

The Current Failures of Title IX in Collegiate Athletics and the Modern, NIL Era
Solutions

by

Alyssa Forbes

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Thesis Committee:

Dr. Ron Kates, Thesis Director

Dr. Philip Phillips, Thesis Committee Chair

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APPROVED:

Dr, Ron Kates, Thesis Director
Professor, College of Liberal Arts, Department of English

Dr. Philip Phillips, Thesis Committee Chair
Associate Dean, Honors College

For my dad, who instilled in me a love of sports

and

my mom, who inspired me to work hard and dream big.

Abstract

After the proliferation of NIL rights in NCAA sports, the landscape and market of college sports changed drastically. Women's sports have been on the rise in recent years, which sets the stage for change to occur in Title IX enforcement and in how the NCAA and its member institutions value women's sports. However, because of the rise in popularity of women's sports, the gender disparities created by NIL's presence in NCAA sports have been highlighted. Although Title IX drastically improved the state of women's sports in America, the Three-Part Test used to assess violations prevents it from progressing women's sports. Congress, the OCR, and the NCAA must work together to fix the Title IX complications created by student-athletes monetization of their NILs.

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Introduction

Title IX is one of the most important pieces of federal women's rights legislation in the history of the United States. Title IX requires institutions across the country to provide equal educational opportunities for women. Sports is one of the many aspects of the American education system that Title IX has deeply impacted, and therefore, has been incredibly important in the evolution of women's sports. However, about 80-90 percent of universities still do not comply with Title IX as it applies to athletics ("What Is Title IX?"). The failures of Title IX are important now more than ever due to the unprecedented growth in popularity of women's sports over the past few years.

Women's sports have grown immensely thanks to female athletes' social media platforms, the Caitlin Clark Effect, and new name, image, and likeness (NIL) rules for NCAA athletes. The most prominent display of public support for female athletes came during the 2024 women's March Madness tournament, which broke viewership and attendance records. Women's sports have proved their abilities to garner massive audiences, earning them increased investment over the past two years. But with more attention on women's sports, the disparities between men's and women's intercollegiate sports have become more apparent. Universities that do not comply with Title IX are harming female athletes more than ever now that women's professional leagues are amassing increasing amounts of investments. Furthermore, NIL presents an entirely new challenge to gender equity in intercollegiate sports because male student-athletes receive significantly more NIL compensation than female student-athletes.

With the proliferation of NIL rights for NCAA athletes and the increase in popularity of women's sports, addressing the failures of Title IX and applying the law to

NIL activities has become incredibly important. The Office of Civil Rights (OCR) should capitalize on this popularity by creating more substantial Title IX enforcement procedures while female athletes still receive this immense public support. Also, the current NIL landscape with layers of contradicting rules remains too complex to maintain. Congress and the OCR must provide uniform guidelines and procedures across the country if gender equity is ever to be fully realized in this new era of NCAA sports. The following thesis examines how and why Title IX fails to achieve gender equity today, the growth of women's sports as the background for recommendations, and how NIL currently operates in the NCAA. This study concludes by offering recommendations for Title IX and NIL regulations to achieve gender equity within intercollegiate sports.

Chapter 1: Title IX

Introduction

“Other than women’s suffrage, possibly no other piece of legislation has had a greater effect on women’s lives,” write Nancy Hogshead-Makar and Andrew Zimbalist in their book *Equal Play Title IX and Social Change* (50). Title IX has transformed the education system for women by providing them with more opportunities to pursue higher education and protecting them from sexual harassment while doing so. Title IX is a broad piece of legislation, but many Americans know it for its role in advancing women’s athletic opportunities. Since 1972, the percentage of female athletes competing in high school sports rose from 7% to 43% in 2019, and at the collegiate level, the percentage rose from 15% to 44% in 2021. This accounts for an increase of more than three million female athletes combined playing on varsity teams (“50 Years of Title IX: We’re Not Done Yet” 7). Title IX has immensely improved the status of women’s sports, but it did not occur overnight; female athletes, administrators, lawyers, and legislators had to fight for change at every step of the process. Policy interpretations, court precedents, and societal attitudes have contributed to the transformation of Title IX in the past fifty-two years.

But despite Title IX’s impact on women’s sports, the law’s flawed enforcement prevents women’s collegiate sports from obtaining parity with men’s collegiate sports. As of 2020-2021, around 87% of universities fail to offer women athletic opportunities proportional to those of men. Moreover, men received \$251 million more scholarship money than women at the Division I level (Rivera 414). Women’s athletics remain undervalued and oppressed in the current NCAA system because of Title IX’s ineffective

enforcement. This section will discuss how Title IX came to be enforced as it is today and what flaws continue to complicate the struggle for equity in collegiate athletics.

Before Title IX

In 1943, several baseball executives created the All-American Girls Professional Baseball League (AAGBPL) to keep the sport of baseball alive while MLB players fought in World War II. While promoting female sports was a progressive idea at the time, promoters were still concerned that their players would be perceived as overly masculine or homosexual, especially Philip Wrigley, owner of the Chicago Cubs at the time and the man who spearheaded this league. One of Wrigley's associates noted that he expected his players to uphold "the highest ideals of womanhood" (Fincher qtd. in Cohen). He required that AAGBPL players be given beauty tutorials, attend charm classes, and wear dresses to play baseball (Cohen).

For most of the 20th century, that was the reality for women who wanted to play sports. The stigmas surrounding women's sports meant that female athletes were meticulously feminized and monitored to conform to rigid gender expectations while competing in sports. These expectations contributed to women and girls' severe lack of athletic opportunities.

Fear of the 'masculine' female athlete was prolific and long-lasting. According to Susan Cahn in her book *Coming on Strong: Gender and Sexuality in Twentieth Century Sports*, "female athletes and physical educators operated under a cloud of sexual suspicion" (11). People were skeptical because they believed women who played sports would develop masculine traits due to their participation in the traditionally masculine realm of competition. These fears included lesbianism, an inability to attract a husband,

and even a loss of the capacity to reproduce (Cahn 9-11). This led to the proliferation of policies and endorsements that sought to promote heterosexuality and femininity in women's sports. For example, in 1946, the Ohio P.E. Association's brochure outwardly stated, "The mannish concept of the physical educator is no longer acceptable" (Cahn 12). As fears surrounding gender expectations and women's sports persisted, a 1973 issue of *Sports Illustrated* observed that "prudery is a major factor contributing to the present low estate of women's sports" (Gilbert and Williamson 42). The article cites examples of this phenomenon: in one instance, the director of physical education for the state of Georgia at the time said, "I don't think the phys-ed program on any level should be directed toward making an athlete of a girl" (Short qt. in Gilbert and Williamson 41). This was a man responsible for creating the physical education curriculum for an entire state, who had the power to prevent women from playing sports on an institutional level. The widely held belief that physical educators needed to protect women from experiencing competition impacted the trajectory of women's sports throughout the 20th century.

Another significant factor hindering women's sports was the idea of female fragility. At the start of the 20th century, women's sports were rooted in the need for physical activity rather than competition. During the twenties, women were thought too fragile for serious competition. Most public schools used a non-competition philosophy for girls' physical education, believing a competitive environment was too stressful for women (Cain 342). According to Cahn, "moderation" was the word that dictated all female physical education (10). Women were expected to be physically active, but not to the same extent as men, and not in a competitive manner. One way in which physical educators enforced moderation was by providing different rules for men's and women's

basketball. When basketball was developed, it looked much like the modern version: a five-on-five game in which every player ran the length of the court. But in 1901, women's rules were created for basketball. The rules created a six-on-six match in which the court was divided into three sections so that girls were not required to run the length of the court (Cain 341). The three-section division was changed to two in 1938, and those rules were used for high school women's basketball until 1971, when women were finally permitted to run the entire length of the court (Cain 342, Zazzara). Basketball is just one example of the limitations placed on female athletes before the proliferation of Title IX and the subsequent acceptance of female athleticism.

