion, rather than encourage the IRS to balance substantial interests better suited for Congressional evaluation.[68]

In the decades that followed *Bob Jones*, the public policy doctrine was more successfully cabined by the majority's limiting principles, or the IRS' reticence, than Powell predicted.[69] The IRS has only grounded revocations on public policy in rare cases involving racial discrimination, illegal activity, and civil disobedience.[70] Despite *Bob Jones'* outsized influence as fodder for legal scholarship[71] and citation in civil rights cases,[72] "the public policy test remains largely undeveloped."[73] Most tax cases citing *Bob Jones* rest their holdings on other theories.[74] The IRS has also been permissive toward discrimination by nonprofit organizations in contexts other than racial discrimination in private schools.[75] The few exceptions include overtly illegal acts, such as an anti-animal cruelty nonprofit committing animal abuse in its own sanctuary.[76]

Richard Schmalbeck has suggested the "community benefit" standard pronounced in nonprofit hospital cases represents one

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67. *See id.*

68. *See id.*

69. *See* Neal Devins, *On Casebooks and Canons or Why Bob Jones University Will Never Be Part of the Constitutional Law Canon*, 17 CONST. COMMENTARY 285, 285 (2000) ("As a matter of constitutional doctrine, Bob Jones was never that important to begin with and now seems destined to fade into oblivion.").

70. *See* David A. Brennen, *The Power of the Treasury: Racial Discrimination, Public Policy and "Charity" in Contemporary Society*, 33 U.C. DAVIS L. REV. 389, 391 n.2 (2000) (citing Rev. Rul. 75-384, 1975-2 C.B. 204; Rev. Rul. 71-447, 1971-2 C.B. 230; I.R.S. Gen. Couns. Mem. 39,862 (Nov. 22, 1991)).

71. Numerous articles have been written hypothesizing new applications of public policy doctrine. *See, e.g.*, Karla W. Simon, *The Tax-Exempt Status of Racially Discriminatory Religious Schools*, 36 TAX L. REV. 477 (1981); Cathryn V. Deal, *Reining in the Unruly Horse: The Public Policy Test for Disallowing Tax Deductions*, 9 VT. L. REV. 11 (1984); Donald C. Alexander, *Validity of Tax Exemptions & Deductible Contributions for Private Single-Sex Schools*, 70 TAX NOTES 225 (1996).

72. *See, e.g.*, McLaughlin v. Pernsley, 693 F. Supp. 318, 331 (E.D. Pa. 1988), *aff'd*, 876 F.2d 308 (3d Cir. 1989) (leveraging *Bob Jones* to argue that the placement of a foster child based on race violated public policy).

73. *See* Schmalbeck, *supra* note 54, at 26.

74. *See, e.g.*, Synanon Church v. United States, 579 F. Supp. 967 (D.D.C. 1984) (arguing against tax-exempt status based private inurement, mentioning *Bob Jones* because of attacks committed by Church members).

75. Schmalbeck, *supra* note 54, at 2.

76. *See* I.R.S. Priv. Ltr. Rul. 200837039 (Sept. 12, 2008).

outgrowth of *Bob Jones'* affirmative public benefit requirement.[77] Schmalbeck admits hospitals are a "special case" in nonprofit law requiring a showing of "something more" than health promotion.[78] Courts in nonprofit hospital cases like *IHC Health Plans v. Commissioner* have cited *Bob Jones* as endorsing the public benefit theory, suggesting a connection between public policy and the development of the community benefit standard.[79] Even so, this connection has been largely neglected by other scholars and courts elaborating on community benefit. As discussed in Part II, this Comment is the first to suggest a revival of public policy principles through an affirmative articulation of the private benefit rule.

II. INCORPORATION OF PUBLIC POLICY'S ANTIDISCRIMINATION COMMITMENT INTO PRIVATE BENEFIT DOCTRINE

This Comment is not the first to suggest revisiting public policy's inclusion in nonprofit law, but it is the first to propose developing a reformed version of the private benefit rule to do so. This Part explains why other methodologies for reinvigorating an antidiscrimination commitment in nonprofit law have not gained traction. It then explores how a multi-factored community benefit test that accounts for public policy principles would resolve nonprofit law's antidiscrimination loophole. In evaluating whether a nonprofit organization serves a public rather than private interest, the IRS should modify the traditional public benefit rule by analyzing broader community benefit indicators, such as commitment to public policy like antidiscrimination law.

A. QUESTIONABLE MEANS OF INCORPORATING ANTIDISCRIMINATION PRINCIPLES INTO NONPROFIT LAW

Scholars have debated methodologies for breathing new life into the public policy doctrine, but each has missed the mark.[80] Efforts to cultivate a coherent antidiscrimination commitment in nonprofit law—from *Bob Jones'* public policy doctrine, *McGlotten*'s constitutionalization project, and Title IX government subsidy

77. Schmalbeck, *supra* note 54, at 5–6.
78. *Id.* at 29.
79. IHC Health Plans, Inc. v. Comm'r, 325 F.3d 1188, 1198 (10th Cir. 2003).
80. Alex Zhang, *Antidiscrimination and Tax Exemption*, 107 CORNELL L. REV. 138, 1381–83 (2021).

theories—have all lost traction with courts and the IRS.[81] Nonetheless, discrimination in the nonprofit sector remains rampant. This subpart explores those failed attempts to reincorporate antidiscrimination principles into the public policy doctrine and proposes a new approach that integrates public policy doctrine into the private benefit rule.

