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THE IMAGE AND LIKENESS OF WOMEN: THE IMPLICATIONS OF TITLE IX IN THE NIL ERA

ANA APOSTOLERIS RIVERA*

I. INTRODUCTION

It has never been a secret that where there are sports, money—or the idea of money—follows. In the United States, and globally, men’s professional sports represent some of the most lucrative classes of business, both for athletes themselves and for many of those behind the scenes. Cultural conversations about money in sports abound, from who does and does not deserve it to how fans can parlay their educated guesses into more of it.

It has also never been a secret that the sports world has long been plagued by inequalities, perhaps none as pervasive as sex inequalities. Almost uniformly, female athletes are not resourced as heavily as male athletes; from junior leagues to the pros, expenditure and investment in athletics for girls and women is significantly less than what is put into men’s sports. In college sports, these inequities were theoretically to have been remedied, at least to an extent, by the 1972 passage of Title IX of the Education Amendments to the Higher Education Act of 1965, which codified that educational programs that received or benefitted from federal funds or assistance could not discriminate on the basis of sex.¹

College sports under the purview of the National Collegiate Athletic Association (NCAA) have generally been the domain of amateurs, subject to strict guidelines barring professional athletes from participation. Further, as universities are significant beneficiaries of federal assistance, the administration

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¹ Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2024).

of college athletic departments is very much subject to the restrictions imposed by Title IX.² In theory, then, the removal of money and the imposition of nondiscrimination provisions on college athletics should have served to create something of an equal playing field. In reality, college sports have never been a small-money enterprise, and as such the money has not flowed equitably.³ College athletics have been used over the course of the past century and a half to elicit donations and boost university profiles and enrollment, and coaches and athletic administrators are often some of the highest paid positions on campus.⁴ Coupled with persistently ineffective enforcement of Title IX, this meant that the differential investment in men's and women's sports remained a significant issue even 50 years after the passage of the statute.⁵

In 2021, financial realities for student-athletes changed dramatically when the Supreme Court handed down their decision in *NCAA v. Alston*,⁶ invalidating the NCAA's prohibitions on providing education-related compensation to its athletes and opening up pathways for students to be financially compensated without affecting their amateur athletic status. Within months of the *Alston* decision, the NCAA issued guidance to its student-athletes allowing them to profit from their name, image, and likeness (NIL) in accordance with governing state law.⁷

Suddenly, students and athletic programs alike were faced with an entirely new financial landscape, where female and male athletes alike were able to market themselves and reap the monetary benefits of their talents. During the 2021-2022 academic year, college athletics was functionally reshaped, with top talents—athletic and otherwise—inking sponsorship deals while retaining their NCAA eligibility.⁸ However, as new streams of revenue are introduced into the

² Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999).

³ Michael Smith, *NCAA Revenue Distribution Rewards Only Men, Not Women*, SPORTS BUS. J. (Mar. 20, 2023), <https://www.sportsbusinessjournal.com/Journal/Issues/2023/03/20/Upfront/ncaa-revenue-distribution.aspx>.

⁴ Scott White, *College Athletes Get Way More Than a Slice Of The Admissions Pie*, FORBES (Oct. 6 2023, 7:23 PM), <https://www.forbes.com/sites/scottwhite/2023/10/06/college-athletes-get-way-more-than-a-slice-of-the-admissions-pie/?sh=72e82a69422c>; see also David Keech, *College Coaches Dominate Highest-Paid State Employees List*, ONFOCUS (Aug. 4, 2023), <https://www.onfocus.news/college-coaches-dominate-highest-paid-state-employees-list/>.

⁵ Jeffrey Shearer, *Good Initiative, Bad Judgement: The Unintended Consequences of Title IX's Proportionality Standard on NCAA Men's Gymnastics and the Transgender Athlete*, 9 PACE INTELL. PROP. SPORTS & ENT. L.F. 1 (2020).

⁶ Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 141 S. Ct. 2141 (2021).

⁷ Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>.

⁸ Christian Williams, *NIL Deals – A Billion Dollar Opportunity for the Black Community*, LINKEDIN (Dec. 18, 2022), <https://www.linkedin.com/pulse/nil-deals-billion-dollar-opportunity-black-christian-williams/>.

college sports world, so too are new opportunities for existing inequalities to be exacerbated—and, potentially, to be remedied.

This article will explore the intersections of gender, law, and finance in Division I college athletics, and how the new world of NIL can be shaped by the promise of Title IX. In Part II, the article will briefly analyze the state of college sport for women prior to the passage of Title IX. Part III will discuss challenges and obstacles to Title IX's implementation in the years since its passage and will further discuss financial inequities facing female student athletes in the years leading up to the implementation of NIL policies. In Part IV, this article will discuss the immediate impacts of NIL policy on women's athletics. Part V will analyze how colleges can and should abide by the letter and spirit of Title IX in this new era of college athletics to advance opportunities for female athletes.

II. A BRIEF HISTORY OF WOMEN'S COLLEGE ATHLETICS BEFORE 1972

In the 150-year history of organized college competition, the vast majority of the record pertains only to men. Indeed, in his decision in *Alston*, Justice Neil Gorsuch dedicates a significant amount of space to recounting the history of men's—and only men's—college athletics.⁹ The story goes as such: Men's organized college sports began in roughly 1852, when Harvard and Yale participated in a boat race at Lake Winnepesaukee, New Hampshire.¹⁰ This boat race was sponsored by a wealthy railroad executive, who offered the competitors all-inclusive vacations with unlimited alcohol as compensation for their participation.¹¹ Thus began the public's moneyed interest in college, which grew so rapidly that Ivy League matchups were reportedly taking in tens of thousands of dollars at the gate by 1890.¹²

Between 1905, when the NCAA was established, and 1948, the payment of college athletes was frowned upon but in no way materially discouraged. Gorsuch writes—

[C]ommercialism extended to the market for student athletes. Seeking the best players, many schools actively participated in a system “under which boys are offered pecuniary and other inducements to enter a particular college.” . . . In 1939, freshmen at the University of Pittsburgh went on strike because upperclassmen were reportedly earning more money. In the

⁹ Nat'l Collegiate Athletic Ass'n v. *Alston*, 594 U.S. 69 (2021).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 2148.

1940s, Hugh McElhenny, a halfback at the University of Washington, became known as the first college player ever to take a cut in salary to play pro football. . . . He reportedly said: “[A] wealthy guy puts big bucks under my pillow every time I score a touchdown. Hell, I can’t afford to graduate.”¹³

This was increasingly considered a moral failing in the collegiate athletics domain, and in 1948 the NCAA adopted the “Sanity Code,” which expressed opposition to promised pay for student athletes, but also expressly established the concept of the college scholarship and established consequences—namely, suspension or expulsion—for violators of amateurism rules.¹⁴ The rules shifted and expanded over the course of the next 70 years, but the concept over the course of a century and a half was the same—men’s athletics were the feature presentations, and worth so much money that the governing body had to actively prohibit students from accepting eye-popping sums.¹⁵

Conversely, women’s athletics in the university sphere were an afterthought to the extent that they were acknowledged at all.¹⁶ The existence of women’s athletics prior to the second half of the twentieth century is somewhat sparsely recorded, and decipherable largely through primary sources, in part because competitions were largely intramural and there were few standardized avenues for competition.¹⁷ The first recorded college affiliated women’s team was formed at Smith College in 1892, in women’s basketball.¹⁸ Throughout the 1890s, the game itself was heavily modified in response to concerns about women adopting a “masculine” performance style.¹⁹ According to contemporaries, “[r]ough and vicious play seems worse in women than in men; . . . [and] the selfish display of a star by dribbling and playing the entire court, and rough-housing by snatching the ball could not be tolerated.”²⁰ The women’s game, therefore, banned dribbling and opponent contact.

¹³ *Id.* at 2149.

¹⁴ Nat’l Collegiate Athletic Ass’n v. Alston, 594 U.S. 69 (2021).

¹⁵ NCAA MANUAL, BYLAWS, ARTICLE 16.

¹⁶ *Women’s Sports History*, NAT’L WOMEN’S HIST. MUSEUM (Aug. 4, 2016), <https://www.womenshistory.org/articles/womens-sports-history>.

¹⁷ *Id.*

¹⁸ Jennifer Jennings, SMITH COLLEGE, <https://www.smith.edu/newssmith/spring2004/basketball.php> (last visited Apr. 15, 2024).

¹⁹ Richard C. Bell, *A History of Women in Sport Prior to Title IX*, 24 THE SPORT J. 1 (2008).

²⁰ Joan S. Hult, *The Story of Women’s Athletics: Manipulating a Dream, 1890-1985*, in WOMEN AND SPORT: INTERDISCIPLINARY PERSPECTIVES 83, 86 (Human Kinetics 1994).

The first record of a women's contest between different schools took place in 1896, with Stanford women defeating University of California at Berkeley.²¹ However, despite participating in this historical first, Stanford's faculty athletic committee banned intercollegiate competition for women just three years later, indicating in 1899 that

no intercollegiate [women's] contest requiring team work of any kind will be permitted, and any contest in which the women engage must take place on the home grounds. . . . This ruling of the Faculty places women's athletics here on the same basis as they are in the Eastern colleges. There the question of health has been studied carefully and any contests of any kind between colleges have been prohibited for the good of the students' health.²²

Notably, even as a grand total of one intercollegiate women's game had been played up until that point, this decision was met with some level of disappointment, as recorded in the *Daily Palo Alto*, the Stanford student newspaper. "The decision of the Faculty Athletic Committee in regard to intercollegiate [women's] basket-ball contests will be regretted by many of the students who have always had a great interest in the game, and who have looked forward to seeing again a game between a Stanford and a Berkeley team," the paper noted.²³

The first and only intercollegiate game took place in '96, and then the Stanford girls brought home the ball. . . . Now, when. . . the prospect for an intercollegiate contest [was] the brightest that [it] have been for years, comes the faculty decision emphatically prohibiting all such contests. From the stand they take, that of health, the committee of course is right, and no one will say that the strain which a girl is under during a contest of much moment will work her any great good. But the disappointment is not made any the less keen.²⁴

Many other colleges soon followed suit in banning or strongly discouraging intercollegiate competition among women.

[F]iercely competitive athletics have their dangers for men, but they develop manly strength. For women their dangers are

²¹ *Looking Back: The First Game*, STAN. UNIV., <https://125.stanford.edu/the-first-game/> (last visited Nov. 16, 2023).

²² THE DAILY PALO ALTO (Dec. 15, 1899), <https://archives.stanforddaily.com/1899/12/15?page=5>.

²³ *Id.* at 4.

²⁴ *Id.*

greater, and the qualities they tend to develop are not womanly.” . . . “Where the conditions are favorable for the development of school games, matches between class teams in the school will inspire a larger number of entries in the sport and less danger from over-excitement than inter-scholastic matches, where a school furnishes but one team and more intense nervous strain accompanies the keener competition,”²⁵

noted Lucille Eaton Hill, Director of Physical Training at Wellesley College, in 1903. This broadly-held belief resulted in women’s athletics being relegated primarily to intramurals and “play days.”²⁶ Sports clubs, mostly headed by female physical education instructors, were generally focused less on competition and more on “balanc[ing] the rigors of intellectual life with healthful and appropriate sporting activities . . . increasing strength and muscle to improve women's maternal function and to enhance beauty and feminine curves. Their goals included correct posture, facial and bodily beauty, health, [and] recreation.”²⁷

In 1924, the Women's Division of the National Amateur Athletic Federation (NAAF) published a sixteen-point “creed” on the purpose of women’s athletics, which was endorsed by the majority of groups interested in the topic.²⁸ The creed, whose principles were central to the administration of women’s athletics for the next several decades, stated:

The Women's Division believes in the spirit of play for its own sake and works for the promotion of physical activity for the largest possible proportion of persons in any given group, in forms suitable to individual needs and capacities, under leadership and environmental conditions that foster health, physical efficiency, and the development of good citizenship.