Women's distance running offers another example of how the concept of female fragility prevented women from participating in sports. Until 1965, the Amateur Athletic Union (AAU), one of the most prominent amateur athletic organizations in the United States, did not allow women to run distances over 800 meters. In 1965, they moved the distance up to 1500 meters and finally allowed women to run three-kilometer races in 1970 (Schultz "Breaking into the Marathon ..." 5). When Kathrine Switzer signed up as K.V. Switzer to run the Boston Marathon in 1967, race organizer Jock Semple attempted to physically pull her off the course. Switzer finished the race, but due to her completion of a prohibited distance for women, Switzer's AAU membership was revoked (Switzer).

Despite these negative perceptions, women's sports had gained enough traction to form the Commission on Intercollegiate Athletics for Women (CIAW) in 1967 (Suggs 16). The sports were limited to golf, gymnastics, track and field, swimming, badminton, and volleyball, but they held championship games and provided a space for intercollegiate competition for women. This organization quickly transformed into the

Association for Intercollegiate Athletics for Women (AIAW) in 1971, which felt the need to protect women's sports from the influence of the NCAA, which only oversaw men's sports at the time (Suggs 16). To the detriment of its participants, the AIAW banned scholarships for women's sports and severely limited recruiting; however, they did fight for the creation of separate women's teams and more funding for women's sports (Suggs 17-19). They were generally unsuccessful in providing adequate funding and opportunities for women's sports at the collegiate level because they had no legal recourse for obligating institutions to provide these resources. Their means were limited due to their lack of resources; in 1973, three years after their founding, the AIAW had an operating budget of \$24,000 per year and employed one part-time executive and a single full-time assistant. Meanwhile, the NCAA had an operating budget of \$1.5 million and forty-two full-time employees (Gilbert and Williamson 37).

A *Sports Illustrated* article from May 1973 provides a precise picture of the state of women's sports before Title IX took effect. Starting at the high school and grade school levels, there were many tax-based school systems in which no funding existed for girls' interscholastic sports. In fact, until Title IX was passed, two states, Utah and Nevada, did not provide any public funding for girls' sports (Gilbert and Williamson 37). At the collegiate level, women were virtually excluded from scholarships due to the AIAW's rule that women on athletic scholarships could not participate in championship competitions. In contrast, about 50,000 men a year earned athletics scholarships in 1973. Women were estimated to have received less than fifty athletic scholarships that year (Gilbert and Williamson 38). Furthermore, the athletics budgets for men and women were extremely lopsided; in 1973, the University of Washington's women's athletics budget

comprised nine-tenths of a percent of the school's \$2 million athletics budget (Gilbert and Williamson 37). These budget inequities not only discouraged women from participating in sports but also undermined their experiences if they did choose to participate.

Gender discrimination affected all aspects of sport, not just funding: women's teams were not allowed to use the men's facilities and were not afforded comparable competitive opportunities. One example comes from Anne Gordon Bain, a former female basketball player at Radcliffe College who graduated in the early 70s. In an interview, Bain recalled an incident at one of her games in which the men's basketball team ended the game prematurely because it had run into their practice time (Aggarwal-Schifellite). This was a frequent occurrence for women's teams, who had to vie for gym time with men's teams. The *Sports Illustrated* article mentioned earlier describes the same situation at State University College of New York at Cortland (39-40). These examples display the degradation and indignity that female athletes endured from the institutions that were supposed to support them.

In the fifty years leading up to Title IX, the negative stereotypes surrounding women's sports hampered both the number and quality of opportunities women had to participate in sports. The masculinization of female athletes and the contradictory idea that women were too fragile for competition created a negative image of women's sports. As a result, institutions often refused to offer athletics opportunities to women, and if they did, they refused to adequately support these programs.

Applying Title IX to Sports

When Title IX was passed in 1972, its application to sports was unknown because it failed to mention them. Worried about their lack of compliance, the NCAA began

lobbying against Title IX's application to women's sports, leading to the proposal of the Tower Amendment, which would have exempted sports from Title IX (Hogshead-Makar and Zimbalist 50). Section (6) of the Tower Bill, which would have amended Title IX of the *Educational Amendments of 1972*, reads, "This section shall not apply to an intercollegiate athletics activity insofar as such activity provides to the institution gross receipts or donations required by such institution to support that activity" (United States Senate 59). This bill would have essentially removed all sports from the scope of Title IX because any sport that produced any revenue or garnered a single donation would have been exempt. This bill was rejected, leaving the question of Title IX's application to sports unanswered.

The Javits Amendment answered this question... sort of. The Javits amendment was passed in 1974 and included a provision for sports in section 844, which states that Title IX will encompass intercollegiate athletics with "reasonable provisions considering the nature of particular sports" (United States Congress 64). The ambiguity of this wording left schools and the NCAA with many questions about compliance.

By the beginning of the 1980s, the percentage of female high school athletes had increased by 600%, and the percentage of collegiate female athletes had increased by 100% from pre-Title IX days (Hogshead-Makar and Zimbalist 99). The trend continued as Title IX aged, and by 2017, three million girls participated in high school sports, ten times the amount who participated in 1971, when participation was only about 300,000 girls (Schultz 30). This phenomenon did not occur because Title IX simply existed. Rather, through the effort of thousands of people, including legislators, litigators, female athletes, and coaches, Title IX was able to advance women's sports.

Immediately following the passage of the Javits Amendment, there was very little growth in women's sports. In 1975 President Ford signed the Title IX athletics regulations created by the Department of Health Education and Welfare (HEW), the government body enforcing Title IX at the time, which outlined how the Javits Amendment would be implemented (Mitchell and Ennis XXX). These regulations created a deadline for compliance, which accelerated the process of encompassing athletics within the scope of Title IX. They required elementary schools to create equal athletics opportunities for both sexes within a year and for secondary or postsecondary schools to do so within three years (United States HEW 66).

The NCAA, who lobbied for the passage of the Tower Amendment, did not readily accept defeat. They resisted these regulations by filing a legal complaint against the HEW in 1978, asking the court to invalidate the application of Title IX to intercollegiate athletics. The NCAA outlined their complaint into six separate counts, essentially stating that the application of Title IX to sports went beyond the scope of authority of the HEW and that this action was injurious to the NCAA and its member schools (United States, Federal District Court, *NCAA v. Califano* 84-85). The district court found that the NCAA did not have standing, meaning that the NCAA could not demonstrate that an injury had occurred and, therefore, the court could not decide this case, and the appellate court affirmed (United States 10th Circuit Court of Appeals 1980). This case was integral in the defense of Title IX regulations for athletics because it declared that requiring equity among men's and women's sports did not constitute legal harm done to the NCAA or any of its member institutions.

By mid-1978, the HEW was so overwhelmed by discrimination complaints that it created a policy interpretation to clarify what constituted a violation of Title IX in athletics. The Policy Interpretation of Title IX and Intercollegiate Athletics of 1979 outlines three sections of compliance: scholarships, athletics benefits, and equal accommodation of students' interests and abilities (United States HEW 69). Each section outlines how schools can achieve compliance in these areas. The interpretation states that institutions that provide scholarships must provide them to the members of each sex "in proportion to the number of students of each sex participating in intercollegiate athletics" (United States HEW 71). This section does not call for equal scholarship money nor equal available scholarships for men and women; only that scholarship money be proportional to the participation rate of each sex. In the next section, the policy interpretation establishes criteria for athletics benefits by examining the following factors:

- (2) Provision and maintenance of equipment and supplies;
- (3) Scheduling of games and practice times;
- (4) Travel and per diem expenses;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training services and facilities;
- (9) Provision of housing and dining services and facilities; and
- (10) Publicity (United States HEW 73).

The interpretation states that these factors need not be identical for the men's and women's teams to achieve compliance so long as they are "equal in effect" so that "the overall effects of any differences [are] negligible" (United States HEW 73). The final prong, accommodating the interests of students, is assessed by examining:

- a. The determination of athletics interests and abilities of students;

- b. The selection of sports offered; and
- c. The levels of competition available, including the opportunity for team competition (United States HEW 79).