1. *Constitutionalizing the Tax Code*

One way to solve nonprofit law's discrimination problem is by considering federal tax subsidies a form of state action, thereby constitutionally prohibiting the government's support for nonprofit organizations that engage in discriminatory practices.[82] But this "constitutionalization" of the tax code has largely been dismissed by courts.[83] While *Bob Jones* hinted at taxpayers' collective contribution to 501(c)(3) deductions, the Court never incorporated state action doctrine or characterized the tax-exempt status as a government subsidy.[84] Some lower courts have gone so far, including the D.C. District Court in a case predating *Bob Jones* that had substantial influence on tax policy.[85] These decisions used grounds independent of public policy doctrine[86] to attempt to weed discrimination out of nonprofit law. While identical arguments are unlikely to be endorsed by courts or the IRS today given their radical implications for the sector,[87] their contours can be instructive in exploring how nonprofit law can reincorporate antidiscrimination principles.

In *McGlotten v. Connally,* a three-judge panel on the D.C. District Court ruled against tax-exempt status for social fraternal organizations that engage in unconstitutional racial

81. *See infra* notes 82–96 and accompanying text.
82. *See infra* note 95.
83. *Id.*
84. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983).
85. *See infra* notes 88–93 and accompanying text; *see also* E.H. ex rel. Herrera v. Valley Christian Acad., 616 F. Supp. 3d 1040 (C.D. Cal. 2022); Buettner-Hartsoe v. Balt. Lutheran High Sch. Ass'n, 2022 WL 2869041 at *5 (D. Md. July 21, 2022), *motion to certify appeal granted*, 2022 WL 4080294 (D. Md. Sept. 6, 2022).
86. Rather than assert organizations violate public policy, akin to *Bob Jones*, these courts invoke separate grounds for invalidating an organization's 501(c)(3) status, including by framing tax exemptions as state action or as government subsidies. *See e.g.*, *E.H. ex rel. Herrera*, 616 F. Supp. 3d at 1049–50.
87. *See* Schmalbeck, *supra* note 54, at 38 (noting the inherent subjectivity of public policy doctrine and its ambiguous future use).

discrimination.[88] The court concluded the tax benefits granted to fraternal organizations, which include exemption from federal income taxation under § 501(c)(8) and tax-deductible donations under § 170(c)(4), amount to government subsidies thereby triggering state action doctrine.[89] The court found that, by virtue of the tax subsidies, the federal government supports and encourages discrimination by fraternal orders in violation of the Fourteenth Amendment.[90] It also determined these tax subsidies constitute "federal financial assistance" within the meaning of § 601 of the Civil Rights Act of 1964.[91] The same judgment was not applied to § 501(c)(7) social clubs because the "exempt function income" taxation model "does not operate to provide a grant of federal funds through the tax system."[92] The case never addressed the application of state action doctrine to § 501(c)(3) organizations. But given charitable organizations' most favored position in the tax code and their characterization by many theorists and judges as receiving a government subsidy,[93] *McGlotten*'s logic would seem to apply.

Congress even seemed to endorse *McGlotten*'s sweeping application of state action to fraternal organizations by enacting § 501(i), which disqualifies social clubs from exemption where the organization's governing instruments or policy statements contain provisions on discrimination based on race or religion.[94] Despite this success, *Bob Jones* and subsequent cases do not substantially couple antidiscrimination with a "constitutionalization" of the tax

88. 338 F. Supp. 448, 457–59 (D.D.C. 1972).
89. *Id.* at 456.
90. *Id.* at 455.
91. 42 U.S.C. §§ 2000d–d-7 (1970).
92. *McGlotten*, 338 F. Supp. at 458.
93. *See, e.g.*, Regan v. Tax'n with Representation of Wash., 461 U.S. 540, 544 (1983) ("Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income."); Walz v. Tax Comm'n, 397 U.S. 664, 701 (1970) (Douglas, J., dissenting) ("Indeed I would suppose that in common understanding one of the best ways to 'establish' one or more religions is to subsidize them, which a tax exemption does."); *see also* David E. Pozen, *Remapping the Charitable Deduction*, 39 CONN. L. REV. 531, 552–53 (2006) ("In Congress, the courts, the media, and now academia, the deduction is widely viewed not as a means to reify the ideal tax base . . . but as a tax expenditure used to promote charitable giving and thereby the ultimate well-being of society. That is, the deduction is widely viewed as a government subsidy.").
94. 26 U.S.C. § 501(i) (2018) ("[I]f, at any time during such taxable year, the charter, bylaws, or other governing instrument, of such organization or any written policy statement of such organization contains a provision which provides for discrimination against any person on the basis of race, color, or religion.").

code.[95] This can most likely be explained by the narrowing scope of the state action doctrine and the radical nature of *McGlotten*'s constitutional argument.[96]

2. *Title IX Government Subsidy Theory: Bridging the Civil Rights Act and Tax-Exempt Status*

Despite *McGlotten*'s principles warranting little doctrinal development, some courts have found connections between federal financial assistance under the Civil Rights Act and tax-exempt status. In *Fulani v. League of Women Voters Education Fund,*[97] the court held that a nonprofit organization engaging in race and sex discrimination was subject to Title VI and Title IX because it "receive[d] federal assistance indirectly through its tax exemption and directly through grants from the Department of Energy and the EPA."[98] It is unclear how much the tax exemption factored into the *Fulani* court's analysis, though, as the organization's grants from the Department of Energy and the EPA amounted to over $300,000.[99] Nonetheless, scholars have pointed to *Fulani* as an early post-*McGlotten* case relying on principles of government subsidy to bridge the gap between antidiscrimination law and tax-exempt status.[100]

Two recent court cases brought the intersection of 501(c)(3) status and Title IX back into the fray. In *E.H. ex rel. Herrera*,[101] the court cited *McGlotten* and *Fulani* to assert decisively that a private school's "tax-exempt status confers a federal financial

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95. *See* Boris I. Bittker & Kenneth M. Kaufman, *Taxes and Civil Rights: Constitutionalizing the Internal Revenue Code*, 82 YALE L.J. 51 (1972).