- To accomplish this ideal for women and girls, it aims:
- To promote programs of physical activities for all members of given social groups rather than for a limited number chosen for their physical prowess.
- To protect athletics from exploitation for the enjoyment of the spectators or for the athletic

²⁵ ELLEN W. GERBER ET AL., THE AMERICAN WOMAN IN SPORT 69 (1974).

²⁶ *Id.*

²⁷ Hult, *supra* note 20, at 85.

²⁸ This included the Committee on Women's Athletics of the American Physical Education Association, the Association of Directors of Physical Education for Women in Colleges and Universities, the American Association of University Women, and the National Association of Deans of Women. See GERBER ET AL., *supra* note 25, at 71.

reputation or commercial advantage of any institution or organization.

- To stress enjoyment of the sport and the development of sportsmanship, and to minimize the emphasis placed on individual accomplishment and the winning of championships.
- To restrict recognition for athletic accomplishment to awards which are symbolical and which have the least possible intrinsic value.
- To discourage sensational publicity, to guide publicity along educational lines and to stress through it the sport rather than the individual or group competitors.
- To put well-trained and properly qualified women in immediate charge of athletics and other physical education activities.
- To work toward placing the administration as well as the immediate leadership of all physical education activities for girls and women in the hands of well-trained and properly qualified women.
- To secure adequate medical examination and medical follow-up advice as a basis for participation in physical activities.
- To provide sanitary and adequate environment and facilities for all physical activities.
- To work for such adequate time allotment for a physical education program as shall meet the need of the various age groups for growth, development and maintenance of physical fitness.
- To promote a reasonable and sane attitude toward certain physiological conditions which may occasion temporary unfitness for vigorous athletics, in order that effective safeguards should be maintained. ·
- To avoid countenancing the sacrifice of an individual's health for the sake of her participation in athletic competition.
- To promote the adoption of appropriate costumes for the various athletic activities.
- To eliminate gate receipts.

- To discourage athletic competition which involves travel.
- To eliminate types and systems of competition which put the emphasis upon individual accomplishment and winning rather than upon stressing the enjoyment of the sport and the development of sportsmanship among the many.²⁹

The powers that be in the world of female athletics, accordingly, did not see sports for women serving the same purpose as sports for men, and their stated goal of “eliminat[ing] gate receipts” certainly indicated that, regardless of any interest from the public that could be monetized, financial gain was not considered to be a proper interest for women in sports.³⁰ Indeed, all kinds of recognition for athletic performance were generally frowned upon, with winning discouraged as a goal.³¹ Throughout the early decades of the twentieth century, the Women’s Division reaffirmed its commitment to providing recreational athletic opportunities for female students, but specifically indicated by 1929 that interschool competition was not encouraged.³²

These concepts of friendly competition, skill development, and gender-specific propriety prevailed on some level until the 1960s, but the desire among female athletes for intercollegiate competition persisted. While most female collegiate competition was in the form of “play days” and “sports days,”³³ varsity athletics were not entirely eliminated on a nationwide level; in 1941, the first women’s national championship in golf was held by the Division for Girls’ and Women’s Sports (DGWS) of the American Association for Health, Physical Education and Recreation.³⁴ The National Joint Committee on Extramural Sports for College Women (NJCESCW) was formed in 1956 and was the first organization to attempt to govern women’s intercollegiate athletic programs.³⁵

²⁹ *Id.* at 72-73.

³⁰ *Id.* at 73.

³¹ *See generally id.*

³² In 1929, a statement of policy from the Women’s Division read: “The Women’s Division does believe whole-heartedly in competition . . . What it disapproves of is the highly intensive specialized competition such as exists when we have programs of interschool competition, intergroup open track meets, or open swimming meets, with important championships at stake.” *Id.* at 73.

³³ *Id.* at 74.

³⁴ *USC All Americans*, TROJAN FORCE, <https://trojanforcestats.us/AIAW-Historical-Sketch.pdf> (last visited Feb. 4, 2024).

³⁵ Virginia Hunt, *Governance of Women’s Intercollegiate Athletics: An Historical Perspective 18* (1976) (Ph.D. Dissertation, University of North Carolina at Greensboro), https://libres.uncg.edu/ir/uncg/f/Hunt_uncg_7624943.pdf.

In 1957, tensions in the prevailing view of women's sports became apparent when DGWS put out a policy statement indicating that "interscholastic or intercollegiate form[s] of competitive activities . . . should be offered only when it does not interfere with the intramural and extramural programs,"³⁶ implying that despite the growth and formalization of intercollegiate athletics for women, intramural sports should still be prioritized. Just six years later, however, DGWS's policy statement listed varsity intercollegiate teams as one of the four standard forms of competition, removed references to intramural athletics being prioritized, and specifically called opportunities for "highly skilled" female athletes beyond intramural programs "desirable."³⁷

The values of the women's liberation movement of the 1960s spilled over into the athletic space, as highly competitive, varsity sports were further normalized for women. In 1966, DGWS formed a Commission on Intercollegiate Sports for Women (CISW), later renamed the Commission on Intercollegiate Athletics for Women (CIAW), which was designed to govern intercollegiate competition for female athletes by providing guidelines and standards for interschool events, as well as sanctioning procedures.³⁸ At the time, only golf and tennis national championships existed for women, but the CIAW quickly and dramatically expanded the scope of championships.³⁹ By 1972, there were officially sponsored national championships in gymnastics, track and field, swimming, badminton, volleyball, and basketball, as well as golf and tennis.⁴⁰

Due to this growth, the need for a formalized membership organization became apparent. In 1972, the Association for Intercollegiate Athletics for Women (AIAW) was established, with 278 different colleges joining in its inaugural year.⁴¹ The AIAW had the power to enforce its policies and limit participation in its tournaments and championships to member schools, much like the NCAA.⁴² The AIAW exclusively governed women's collegiate athletics for nearly a decade.⁴³ The association was composed almost entirely of women, and it brought its own ethic to athletic governance in an effort to

³⁶ GERBER ET AL., *supra* note 25, at 74.

³⁷ *Id.* at 75.

³⁸ *Id.* at 83-84.

³⁹ *Id.* at 84.

⁴⁰ *Id.*

⁴¹ Betsey B. Creekmore, *Association for Intercollegiate Athletics for Women*, VOLOPEDIA (Sept. 24, 2018), <https://volopedia.lib.utk.edu/entries/association-for-intercollegiate-athletics-for-women-aiaw/>.

⁴² GERBER ET AL., *supra* note 25, at 84.

⁴³ *USC All Americans*, *supra* note 34.

circumvent some of the issues facing men's sports under NCAA guidance.⁴⁴ Primarily, this meant removing money from the equation to the greatest extent possible—AIAW coaches were not allowed to recruit off-campus, prospective student visits were paid for by that student, and athletic scholarships were at first banned and then limited.⁴⁵

Despite these advancements, there is little debate that, in the early 1970s, women's athletic programs largely lacked the support and structure of men's athletic departments.⁴⁶ Women's sports programs were comparatively underfunded, and often lacked sufficient locker rooms, equipment, and medical personnel.⁴⁷ However, the 1970s would prove to be a turning point in the continuing struggle for equal opportunity and the beginning of a new era of women's athletics.

III. TITLE IX AND THE NEED FOR NIL

A. Growth and Shortcomings under Title IX

On June 23, 1972, President Richard Nixon signed into law Title IX of the Education Amendments to the Higher Education Act of 1965.⁴⁸ On its face, Title IX has nothing to do with sports. In fact, the provision, in relevant part, has only thirty-seven words and reads broadly, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁴⁹

As such, the passage of Title IX did not immediately disrupt the moneyless ethic of women's sports. Indeed, it took over a year to solidify that the clause applied to college sports at all. However, by 1973, women's sports advocates had begun lodging formal Title IX complaints in response to the under-

⁴⁴ Mark Bechtel, *AIAW vs. NCAA: When Women's College Basketball Had to Choose*, SPORTS ILLUSTRATED (June 14, 2022), <https://www.si.com/college/2022/06/14/aiaw-ncaa-womens-college-basketball-league-title-ix-daily-cover>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Jeffrey T. Ramsey, *Big Men on Campus: Administrative Response to Title IX and the Development of Women's Sports in the Big Ten Conference, 1972-1982*, at 105 (2014) (P.h.D. Dissertation, Marquette University), https://epublications.marquette.edu/cgi/viewcontent.cgi?article=1356&context=dissertations_mu.

⁴⁸ *50th Anniversary of Title IX*, RICHARD NIXON FOUND., (June 16, 2022) <https://www.nixonfoundation.org/2022/06/50th-anniversary-title-ix/>.

⁴⁹ Title IX, Education Amendments of 1972, 20 U.S.C. § 1681 (2024).

resourcing of their departments.⁵⁰ In 1974, the U.S. Department of Health, Education, and Welfare (HEW) published a proposed regulation that specifically applied Title IX to athletics, and specifically indicated that schools receiving federal funding must work to remedy inequalities in areas including access to equipment, travel allowances, and coach pay, although overall expenditures did not have to be equal.⁵¹

It quickly became apparent that a world focused on men's athletics was not particularly keen to abide by the idea that women's sports required equal opportunity. Most schools that offered men's and women's sports were members of both the NCAA and the AIAW, but were under no obligation to invest proportional resources into their women's programs until Title IX. Given

⁵⁰ At the University of Illinois, for example, dozens of women athletes and other interested parties signed onto a letter to HEW in September of 1973, alleging Title IX violations on the basis that their opportunities were being reduced and that they did not receive equal funding to the men's program. Calling themselves "Concerned Women Athletes," they noted that "everyone has the spirit and the commitment but no one can bear to make the men's program smaller and bring a little equity for women." Mary Pollack, *A Documentary History of Demands for Sex Equality in Intercollegiate Sports at the University of Illinois, 1973-74*, (The Mary Pollack Papers, 41/20/47, Box 1, IL-A).

⁵¹ The final regulation, which was published in June of 1975, included a section titled "Athletics" which read in part:

Where selection is based on competitive skill or the activity involved is a contact sport, athletics may be provided through separate teams for males and females or through a single team open to both sexes. If separate teams are offered, a recipient institution may not discriminate on the basis of sex in provision of necessary equipment or supplies, or in any other way, but equal aggregate expenditures are not required. The goal of the final regulation in the area of athletics is to secure equal opportunity for males and females while allowing schools and colleges flexibility in determining how best to provide such opportunity. In determining whether equal opportunities are available, such factors as these will be considered:

- whether the sports selected reflect the interests and abilities of both sexes; -- provision of supplies and equipment;
- game and practice schedules;
- travel and per diem allowances
- coaching and academic tutoring opportunities and the assignment and pay of the coaches and tutors;
- locker rooms, practice and competitive facilities;
- medical and training services;
- housing and dining facilities and services;
- publicity.

. . . Recipients are requested to "select sports and levels of competition which effectively accommodate the interests and abilities of members of both sexes." Thus, an institution would be required to provide separate teams for men and women, in situations where the provision of only one team would not "accommodate the interests and abilities of members of both sexes."

that highly resourced men's sports, particularly football and basketball, were revenue-drivers for many colleges, "dilution" of such moneymakers in favor of forced funding of women's sports was a broad concern.