This means schools must first determine the level of interest in women's sports and then offer sports according to said interest. The Policy Interpretation also requires that schools account for the fact that members of one sex have been historically disadvantaged and consider the ability of the excluded sex to maintain a team (United States HEW 80). To enforce all of these requirements, the interpretation outlines two different roads to inquiry:

- Compliance Reviews. Periodically, the Department must select a number of recipients (in this case, colleges and universities which operate intercollegiate athletic programs) and conduct investigations to determine whether recipients are complying with Title IX (45 CFR 80.7(a))
- Complaints. The Department must investigate all valid (written and timely) complaints alleging discrimination on the basis of sex in a recipient's programs. (45 CFR 80.7(b)) (United States HEW 82).

After these reviews, the HEW and the institution have ninety days to create a plan to implement compliance. During this process, the two will negotiate a timeline for these changes to occur, and the institution must describe how its resources will be used to affect change. Then, the HEW must periodically conduct investigations to ensure the institution adheres to the plan. This interpretation finally gave schools adequate Title IX guidelines for sports, but the question of their effectiveness remained unanswered.

Although the 1979 Policy Interpretation was thorough, universities needed clarification about how they could meet these standards. So, in 1996 the Office of Civil Rights (OCR), which replaced the HEW in 1980, released another clarification of the Intercollegiate Athletics Policy Guideline, explicitly outlining the Three-Part Test, which

is still used today to measure Title IX compliance within the three categories outlined in the 1979 Policy Interpretation (Hogshead-Makar and Zimbalist 134, Mitchell and Ennis XXX). The Three-Part Test provides three different avenues for compliance, allowing schools more control in addressing Title IX compliance because they are only required to prove one of the three prongs (United States OCR 162). 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 (United States OCR 152-153).

Two years after the Policy Clarification was released, the OCR issued a response to a letter from Bowling Green University, which requested guidance in complying with Title IX, specifically related to the proportions of athletic financial aid. The 1979 policy interpretation states that if schools award athletic scholarships, they must be granted to members of each sex “in proportion to” the number of student-athletes of each sex, not requiring exact proportionality. In the Bowling Green “Dear Colleague Letter,” which still governs Title IX compliance, the OCR stated that a disparity of one percent or less will be presumed “reasonable and based on legitimate and nondiscriminatory factors.” However, any disparity in these scholarship budgets over one percent will be presumed to violate the “substantially proportionate” requirement (United States OCR 167). This requirement sets strict and clear guidelines for schools to follow when devoting scholarship money to their student-athletes. But as of 2021, men still received over 3,000

more scholarships than women, accounting for 51.2% of scholarships (Gough). This is significant progress from 1973 when women accounted for about 0.1% of scholarships (Gilbert and Williams 38).

Applying Title IX to sports did not automatically resolve the disparities among men's and women's sports. The law required several layers of policy guidelines, interpretations, and further clarifications. These layers helped Title IX affect change regarding athletics, but it would not have been possible without courts creating legal precedents about how these policy guidelines operate.

Legal History

Over the following two decades, equity in women's sports and the legal authority of Title IX fluctuated. Title IX litigation was necessary to clarify how Title IX could actually affect change in women's education and sports. Much of the early Title IX litigation did not concern sports because women still had to fight for educational reform in court to enact any change in their institutions. However, this educational litigation still impacted how Title IX applied to athletics. Without this litigation, Title IX would not have the same effect that it does today.

In 1979, the Supreme Court handed down a landmark decision in *Cannon v. University of Chicago*, declaring that Title IX entitles individuals to seek a remedy for discrimination in court. In this case, the University of Chicago argued that Geraldine Cannon, who sued the university for gender discrimination in medical school admissions, did not have standing because Title IX did not expressly state that individuals could sue institutions on grounds of gender discrimination (United States, Supreme Court, *Cannon*

v. University of Chicago 92-97). The court declared that although Congress did not expressly provide the right for people to sue institutions for gender discrimination in Title IX, the right to do so is implied. Although the facts of this case did not concern athletics, it permitted female athletes to take private action. Without it, every Title IX case would have to go through the OCR (Hogshead-Makar and Zimbalist 54). This decision was monumental because the OCR has historically been ineffective in addressing Title IX complaints, which will be discussed in depth later in this chapter.

If the seventies were a decade of growth in women's sports, the eighties were a period of stagnation. The Reagan administration's goal of limited government negatively impacted Title IX because it was enforced by an executive agency (Hogshead-Makar and Zimbalist 99). In 1984, the Supreme Court issued one of its most damaging decisions in the history of Title IX. In *Grove City v. Bell*, the court concluded that only specific programs receiving government funding were subject to Title IX regulations; this virtually excluded all athletic departments from the scope of Title IX because these programs did not receive direct government financial assistance (Hogshead-Makar and Zimbalist 101). In this case, Grove City College, which received no financial aid from the government but had students who did, refused to sign a Title IX assurance of compliance. The student body sued the school with assistance from the Department of Education. This case paralyzed Title IX; courts across the country dropped all Title IX complaints, and the growth of women's sports came to a halt (Hogshead-Makar and Zimbalist 101). From 1971-1981, the percentage of women's participation in NCAA Division I athletics rose from 15% to 30%, but in the following decade, from 1981-1991, the percentage rose only 1% to 31% overall (Zimbalist 302). This stagnation was a consequence of Title IX no

longer applying to athletic departments. However, Congress quickly mobilized, and by 1988, they had passed the Civil Rights Restoration Act over Reagan's presidential veto (Hogshead-Makar and Zimbalist 102). Some language in the law confirms that the court's decision in *Grove City* necessitated Congressional action; it reads, "certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of Title IX." The Civil Rights Restoration Act then proceeds to clarify that a "program or activity" refers to "any other activity which is established by [a college, university, or other postsecondary institution]," effectively applying Title IX to athletics departments again (United States Congress 117).

The re-establishment of Title IX's application to sports was crucial to Title IX litigation in the following years, during which several significant precedents were set. In *Franklin v. Gwinnett County Public Schools*, the Supreme Court unanimously permitted Title IX sex-based discrimination victims to seek monetary relief. In this case, a female high school student sued her school, claiming that she had been sexually harassed by one of her teachers. Before *Franklin*, those who filed Title IX claims could only receive injunctive relief, meaning that the court could force the institution to amend the situation by prohibiting or requiring a certain action, but plaintiffs could not receive monetary relief. This is important because female athletes could now sue their schools for damages or reimbursement for expenses incurred from their athletic participation. This case also required that students prove that their school intentionally violated Title IX, a requirement that had not been previously established (Hogshead-Makar and Zimbalist 133).

Finally, *Amy Cohen v. Brown University* demonstrated the legal authority of Title IX as it applies to athletics and remains good precedent today. It was the first case involving the 1996 Policy Clarification's Three-Part Test (Mitchell and Ennis 28). In 1991, Brown University revoked the women's gymnastics, women's volleyball, men's water polo, and men's golf teams of their varsity statuses (United States 1st Circuit Court of Appeals, *Amy Cohen v. Brown University* 144). Brown University believed that because they cut an equal number of teams per gender, they would be compliant with Title IX; however, they effectively cut \$62,028 from the women's athletic budget and \$15,295 from the men's athletic budget (Zimbalist 141). After the trial, a judge ordered Brown to upgrade four women's teams to varsity status (Zimbalist 142). Upon appeal, Brown argued that the OCR's interpretation of the law rendered it an affirmative action statute because it gave preferential treatment to women by requiring institutions to provide women with more athletic opportunities than their abilities and interests warranted (United States 1st Circuit Court of Appeals *Amy Cohen v. Brown University* 144). The court found this to be a misinterpretation of the Three-Part Test, upholding the test and maintaining Title IX's effectiveness. In doing so, the 1st Circuit Court wrote, "Had Congress intended to entrench, rather than change, the status quo—with its historical emphasis on men's participation opportunities to the detriment of women's opportunities—it need not have gone to all the trouble of enacting Title IX" (United States 1st Circuit Court of Appeals *Amy Cohen v. Brown University* 151). Upholding the Three-Part Test in court showed high schools and universities nationwide that the government was serious about giving women equal opportunities in sports. Despite improvements, female athletes' success in court did not establish equity in athletic

departments across the country. While female athletes have continued to win in the courtroom—about 95% of the time, according to the Women’s Sports Foundation—they still lack equal opportunities in athletics (“What is Title IX?”).