96. *See* Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (holding the employment decision made by a private school is not state-action even if most student tuition comes from the state); Jackson v. Metro. Edison, 419 U.S. 345 (1974) (holding that extensive state regulation of a public utility does not transform its acts into state action). These post-*McGlotten* cases indicate that state action is a less appealing conceptual hook. After *Jackson*, scholars began raising alarms that rooting *Bob Jones* in a constitutionalization of the tax code would abolish the distinction between state/private conduct and necessarily bring about statutory arguments on 501(c)(3) exemptions amounting to federal financial assistance under the Civil Rights Act. *See* Devins, *supra* note 62, at 415.

97. 684 F. Supp. 1185 (S.D.N.Y. 1988).

98. *Id.* at 1192.

99. *See id.* at 1187.

100. *See* Sam Kiel, *From Tax-Exemptions to Title IX: Independent Schools and the Sec. 501(C)(3) Conundrum*, 14 WAKE FOREST L. REV. ONLINE 1, 9 (2024).

101. E.H. ex rel. Herrera v. Valley Christian Acad., 616 F. Supp. 3d 1040, 1049–50 (C.D. Cal. 2022).

benefit that obligates compliance with Title IX."[102] Because the case settled before appeal, this legal evaluation of Title IX's reach was never considered by the Ninth Circuit.[103] In *Buettner-Hartsoe*,[104] the court considered several Title IX claims against a private school and concluded as a matter of statutory interpretation that the school's tax-exempt status constituted "federal financial assistance" triggering the application of Title IX.[105] The court noted their ruling corresponded with the statute's purpose of eliminating the use of federal resources to further discriminatory practices."[106] The Fourth Circuit disagreed, asserting in March 2024 that the plain language of Title IX "contemplates the transfer of funds from the federal government to an entity" and thus the withholding of a tax burden does not represent an "affirmative grant of funds" captured by the statute.[107] In the Fourth Circuit, the project of incorporating antidiscrimination principles into nonprofit law through Title IX has therefore proved unattainable.

In Footnote 7 of the Fourth Circuit's opinion, though, the appellate court left open the possibility that the IRS was empowered to draw tax-exemption lines based on Title IX principles.[108] The court clarified that despite no regulations by the IRS on the matter, "the IRS could condition tax exempt status on organizations following Title IX or whether ending gender discrimination in schools is a public policy akin to ending racial discrimination in schools in *Bob Jones*."[109] Despite the Fourth Circuit's choice to punt 501(c)(3) antidiscrimination questions from courts to the IRS, the IRS shows no promise of wielding *Bob Jones*–style public policy doctrine to address sex discrimination.[110]

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102. *Id.* at 1050.

103. *See* E.H. ex rel. Herrera v. Valley Christian Acad., 2023 WL 7474948 (C.D. Cal. July 25, 2023).

104. *See* Buettner-Hartsoe v. Balt. Lutheran High Sch. Ass'n, 2022 WL 2869041 at *5 (D. Md. July 21, 2022), *motion to certify appeal granted*, 2022 WL 4080294 (D. Md. Sept. 6, 2022).

105. *Id.* at *3 (referencing 34 C.F.R. § 106.2(i)) (2023)).

106. *Id.* at *5 (quoting Cannon v. Univ. of Chi., 441 U.S. 667, 704 (1979)).

107. *See* Buettner-Hartsoe v. Balt. Lutheran High Sch. Ass'n, 96 F.4th 707, 713 (4th Cir. 2024).

108. *See id.* at 713 n.7.

109. *Id.*

110. *See* Kiel, *supra* note 100, at 12 ("Since the public policy doctrine came from a Treasury News Release, later adopted by the Supreme Court, and did not come directly from the Legislature, using the public policy doctrine to incorporate an organization's tax-exempt status to constitute 'federal financial assistance' for the purposes of Title IX would likely be

These recent applications of Title IX to nonprofits signal that existing frameworks to eliminate discrimination in the nonprofit sector fall short. As discussed in the following Part, a new solution for resurrecting antidiscrimination principles in the nonprofit sector is needed. By incorporating public policy principles into a community benefit standard against which all nonprofits should be evaluated, the IRS can more viably resurrect a *Bob Jones*–era promise of antidiscrimination.

B. A NEW THEORY OF PRIVATE BENEFIT FOR NONPROFIT ORGANIZATIONS

To reinstate antidiscrimination law protections in the nonprofit sector, the IRS should rearticulate the private benefit doctrine to capture how organizations like NIL collectives contravene the public benefit. It can also reanimate the public policy doctrine as one subpart of a broader analysis on whether an organization serves the community. This Part applies a more comprehensive private benefit standard to nonprofit organizations than is present in current doctrine, especially in contexts other than hospitals. By incorporating notions like equity into the private benefit doctrine, the IRS can better define a conceptual vision to bind the nonprofit sector together.