To that end, in 1974, an amendment to Title IX was introduced that would exempt revenue-producing sports from its enforcement;⁵² after that amendment died in the House, a less sharp-toothed version was approved that required HEW to issue guidance that included "reasonable provisions [that] consider. . . the nature of particular sports."⁵³ Even so, the NCAA sued in 1976, seeking to invalidate the HEW regulations. Specifically, they argued that:

The HEW regulations purport to extend administrative jurisdiction over programs and institutions beyond the scope of the governing statutes in that they reach collegiate athletic programs that do not directly receive federal financial assistance. . . . The provisions of the regulations that purport to require that there be no difference in the treatment of male and female student-athletes, and thus purport to invalidate NCAA rules, are arbitrary and capricious . . . the regulatory requirement that athletic scholarships and grants-in-aid must, if provided, "provide reasonable opportunities for members of each sex" creates an arbitrary and capricious sex-based quota system . . . and the regulatory standards under which HEW professes to evaluate "equality of opportunity" are impermissibly vague and indefinite and thus allow HEW "unfettered and unimpeded discretion" in determining the existence of a violation, contrary to the due process requirements of the Fifth Amendment.⁵⁴

The case was dismissed in 1978, with the court finding that the NCAA lacked standing to bring such a challenge.⁵⁵ The decision noted that "it is not sufficient that the plaintiff association merely demonstrates a long-standing interest or expertise in the subject-matter of the lawsuit," and that the NCAA did not show that it was suffering or would necessarily suffer any injury in fact.⁵⁶ The court specifically found that the NCAA predicated its argument on the theoretical invalidation of its own internal rules, and

⁵² *The Living Law*, TITLE IX.INFO, <http://www.titleix.info/history/the-living-law.aspx> (last visited March 30, 2024) (citing 120 Cong. Rec. 15, 322-15, 323 (1974)).

⁵³ *Id.* (citing Sen. Conf. Rep. No. 1026, 93rd Cong., 2nd Sess. 4271 (1974)).

⁵⁴ *NCAA v. Califano*, 444 F. Supp. 425, 429 (D. Kan. 1978).

⁵⁵ *Id.* at 439.

⁵⁶ *Id.* at 430.

that the mere regulatory invalidation of a rule of a voluntary association accompanied by no discernible ramifications other than the prospect of abandoning or rewriting the affected rule [does not] constitute . . . any sort of injury remotely cognizable under Article III of the Constitution. Mere ‘injury’ to an organizational rule clearly cannot in itself form a legitimate basis for standing.⁵⁷

Thus, it was decided that the NCAA’s internal preferences, and the greater financial benefits offered to its male athletes than the AIAW’s female athletes, were not going to be legal grounds to skirt Title IX.⁵⁸ In 1979, HEW released further guidance, articulating a three-prong test that required a showing of proportionality or expansion efforts towards that goal to determine whether a program was in compliance.⁵⁹ In the late 1970s, therefore, the NCAA started considering broad scale moves to incorporate women’s sports into its governance. This was not an uncontroversial proposal, even among many advocates for women’s athletics. The AIAW had been operating autonomously for the better part of the decade and was run by mostly female administrators who prioritized women’s programs.⁶⁰ There was concern among many that a merger with the NCAA would ultimately be detrimental to women, because women would functionally lose that self-governance and the complete prioritization of their administrative body.⁶¹

Others, however, pointed to the different standards between the AIAW and the NCAA as de facto Title IX violations.⁶² Nora Lynn Finch, the women’s

⁵⁷ *Id.* at 431.

⁵⁸ *Id.* at 436.

⁵⁹ The three prongs are as follows –

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413 et seq. (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86), <https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html>.

⁶⁰ *USC All Americans*, *supra* note 34.

⁶¹ Bechtel, *supra* note 44.

⁶² *Id.*

athletic director at North Carolina State University, noted, in 1981, that a merger seemed inevitable, and that, “The AIAW discriminates against women athletes because the NCAA allows men more in recruiting and scholarships.”⁶³ The first NCAA women’s sports committees were formed in October 1980,⁶⁴ and at the NCAA convention in January of 1981, a contentious, multi-round vote resulted in the NCAA adopting a measure that would institute championship tournaments for women.⁶⁵

During the 1981-1982 school year, the NCAA offered twenty-nine women’s championships in twelve sports; the AIAW, conversely, suffered a precipitous drop in participation and lost almost a quarter of its membership dues as well as television contracts, as many schools that had been AIAW members transitioned their women’s programs to the NCAA.⁶⁶ The AIAW persisted for two more seasons, offering its own championships while suing the NCAA for attempting to create a monopoly; however, the AIAW folded in 1983, and the case was ultimately decided in favor of the NCAA in 1984.⁶⁷ Thus, nearly a decade after the passage of Title IX, the stage was functionally set for how women’s college sports would operate going forward⁶⁸—under the same governance as men, theoretically with specific federal protection, with a federally-sanctioned compliance test, promising equality of opportunity.

In the forty years since, the impact of Title IX has been undeniable. “In 1971-1972, fewer than 30,000 US college women participated in college sports[;]”⁶⁹ in 2021-2022, that number had grown to slightly over 229,000, constituting approximately 44% of all college athletes.⁷⁰ In large part because of these increased opportunities in response to Title IX, athletic opportunities in other domains have also increased. With the exception of the Ladies’ Professional Golf Association (LPGA) and some short-lived leagues, women’s

⁶³ *Id.*

⁶⁴ *Timeline - 1980s*, NCAA, <https://www.ncaa.org/sports/2021/6/14/timeline-1980s.aspx> (last visited Mar. 29, 2024).

⁶⁵ Bechtel, *supra* note 44.

⁶⁶ *AIAW v. NCAA*, 735 F.2d 577, 580 (D.C. Cir. 1984).

⁶⁷ *Id.* at 590.

⁶⁸ Save for three years in the mid-1980s when the enforcement of Title IX in athletics departments was gutted by *Grove City Coll. v. Bell*, 465 U.S. 555 (1984), which held that Title IX applied only to the specific department receiving federal financial assistance within a school. This interpretation was rendered moot by the Civil Rights Restoration Act of 1987, which specified that all of a school’s departments must comply with Title IX.

⁶⁹ *Title IX and Athletics: Proven Benefits, Unfounded Objections*, 8, NAT’L COAL. FOR WOMEN AND GIRLS IN EDUC., <https://www.newge.org/TitleIX40/Athletics.pdf> (last visited Mar. 29, 2024).

⁷⁰ *NCAA Demographics Database*, NCAA, <https://www.ncaa.org/sports/2018/12/13/ncaa-demographics-database.aspx> (last visited Mar. 29, 2024).

professional sports are almost entirely a post-Title IX phenomenon.⁷¹ The Women's Tennis Association (WTA) was founded in 1973, with an explicit goal of uniting female tennis players and protecting their financial interests on the professional circuit.⁷² The Women's National Basketball Association (WNBA) played its first season in 1997, and women's soccer was played in an organized professional league in the US for the first time in 2001.⁷³ These professional leagues are full of former college athletes, many of whom would not have had the opportunity to reach their full potential, and to eventually monetize their talents, without Title IX.

However, the backdrop of this huge increase in opportunity is the reality that colleges and universities are still in many ways failing their female athletes, at times in direct violation of Title IX. While an undoubtedly impactful piece of legislation, Title IX is, in reality, somewhat toothless. The U.S. Department of Education's Office of Civil Rights (OCR) has jurisdiction over Title IX complaints but has very few tools at its disposal for effective enforcement; OCR theoretically has the power to revoke federal funds from schools that are not in compliance with Title IX, but that sanction has never actually been imposed on any institution.⁷⁴

A USA TODAY investigation, the results of which were published in 2022, surveyed OCR's correspondence with 133 Division I colleges, and found that even when clear Title IX violations were found, schools rarely received citations.

Instead [OCR] obfuscates the transgressions in bureaucratic language that stops short of assigning blame, thereby allowing schools to claim innocence while negotiating voluntary resolutions. Other times, schools opt to enter agreements before the agency renders its findings. In just 18 of the 99 cases did

⁷¹ Maggie Mertens, *50 Years of Title IX: How One Law Changed Women's Sports Forever*, SPORTS ILLUSTRATED (May 19, 2022), <https://www.si.com/college/2022/05/19/title-ix-50th-anniversary-womens-sports-impact-daily-cover>.

⁷² *About the WTA*, WOMEN'S TENNIS ASS'N, <https://www.wtatennis.com/about> (last visited Mar. 29, 2024).

⁷³ Brian Straus, *WUSA: Following the Phenomenal Success of the 1999 Women's World Cup, the First Women's Professional Soccer League was Formed Around the Core of the U.S. National Team. But to Succeed, it Will Have to be More Than Mia vs. Brandi.*, WASH. POST (Apr. 13, 2001), <https://www.washingtonpost.com/archive/sports/2001/04/13/wusa-following-the-phenomenal-success-of-the-1999-womens-world-cup-the-first-womens-professional-soccer-league-was-formed-around-the-core-of-the-us-national-team-but-to-succeed-it-will-have-to-be-more-than-mia-vs-brandi/fcbd430e-7faa-45bf-b656-81d8dbaa570b/>; *History*, WNBA, <https://www.wnba.com/history> (last visited Feb. 4, 2024).

⁷⁴ Rachel Axon, *What Happens if a School Doesn't Comply with Title IX? Not a Whole Lot*, USA TODAY (Dec. 22, 2022, 4:39 PM), <https://www.usatoday.com/in-depth/news/investigations/2022/12/15/title-ix-enforcement-essentially-toothless-mired-red-tape-delays/10803850002/>.

the agency unequivocally state that a school violated Title IX,

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the report reads.

Further, the report found that, despite an agency goal of resolving its Title IX cases within six months, cases routinely took over two years to investigate complaints.⁷⁶ In cases where monitoring agreements were reached, communication regarding compliance monitoring was found to be spotty at best. Schools also face “zero consequence for openly defying or even withholding [requested] records from the federal agency.”⁷⁷

Because of this lack of enforcement, large percentages of Division I schools lag far behind the numbers that would demonstrate equitable opportunity for men and women in athletics. As of 2020-2021, up to 87% of schools are failing to offer athletic opportunities for women proportionate to their enrollment.⁷⁸ Proportionality, while not the be-all-end-all of compliance, is a key factor in determining whether schools are offering equal opportunity in line with Title IX guidance; schools can also show compliance by demonstrating that they are making strides towards adding athletic slots for the underrepresented sex, or that they are meeting the abilities and interests of their female students, but these factors are rendered somewhat moot if a school can show that they offer proportionate athletic opportunities.⁷⁹

Further, the majority of schools are not in compliance with Title IX when it comes to scholarship and other expenditures. In 2019-2020, of the approximately \$240 million spent on recruiting, 70% of that was spent on recruitment of male student athletes.⁸⁰ In 2019-2020, male athletes received \$252 million more in athletic scholarships than female athletes received.⁸¹ According to a 2019-2020 study, only about 30% of recruitment money was spent on scholarships to female athletes to the number of female athletes enrolled.⁸² This is in large part due to the NCAA’s own policies; schools are

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Rachel Axon & Lindsay Schnell, *50 Years After Title IX Passed, Most Top Colleges Deprive Female Athletes of Equal Opportunities*, USA TODAY (Dec. 15, 2022, 4:49 AM), <https://www.usatoday.com/in-depth/news/investigations/2022/06/03/title-ix-failures-50-years-colleges-women-lack-representation/9664260002/>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Kenny Jacoby et al., *Female Athletes Stuffed on Scholarships at Some of the Biggest Colleges in the Country*, USA TODAY (Dec. 15, 2022, 4:34 AM), <https://www.usatoday.com/in-depth/news/investigations/>

allowed to offer up to 85 full-ride football scholarships, whereas no women's sports team can offer more than 20 full-ride scholarships.⁸³ As was made clear decades ago in *NCAA v. Califano*, NCAA internal policies are not grounds to violate federal law; however, large numbers of schools continue to prioritize NCAA policies over Title IX compliance.⁸⁴

Beyond direct expenditures by the school, many college athletic programs also take in funds that can total millions of dollars from “boosters,” defined by the NCAA as individuals who are “representative of an institution’s athletic interests.”⁸⁵ Boosters are often alumni, but sometimes other moneyed, interested parties, and are viewed as something of a secret weapon for athletic departments—a 2022 study found that “programs who receive the most from generous donors tend to have a heightened advantage against others through recruiting success, coaching prestige, facility enhancements and other upgrades.”⁸⁶ Donations from boosters can be targeted towards projects, such as stadium renovations, but can also be targeted towards specific teams. While schools are responsible under the law for ensuring that the expenditure of donated funds are done equitably and in compliance with Title IX,⁸⁷ as with many other avenues of compliance this has not been without complication. OCR itself noted in 1995, in the resolution of a complaint regarding high school programs, that

[i]n the experience of the OCR, sponsors, as a whole, are more interested and willing to assist boys' teams than girls' teams, and male-oriented booster activities generate more public interest than girls' activities. If all benefits are not considered in examining interscholastic athletics, the purpose and effect of the Title IX requirements could be routinely undermined by the provision of unequal benefits through private financial assistance. . . . It should also be noted that this does not mean that teams must “share” proceeds from fundraising activities. It

2022/08/17/female-athletes-stiffed-scholarship-money-colleges-title-ix/7640647001/; *50 Years of Title IX We're Not Done Yet*, WOMEN'S SPORTS FOUND., https://www.womenssportsfoundation.org/wp-content/uploads/2022/05/13_Low-Res_Title-IX-50-Report.pdf (last visited Apr. 16, 2024).