Title IX Operating Today

The Office of Civil Rights

Despite significant progress in women’s sports since the adoption of Title IX, female student-athletes still face inequities. Most estimates find that 80-90% of educational institutions are not compliant with Title IX as it applies to athletics (“What Is Title IX?”). According to the United States Government Accountability Office (GOA), as of 2022, the rate of female participation in collegiate athletics remains fourteen percentage points below female enrollment (10). Women’s enrollment rates are higher than men’s, but men have higher participation rates in athletics (United States GOA 29). As of 2021, women comprised 44% of NCAA athletes and 58% of undergraduate enrollment in the United States (“NCAA Demographics Database” “Undergraduate Enrollment”). While exact proportionality is not a requirement of Title IX, these numbers indicate that women and men still do not have equitable athletic opportunities at the collegiate level and that women remain discriminated against.

A major cause for this disparity is the lack of Title IX enforcement in athletics. The OCR, which is responsible for enforcing Title IX by conducting compliance reviews and addressing complaints, does not perform either task efficiently. This is partly because the OCR is responsible for fifty-five statutes regarding civil rights (Adler). A study conducted by the GOA from 2008 to 2022 titled “College Athletics: Education Should Improve its Title IX Enforcement Efforts” found that 96% of collegiate Title IX athletics

cases were opened due to a complaint rather than a compliance review conducted by the OCR (20). The GOA found that the OCR conducts about twenty investigations a year across all areas of civil rights. Several officials noted that without a complaint, it is unlikely that the OCR will conduct a Title IX investigation at all (22-23). The study found that over the course of fourteen years, the OCR only conducted nineteen athletics compliance reviews (GOA 22).

Furthermore, the GOA found that when the OCR chooses a university to review, “they make limited use of [Equity in Athletics Disclosure Act] data” (24). The Equity in Athletics Disclosure Act (EADA) requires certain universities to provide financial and statistical information about their men’s and women’s athletics teams. This indicates that the OCR does not adequately utilize its statistical resources (United States, GOA 9). This means that even when they do perform a compliance review on athletics, the OCR could be ignoring schools that need to be reviewed. The OCR’s activities demonstrate that they do not proactively seek Title IX violations because they conduct so few investigations, and even when they do, they fail to use their resources to their full potential.

When the OCR receives complaints, solutions are slow-moving and rarely re-examined, if they are implemented at all. During the GOA’s fourteen-year Title IX investigation previously mentioned, 61% of Title IX collegiate athletics complaints were dismissed on the grounds of not containing enough detail (21). After accepting a complaint, the OCR must complete a lengthy review process. The officials interviewed for the GOA study admitted that assessing whether schools comply with the Three-Part Test is “time-consuming and difficult,” sometimes requiring multiple visits to the institution (22). This indicates that the inefficiency of the OCR could be caused by the

fact that the office still uses a forty-five-year-old policy (the Three-Part Test) that allows schools to circumvent Title IX.

Another detriment to Title IX efficacy is the OCR's lengthy response times. When the OCR finds compliance discrepancies, it must negotiate a formal agreement with the institution in question. If the school fails to execute this agreement, the OCR will revoke federal funds—the OCR's only Title IX enforcement power. As of 2022, fifty years after Title IX was adopted, the OCR has never invoked this power, indicating its reluctance to punish schools that do not comply (Axton). When a university creates a compliance resolution with the OCR, it must submit reports to monitor their progress. The GOA study found that, on average, it took the OCR six months to respond to these reports, but several responses took one to five years (25-26). These delayed response times prevent schools from addressing Title IX concerns because schools are hesitant to improve or add women's athletics programs until they can guarantee the OCR will approve those solutions (GOA 26). This means that the OCR's delayed responses also delay improvements to facilities, coaches, and benefits for female athletes. Expounding the problem of failed communication is the fact that the OCR does not require staff to record due dates for these responses, creating confusion within their office regarding the management of caseloads (GOA 28). Overall, the OCR's prolonged investigation and response times impede the progress of female athletes because they do not efficiently address inequities in collegiate sports.

Female athletes quickly recognized the OCR's ineffectiveness in resolving Title IX violations. In their book *Equal Play Title IX and Social Change*, Nancy Hogshhead-Makar and Mark Zimbalist write that, by the 1990s, athletes had realized that if they filed

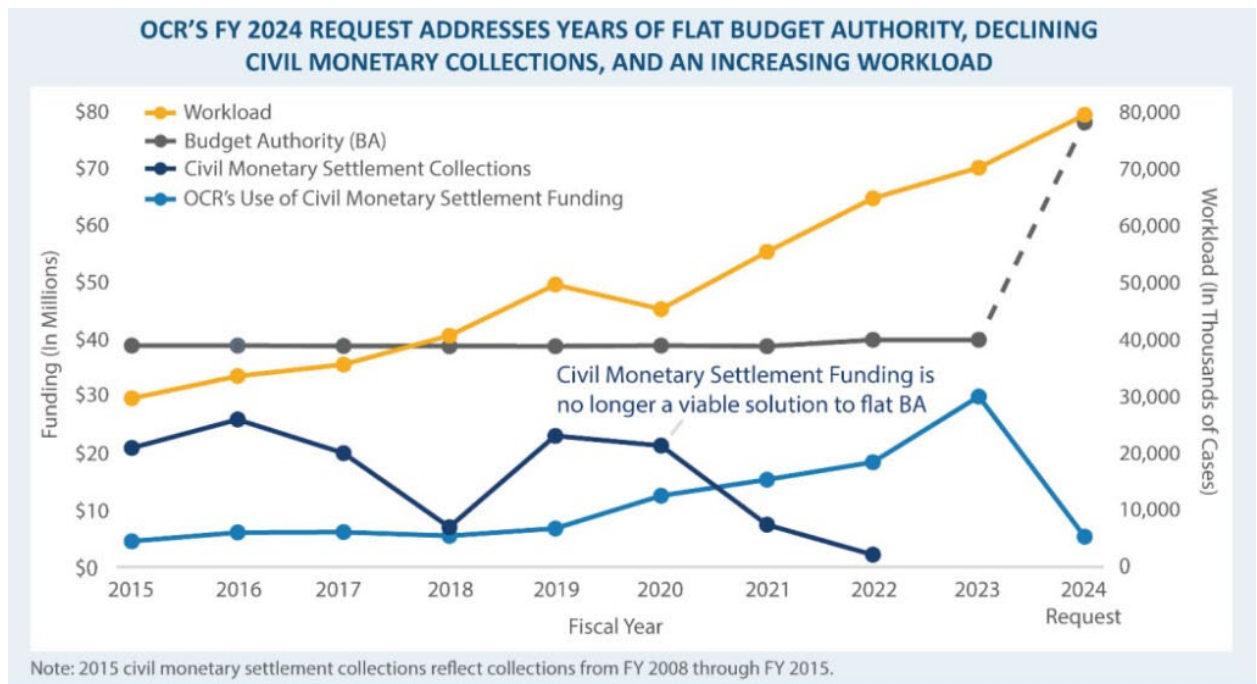
a complaint with the OCR, they “could not rely on the basic elements of due process,” so they began bypassing the OCR and filing complaints in court (137). The OCR has a long history of inefficiency that contributes to the prolonged fight for equity in women’s collegiate sports.

Inadequate government funding contributes significantly to the OCR’s ineffective Title IX enforcement. Since 2018, the OCR has had a 28% increase in complaints and a 45% decrease in staff (Adler). As the OCR’s caseload has increased, its budget has remained stagnant (see Figure 1). The GOA’s study on Title IX enforcement reveals that the OCR fails to address Title IX concerns effectively. The OCR does not have enough staff nor resources to address Title IX, let alone the other fifty-four statutes it is responsible for. Its current budget fails to ensure that the OCR fulfills its duties.

With the election of former President Donald Trump in November of 2024, the OCR is in danger of being dismantled because it resides in the Department of Education. The removal of the Department of Education is one of the goals of Project 2025, which has the support of several Republican Congressmen (Asare). The future of the OCR is now uncertain, and it remains to be seen how Title IX, among other civil rights statutes, will be enforced if the Department of Education is dismantled and the OCR alongside it.