In the context of nonprofit hospitals, the IRS determined organizations must do more than simply avoid conferring non-incidental private benefits.[111] In the application of 501(c)(3)'s private benefit requirement, the IRS developed a more exacting, multi-factor community benefit test.[112] Revenue Ruling 69-545 and subsequent revisions to the Tax Code demand hospitals prove they not only meet the negative private benefit requirement but also demonstrate service of the public benefit.[113] This affirmative showing can be made through contributions like an emergency room open to all, a community-driven board, an open medical staff policy, care of patients notwithstanding ability to pay, and distribution of surplus funds toward medical facilities, patient

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seen as extending the scope of the statute beyond the point where Congress indicated it should reach.").

111. *See supra* Part I.B.; Rev. Rul. 69-545, 1969 2 C.B.117.

112. *See supra* Part I.B.

113. Rev. Rul. 69-545, 1969 2 C.B.117.

care, medical education, or research.[114] Broadly, these factors can be understood as encapsulating what makes nonprofit hospitals "'good' for society"[115] and therefore worthy of charitable status. Factors necessitating services be "open to all" notwithstanding "ability to pay" demonstrate some commitment to equity, eliminating barriers to participation across historically underserved communities.[116] This targeting of communities traditionally excluded from an organization's services also advances distributive justice, a tool for framing nonprofit law that has theoretical and practical benefits.[117]

If the private benefit rule is truly a corollary to the principle that nonprofits should serve the public benefit, the IRS should demand this affirmative showing of all nonprofit organizations. The IRS should use the example of NIL collectives to announce a new community benefit standard extended beyond the nonprofit hospital context. In evaluating whether a nonprofit organization serves a public rather than private interest, the IRS should supplement its negative analysis of nonprofit organizations with an evaluation of community benefit indicators, including whether an organization contravenes public policy like antidiscrimination law.

Other indicators could mirror the equity and distributive justice values advanced by the nonprofit hospital community benefit test, such as commitment to serving historically marginalized communities, community representation in leadership, and transfer rather than investment of surplus wealth. This Comment does not attempt to capture the full range of possible values or indicators that could comprise a 501(c)(3)-wide community benefit test. It affirms, however, that an evaluation of whether an organization complies with public policy should be one factor incorporated into a broader community benefit test.

While *Bob Jones* attempted to narrow the reach of the public policy doctrine to "clearly-established" and "fundamental public policy," a multi-factored analysis of an organization's service of the community benefit does not require such a limiting rule with

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114. *See* IRS, *Charitable Hospitals Requirements*, *supra* note 39.

115. Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505, 507 (2010).

116. For more on how nonprofits could better serve the poor, see Joassart-Marcelli, *supra* note 20.

117. Fleischer argues that current theories explaining the tax exemption cannot avoid distributive justice questions. *See* Fleischer, *supra* note 115, at 546.

uncertain "scope of applicability."[118] Because the public policy test would become one, among several, factors used to balance whether an organization operates for the public benefit, the impossibly high bar of *Bob Jones* public policy is unnecessary. Organizations that violate more fundamental public policies may be denied exemption without a substantial showing of community benefit along with other indicators. By contrast, organizations that violate policies over which there is less consensus may survive community benefit analysis with evidence of meeting other indicators.

In Part III, this Comment applies this affirmative strengthening of the private benefit doctrine to the case study of NIL collectives, contending the IRS should factor subversion of Title IX, and the strong public policy against sex discrimination, into the analysis of why these organizations are undeserving of 501(c)(3) status.

III. CASE STUDY: APPLICATION OF MULTI-FACTOR COMMUNITY BENEFIT TEST TO THE SYSTEMATIC EXCLUSION OF WOMEN ATHLETES IN NIL COLLECTIVES

NIL collectives have garnered recent scrutiny for their lack of transparency, unchecked discriminatory impact on women athletes, and questionable claim to 501(c)(3) status. New York Times investigative reporter David Fahrenthold recently characterized the NIL nonprofit industry as "an unregulated black market for labor" where athletes are "paid by people who are not really their employers for doing a job that's not really the job they're doing."[119] As a result, despite the nonprofits' close affiliation with universities, the industry subverts federal regulation, notably Title IX. Just as feminists celebrated the 50th anniversary of Title IX in 2022, the economy of NIL collectives intensified and presented serious threats to gender equality in college sports.[120] In January 2023, only 34% of existing NIL

118. *See* Mirkay, *supra* note 55, at 66.

119. The Daily, *The Wild World of Money in College Football*, N.Y. TIMES, at 15:57 (Jan. 8, 2024) (on file with the *Columbia Journal of Law & Social Problems*)., https://www.nytimes.com/2024/01/08/podcasts/the-daily/college-football.html?

120. *See* Abigail Oliphant, *NIL Collectives and Title IX: A Proactive Consideration of Title IX's Application to Donor-Driven NIL Collectives*, 57 IND. L. REV. 531, 531 (2023) ("NIL compensation experienced rapid growth in 2022.").

collectives offered any compensation to female athletes.[121] While this criticism has received some attention in academic scholarship[122] and the media,[123] it has received little attention by regulators.

In May 2023, the IRS's Office of Chief Counsel released Memorandum AM 2023-004: a warning that the Service regards many NIL collectives as furthering a substantially nonexempt purpose by serving the private benefit of student-athletes.[124] The IRS provided a lengthy legal analysis of the public benefit doctrine and evaluated NIL collectives' largely non-incidental private benefits conferred on student athletes.[125] But in its 12-page Memorandum, not once did the IRS Chief Counsel cite the collectives' discriminatory impact on female athletes.[126] The Memorandum itself did not revoke tax exempt status of NIL collectives but cautioned the collectives "may face future examinations or enforcement action by the IRS."[127] The IRS has yet to take such an enforcement action against a NIL collective, despite many collectives failing to change their tax status or make meaningful operational changes.[128] This Comment exemplifies how the IRS could seize the opportunity of revoking NIL collective 501(c)(3) status to clarify important elements of the community benefit doctrine and reinvigorate the application of antidiscrimination principles in IRS enforcement.