⁸³ Jacoby et al., *supra* note 82.

⁸⁴ *Id.*

⁸⁵ *Role of Boosters*, NCAA, <https://www.ncaa.org/sports/2013/11/27/role-of-boosters.aspx> (last visited Nov. 16, 2023).

⁸⁶ *College Sports Top Donors: Ranking the Most Generous Athletics Boosters*, 247SPORTS (Aug. 29, 2023, 12:21 PM), <https://247sports.com/longformarticle/college-sports-top-donors-ranking-the-most-generous-athletics-boosters-214986422/>.

⁸⁷ *See, e.g., Chalenor v. University of North Dakota*, 291 F.3d 1042, 1048 (8th Cir. 2002) (“A school may not skirt the requirement of providing both sexes equal opportunity in athletic programs by providing one sex more than substantially proportionate opportunity through the guise of outside funding.”)

does, however, place a responsibility upon the district to ensure that benefits, services, treatment and opportunities overall, regardless of funding sources, are equivalent for male and female athletes.⁸⁸

While OCR was specifically addressing high school programs in this resolution, the referenced phenomenon plays out in the university sphere as well—to the extent that boosters and booster clubs direct their donations to specific teams, those disproportionately benefit men’s football and, to a lesser extent, men’s basketball teams.⁸⁹

Because schools can prioritize their financial interests and face no tangible consequence when those interests lead them out of compliance with federal law, it is unsurprising that even well-meaning athletic departments often make expenditure and personnel decisions with their bottom line as more of a salient concern than Title IX. As Connecticut Senator Chris Murphy has noted, [a]thletic directors don’t get hired to build a great women’s sports program. They get hired to get the football team into the top 25. That’s the sad reality.”⁹⁰

B. Amateurism and Alston

Despite this institutional obsession with the finances of college sports, until the 2021 *Alston* decision, student-athletes themselves were functionally barred by NCAA policy from benefiting from any of the copious amounts of cash exchanging hands.⁹¹ As discussed in Part II, moneyed interests have been intertwined with college sports since the beginning, and at the turn of the twentieth century this became an issue of widespread ethical concern. After the establishment of the NCAA in 1905, student athletes were prohibited from receiving any kind of compensation including scholarships for half a century.⁹² In 1956, schools were first allowed to offer “grants-in-aid” to students for participating in athletics, but only for educational expenses—room, board,

⁸⁸ U.S. DEP’T OF EDUC., *Jurupa Unified School Dist.*, OCR File No. 09-01-1222 (Feb. 7, 1995), <https://www2.ed.gov/about/offices/list/ocr/letters/jurupa.html>.

⁸⁹ Matthew Reed, *Does Title IX Apply to Gender Disparity in NIL Compensation?*, THOMPSON & THORNTON, LLP. (Mar. 7, 2023), <https://titleixtips.com/does-title-ix-apply-to-gender-disparity-in-nil-compensation/>.

⁹⁰ Axon & Schnell, *supra* note 78.

⁹¹ Nat’l Collegiate Athletic Ass’n v. Alston, 594 U.S. 69 (2021).

⁹² *Id.*

tuition, and books.⁹³ Prior to 2021, students were at no point allowed to accept sponsorships or in any way profit off of their name or image.⁹⁴

This does not mean that there have not been ways for athletes to benefit throughout the years, in ways that largely favored male athletes. As previously discussed, male student-athletes receive more scholarship money per year than female student-athletes by hundreds of millions of dollars.⁹⁵ In addition, there have been multiple instances over the years where it has been found that high-profile players in high-profile programs, almost exclusively in revenue-generating men's sports, have been given financial benefits in violation of NCAA rules. In 1987, for example, an investigation found that Southern Methodist University and its boosters had been paying their football players over the course of years, promising money to prospective students to bolster their recruiting—this led to the NCAA barring the team from play in 1987 and 1988, among other sanctions.⁹⁶ More recently, the University of Alabama faced major sanctions in 2002 for a scandal in which football team boosters made payments in the tens of thousands of dollars to secure high school recruits,⁹⁷ and a wide-ranging investigation in 2017-2018 implicated over a dozen top Division I men's basketball teams in an underground recruiting scheme which involved paying significant sums to recruits, players, and their families.⁹⁸ Notably, these scandals all involved football and men's basketball teams, so to the extent that players benefited from the administration's rule violations, all such benefits went to male athletes.

Although these actions by school personnel and boosters were clearly in violation of the rules, it has been a topic of debate as to whether they should be. Especially in revenue-generating sports, an argument has long been that players are the labor behind the large amounts of money that school athletic departments pull in—therefore, it seems unfair that they should be shut out of it. Further, as commercialization around college sports increases, the argument that college

⁹³ *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1063 (N.D. Cal. 2019)

⁹⁴ Robert Litan, *The NCAA's "Amateurism" Rules*, MILKEN INST. REV. (Oct. 28, 2019), <https://www.milkenreview.org/articles/the-ncaas-amateurism-rules>.

⁹⁵ Jacoby et al., *supra* note 82.

⁹⁶ Eric Dodds, *The 'Death Penalty' and How the College Sports Conversation Has Changed*, TIME (Feb. 25, 2015, 6:00 AM), <https://time.com/3720498/ncaa-smu-death-penalty/>.

⁹⁷ John Zenor, *NCAA Rolls Crimson Tide for Violations*, USA TODAY (Feb. 1, 2002, 8:47 PM), <https://usatoday30.usatoday.com/sports/college/football/2002-02-01-alabama-violations.htm>.

⁹⁸ Pat Forde & Pete Thamel, *Exclusive: Federal Documents Detail Sweeping Potential NCAA Violations Involving High-Profile Players, Schools*, YAHOO!SPORTS (Feb. 23, 2018), <https://sports.yahoo.com/exclusive-federal-documents-detail-sweeping-potential-ncaa-violations-involving-high-profile-players-schools-103338484.html>.

athletics should somehow be separate from the money and marketing of the pros becomes less and less credible.⁹⁹

As such, after years of debate and litigation,¹⁰⁰ state legislatures in 2020 began to consider laws that would allow college athletes to monetize their NIL rights without forfeiting college eligibility. Concurrently, *NCAA v. Alston* was making its way through the federal courts—while the case did not directly involve NIL, it addressed compensation and education-related benefits provided to athletes.¹⁰¹ These benefits, such as computers and internships, were until that point barred by the NCAA to preserve the appearance of amateurism; this was challenged by student-athletes, who alleged that limiting compensation in this way was a breach of antitrust principles.¹⁰² On June 21, 2021, the Supreme Court affirmed the district court’s ruling in favor of the student-athletes, finding in part that

the NCAA's compensation limits “produce significant anticompetitive effects in the relevant market.” Though member schools compete fiercely in recruiting student-athletes, the NCAA uses its monopsony power to “cap artificially the compensation offered to recruits.” In a market without the challenged restraints, the district court found, “competition among schools would increase in terms of the compensation they would offer to recruits, and student-athlete compensation would be higher as a result.”¹⁰³ [I]t was only after finding the NCAA's restraints “patently and inexplicably stricter than is necessary” to achieve the procompetitive benefits the league had demonstrated that the district court proceeded to declare a violation of the Sherman Act.¹⁰⁴ By permitting colleges and universities to offer enhanced education-related benefits, [this] decision may encourage scholastic achievement and allow

⁹⁹ See, e.g., Nicole Kraft, *Why the Public Strongly Supports Paying College Athletes*, FORBES (Aug. 21, 2023, 11:00 AM), <https://www.forbes.com/sites/nicolekraft/2023/08/21/why-the-public-strongly-supports-paying-college-athletes/>.

¹⁰⁰ See, e.g., *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015), in which student-athletes sued challenging universities’ use of their image and likeness for commercial purposes (such as video games) without compensating the student-athletes themselves. The District Court found that the NCAA’s actions violated antitrust law as unreasonable restraint of trade; the Ninth Circuit affirmed.

¹⁰¹ *Alston*, 594 U.S. at 69.

¹⁰² Specifically, they alleged that the NCAA’s rules violate §1 of the Sherman Act, which prohibits “contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce.” *Id.* at 73.

¹⁰³ *Id.* at 82 (citations omitted).

¹⁰⁴ *Id.* at 100-01 (internal quotations removed).

student-athletes a measure of compensation more consistent with the value they bring to their schools.¹⁰⁵

Functionally, *Alston* preserved the status quo in terms of NCAA policy in barring direct payments to athletes for participation in sports—they did not touch that question at all—but completely upended the idea that the NCAA could place unlimited restraints on athlete compensation, as they had been doing up until that point. While the NCAA still had broad latitude in the specifics of their policies, they were not allowed under antitrust law to implement “inexplicably strict[]” policies kneecapping athlete compensation.¹⁰⁶

This decision, in conjunction with the legislative movement in numerous states to pass laws allowing NIL compensation, prompted the NCAA to adopt an interim policy just nine days later, expressly allowing student-athletes to be compensated for use of their image and to receive brand deals in accordance with state law.¹⁰⁷ On July 1, 2021, the state of amateurism in the NCAA underwent a ground-shifting change, as players were able to receive compensation outside of scholarship money for the first time.

c. The Need for NIL in Women’s Sports

While the larger debates around NIL proposals were primarily focused on men’s athletics—indeed, despite penning a historiography on college sports in his opinion in *Alston*, Justice Gorsuch did not make any mention of opportunities for women—there were immediate concerns about its applicability and impact on women’s sports.¹⁰⁸ As will be more thoroughly discussed in Part IV, questions about how third-party donations and endorsements impacted Title IX compliance were almost immediate, and men’s

¹⁰⁵ *Id.* at 107.

¹⁰⁶ *Alston*, 594 U.S. at 100-01.

¹⁰⁷ Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (Jun. 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>. The Interim Policy states that:

- Individuals can engage in NIL activities that are consistent with the law of the state where the school is located. Colleges and universities may be a resource for state law questions.
- College athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to name, image and likeness.
- Individuals can use a professional services provider for NIL activities.
- Student-athletes should report NIL activities consistent with state law or school and conference requirements to their school.

¹⁰⁸ *See generally Alston*, 594 U.S. 69.

football and basketball stood to dominate the conversation as well as the financial landscape.