Figure 1

Amount of OCR Funding and Number of Caseloads from 2015-2014



Source: *The HIPPA Journal*, "HHS Requests Additional \$38 Million in Funding for OCR in Fiscal Year 2024," 14 March 2023.

The NCAA

The NCAA's seizure of women's sports led to what Mark Bechtel at *Sports Illustrated* calls "one of the great ironies of Title IX:" women losing authority over their own sports (Bechtel). At the 1981 NCAA convention, the NCAA voted to assume women's sports into their organization. The AIAW did not consent to this decision and attempted to remain in operation. Both organizations hosted national championships for women's basketball in 1982. Schools could choose which tournament to play in, most of which chose the more affluent NCAA tournament (Bechtel). The AIAW filed a lawsuit against the NCAA in 1982 to prevent them from hosting women's championships. They claimed the NCAA violated anti-trust laws, but the court dismissed their suit (Hogshead-Makar and Zimbalist 106-107). Ultimately, this loss led to a significant decline in

leadership positions for women in sports. After men's and women's athletics departments merged, many female administrators, coaches, and trainers lost their jobs to men holding those positions in male athletic departments (Hogshead-Makar and Zimbalist 107).

Despite the adverse effects of the NCAA takeover, it is difficult to ignore the positive impact of the NCAA finally housing women's sports. The NCAA had more funding and television contacts than the AIAW. So even though they used most of those resources on men's athletics, they were still better equipped to host and promote women's sports than the AIAW. Tanya Haave, a University of Tennessee basketball player at the time of the first NCAA women's basketball tournament, noted that "it provided credibility" to be in the same organization as the men. Haave, who played in the first NCAA women's Final Four game and the AIAW final four the year prior, said that "you could definitely feel a difference now that the NCAA had taken over, in terms of the resources committed to it and the marketing with it. And it seemed to be a level above" (qtd. in D'Arcangelo).

The increase in resources was hugely popular, but many women opposed allowing men to govern women's sports because they knew women's sports would never be the priority (Bechtel). The differences between the 2021 men's and women's basketball championships proved their concerns were legitimate. Carole Oglesby, the first president of the AIAW, saw the writing on the wall all along. Expressing her disappointment at how the NCAA treated the 2021 tournaments, she told the *Wall Street Journal*, "just looking at the results, it's never been treated on an equal basis" (qtd. in Higgins). Oglesby's observation that female athletes are not treated equally could be attributed to the lack of representation of women in leadership positions in the NCAA. According to NCAA data,

as of 2023, only 25% of athletic directors are female, 25% of head coaches are female, 29% of university presidents are female, 30% of conference commissioners are female, and 35% of head athletic trainers are female. These numbers decrease when limiting the scope to Division I statistics. At the Division I level, only 15% of athletic directors are female, 25% of head coaches are female, 23% of university presidents are female, and 23% of conference commissioners are female (McGuire). While the NCAA improved the quality of women's sports, it still fails to promote equity in many respects and allows female athletes to remain second-class citizens within their organization.

Female athletes face discrimination from the NCAA because it hosts their championships. During the 2021 NCAA basketball tournaments, Sedona Prince, a former University of Oregon basketball player, posted a TikTok highlighting the disparities between the men's and women's tournaments. The NCAA was "widely criticized" online and in the media for gender discrimination in their resource allocation for the tournaments (Jones "NCAA hires..."). One notable Instagram post came from a sports performance coach for Stanford University's women's basketball team, who posted images of the men's weight room filled with weight racks and the women's weight room containing one set of dumbbells. In her caption, she wrote, "In a year defined by a fight for equality, this is a chance to have a conversation and get better," seemingly referring to the civil unrest in the United States about both COVID-19 and the murder of George Floyd and subsequent backlash from the Black Lives Matter Movement (Kershner qtd. in Jones). 2020 and 2021 were characterized by an intense political and cultural atmosphere regarding civil rights and equality. Subsequently, public image, especially relating to equality, became incredibly important. This context is important because it led to

increased public outcry about the NCAA's discrimination and prompted the organization to enlist a civil rights law firm to conduct a gender equity review before the 2021 tournament even ended (Kaplan Hecker & Fink 4). This review primarily focused on the NCAA's treatment of men's and women's basketball. By August 2021, Kaplan Hecker & Fink, the law firm the NCAA enlisted to conduct the review, had found major inequities in the NCAA's provisions for men's and women's basketball.

The report found that the organizational structure and culture of the NCAA prioritizes men's basketball over women's basketball. Specifically, the report found that the NCAA's senior vice president of basketball focused primarily on men's basketball and that more senior leaders within the organization worked in men's basketball while more junior leaders were charged with women's basketball. It also found that the men's tournament had significantly more full-time staff and a larger budget. Kaplan Hecker & Fink also discovered that men's and women's basketball operate independently with little communication to the detriment of women's basketball, which could have benefitted from the marketing resources of men's basketball. Finally, the report found that there is no infrastructure within the NCAA monitoring gender equity in basketball championships (Kaplan Hecker & Fink 7-8).

The gender equity review also found that the NCAA's media agreements establish gender inequity. The NCAA's contracts with TBS and CBS, which give those networks the rights to the men's tournament, are worth \$1.1 billion annually, while the NCAA's contract with ESPN to house the women's basketball tournament, along with twenty-eight other championships, is worth \$34 million per year. The report estimates that the worth of the women's basketball tournament is anywhere from \$81 million to \$112

million, meaning that the NCAA severely undervalues women's basketball by around \$78 million (Kaplan Hecker & Fink 8-9).

The gender equity review also discovered that the NCAA rewards investment in men's basketball but not women's. According to the report, the NCAA's 'Basketball Fund' allocates money "based solely on the participation of a conference's automatic qualifying team in, and a conference's overall performance at the Division I Men's Basketball Championship" (10). This incentivizes schools to fund their men's basketball programs in hopes that their team will perform well in the tournament and earn more money from the NCAA. No such program exists for women's basketball, which undercuts a university's desire to fund and promote its women's teams. For example, even a school like Stanford, which has an incredibly successful women's basketball program coached by the winningest head coach in college basketball, Tara Vandaveer (she became second to Geno Auriemma in November of 2024), has more incentive to invest money in their men's team, who has little to no notoriety, because the NCAA will reward them if their men's team gets into the tournament. Stanford's most recent EADA report records that the school spends \$70,912 more on men's basketball than women's basketball despite the women's team having won the NCAA tournament in 2021, a better record over the past five years than the men's team, and three more players than the men's team (U.S. Department of Education, Stanford University). While there is no way of knowing whether the NCAA's basketball fund money directly contributes to this discrepancy, it is certainly notable that schools are devoting more money to men's basketball than women's basketball regardless of teams' historical success or record and that the NCAA's distribution of funds promotes this type of investment.

Lastly, the report found that the NCAA provides fewer opportunities for women's basketball. In 2021, the NCAA provided "play-in games" for the men's basketball tournament, meaning that sixty-eight teams participated but did not do so for the women, who only had sixty-four teams in their basketball tournament. This recently changed in 2022; based on the recommendations of this report, the NCAA expanded the women's tournament to sixty-eight teams, the same amount that the men have had since 2011 (Nixon 2022, Wilco). The study also observed that the NCAA owns and operates the men's National Invitational Tournament (NIT) but not the Women's National Invitational Tournament (WNIT) (Kaplan, Hecker & Fink). The NCAA listened to the study's recommendation and, in 2024, hosted its first Women's Basketball Invitational Tournament (WBIT) (Nixon 2023).

One impediment to the progress of women's collegiate sports is that the NCAA is not subject to Title IX regulations because it is not federally funded. While the NCAA does have its own gender equity initiatives, the organization has no legal obligation to reinforce gender equality in collegiate sports (Axon). This results in significant inequities like the ones witnessed during the 2021 men's and women's NCAA tournaments.