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121. Amanda Christovich, *NIL Collectives Are Slacking on Supporting Women's Sports*, FRONT OFF. SPORTS (Jan. 10. 2023. 12:29 PM), https://frontofficesports.com/collectives-womens-sports/ [https://perma.cc/U3LK-L5LJ] (citing an Opendorse white paper that found only thirty-four percent of existing collectives offered compensation to women's athletes).

122. *See, e.g.*, Oliphant, *supra* note 120; Ramsey, *supra* note 11.

123. *See, e.g.*, Carly Wetzel, *What NIL Collectives Mean for Women's Sports*, VOICE IN SPORT (Jan. 31, 2024), https://www.voiceinsport.com/post/advocacy/what-nil-collectives-mean-for-womens-sports [https://perma.cc/Z4FR-MV54].

124. *See* IRS Memo AM 2023-004, *supra* note 47.

125. *See id.*

126. *See id.*

127. Jim Vertuno, *IRS Throws a Chill Into Collectives Paying College Athletes While Claiming Nonprofit Status*, AP NEWS (June 30, 2023, 9:09 AM), https://apnews.com/article/nil-athlete-endorsements-ncaa-irs-9d006bdb429f76adaa3d108196fd2c8c [https://perma.cc/G82B-DR2B].

128. *See* Fahrenthold & Witz, *supra* note 4 ("But at most other charitable collectives, nothing has changed. Most said they would wait for the I.R.S. to give them specific instructions, a process that could take years.").

A. EXPLAINING THE NIL COLLECTIVE AND ITS ENTRY INTO 501(C)(3)

June 21, 2021, was a transformational day in the college sports economy. *NCAA v. Alston*[129] marked the Supreme Court's abrogation of some of the National Collegiate Athletic Association (NCAA)'s student-athlete benefit limitations on antitrust grounds. While the case did not concern students' NIL rights, the decision propelled the NCAA's abandonment of any standardized NIL limitations and deference to state- and university-developed NIL standards.[130] On June 30, 2021, the NCAA announced their NIL Policy, instructing players to refer to state law and comply with university disclosure requirements.[131] The proliferation of NIL collectives shortly followed.

While early legislation imagined self-facilitated NIL deals between athletes and corporate sponsors,[132] third-party private organizations quickly emerged to facilitate coordination.[133] Because of the U.S. tax code's design, donors to 501(c)(3) NIL collectives can claim deductions on donations to the organization, while also contributing to the success of their preferred college sports team.[134] NIL collectives registered as charities claim to further an exempt purpose through a variety of tactics. Some partner student-athlete affiliates with approved community charities to attend fundraising events or contribute to social media

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129. 594 U.S. 69 (2021).

130. *See* Sam C. Ehrlich & Neal C. Ternes, *Putting the First Amendment in Play: Name, Image, and Likeness Policies and Athlete Freedom of Speech*, 45 COLUM. J.L. & ARTS 47, 48 (2021); *see also* Kathryn Kisska-Schulze, *NIL: The Title IV Financial Aid Enigma Symposium: Name, Image, and Likeness in College Sports*, 76 OKLA. L. REV. 145, 146 (2023).

131. *See* Michelle Brutlag Hosick, *NCAA Adopts Name, Image and Likeness Policy*, NCAA (June 30, 2021), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx (on file with the *Columbia Journal of Law & Social Problems*). State NIL laws vary broadly, but most prohibit the NCAA from imposing restrictions on student NIL rights and prohibits students from earning compensation for athletic performance. *See* Castillo, *supra* note 10, at 188–92.

132. *See* Michael McCann, *What Will Happen if the California Fair Pay to Play Act Gets Signed Into Law?*, SPORTS ILLUSTRATED (Sept. 10, 2019), https://www.si.com/college/2019/09/10/california-fair-pay-play-act-law-ncaa-pac-12 [https://perma.cc/9DNV-3V6X]; *see also* Tan Boston, *The NIL Glass Ceiling*, 57 U. RICH. L. REV. 1107, 1126 (2022).

133. Boston, *supra* note 132, at 1127.

134. *See* Kisska-Schulze, *Narrowing the Playing Field*, *supra* note 15, at 60 ("A distinctive feature of section 501(c)(3) organizations is the tax deductibility of donations made to them, meaning that persons who donate money to section 501(c)(3) NIL collectives can receive a tax deduction . . . .").

campaigns.[135] Others join force directly with one charitable partner to compensate student athletes for their contributions to that charity's mission.[136] Some collectives have nonprofit and for-profit arms, like The Swarm Collective.[137] University of Iowa quarterback Cade McNamara reported being paid $600 an hour by the charitable collective for food delivery to seniors, while also receiving compensation from the collective's for-profit, Swarm Inc., for commercials made with corporate sponsors.[138] Despite these efforts to frame their activities in compliance with 501(c)(3), collectives have faced recent scrutiny for their incorporation as charitable organizations.[139]

Out of the confused fabric binding the "nonprofit industrial complex"[140] together, NIL collectives have emerged with a force. In its second year, NIL market revenue surpassed $1 billion, with 75 percent coming from collectives.[141] Women only saw a slice of this market, with 34 percent of collectives offering donation opportunities for women's sports.[142] Despite apparent questions of

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135. *See, e.g.*, FOUND., *About Us*, *supra* note 3 ("Once a student-athlete is selected and approved by FUND, they will choose a charity to support. Student-athletes are provided various opportunities to make a difference such as attending fundraising events, social media campaigns, volunteering at charity sites, and more.").