Despite these concerns, it was also clear that the concept of being able to retain eligibility while monetizing athletic success had the potential to immediately revolutionize some of the more high-profile women's sports. Because professional post-college athletic opportunities are more limited for women than for men, even as women's professional sports continues to be a growing industry, for many female athletes their college-eligible years are also their peak years in terms of earning potential; in this sense, NIL policy could be interpreted to address an equity issue.¹⁰⁹ In college, many women will not only be at their athletic peaks, but will have access to more resources and more viewers than at any other point in their athletic lives.¹¹⁰

This dynamic, coupled with the strict amateurism rules of the NCAA, uniquely impacted female athletes. A high-profile college football prospect, for example, could not only benefit from his scholarship (and any of the under-the-table benefits that seemed to be targeted at these kinds of recruits), but would ultimately be hoping for a payoff in the millions as a professional draftee. In the event that such a prospect's professional career did not pan out, they would often have access to industry jobs, like coaching positions, that are often very handsomely compensated. Therefore, even if a high-profile male athlete were disadvantaged by not being able to capitalize on his brand during high school and college, there were more numerous and more lucrative avenues potentially available to them in the future.

On the contrary, NCAA policies regarding athlete compensation served to largely cut off any possibility of women being paid for their athletic talents at all, regardless of their athlete profile, unless they chose to forfeit the exposure and networks of college athletics to do so. This kept some of the biggest stars in women's sports from competing in college and benefitting from their scholarships. Because the professional landscape for women's sports is more limited than it is for men, and fewer female athletes are the subject of consistent media coverage, a good number of the most high-profile, highly marketable

¹⁰⁹ Katie Lever, a former Division I track athlete at Western Kentucky University and current media editor and sportswriter, articulated this point in a panel discussion hosted by Senator Murphy's office on inequities in college sports. *Madness, Inc: Murphy Hosts Virtual Summit on the Inequities in College Sports, Holds Conversation on Empowering College Athletes and the Need for Collective Bargaining*, CHRIS MURPHY (Mar. 31, 2022), <https://www.murphy.senate.gov/newsroom/press-releases/madness-inc-murphy-hosts-virtual-summit-on-the-inequities-in-college-sports-holds-conversation-on-empowering-college-athletes-and-the-need-for-collective-bargaining>.

¹¹⁰ See Morgan Smith, *Women's Sports Could Bring in Over \$1 Billion in 2024 – Record-Breaking Viewership, Stars Like Caitlin Clark are Driving Growth*, CNBC (Mar. 20, 2024, 3:25 PM), <https://www.cnbc.com/2024/03/08/womens-sports-could-bring-in-over-1-billion-in-2024-whats-driving-growth.html>.

female athletes have been Olympians.¹¹¹ In some notable cases, female Olympians have had to make decisions about whether they would benefit financially from their excellence prior to their college years.

One such example is current University of Arkansas Razorbacks gymnastics head coach Jordyn Wieber.¹¹² At the age of 17, she won a team gold medal at the 2012 London Olympics with the United States gymnastics squad, known as the “Fierce Five”; this team featured competitors who were household names by the end of the Games, including 16-year-old Gabby Douglas and 18-year-old Aly Raisman.¹¹³ Wieber had won the individual all-around gold medal at the previous year’s World Championships at age 16 and was considered a favorite to repeat heading into the London Games.¹¹⁴ Because of how lucrative Olympic gold medals can be for a professional gymnast in terms of endorsements, Wieber made the decision to turn professional in the lead-up to the Olympics.¹¹⁵ She proceeded to put up the fourth-highest qualifying score in the all-around competition, behind teammates Douglas and Raisman.¹¹⁶ However, because of specific rules governing international gymnastics competitions that limit event finalists to two per country, Wieber was ineligible to compete in the all-around final despite being the defending world champion and a medal threat.¹¹⁷

Douglas went on to become the first Black woman to win the all-around gold, and Raisman won multiple individual event medals; Wieber, while vital to her team’s overall win, was consequently not one of the more high-profile athletes on team USA.¹¹⁸ Prior to her decision to go pro, she had been committed to compete for the University of California Los Angeles Bruins, perennially one

¹¹¹ See, e.g., Alicia Jessop, *Gabby Douglas’ Gold Medals at the London Olympics Mean Multi-Million Dollar Endorsement Deals*, FORBES (Aug. 2, 2012, 6:07 PM), <https://www.forbes.com/sites/aliciajessop/2012/08/02/gabby-douglas-gold-medals-at-the-london-olympics-mean-multi-million-endorsement-deals/?sh=713f724931f3>.

¹¹² See *id.*

¹¹³ Lee Jenkins, *Point After: The NCAA’s Golden Rule*, SPORTS ILLUSTRATED (Apr. 15, 2015), <https://www.si.com/more-sports/2015/04/15/jordyn-wieber-ucla-student-manager-ncaa-olympics>.

¹¹⁴ Diane Pucin, *Jordyn Wieber Wins All-Around Title Despite Mistakes*, L.A. TIMES (Oct. 13, 2011, 12:00 AM), <https://www.latimes.com/sports/la-xpm-2011-oct-13-la-sp-world-gym-20111014-story.html>.

¹¹⁵ Jenkins, *supra* note 113.

¹¹⁶ Tim Keeney, *Women’s Olympic Gymnastics Results 2012: Jordyn Wieber Unfairly Eliminated*, BLEACHER REP. (Jul. 29, 2012), <https://bleacherreport.com/articles/1276977-womens-olympic-gymnastics-results-2012-jordyn-wieber-unfairly-eliminated/>

¹¹⁷ Jenkins, *supra* note 113.

¹¹⁸ *London 2012 Gymnastics Artistic Individual All-Round Women Results*, OLYMPICS, <https://olympics.com/en/olympic-games/london-2012/results/gymnastics-artistic/individual-all-round-women> (last visited Apr. 8, 2024); *Alexandra Raisman: Olympic Results*, OLYMPICS, <https://olympics.com/en/athletes/alexandra-raisman> (last visited Apr. 8, 2024).

of the country's top college gymnastics teams, but accepting endorsement money meant that she could no longer do so.¹¹⁹ Wieber, therefore, missed out on both the levels of sponsorship money that she was expected to have access to as an Olympic all-around medalist, and on the ability to compete in college.

Wieber's story exemplifies the choice faced by a lot of female athletes prior to the implementation of NIL policies, and it also exemplifies the way strict amateurism policies kneecapped the marketing potential of college teams by keeping some of the biggest stars in sport from competing. Ultimately, the fact that she was unable to compete in college but still wanted to enroll at UCLA as a student ended Wieber's gymnastics career, as balancing her life as a student and gymnastics team manager while attempting to train herself for the 2016 Olympics proved too much. She officially retired from the sport in 2015 at age 19.¹²⁰ Former UCLA head coach Valerie Kondos-Field said of Wieber at the time, "It's a crime [that she had to retire], because she is not ready to be done," but noted that for gymnasts, and many other Olympians, the choice to cash out before college is now or never. "There's no such thing as professional gymnastics," she said. "They can go to Cirque du Soleil, I guess."¹²¹

In a post-*Alston* environment, an athlete like Wieber would be able to "have it all"—she would be able to capitalize on reaching the very pinnacle of her sport at the age of 16, get paid for brand deals and speaking engagements, and also continue competing in college. In fact, almost immediately after the *Alston* ruling and the associated policy changes that took effect for the 2021-2022 school year, athletes fresh off spectacular performances at the 2021 Tokyo Olympics began competing for NCAA programs in increased numbers.¹²² In fact, four of the six women who comprised the USA gymnastics team in Tokyo began competing for college programs just weeks after the Olympics, including several, like all-around gold medalist Sunisa Lee, who had large endorsement profiles.¹²³

This newfound ability for women to control their own financial futures without giving up scholarships and the chance to compete for NCAA programs resulted in a distinct new era of women's college athletics, exemplified by some of the brightest stars bringing newfound publicity to their sports. However, this

¹¹⁹ Jenkins, *supra* note 113.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Associated Press Texas, *Return of Simone Biles, Sunisa Lee is a Boon for U.S. Gymnastics. It's Created a Logjam, Too*, SPECTRUM NEWS 1 (Aug. 25, 2023), <https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2023/08/25/the-return-of-simone-biles-and-sunisa-lee-is-a-boon-for-us-gymnastics--it-s-created-a-logjam--too>.

¹²³ *Id.*

new era also resulted in a new set of questions about who benefits from this financial freedom.

IV. BENEFICIARIES OF THE NATAL NIL IN WOMEN'S SPORTS

A. Performance vs. Payout: What Sells?

While athletes are generally engaged in team competition, the benefits of NIL are individual; individual student-athletes are able to negotiate brand deals and monetize their public image for their own gain, not necessarily for any sort of direct collective gain for their team or school. Because of this, even though their personal brand is that of “athlete,” their earning potential is not necessarily directly correlated with their athletic skill or output—it is, at its core, an exercise in marketing, and therefore the success of any individual through an NIL framework is subject to societal forces beyond what is seen on the court or field.

This then begs the question of whether there are significant differences between men and women in how athletic performance—the core of the “athlete”—correlates with NIL worth. One might suspect that there may indeed be telling differences, due simply to stereotypes of what is societally valued in men and women. As far as things have come in the century-and-change since women began participating in athletics in some significant number, traditional femininity and socially-prescribed beauty are still powerful economic calling cards for women, and the history of the social perception of women in sports has shown that strength, athleticism, and competitiveness have not always been seen as positive—or marketable—attributes in women.

Some of the early returns on who would benefit the most from NIL seemed to put the spotlight squarely on these questions. Social media, especially Instagram and TikTok, played an outsized role in which female athletes were immediately marketable. An example of this phenomenon can be found in Olivia Dunne, a gymnast for the Louisiana State University Tigers and one of the most recognizable athletes of the NIL era. Dunne began competing for LSU during the 2020-2021 season, prior to *Alston* and the changes in NIL policy.¹²⁴ By the time she entered college, she had already amassed over three million followers on TikTok and approximately three quarters of a million followers on Instagram.¹²⁵ Her content, while occasionally showcasing gymnastics skills, consisted primarily of trends and lifestyle content. As a 2023 article noted,

¹²⁴ Brie Andras, *LSU Gymnast Doubles as Social Media Star*, TIGERTV (Sept. 21, 2020), https://www.tigertv.tv/sports/lsu-gymnast-doubles-as-social-media-star/article_ff643744-fc23-11ea-9b5b-bbbbd2a502ea.html.

¹²⁵ *Id.*

Dunne, who has long blond hair, a heart-shaped face and kewpie doll features, has mastered the art of posting sports-agnostic selfies that send her fans into a tizzy. Occasionally she wears a leotard, but mostly she dons crop tops, minidresses, angel wings. . . . The posts inspire comments that rain down like an endless waterfall. ‘Wife?’ ‘Stunning . . . I’d sell my kidney and my liver just to meet you.’¹²⁶

Due to her immense popularity online, and her reach outside of the usual demographics of college gymnastics fans—her followers are largely white, teenage boys,¹²⁷ who are at times so enthralled by her celebrity that LSU has needed to invest in additional security on meet days¹²⁸—it was almost a foregone conclusion that she would be one of the highest paid female athletes in the world once she was able to accept endorsement money. Her following had grown to a total of over five million followers across platforms by summer 2021,¹²⁹ and has been valued in the millions of dollars since On3.com started publishing NIL valuation rankings in 2022.¹³⁰

The idiosyncrasy of Dunne's fame, however, is that she has functionally become a sports star without sport as the focal point of her stardom. While her social media posts often feature her LSU teammates, and sometimes feature clips of her training, her popularity has not been impacted by the fact that she is not considered one of the top performers in NCAA gymnastics. Dunne has never competed in the all-around, missed much of her junior year due to injury, and has, over the course of her college career, been primarily a single-event contributor for the Tigers, competing only on the uneven bars in most meets. Despite this, she remains the highest paid female athlete in the NCAA by a significant margin—as of the end of the 2022-2023 school year, her worth was estimated at \$3.4 million, almost \$2 million more than the second ranked female

¹²⁶ Lauren Mechling, *How Olivia Dunne Turned the Male Gaze into a Gymnastics Empire*, THE GUARDIAN (Feb. 28, 2023, 3:30 PM), <https://www.theguardian.com/sport/2023/feb/28/olivia-dunne-gymnastics-lsu-college-sports>.