The OCR and the NCAA both contribute to the lack of enforcement of Title IX and the continuance of gender inequity in collegiate sports. The OCR's ineffective methods and lengthy response times prevent them from proactively enforcing Title IX. This inefficiency means female athletes must file a legal complaint against their school to adequately address their Title IX concerns. Moreover, while the NCAA has taken steps to enact equality in men's and women's basketball, many inequities remain within the organization's structure. Title IX has no control over the NCAA; therefore, it can function

as it sees fit, maintaining the gender inequity that exists within the organization without any repercussions.

The Effect of Title IX on Men's Sports

Many people blame Title IX for the elimination of men's athletic programs, but this is not quite the case. Men's programs at the collegiate level have been lost, especially in sports like wrestling, swimming, water polo, and baseball. However, any major losses of these teams occurred from 1984-1988 when Title IX was unenforceable due to the outcome of the *Grove City* Supreme Court case (see page 15) (Schultz 35). Wrestling programs were reduced at a higher rate, 13.3 teams per year, from 1984 to 1988, than the following twelve years (1988-2000), which saw an average loss of 4.6 wrestling teams per year (Hogshead-Makar and Zimbalist 105). Colleges removed men's teams at a higher rate without any obligation from Title IX than they did after its reinforcement. Moreover, from 1988 to 2016, the number of men's NCAA sports teams increased by 98 (Schultz 35).

Furthermore, the OCR discourages schools from removing men's teams to comply with Title IX. In 2003, the OCR addressed this issue in a "Dear Colleague" letter, "OCR hereby clarifies that nothing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX, and that the elimination of teams is a disfavored practice" (Reynolds 2). The letter also notes that eliminating teams to achieve compliance contradicts the "spirit" of Title IX because it was enacted to create more athletics opportunities for students, not remove them (Reynolds 2). The OCR also claimed it would "seek remedies that do not involve the elimination of teams" while

negotiating compliance agreements (Reynolds 2). Title IX's governing body actively avoids eliminating men's teams and advises schools not to do so either.

Despite these guidelines, many male student-athletes and coaches have felt that Title IX removed their athletics opportunities. In 2002, the National Wrestling Coaches Association (NWCA) sued the Department of Education, claiming that their Three-Part Test guidelines from the 1996 Policy Clarification violate the Due Process Clause of the Fifth Amendment and establish the same discrimination that Title IX prohibits. The United States Appellate Court for the District of Columbia found that the NWCA lacked standing because they could not demonstrate how an injunction on the Three-Part Test would remedy the situation (United States, Appellate Court, *National Wrestling Coaches Association v. Department of Education* 191). The court stated that the decision to eliminate men's wrestling programs rested with the universities, and eliminating these programs constituted only one method for Title IX compliance. The court cited the 1996 Policy Clarification, which says, "Nothing in the Clarification requires that an institution cap or eliminate participation opportunities for men...Ultimately, Title IX provides institutions with flexibility and choice regarding how they will provide nondiscriminatory participation opportunities" (U.S. OCR qtd. in United States, Appellate Court 190). The court's decision in this case indicated that if men wished to challenge the elimination of their teams, the only pathway would be to challenge the universities themselves because they are committing the injury rather than the OCR. This case was crucial in upholding Title IX's enforcement because it legally demonstrated that it does not discriminate against men's athletic teams.

Schools that do eliminate men's teams are predominantly Football Bowl Subdivision (FBS) schools wanting to bolster their football programs. Jaime Schultz suggests this in her book *Women's Sports: What Everyone Needs to Know*, in which she states that the athletic "arms race" induces schools to spend increasing amounts of money on football and men's basketball to stay competitive. According to Schultz, on average, FBS schools spend 80% of their men's athletics budget on football and men's basketball. She also points out that in 2016, FBS schools spent an average of \$12 million on football and men's basketball while only spending an average of \$9 million on all of their women's programs combined (36). People often blame Title IX for reducing men's sports programs, but no one questions the increasing amount of money reserved for football and men's basketball teams.

Comparing the University of Alabama (Alabama) to Pennsylvania State University (Penn State) reinforces the argument that men's teams are eliminated because of football and men's basketball expenditures rather than Title IX. Both schools operate their athletics programs at very similar budgets—during the 2022-23 school year, Alabama's total expenses amounted to \$191,190,486, while Penn State's amounted to \$191,411,846—but Penn State supports seven more men's teams than Alabama. This comes at the cost of their football program, which is significantly less successful than Alabama's, but those are the difficult decisions that athletic departments must make. Both schools provide roughly equal opportunities for men and women, although neither provides athletic opportunities proportional to enrollment: 42.9% of Penn State athletes are female, while 47.5% of their student body is female, and 53.4% of Alabama athletes are female, while 56.0% of their student body is female (U.S. Department of Education,

“The University of Alabama” and “Pennsylvania State University”). The 2022-23 school year’s EADA report for Alabama, a school whose football and men’s basketball teams made it to the postseason during the 2023-2024 school year, states that the school spent \$92,620,388 on those two men’s programs, only spending \$13,439,775 on the other five men’s varsity programs and \$28,476,350 on all ten of their women’s programs (U.S. Department of Education). In contrast, Penn State, who won the NCAA men’s wrestling championship in 2024, spent \$71,019,857 on football and men’s basketball, \$21,166,941 on their twelve other men’s teams, and \$27,398,796 on all ten of their women’s teams during the 2022-23 school year (U.S. Department of Education). The two universities have roughly the same proportionality of female participation and female enrollment and have roughly equal overall expenditures. The only areas in which they differ are the number of men’s teams they carry and football and men’s basketball expenditures. Penn State spends \$21,600,531 less on those two programs and can afford seven more men’s varsity programs than Alabama. This indicates that football and men’s basketball expenditures, rather than Title IX compliance, cause reductions in men’s teams because these two schools only differ in those areas, not their women’s sports ratios.

Conclusion

Title IX has a long and complicated history. It has advanced women’s sports immensely in the past fifty-two years but remains flawed. The enforcement procedures of Title IX are slow and unreliable, meaning that the only effective remedy for female athletes to address gender discrimination in athletics is suing their school, a costly and risky process if the athletes wish to continue playing for that school. Furthermore, schools have eliminated men’s teams to increase spending on football and men’s basketball while remaining Title IX compliant, rather than maintain or decrease those

expenditures to keep more men's programs. While Title IX is not necessarily defunct, it could use some improvements to its enforcement mechanisms to ensure better compliance throughout collegiate sports. This cannot be done unless the OCR, which receives an increasing number of cases per year, receives more government funding.

All these problems were further complicated by the proliferation of new name, image, and likeness (NIL) rules that allow NCAA athletes to make money off their personal brands. But, the new NIL rules and increased social media usage of players have garnered women's collegiate sports, particularly women's basketball, an unprecedented amount of media attention and fans in recent years. None of this would have been possible without Title IX and the leaps and bounds it has made toward equity in collegiate sports.

Chapter 2: The Recent Growth in Women's Sports

Introduction

The NCAA's external Gender Equity Review described former Oregon basketball player Sedona Prince's TikTok video, which highlighted the inequities among the men's and women's NCAA championships: "The contemporary equivalent of 'the shot heard round the world'" (Kaplan, Hecker, and Fink 1). The video launched a movement for women's sports that came to fruition during the 2023-2024 college basketball season with the stardom of Caitlin Clark and Angel Reese. By 2021, Prince had gained a large following on TikTok, coinciding with the massive growth in popularity of the app that year (Ceci). After Prince's video went viral on TikTok and across other social media platforms, the NCAA received backlash for their gender discrimination and eventually commissioned an internal equity review before the tournament concluded (Kaplan Hecker & Fink 4). This video exposed the NCAA and incited a revolution in the sports world. *The Wall Street Journal* called it "The TikTok that changed college hoops" ("The TikTok that Changed College Hoops"). The video brought so much attention to women's college basketball that it stimulated one of the most substantial increases in the popularity of women's sports that the United States has ever seen.