136. For example, GXG is a NIL collective paying student athletes at Baylor University to advance 501(c)(3) Startup Waco's charitable mission of "creating a thriving culture of entrepreneurship. *See How Startup Waco Came To Be,* STARTUP WACO, https://startupwaco.com/about/ [https://perma.cc/TKV6-85NU]. The collective connects student athletes to NIL opportunities while also helping them "conceptualize and launch new businesses." *See F.A.Q.,* GXG, https://www.gxg.startupwaco.com/faqs [https://perma.cc/MS7T-MZF7].

137. *See Our Mission*, SWARM, https://iowaswarm.com/about/ [https://perma.cc/5DEB-78VL].

138. *See* Fahrenthold & Witz, *supra* note 4.

139. *See generally* IRS Memo AM 2023-004, *supra* note 47.

140. This term has been leveraged across the political spectrum to characterize the robustness and power of the American nonprofit sector. According to Andrea Smith, the nonprofit industrial complex "manages and controls dissent by incorporating it into the state apparatus," forming a "shadow state" that replace government in the conferral of social services. *See* Andrea Smith, *Introduction* to THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX 1, 8–10 (INCITE! ed., 2017). Conservatives have wielded this term to underscore a leftist takeover of the nonprofit sector "turn[ing] us into Sweden by stealth." *See* Gerard Alexander, *The Nonprofit Industrial Complex*, AM. ENTER. INST. (April 23, 2007), https://www.aei.org/articles/the-nonprofit-industrial-complex/ [https://perma.cc/W3HZ-JZQE].

141. Amanda Christovitch, *Led by Collectives, Year 3 of NIL To Reach $1.17B Market,* FRONT OFF. SPORTS (June 28, 2023), https://frontofficesports.com/led-by-collectives-year-3-of-nil-to-reach-1-17b-market/ [https://perma.cc/EFJ5-5XZU].

142. *See Cashing In: Women's Sports and NIL Success*, OPENDORSE (2023), https://biz.opendorse.com/wp-content/uploads/2023/01/NIL-and-Women-in-Sports.pdf [https://perma.cc/94BA-GCQE].

disparate impact, the IRS issued a warning to NIL collectives focused exclusively on private benefit doctrine.[143] This Comment urges an incorporation of antidiscrimination and public policy principles into the analysis.

B. WHERE THE IRS'S TREATMENT OF NIL COLLECTIVE GOES WRONG: AN INCOMPLETE ARTICULATION OF THE PRIVATE BENEFIT DOCTRINE

An IRS Chief Counsel Memo, released in May 2023, asserts that many NIL collectives are unlikely to remain eligible for 501(c)(3) status under the private benefit doctrine because they advance a substantial non-exempt purpose: the private interests of student athletes.[144] In its Memo, the IRS provides an overview of Treasury Regulations, Revenue Rulings, and case law relevant to the application of private benefit doctrine to NIL collectives.[145] Without reviewing any one NIL collective in particular, the Memo concludes the private benefit of student athlete compensation is "not a byproduct but is rather a fundamental part of a nonprofit NIL collective's activities."[146] Notwithstanding the collectives' pursuit of some charitable goals, the IRS concludes the substantial conferral of athlete compensation calls into question whether the organizations advance the public benefit.[147]

Despite the private benefit doctrine's substantial development in the nonprofit hospital industry, the IRS Memo makes no comparison to the body of law defining whether hospitals serve community benefits. In fact, the Memo makes no reference to "community benefit" whatsoever. The Chief Counsel's analysis focuses on a weighing of qualitative and quantitative metrics of private benefit, without advancing any coherent understanding of "charitable" that NIL collectives contradict. By failing to mention women athletes, the Memo also overlooks an opportunity to incorporate public policy principles into evaluation of charity's compliance with the operational test.

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143. *See* IRS Memo AM 2023-004, *supra* note 47, at 12.
144. *See id.*
145. *See id.*
146. *Id.* at 8.
147. *See id.*

C. AN ALTERNATIVE ACCOUNT: APPLYING A REVITALIZED COMMUNITY BENEFIT EVALUATION TO NIL COLLECTIVES

The IRS's Chief Counsel Memo declaring NIL collectives potentially violative of the private benefit rule was incomplete and neglected an opportunity for reviving the principles of the public policy doctrine. In its future evaluations, in addition to analyzing NIL collectives' compliance with the negative requirements of the private benefit rule, the IRS should explore to what extent NIL collectives advance the community benefit. Because there is reason to question the extent to which organizations that violate public policy can serve the public benefit,[148] the IRS should evaluate whether NIL collectives contravene public policy as one indicator in this analysis. This Comment does not offer a detailed exploration of other possible indicators as applied to NIL collectives, but factors such as community-driven leadership and service of marginalized communities may be other useful indicators that parallel existing justifications for the nonprofit sector.