¹²⁷ *Id.*

¹²⁸ Alyssa Roenigk, *Disruptive Dunne Fans Force LSU to Up Security*, ESPN (Jan. 12, 2023, 6:02 PM), https://www.espn.com/college-sports/story/_/id/35433866/lsu-ups-security-fans-olivia-dunne-disrupt-gymnastics-meet.

¹²⁹ Dana DiPiazza, *After NCAA Rule Change, LSU Gymnast Expected to Earn More Than Any Other College Athlete*, WBRZ (July 1, 2021, 10:33 AM), <https://www.wbrz.com/news/lsu-gymnast-expected-to-earn-more-money-than-any-other-college-athlete/>.

¹³⁰ *On3 Women's NIL 100*, ON3NIL (Nov. 10, 2022), <https://www.on3.com/nil/rankings/player/womens-nil-100/> [<https://web.archive.org/web/20230518074502/https://www.on3.com/nil/rankings/player/womens-nil-100/>].

athlete.¹³¹ By comparison, University of Florida gymnast Trinity Thomas, who was the 2022 NCAA all-around champion and is widely considered one of the best college gymnasts of all time, was the twenty-eighth highest valued female athlete at the end of the 2022-2023 school year, with an estimated worth of \$109,000.¹³² According to Dunne, however, the competition floor and the NIL game are entirely different fields. “I’ve spent years building an audience, and brands pay me for what they believe is worth the reach of the demographic that I offer,” she said.¹³³

A similar case can be observed in basketball-playing twins Haley and Hanna Cavinder, who were both in the top five in NIL valuation among female college athletes coming into the 2022-2023 season.¹³⁴ The Cavinder twins, as they brand themselves on social media, played their senior season for the University of Miami’s women’s team after transferring from Fresno State University. Haley was one of Miami’s top performers and a second-team All-Atlantic Coast Conference selection;¹³⁵ Hanna, while not a star at Miami, was still a regular contributor.¹³⁶ However, the twins were known primarily for their social media presence and NIL potential. Prior to the 2021-2022 season, when they still competed for Fresno State, it was estimated that they were giving up \$500,000 per year to maintain their NCAA eligibility. They, similarly to Dunne, had amassed three million TikTok followers and half a million followers on Instagram by summer 2021.¹³⁷ Their accounts had little to do with basketball, as they primarily featured the twins lip-synching to trending songs and dancing; however, they, like Dunne, were able to parlay charisma and blonde good looks into a massive following, and subsequently lucrative brand deals once they gained access to the NIL market. The twins signed their first major endorsement

¹³¹ *On3 Women’s NIL 100*, ON3NIL (June 12, 2023), <https://www.on3.com/nil/rankings/player/womens-nil-100/> [https://web.archive.org/web/20230612062340/https://www.on3.com/nil/rankings/player/womens-nil-100/].

¹³² *Id.*

¹³³ Stephanie Apstein, *LSU Stars Angel Reese and Olivia Dunne Are Rolling in NIL Deals*, SPORTS ILLUSTRATED (Sept. 13, 2023), <https://www.si.com/college/2023/09/13/lsu-leader-nil-deals-women-athletes-angel-reese-livvy-dunne>.

¹³⁴ *On3 Women’s NIL 100*, *supra* note 130.

¹³⁵ *Haley Cavinder*, UNIV. OF MIA, ATHLETICS, <https://miamihurricanes.com/roster/haley-cavinder/> (last visited Mar. 30, 2024).

¹³⁶ *Hanna Cavinder*, UNIV. OF MIA, ATHLETICS, <https://miamihurricanes.com/roster/hanna-cavinder/> (last visited Mar. 30, 2024).

¹³⁷ Geoff Grammer, *NIL Arrives: At Long Last, Show College Athletes the Money*, ALBUQUERQUE J. (Jun. 30, 2021), https://www.abqjournal.com/sports/college/nil-arrives-at-long-last-show-college-athletes-the-money/article_46bdb7e4-5bda-5a3b-b58a-fd81df25dd12.html.

deal the day that the NIL rules changed,¹³⁸ and as of February 2023 had valuations of over \$800,000 each.¹³⁹

From one perspective, these successes are a story of female control—young women who have found a way to translate their talents into significant personal wealth, while competing and being recognized in athletics at a high level. Dunne and the Cavinders have been able to build financial empires for themselves, while exercising control over their own images and bringing publicity to their schools and their sports—this is a feat that should not be minimized. The changing of NIL rules creates an intersection of sport and celebrity, and, in a world where female athletes fight for recognition, that can be a good and necessary thing.

It also, however, calls into question the steps women have to take to avail themselves of these opportunities. Even with these female megastars making six-and-seven figures off of endorsement, NIL money is still largely going to men; one study found that women can expect approximately half of the compensation men get even in the same sport and level of competition.¹⁴⁰ A quick scroll of available data indicates that female athletes have to have significantly more social media engagement in terms of follower count to rank similarly to men.¹⁴¹ If the endorsement market for women is limited, is the way for female athletes to make money to be white and blonde, and to build social followings focused on conventional beauty rather than athletic talent? How much, if at all, does a female athlete's competitive resume matter in building an NIL brand?

At the beginning of the 2022-2023 school year, it appeared that, while athletic reputation and performance could matter,¹⁴² it mattered differently for

¹³⁸ Dan Murphy, *Let's Make a Deal: NCAA Athletes Cashing in on Name, Image and Likeness*, ESPN (July 1, 2021, 11:37 AM), https://www.espn.com/college-sports/story/_/id/31738893/ncaa-athletes-cashing-name-image-likeness.

¹³⁹ *On3 Women's NIL 100*, ON3NIL (Feb. 12, 2023), <https://www.on3.com/nil/rankings/player/womens-nil-100/> [<https://web.archive.org/web/20230212004919/https://www.on3.com/nil/rankings/player/womens-nil-100/>].

¹⁴⁰ Shira Springer, *NIL Gender Pay Gap Is Real, but Doesn't Have to Be the Norm*, SPORTS BUS. J. (Oct. 9, 2023), <https://www.sportsbusinessjournal.com/Articles/2023/10/09/opinion-springer.aspx>.

¹⁴¹ *On3 NIL 100*, ON3NIL (Nov. 17, 2023), <https://www.on3.com/nil/rankings/player/nil-100/> [<https://web.archive.org/web/20231117062156/https://www.on3.com/nil/rankings/player/nil-100/>]. Only five male athletes on the Top 100 list as of November 2023 had Instagram follower counts over one million, two of them being LeBron James' sons; it is not uncommon for male athletes to have endorsement values at over half a million dollars with just a few thousand followers overall. On the other hand, each of the women on the Top 100 as of November 2023 has at least 750,000 followers on Instagram alone.

¹⁴² *On3 Women's NIL 100*, *supra* note 130 (as of November 2022, in addition to Dunne and the Cavinders, the top five female athletes by estimated endorsement value was rounded out by Auburn's Sunisa Lee, who won three gymnastics medals at the 2021 Olympics including all-around gold, and the University of

men and women. There were some male athletes for whom their off-the-field profiles drove large NIL worth—for example, Bronny James, son of basketball superstar LeBron James, and Arch Manning, nephew of legendary NFL players Peyton and Eli Manning, have consistently been at the top of endorsement charts, even as high schoolers—but in general, the top-valued male athletes roughly correlated to top male performers. In October 2022, the top ten men in NIL value included 2021 Heisman Trophy winner Bryce Young, 2021 freshman of the year C.J. Stroud, 2022 Heisman Trophy winner Caleb Williams, and unanimous 2022 All-American Bijan Robinson—all football players, all of whom, excluding Williams,¹⁴³ are playing in the NFL as of 2023.¹⁴⁴

Functionally, therefore, it appeared as though the top earners for men were being paid for being great on the field in anticipation of being paid even more for their talents, while women were being paid for social media virality. Top performers in higher-profile women's sports, like the University of South Carolina's basketball phenomenon Aliyah Boston and the previously-referenced champion gymnast Trinity Thomas, were not even on the overall top 100 NIL list, which includes both male and female athletes, as of October 2022.¹⁴⁵ Of the eight women on that list, only two, the University of Connecticut's Paige Bueckers and Auburn's Sunisa Lee, had won any national individual awards at the collegiate level.¹⁴⁶

While this may seem somewhat disheartening, if the goal is for female athletes to have the opportunity to monetize their sports performance, trends in that regard may have started to shift during the 2022-2023 seasons. Specifically, the Women's March Madness basketball tournament in 2023 seemed to be something of a bellwether; during the tournament, several star players soared to new heights of public recognition and marketability. The University of Iowa's Caitlin Clark, a junior who up until the tournament had a comparatively minimal endorsement profile despite being a bona fide star who had just unanimously been voted Big 10 Player of the Year, shined during March Madness, averaging over 30 points per game throughout the tournament and putting up a 41-point

Connecticut's Paige Bueckers, who won the Associated Press Player of the Year along with a litany of other awards in her 2021 freshman basketball season).

¹⁴³ Caleb Williams was the #1 draft pick in the 2024 NFL Draft and is expected to start his professional career in the upcoming season. See Courtney Cronin, *Bears select QB Caleb Williams with No. 1 pick in NFL draft*, ESPN (Apr. 25, 2024, 8:19 PM), https://www.espn.com/nfl/story/_/id/40025526/bears-select-qb-caleb-williams-no-1-pick-nfl-draft.

¹⁴⁴ *On3 NIL 100*, *supra* note 141.

¹⁴⁵ *Id.*

¹⁴⁶ 2023-24 *Women's Basketball Roster*, UCONN WOMEN'S BASKETBALL, <https://uconnhuskies.com/sports/womens-basketball/roster/paige-bueckers/13213> (last visited Feb. 4, 2024); 2023 *Gymnastics Roster*, AU GYMNASTICS, <https://auburntigers.com/sports/womens-gymnastics/roster/sunisa-lee/18139> (last visited Feb. 4, 2024).

effort in Iowa's Final Four game.¹⁴⁷ In just weeks, her endorsement value skyrocketed. As of February 2023, she did not appear on the NIL Top 100 list,¹⁴⁸ and was twenty-second among women with an estimated endorsement value of just under \$150k.¹⁴⁹ Three months later, her estimated NIL worth had grown by over 500%, putting her fourth among female athletes¹⁵⁰ and forty-fourth overall.¹⁵¹ Clark does not have a particularly expansive social media presence, as far as female athletes with major endorsements go,¹⁵² and posts almost exclusively basketball-related content. Although the trends and data are new, Clark may be an example of an exceptional female athlete who is able to excel at the NIL game primarily on the back of being a talented and engaging performer and keeping the focus on the court.