While Sedona Prince, Paige Bueckers, Hailey Van Lith, and the Cavinder twins developed their social media accounts into massive platforms, women's basketball was not the only NCAA sport whose female athletes created fanbases via social media. Female athletes like Olivia Dunne (gymnastics), Emily Cole (track and cross country), and Alexa Hendricks (volleyball) grew their social media accounts into major platforms, acquiring hundreds of thousands of followers on TikTok and Instagram. By building social media communities, female athletes managed to promote their sports beyond what

traditional media platforms offered. The social media buzz surrounding women's sports became a key factor in 2023. When star player Caitlin Clark found herself at the doorstep of some major records by the beginning of her senior season, the already interested American public was prepared to launch women's sports into the limelight. This is precisely what happened; dubbed "The Caitlin Clark Effect" by news media outlets nationwide, Caitlin Clark's record-breaking season at Iowa led to unprecedented levels of support and viewership for women's basketball (McGuire). Many fans and sports journalists credit Clark alone for the recent boom in women's sports, but she would not have had the same impact had it not been for female athletes finding their voices on social media and forcing their sports into public purview. The work of hundreds of female athletes generated public popularity, but Caitlin Clark forced major media outlets to take notice of this movement with her unprecedented performance on the court.

TikTok's Effect on Women's Sports

Traditional media platforms have virtually ignored women's sports. A thirty-year study conducted by the University of Southern California and Purdue University found that as of 2019, women's sports received 5.1% of sports coverage on the three major network affiliates' sports news broadcasts. According to the study, coverage had grown a minuscule 0.1% from the 5% of sports coverage women received in 1989 when the study began (Kleen). Female athletes seized the opportunity to use social media to gain exposure for their sports because traditional media platforms neglected to cover women's sports.

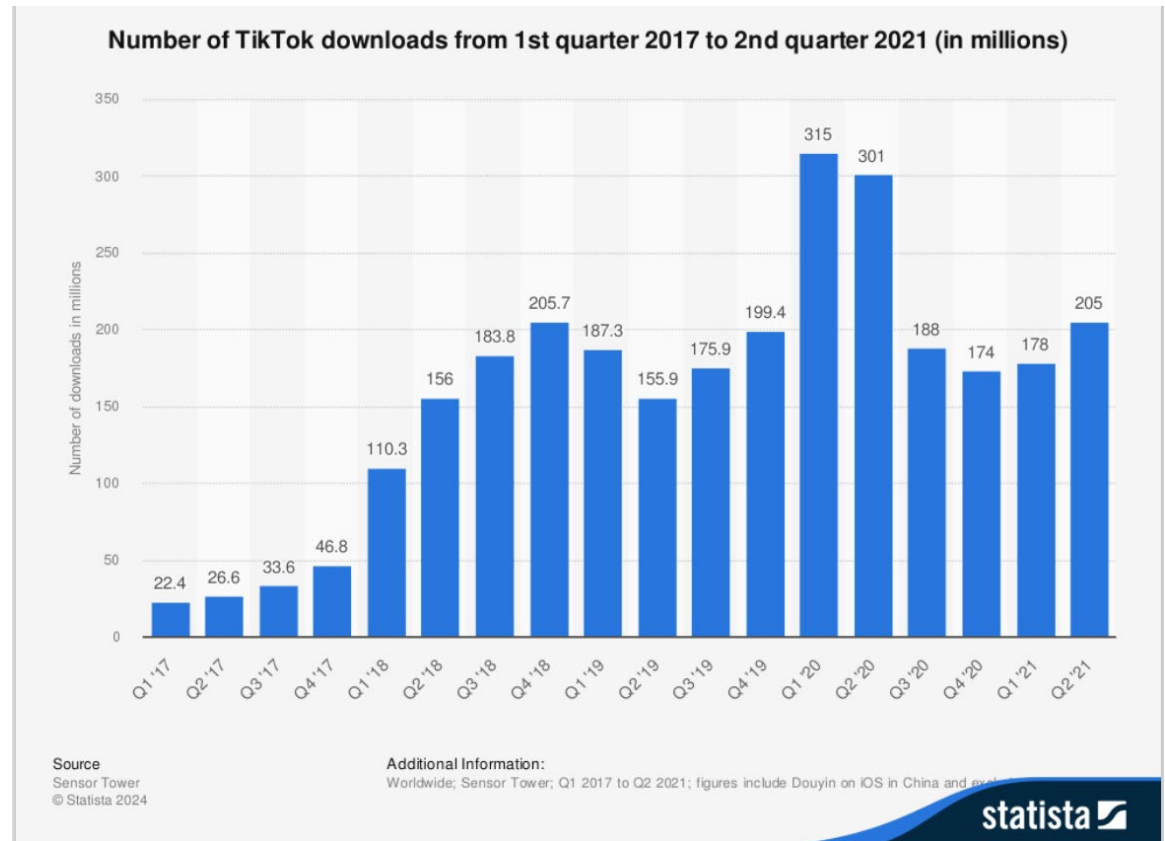
With apps like TikTok, Instagram, and Twitter, athletes no longer need a major media outlet to connect with the general public. Today's NCAA athletes grew up in a

world where women had opportunities to play sports, but not one in which those sports were given recognition. Today's female student-athletes have never lived in a world without Title IX or the Women's National Basketball Association (WNBA). Their idols fought for a playing field, and now they fight for recognition from the media. Many of these young women "have been conditioned to promote themselves," says Cara Hawkins-Jedlicka, a professor of communications at Washington State (qtd. in Lever). Oftentimes, like in Prince's case, female athletes are their own advocates. During the past four years, female athletes have used their platforms to promote their sports, and the public and investors responded. After Sedona Prince posted the TikTok video exposing the NCAA for gender discrimination, the NCAA made changes that led to millions of dollars of investment in women's collegiate sports (Murphy).

TikTok experienced immense growth in 2020 with the onset of the COVID-19 pandemic. A *Statista* chart of TikTok downloads from 2018 to 2023 (see Figure 2) reveals that the spike in downloads during the first half of the year, coincided with the spread of COVID-19 into the United States, which escalated in March of 2020 (Ceci, Hauck et. al.). With over two billion downloads by April 2020, TikTok quickly transformed how people shop, learn, cook, and consume entertainment (Lorenz). While the world was drastically changing due to COVID-19, TikTok drastically changed the social media landscape.

The sports industry, which has long recognized the importance of social media marketing, was deeply affected by the popularity of TikTok. Nearly every major league sports team has Twitter, Instagram, and TikTok accounts. To take full advantage of the marketing opportunities that social media offers, most franchises and leagues hire

Figure 2. Number TikTok Downloads



Source: Statista, "TikTok Global Downloads Worldwide 2023," 4 Mar. 2024.

content creators; the NFL began creating specific positions for social media creators in 2016 (Ringrose). Now, most college athletics departments have positions specifically dedicated to social media. For example, MTSU has one creative services assistant specifically for social media and three creative video assistants ("Staff Directory" MTSU). Larger schools like the University of Tennessee at Knoxville (Tennessee), have even more social media positions. Tennessee, whose athletics department has an in-house creative department called 151 Creative, contains positions specifically called 'content creator' (UT Athletics and Staff Directory UT). Tennessee is one of the many universities that has capitalized on TikTok's popularity by having people on staff who manage their TikTok accounts (Lizakowski). People in these creative departments work to produce

social media posts for fans. For example, Jaeden Lizakowski, an Assistant Director of Social & Digital Content at the University of Florida, ensures that “content is produced, executed, and posted across various platforms” for several Florida Gators’ accounts. This includes developing a consistent strategy across all Florida Gators’ social media accounts while also highlighting each team’s individual activities and accomplishments (Lizakowski). Lizakowski also uses analytics tools to monitor the performance of Florida’s social media content, meaning that not only do these departments produce content, but they also track the productivity of their social media accounts (Lizakowski).

TikTok quickly became a popular app for sports fans and organizations alike. Deemed “SportsTok” by the app itself, sports organizations, podcasts, influencers, and fans have all made use of TikTok (“How Brands Can Tap into the World of Sports”). According to TikTok for Business, a website that advises companies on how to best use the app, 57% of its users consume sports content on a weekly basis. TikTok for Business also claims that the community-based nature of the app has made it popular with sports fans and organizations (“How Brands Can Tap into the World of Sports”). This is understandable because sports fans are often considered a distinct type of consumer due to their lifelong relationships with organizations (Williams and Chinn). Like other social media sites, TikTok essentially creates a community of people who love the same team or athlete by engaging them with behind-the-scenes interviews, highlights from competitions, trends, and fan commentary or reactions.