1. *NIL Collectives' Violation of Public Policy*

NIL collectives are not organized and operated exclusively for charitable purposes because they violate several dimensions of the private benefit doctrine: (a) collectives supply more-than-incidental private benefits to student athletes and (b) collectives fail to serve the community benefit because they bolster sex discrimination and dodge federal antidiscrimination law. The IRS Chief Counsel Memo provides ample support for the first proposition[149] but does not explore other indicators that a nonprofit serves the community benefit, such as whether they comply with public policy like antidiscrimination law. Because collectives create a funding model that privileges donor preferences toward male athletics, offers little transparency on the degree of disparate impact, and associates closely with universities as quasi-third-party funders free from Title IX,[150] collectives violate public policy and therefore undermine community benefit.

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148. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983).
149. IRS Memo AM 2023-004, *supra* note 47, at 2.
150. *See* Oliphant, *supra* note 120, at 549 ("NIL compensation is just a new form of third-party funding. Institutions may not escape liability by blaming donor-driven collectives.").

In evaluating NIL collectives under a renewed private benefit/community benefit test, the IRS should begin by defining the public policy that has been violated.

The degree of NIL collectives' violation of public policy depends in part on the framing the policy in question. There is doubtlessly a stronger national policy against "sex discrimination," for example, than there is against "sex discrimination in college sports." This debate on the level of generality applied has a relationship to substantive due process jurisprudence in the Supreme Court,[151] and critics are justified in questioning the blurry conceptual boundaries of the public policy inquiry.[152] *Bob Jones*, however, provides some support for a broader definition of the implicated public policy. While racial discrimination in higher education was a primary focus, the court explored broader dimensions to the national consensus against racial discrimination, referencing the Executive Branch's prohibitions on racial discrimination in employment decisions and housing.[153] *Bob Jones* thus supports an inquiry that begins with evaluating discrimination against women in college sports before proceeding to a broader public policy analysis of sex discrimination. For established public policy, *Bob Jones* also draws from "the position of all three branches of the Federal government."[154] This Comment does not support integrating the qualifiers of "fundamental" and "clearly-established" into public policy analysis, given their uncertain bounds and the positionality of public policy as one factor among many in the community benefit test. It also does not posit that Title IX can presently be applied directly to NIL collectives, as these organizations often go to great lengths to blur

151. The critiques mounted against the blurred boundaries of public policy doctrine have something in common with critiques of substantive due process jurisprudence. Defining the unenumerated right being evaluated in a specific case often has serious implications for whether the right is deemed "fundamental." For an example of this debate over the level of generality applied to define a right, see Michael H v. Gerald D., 491 U.S. 110, 127–28 n.6 (1989).

152. *See* Charles O. Galvin & Neal Devins, *A Tax Policy Analysis of* Bob Jones University v. United States, 36 VAND. L. REV. 1353, 1367 (1983) ("Regrettably, however, the vagueness of both the common community conscience and the public benefit standards creates the danger that the IRS may overzealously enforce the standards, resulting in unwanted social homogeneity.").

153. *See* Bob Jones, 461 U.S. at 594–95 (oscillating between the "Court's view that *racial discrimination in education* violates a most fundamental national public policy" and "[t]he Executive Branch . . . support behind eradication of *racial discrimination*") (emphasis added).

154. Bob Jones Univ. v. United States, 461 U.S. 574, 598 (1983).

the connection between the nonprofit and a university program. Instead, this Comment clarifies that an evaluation of the three government branches' policies demonstrates a strong national public policy against sex discrimination that can be incorporated into a community benefit analysis.

Title IX offers both legislative and executive branch evidence of a public policy against sex discrimination in college sports. Title IX amended Title VII of the Civil Rights Act of 1964 to prohibit gender discrimination in educational program activities that receive federal funding.[155] In 1975, the Department of Health, Education, and Welfare promulgated a federal regulation applying Title IX to college sports.[156] The regulation prohibited federally funded programs from excluding, denying benefits to, or otherwise discriminating on the basis of sex.[157] Title IX is sweeping, mandating that any university with as little as one federally-funded department is subject to the statute's requirements.[158] Whether 501(c)(3) status and the tax benefits it confers amount to federal financial assistance is still a source of dispute in the courts,[159] but for now organizations like NIL collectives operate independent from Title IX's requirements.

Title IX mandates equal opportunity to college athletes notwithstanding sex and is measured through numerous factors including: (a) ranges of sports and levels that reflect student interest and ability across sexes; (b) equal provisions of equipment, facilities, medical services, and housing; and (c) equal publicity.[160] Federal guidance provides that college athletic departments must pass a three-part inquiry to determine whether it offers equal opportunity in compliance with Title IX: whether the amount of men and women on athletic teams is "substantially proportionate" to those enrolled as full-time students; or whether the program has

155. Pub. L. 93–568, 88 Stat. 1855; *Title IX and Other Women's Issues,* USLEGAL, https://sportslaw.uslegal.com/title-ix-and-other-womens-issues/ [https://perma.cc/L26E-HKX4] (noting Title IX "extends the philosophy" of Title VII).

156. C.F.R. § 106.41 (2023).

157. *See id.*

158. *See* H.R. 1214, 100th Cong. (1987) (expanding Title IX's definition of "program" to comprise all operations receiving federal funding).

159. *See supra* notes 97–104 and accompanying text.