In addition, March Madness 2023 showed that the female athlete-turned-social media star can be as lucrative an avenue as the social media star who plays sports. Angel Reese, then a junior at LSU, had a moderate social media going into the tournament—she had about a half-million followers across all platforms, and was ranked twelfth in NIL value among female college athletes in February 2023.¹⁵³ She, like Clark, did not appear on the NIL Top 100 list at that point in time.¹⁵⁴ She was an on-court star as well, named a first-team All-American at the end of the 2022-2023 season, and she flourished during the March Madness tournament, scoring a double-double in every game and leading LSU to the national championship.¹⁵⁵ Her on-court charisma and personality, as well as her impressive game, made her a media focal point, and Reese proactively used that attention to grow her brand. Her social media following more than doubled between the beginning and the end of the tournament, and

¹⁴⁷ *Caitlin Clark 2022-23 Stats Per Game - NCAAW*, ESPN, https://www.espn.com/womens-college-basketball/player/gamelog/_id/4433403/type/womens-college-basketball/year/2023 (last visited Mar. 30, 2024).

¹⁴⁸ *On3 NIL 100*, ON3NIL (Feb. 21, 2023), <https://www.on3.com/nil/rankings/player/nil-100/> [<https://web.archive.org/web/20230221001404/https://www.on3.com/nil/rankings/player/nil-100/>].

¹⁴⁹ *On3 Women's NIL 100*, *supra* note 139.

¹⁵⁰ *On3 Women's NIL 100*, ON3NIL (May 18, 2023), <https://www.on3.com/nil/rankings/player/womens-nil-100/> [<https://web.archive.org/web/20230518074502/https://www.on3.com/nil/rankings/player/womens-nil-100/>].

¹⁵¹ *On3 NIL 100*, ON3NIL (May 29, 2023), <https://www.on3.com/nil/rankings/player/nil-100/> [<https://web.archive.org/web/20230529095826/https://www.on3.com/nil/rankings/player/nil-100/>].

¹⁵² While she still has approximately one million followers across platforms, she has one of the smallest social media footprints among NIL Top 100 female athletes. *On3 Women's NIL 100*, *supra* note 150.

¹⁵³ *On3 Women's NIL 100*, *supra* note 139.

¹⁵⁴ *On3 NIL 100*, *supra* note 148.

¹⁵⁵ *Angel Reese 2022-23 Stats Per Game - NCAAW*, ESPN, https://www.espn.com/womens-college-basketball/player/gamelog/_id/4433402/type/womens-college-basketball/year/2023 (last visited Mar. 30, 2024). A “double-double” is recorded when a player has ten points and ten rebounds or assists in the same game.

by the time LSU hoisted the championship trophy, she had signed seventeen endorsement deals, the most in college basketball.¹⁵⁶ She was, almost overnight, the second-highest ranked female college athlete in terms of endorsement value, behind schoolmate Dunne,¹⁵⁷ and tenth among all athletes.¹⁵⁸

Since last season's tournament, Reese has continued building her personal brand outside of basketball, pursuing modeling¹⁵⁹ and launching a women's empowerment foundation.¹⁶⁰ As of November 2023, she is reportedly worth nearly \$2 million in endorsement valuation, and is regularly in the top 10 in endorsements out of all college athletes.¹⁶¹ The fact that she first came to prominence as an athlete as opposed to a social media presence and was able to expand her impact due to the visibility that her basketball skills brought her suggests that athletic performance and branding success, for those who seek marketability, may go hand-in-hand.

Clearly, in these early years of NIL, there are differences in how endorsements work for female athletes in comparison with male athletes. It is easy to therefore chalk these differences up to a failure in equity; however, they also represent major steps forward. There are now dozens of Division I female athletes who are worth at least tens of thousands of dollars in endorsement money on an individual level. Beyond that, the ability of female athletes to market themselves has contributed to the overall growth of women's sports and an upward cycle of opportunity.

B. Expanding Audiences: Overall Growth of Women's Athletics

Although the benefits of NIL are mostly targeted at individuals, the first several years post-*Alston* have indicated that these benefits can be much more far-reaching than individual athletes' bank accounts. In women's sports specifically, the increased ability of individual athletes to market themselves, in addition to the previously discussed ability of already-famous athletes to compete in college without sacrificing income, seems to have contributed significantly to the growth of entire sports. In turn, this has contributed to a

¹⁵⁶ Pete Nakos, *LSU's 'unicorn' Angel Reese already evaluating slew of NIL opportunities*, ON3NIL (Apr. 3, 2023), <https://www.on3.com/nil/news/lsu-tigers-basketball-unicorn-angel-reese-already-evaluating-nil-opportunities/>.

¹⁵⁷ *On3 Women's NIL 100*, *supra* note 150.

¹⁵⁸ *On3 NIL 100*, *supra* note 151.

¹⁵⁹ Emma Hruby, *LSU Star Angel Reese Advocates for WNBA Expansion in Harper's Bazaar*, JUST WOMEN'S SPORTS (Aug. 17, 2023), <https://justwomenssports.com/reads/angel-reese-lsu-basketball-wnba-expansion/>.

¹⁶⁰ Charna Flam, *Angel Reese to Launch Foundation Dedicated to Female Empowerment*, VARIETY (July 13, 2023, 3:00 PM), <https://variety.com/2023/sports/athletes/angel-reese-announces-foundation-female-empowerment-1235667355/>.

¹⁶¹ *On3 NIL 100*, *supra* note 141.

self-perpetuating cycle where investment in women's athletics has increased, leading to further and further increased popularity.

In college, this is most starkly seen in basketball and gymnastics, the two sports with the most combined NIL worth among female athletes. Both sports have seen huge increases in viewership over the past two seasons, and, while that cannot be entirely attributed to NIL policy changes, it is certainly a contributing factor. As mentioned in Part III, in the fall of 2021, just weeks after the postponed Tokyo Olympics ended, four of the six gymnasts who had represented the USA began competing for their colleges. All-Around gold medalist Sunisa Lee came in with an endorsement profile in the seven figures;¹⁶² her Olympic teammates, Jade Carey, Jordan Chiles, and Grace McCallum, have regularly been in the top 20 in NIL worth among female college athletes.

Their presence has contributed to two consecutive years of record ratings and overall interest in college gymnastics. During the 2021-2022 season, Auburn, where Lee enrolled, sold out every regular season meet, and powerhouse schools like Florida, UCLA, and LSU also regularly played to a packed house.¹⁶³ This led to ESPN airing some meets on broadcast partner network ABC to capitalize on growing interest.¹⁶⁴ In April of 2022, ABC bumped the NCAA Championship meet to an earlier, less desirable timeslot to accommodate NHL programming; the Championships went on to draw 922,000 viewers, 136,000 more than the hockey game it had been demoted for, and 11% more than the previous year's Championships.¹⁶⁵ In 2023, the Championship meet drew an average of 1.02 million viewers to set yet another ratings record.¹⁶⁶

Women's college basketball has seen similar growth in the NIL era. While there were fewer previously established endorsement stars coming into 2021-2022 than there were in gymnastics, women's basketball still saw unprecedented numbers that some attribute to the visibility of players in the NIL

¹⁶² Tom Green, 'Let's Talk 7 Figures': How Olympic Gold Impacts Suni Lee's NIL Earnings Potential at Auburn, AL (July 29, 2021, 3:47 PM), <https://www.al.com/auburn/2021/07/lets-talk-7-figures-how-olympic-gold-impacts-suni-lees-nil-earnings-potential-at-auburn.html>.

¹⁶³ Auburn Gymnastics Season Tickets Sell Out, AU GYMNASTICS (Nov. 2, 2022, 12:26 PM), <https://auburntigers.com/news/2022/11/2/gymnastics-auburn-gymnastics-season-tickets-sell-out.aspx>.

¹⁶⁴ Louise Radnofsky, *It's a Golden Hour for College Gymnastics. The NCAA May Still Miss Out on the Money*, WALL ST. J. (Apr. 13, 2022, 8:18 AM), <https://www.wsj.com/articles/sunisa-lee-college-gymnastics-ncaa-11649824876>.

¹⁶⁵ Meredith Cash, *ABC Bumped the NCAA Women's Gymnastics Championship for Hockey, Then Got Burned When the Gymnasts Drew More Eyes*, BUS. INSIDER (Apr. 28, 2022, 6:24 AM), <https://www.insider.com/ncaa-womens-gymnastics-championship-outdrew-nhl-after-abc-bump-2022-4>.

¹⁶⁶ Amanda Christovich, *2023 NCAA Gymnastics Championship Sets Viewership Record*, FRONT OFF. SPORTS (Apr. 18, 2023, 4:31 PM), <https://frontofficesports.com/2023-ncaa-gymnastics-championship-sets-viewership-record/>.

space. North Carolina player Deja Kelly, herself a top ten NIL performer among college women, said of the phenomenon,

I think NIL has brought more coverage, more eyes to the game. . . People are tuning in to see the players in our game, because of who we are outside of our jerseys. I think because of NIL, you have women's college basketball players partnering with brands that help introduce them to an entire new audience.¹⁶⁷

In 2022, Women's March Madness experienced a 16% viewership increase over the previous season, averaging 634,000 per game and 4.85 million viewers in the championship game, at the time the highest rating for a women's final in nearly twenty years.¹⁶⁸

In 2023, however, the sport was taken to a new level during the tournament. Not only did stars like Reese and Clark become household names, overall viewership was beyond even the most optimistic of expectations. After an encouraging 11% increase in regular-season ratings, interest in the women's game exploded in March, with an overall 55% increase in year-over-year viewership.¹⁶⁹ The Final Four averaged 6.5 million viewers, more than the previous year's championship game, and the 2023 championship game between the Clark-led Iowa Hawkeyes and the Reese-led LSU Tigers averaged a staggering 9.9 million viewers—the most-viewed college basketball game ever, for men or women, on ESPN platforms.¹⁷⁰

Gymnastics and basketball are not the only women's sports seeing recent growth. Softball has become a significant television draw, with the College World Series championship game in 2023 peaking at 2.3 million viewers, and capping a three-year run where the women's championship drew over 1.5 million in television audience each year.¹⁷¹ Notably, in 2022, the women's softball College World Series championship had higher ratings than the men's

¹⁶⁷ Noah Hiles, *With NIL Deals Has Come a Massive Rise in Women's College Basketball Interest, and ACC's Best Are Loving It*, PITTSBURGH POST-GAZETTE (Oct. 29, 2023), <https://www.post-gazette.com/sports/Pitt/2023/10/28/pitt-panthers-basketball-marley-washenitz-blake-hinson/stories/202310250146>.

¹⁶⁸ Joe Reedy, *Women's March Madness Finds Foothold on National TV*, AP NEWS (Mar. 17, 2023, 9:17 PM), <https://apnews.com/article/march-madness-womens-basketball-abc-esp-86b4bd563159ade4e5ed39c31606f0f9>.

¹⁶⁹ Kimberly Elchlepp, *ESPN Platforms Set Unparalleled Records with NCAA Division I Women's Basketball*, ESPN (Apr. 5, 2023), <https://espnpressroom.com/us/press-releases/2023/04/espn-platforms-set-unparalleled-records-with-ncaa-division-i-womens-basketball/>.

¹⁷⁰ *Id.*

¹⁷¹ Nicole Auerbach & Richard Deitsch, *2023 WCWS Championship Series Averages 1.6 Million Viewers: What's Next for the Media Rights?*, THE ATHLETIC (June 9, 2023), <https://theathletic.com/4598276/2023/06/09/womens-college-world-series-2023-viewership/>.

baseball College World Series championship.¹⁷² NCAA women's volleyball has also been surging, with several meets over the past few seasons topping 1 million television viewers,¹⁷³ and a highly-publicized Nebraska meet selling over 80,000 tickets.¹⁷⁴

These trends show that, in addition to being federally mandated by Title IX, investing deliberately and equitably in women's sports is beneficial to schools as well as to their student-athletes. Although the NIL era raises new questions, there are a variety of ways that schools can promote women's athletics and ensure compliance with Title IX.