160. *See* Ramsey, *supra* note 11, at 812; *Title IX and Athletic Opportunities in Colleges and Universities: A Resource for Students, Coaches, Athletic Directors, and School Communities*, U.S. DEP'T OF EDUC. (2023), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/ocr-higher-ed-athletic-resource-202302.pdf [https://perma.cc/6CJC-N5E2].

a history and continuing practice of adjusting athletic opportunities to the interests and abilities of underrepresented women students; or whether the school can show, even in the event of disproportionality, that the school is otherwise meeting the interests of the underrepresented sex.[161] Subsequent federal legislation has reaffirmed Title IX's application to college athletics. In 1994, for example, Congress passed the Equity in Athletics Disclosure Act requiring universities to annually report data on men and women's athletic opportunities.[162]

While the Supreme Court has not ruled directly on women's rights to equal participation in athletics, it has developed a decisive policy prohibiting stereotype-driven sex discrimination, particularly in education. In *United States v. Virginia*,[163] the Court held discrimination against women in educational opportunities of a state-sponsored military school violated the Equal Protection Clause of the Fourteenth Amendment. While the Court did not apply strict scrutiny to sex-based classifications, it required an "exceedingly persuasive justification" when the Court detects sex discrimination.[164] As Justice Ginsburg famously emphasized, "generalizations about 'the way women are,' estimates of what is appropriate for *most women,* no longer justify denying opportunity to women whose talent and capacity place them outside the average description."[165]

Although *United States v. Virginia* involved overt discrimination, NIL collectives range from *per se* exclusions of women athletes to donor models with a disparate impact on female athletes. Despite this distinction, the Court's decisive policy against sex discrimination in higher education, combined with statutory policies targeting disparate impact in areas like employment and higher education,[166] provide strong support for a national policy against sex discrimination, even in cases of disparate impact. Title IX applies to disparate impact and the

161. *See Title IX and Athletic Opportunities in Colleges and Universities: A Resource for Students, Coaches, Athletic Directors, and School Communities*, *supra* note 160.

162. Pub. L. 103–382, § 360B, 108 Stat. 3518, 3967-71 (1994), codified at 20 U.S.C. § 1092(g) (2007).

163. 518 U.S. 515 (1996).

164. United States v. Virginia, 518 U.S. 515, 517 (1996).

165. *Id.* at 552.

166. *See, e.g.*, Pub. L. 88–352, Title VII, § 717, as added Pub. L. 92–261, § 11, Mar. 24, 1972, 86 Stat. 111; *see also* USLEGAL, *supra* note 155 (noting that Title IX "extends the philosophy" of Title VII).

Department of Education has already admitted NIL collectives raise Title IX concerns.[167]

2. *IRS Opportunity in Future Enforcement Action*

NIL collectives should be found violative of 501(c)(3) because they provide a more than incidental private benefit to student athletes, and rather than serve the community benefit, they disproportionately favor male athletes and perpetuate sex discrimination.

The IRS should give due attention to the use of the nonprofit industry as a harbor for violators of antidiscrimination law. Since NIL collectives have a close and interdependent relationship with federally funded universities otherwise subject to Title IX,[168] their contributions to sex discrimination bleed substantially into a domain where federal law has worked to address and eliminate obstacles to gender equity. Collectives releasing NIL information in academic department press releases,[169] for example, deserve scrutiny from the IRS for their promotion of sex discrimination in education programs funded by the federal government, in direct opposition to the goals of federal law.[170]

While sex discrimination is not dispositive to the holding that NIL collectives contravene 501(c)(3), inclusion of public policy analysis into a more comprehensive community benefit test could hold promise for future edge cases. Perhaps future athletic promotional organizations with less obvious private benefits to student athletes will need to show "something more" to receive tax-exempt status, including a commitment to comply with Title IX, to staff their board with community members, or to spend surplus funds on serving historically marginalized student athletes. Perhaps a future adoption agency would have to show both that it

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167. *See* Paula Lavigne & Dan Murphy, *Title IX Will Apply to College Athlete Revenue Share, Feds Say*, ESPN (July 16, 2024), https://www.espn.com/college-sports/story/_/id/40567726/title-ix-college-athlete-revenue-share-nil [https://perma.cc/5HVE-JR6P].

168. *See* Ramsey, *supra* note 11, at 817 (describing the close relationship between NIL collectives and universities subject to Title IX).

169. *See id.*; *see also* Andy Wittry, *Creation of Multiple Collectives at Schools Causes Pushback*, ON3 (Aug. 19. 2022), https://www.on3.com/nil/news/nil-collectives-name-image-likeness-ncaa-policy-fundraising-athletic-department/ [https://perma.cc/92Q8-DF9D].

170. *See Title IX Legal Manual*, U.S. DEP'T OF JUST. C.R. DIV., https://www.justice.gov/crt/title-ix [https://perma.cc/F3DA-9C4Y] (describing Title IX's purpose as "to avoid the use of federal resources to support discriminatory practices in education programs, and to provide individual citizens effective protection against those practices").

does not provide a more than incidental private benefit to the families, but also that it serves the community benefit by committing to provide gay families equal opportunity to adopt. With this reading of the private benefit doctrine, the IRS could revive the workability of the public policy doctrine, now as one factor among several explaining what makes charitable organizations "good for society."[171]

CONCLUSION

As federal civil rights obligations go increasingly underenforced and legal obstacles to antidiscrimination accumulate, the IRS has a role to play in reaffirming a commitment to civil rights. To do so, the agency ought to articulate a more reaching community benefit analysis of nonprofit organizations that reintegrates public policy doctrine principles into nonprofit law. While further development is necessary to explore the dimensions and indicators of a new community benefit rule for all nonprofit organizations, one thing is clear: The nonprofit sector is a disoriented project, lacking an affirmative vision binding together its principles and contents. By incorporating public policy into a community benefit analysis of all nonprofits, the IRS can affirm *equity* as one such principle animating what it means to be charitable.

171. See Fleischer, *supra* note 115, at 507.