V. CARRYING TITLE IX FORWARD THROUGH THE NIL ERA

Despite all of the changes the post-*Alston* era has brought to college sports, the duties imparted to schools by Title IX are not, on the surface, fundamentally altered. Schools are still required to invest and offer opportunities equitably between men's athletics and women's athletics. What has changed with the onset of NIL is that schools have a different category of concerns to be cognizant of; schools cannot wash their hands of NIL as something entirely separate from their operations, especially as schools and athletic departments lean into NIL branding to help recruit and retain players.

While, technically, only the universities themselves are subject to Title IX requirements—meaning, brands doing business with students and other external sources of NIL money are not—any NIL opportunities directly or indirectly arranged by the schools, and policies governing such opportunities, would have to be in compliance. The NCAA itself flagged Title IX compliance as a potential issue when it released its NIL Question and Answer guidance in July 2021, and urged schools to be aware of gender equity requirements in the NIL space.¹⁷⁵ Moving forward, it would be beneficial for schools to act deliberately in how they interact with endorsement platforms and, in doing so, how they keep the interests of their female student athletes at the forefront. While Title IX compliance, as previously discussed, has been spottily enforced at best, now

¹⁷² *Id.*

¹⁷³ *Most-Watched NCAA Volleyball Match Ever: 2023 Continues to Smash Records*, JUST WOMEN'S SPORTS (Oct. 31, 2023), <https://justwomenssports.com/reads/ncaa-volleyball-all-time-viewership-record-wisconsin-minnesota-2023/>.

¹⁷⁴ Emma Hruby, *Nebraska Volleyball Shatters Record with Football Stadium Sellout*, JUST WOMEN'S SPORTS (Apr. 28, 2023), <https://justwomenssports.com/reads/nebraska-volleyball-football-stadium-sellout-ncaa-record/>.

¹⁷⁵ *Name, Image, and Likeness Policy: Question and Answer*, NCAA, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf (last visited Apr. 8, 2024).

that actual monetary opportunities are on the line for student athletes there is an additional level of pressure for schools to abide by federal regulations.

As with all programs subject to Title IX requirements, schools do not have to ensure that male and female student athletes earn the same amount in actual dollars in order to be compliant. Therefore, the fact that men in revenue-generating sports are overall earning more NIL money than women is not, in and of itself, a Title IX violation. However, to the extent that schools are encouraging brand partnerships, offering official co-sponsorship and logo use to certain endorsements, and offering instruction on how to maximize NIL potential, such involvement should be offered equitably under the three-prong test established by OCR.¹⁷⁶ For example, schools should be aware of whether they are offering school branding disproportionately to male athletes or men's teams. If a university is offering department-based or school-based workshops or classes around NIL, they need to ensure that male and female athletes have access to those classes proportional to their enrollment and interests.

Another potential source of equity concern comes from “booster collectives” that have rapidly gotten involved in the NIL space, funding NIL opportunities and facilitating endorsements. As discussed in Part III, individual boosters and booster groups have been investing money—both above and below board—in college sports for decades, and this has not changed with the onset of NIL. In a 2023 survey, more than 120 NIL collectives, or booster groups focused on NIL deals, were identified, including at least one group attached to every college in the five major football conferences. According to Opendorse, an NIL deal platform that processes endorsement money for over 100,000 student-athletes,¹⁷⁷ an average starting player at a major college football program takes in slightly over \$100,000 per year.¹⁷⁸ The company expects that it will process over \$80 million in compensation for student-athletes in 2023-2024 through these collectives, out of over \$100 million total NIL payments.¹⁷⁹

So far, the inequalities have been exacerbated by these booster collectives, in ways that can be quite problematic under a Title IX analysis. For example, Opendorse estimates that the average men's basketball player working with a collective at a top athletics school is paid \$37,000, and the average women's player \$9,000.¹⁸⁰ While money that does not come from schools or through schools is not necessarily subject to Title IX, in many cases collectives are

¹⁷⁶ See GERBER ET AL., *supra* note 25, at 73.

¹⁷⁷ *About Opendorse*, OPENDORSE, <https://biz.opendorse.com/about/> (last visited Apr. 8, 2024).

¹⁷⁸ David A. Fahrenthold & Billy Witz, *How Rich Donors and Loose Rules Are Transforming College Sports*, N.Y. TIMES (Oct. 22, 2023), <https://nytimes.com/2023/10/21/us/college-athletes-donor-collectives.html>.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

deliberately aligning themselves with the universities to further their goals. Collectives communicate regularly with their schools, take calls from school administration, and in some cases have even hired former school employees. In some states, laws that prohibited school involvement with third party collectives have been repealed.¹⁸¹

Therefore, schools who are working side-by-side with NIL booster collectives may face the same compliance questions as schools who accept donations from boosters. Schools, for example, could be exposing themselves to liability under Title IX by disproportionately working with booster collective that focus only on men's sports—not an unlikely issue to arise, given the outsized focus on football from booster groups over the years.¹⁸² Indeed, according to Opendorse's January 2023 report, only about a third of NIL collectives create endorsement opportunities for women's sports.¹⁸³ The Drake Group, a legislative lobbying organization focused on college athletics, wrote a letter in early 2023 to the Department of Education laying out concerns about Title IX compliance and requesting more concrete guidance from OCR, but as of yet such guidance has not been forthcoming.¹⁸⁴

There are several ways that schools can address this to create a more equitable space for their female athletes. Primarily, universities can ensure that their administration is properly trained and informed as to what their obligations are under Title IX and can give their Title IX coordinators the resources to stay up-to-date on this rapidly changing area of policy. Athletic coaches and department heads should also be properly educated on how to interact with booster collectives and other third-party funding platforms; at minimum, administrators should be aware that any money connected to the school must be viewed through a Title IX compliance lens.

Further, schools can create university-based education surrounding NIL marketing. Not only does that serve to educate student-athletes as to what opportunities they may have, schools can ensure that these courses or workshops are offered equitably between their male and female student-

¹⁸¹ Ross Dellenger, *Big Money Donors Have Stepped Out of the Shadows to Create 'Chaotic' NIL Market*, SPORTS ILLUSTRATED (May 2, 2022), <https://www.si.com/college/2022/05/02/nil-name-image-likeness-experts-divided-over-boosters-laws-recruiting>.

¹⁸² Jonathan L. Israel, *Giving Title IX Its Props in the NIL Era of College Sports*, FOLEY & LARDNER LLP (Jan. 27, 2023), <https://www.foley.com/en/insights/publications/2023/01/giving-title-ix-props-nil-era-college-sports>.

¹⁸³ *Cashing In: Women's Sports and NIL Success*, OPENDORSE, <https://biz.opendorse.com/wp-content/uploads/2023/01/NIL-and-Women-in-Sports.pdf> (last visited Apr. 2, 2024).

¹⁸⁴ Andrew Zimbalist, *Request for Issuance of Title IX Athletics Guidance Applying Existing Obligations in the New Commercialized Arena of Intercollegiate Athletics Including Reiteration of Guidance Relating to Promotion, Publicity, Financial Aid and Recruiting Inequities*, THE DRAKE GROUP (Jan. 10, 2023), <https://www.thedrakegroup.org/wp-content/uploads/2023/01/FINAL-Drake-Letter-to-OCR-1-10-23-1.pdf>.

athletes. Several schools have already dived head-first into NIL education—likely the most notable examples so far are LSU and the University of Nebraska. LSU not only has built a small staff entirely dedicated to NIL education but is also particularly successful at marketing its female athletes.¹⁸⁵ Their NIL education department includes lessons on networking, brand marketing, and mandatory financial literacy training.¹⁸⁶ Similarly, Nebraska enrolls all of their student-athletes in an expanded life skills program that trains them in networking, financial literacy, and compliance.¹⁸⁷ This training can be useful for more students than it may originally be assumed—while NIL superstars are few and far between, nearly one-fifth of all Division 1 athletes participated in some NIL activity in 2022, with some schools showing up to 40% figures.¹⁸⁸ The average NIL deal is much smaller in dollar value than the six-figure deals an athlete with an Angel Reese profile might command, but can still make a significant difference for a student.¹⁸⁹

Finally, schools who are committed to equity in the NIL sphere should be investing in female-led collectives and initiatives. For example, Olivia Dunne recently announced the creation of the Livvy Fund, an NIL-focused project with the goal of helping female student-athletes capitalize on their share of the endorsement market.¹⁹⁰ Similarly, former University of Florida gymnast Leah Clapper has recently launched NIL Island, a startup focused on helping student-athletes grow and market their personal brands.¹⁹¹ Partnering with this type of project and making a visible effort to counteract the decades-long head start men's sports have had with regards to fundraising is one way that schools can work towards fulfilling their Title IX obligations in the NIL space.

The first few years of the NIL era have shown that it can be a powerful tool for talented female athletes to gain financial independence and bring attention

¹⁸⁵ Apstein, *supra* note 133.

¹⁸⁶ *Id.*

¹⁸⁷ Lila Bromberg, *In the NIL Arms Race, Some Schools Are Going the Extra Mile to Help Their Athletes*, SPORTS ILLUSTRATED (July 1, 2021), <https://www.si.com/college/2021/07/01/name-image-likeness-programs-schools-ncaa>.

¹⁸⁸ Bill Carter, *Seven Data Points That Will Tell the Story of NIL in 2023*, SPORTS BUS. J. (Jan. 17, 2023), <https://www.sportsbusinessjournal.com/SB-Blogs/OpEds/2023/01/17-Carter.aspx>.

¹⁸⁹ *Id.*, indicating that the mean value of an NIL deal through Opendorse was approximately \$1,300, although some surveys showed the median number was as low as \$65 as the Opendorse number was inflated by “very large deals by a handful of student athletes.”

¹⁹⁰ Bruce Haring, *LSU Gymnast and Influencer Olivia Dunne Sets Fund to Promote Women College Athletes*, DEADLINE (July 8, 2023, 2:32 PM), <https://deadline.com/2023/07/lsu-gymnast-and-influencer-olivia-dunne-sets-fund-to-promote-lsu-women-college-athletes-1235432481/>.

¹⁹¹ Kristi Dosh, *Kristi Dosh Joins Forces with Leah Clapper's NIL Island*, BUS. OF COLL. SPORTS (May 9, 2023), <https://businessofcollegesports.com/name-image-likeness/kristi-dosh-joins-forces-with-leah-clappers-nil-island/>.

to women's sports. Schools have the ability and responsibility to buck the decades-long trend of failure to comply with Title IX to ensure that their female student-athletes have the same opportunities to flourish financially as their male counterparts under this new policy regime.

VI. CONCLUSION

The history of women's sports in the university context is fraught with underestimation, undervaluation, and inequality. For over a century, female athletes have had to fight for resources, opportunities to compete, and recognition. Even in the 50 years since the passage of Title IX, female athletes have continued to deal with obstacles to participation beyond what their male counterparts face.

The NIL era of college athletics has offered a wide range of opportunities for programs and participants alike, both male and female. The history of underinvestment in women's sports, enabled by shoddy enforcement of Title IX, creates a unique category of opportunity. In order to overcome this history, colleges and universities should be deliberate about their investment in helping female student-athletes maximize their potential in the endorsement sphere. While early observations of the mechanisms of NIL have indicated that female athletes face some distinctive impediments towards monetizing their talents, trends over the last several years show that the market is amenable to handsomely compensating female athletes and that opportunities for women in sports are on the rise. The financial freedom of female student-athletes and the rising cultural interest in women's athletics seem to be working hand-in-hand to create an atmosphere ripe for further growth.

The first 50 years of Title IX were marked in equal part by great progress and unmet needs; the next 50, moving through this new era of college sport, can be characterized by even bigger strides towards the opportunity and recognition that female athletes have earned if compliance is considered a top priority. Colleges and universities have an obligation under the law to invest in women, and it would be beneficial to athletes and programs alike that they would step up in fulfilling those obligations.