Social media has helped athletes develop personal brands. Personal branding has become essential for athletes, who must align themselves with a brand's goals to create partnerships with them. Many athletes have taken to social media to create these personal

brands and connect to fans (Sipkin). This was largely set in motion by COVID-19 and the TikTok boom of 2020. With nothing else to do during quarantine, many college athletes began developing their social media accounts, including Haley and Hanna Cavinder, who posted their first viral TikTok during the pandemic, resulting in a total of one million followers by the end of May 2020 (Niesen). The twins continued to post TikTok videos throughout basketball season, and due to the proliferation of NIL rights in 2021, they now boast several major endorsement deals. According to *Sports Illustrated*, they are among the top female earners in the NCAA (SI Staff). The Cavinder twins represent just one example of social media's power and the impact that NIL has made on the lives of student-athletes. Olivia Dunne, one of the highest-paid student-athletes in the NCAA according to the NIL company On3, also began posting TikTok videos in 2020 (Brinkerhoff, On3).

Many women became content creators and influencers before the advent of NIL, forming online communities and establishing relationships with fans. These communities have become incredibly valuable in uplifting women's sports and forcing major media outlets to pay attention to them. According to Timothy F. Bryson, who works for MOGL, a NIL company that helps athletes connect with brands, "male athletes want to be influencers" while "female athletes want to be creators and community builders and focus on qualitative data – what people are saying" (qtd. in Lever). Female athletes build communities by posting content about their lives. This encourages their fans to watch them participate in their perspective sports because they feel a personal connection to the female athletes they see online. Livvy Dunne, Flau'jae Johnson, Paige Bueckers, and so

many others promote women's sports by encouraging their audiences to watch and support them.

The popularity of TikTok has now spread to sports, and female athletes have benefitted from this phenomenon. Through an unorganized effort to create their own brands, female athletes have collectively uplifted women's sports. This set the stage for a new phenomenon to drastically change women's sports in the eyes of the American public: the Caitlyn Clark Effect.

The Caitlin Clark Effect

It is difficult to identify when the Caitlin Clark Effect began because Clark has been a shooting phenom her entire collegiate career; during her freshman year, she averaged 26.6 points per game, shooting slightly over 40% from the three-point range, improving to 27 points per game her sophomore year (Fuller). Then, in her junior year, she led the Hawkeyes to the NCAA March Madness Tournament's championship game. One can reasonably estimate that the Caitlin Clark Effect began during this tournament because the 2022-2023 basketball season received more media attention than previous years due to the NCAA investigation that Sedona Prince provoked during the 2021 tournament. The Caitlin Clark Effect is essentially the immense growth in popularity of women's basketball, specifically, but not limited to, NCAA women's basketball (Drenon). Journalists across the country have dubbed Caitlin Clark's impact the Caitlin Clark Effect. It has become so pervasive that "The Caitlin Clark Effect" has its own Wikipedia page separate from Clark's ("Caitlyn Clark Effect").

Caitlin Clark is a generational talent. She holds the record for most career points in college basketball, leading fans and journalists to compare her to Pete Maravich and

Steph Curry (Cox and Paris). Until then, female athletes had only been gaining traction due to their social media followings and influencer statuses, yet Clark became a household name due to her extraordinary performances on the basketball court. As revered as her skills are, her fierce competitiveness and flare have also drawn fans from across the country. In an interview with the *Washington Post*, Clark admits, “I get mad. You have reactions that you don’t always love in the heat of battle. I’m full of passion no matter what I’m doing” (Clark qtd. in Golliver). Clark’s passion has resonated with many, especially because most people are not accustomed to female athletes playing that way because when they do, they are often criticized for it. This includes Clark, who receives frequent criticism on social media and traditional media platforms for being too cocky, while men get to celebrate excessively or argue with referees with little to no comment. Lisa Bluder, Clark’s University of Iowa coach, has noticed the double standard and hopes Clark can “change some of these conversations” (qtd. in Golliver). A *USA Today* article about Clark’s fierceness stated, “the pearl clutching over Clark’s on-court emotions...is both silly and insulting” (Armour). It seems that Clark has indeed changed the conversation surrounding competitive women, just as Lisa Bluder hoped. While a single woman playing basketball cannot change generations of stigmatism surrounding competitive women, Clark has, at the very least, changed the conversation.

So, just how popular is Caitlin Clark? According to a *New York Times* article titled “When Caitlin Clark Comes to Town,” Iowa’s away games during the 2023-24 basketball season “averaged some 13,000 fans, more than twice as high as the average for non-Iowa games at those colleges” (Cox and Paris). When she broke the collegiate scoring record in April of 2024, the game averaged about 3.4 million viewers (Axson). In 2024, the

women's Big Ten Tournament sold out for the first time, a phenomenon partially attributed to Caitlin Clark (Cox and Paris). During the 2024 March Madness Tournament, Iowa's Final Four game against UConn peaked at 17 million viewers, shattering the previous record—also held by a game that featured Caitlin Clark (Deitsch). Overall, during the 2023-2024 women's basketball season, national television networks found that the audience for women's college basketball games increased by more than 60% from the year prior (Mathews and Morse). This means that the Caitlin Clark Effect is real and observable. A twenty-two-year-old woman from Iowa drew millions of fans to women's basketball because of her talent and passion for the game. But the surge in women's basketball cannot be entirely credited to her; *Front Office Sports* reporter Amanda Christovich claims that Clark would not have gotten the same amount of attention twenty years ago because people were not paying attention (Christovich qtd. in Drenon). Women's basketball needed to experience increased attention on social media and increased investment from the NCAA for the Caitlin Clark Effect to occur. For example, before 2022, the women's basketball championship tournament could not use the signature "March Madness" name that the men's tournament sported (Johnson). This was one of several changes implemented by the NCAA that increased public interest in women's basketball.

Although Caitlin Clark is mostly beloved, the press has not always been so kind. Her rivalry with Angel Reese has attracted positive and negative opinions from across the country. Their rivalry began during the 2023 championship game, where Reese's LSU Tigers played Clark's Iowa Hawkeyes. Towards the end of the fourth quarter, it was apparent that LSU would win, so Reese directed a John Cena-like "you can't see me"

gesture at Clark and pointed at her ring finger. Reese was mocking Clark, who had used the John Cena celebration earlier in the tournament (Treisman). After the game, the media called Reese ‘classless,’ and others took to social media to defend America’s darling, Caitlin Clark, by attacking Reese’s actions. Clark herself claimed not to have been bothered by the gestures (Treisman). This sparked debate across social media because Reese is black, Clark is white, and only Reese received backlash over the gesture. The media continued criticizing Reese, especially when the two teams had a Final Four rematch during the 2024 March Madness tournament, and Reese placed a crown on the LSU bench while Clark was warming up. As of August 2024, the two are competing for Rookie of the Year in the WNBA (Clark eventually won the award), but both continue to reassure the media that they respect each other as competitors and that (Schuster, Winstanley, and Kinsella).

While the rivalry between Clark and Reese has drawn more attention to NCAA basketball and the WNBA, it has broadcast the unfair representation of black female athletes in the media. Clark’s generational talent earned her the recognition that she received, but her status as straight and white likely reinforced her popularity (Schnell). Despite her attempts to avoid this conversation and focus on basketball, Caitlin Clark has involuntarily become a focal point in the discussion of racism in women’s sports. Many have criticized her for not speaking out against racism, including WNBA player Dijonai Carrington, who wrote, “How one can not be bothered by their name being used to justify racism, bigotry, misogyny, xenophobia, homophobia & the intersectionalities of them all is nuts” (Carrington qtd. in Schilkin). While Clark may desire to stay out of these conversations, she has certainly brought attention to these pervasive issues in women’s

sports. Victoria Jackson, a sports historian, claims that Clark's popularity has sparked debate and created a space for discussing these divisive topics in the media (Jackson qtd. in Hightower). Bringing this conversation to the forefront of the media is another way to advance women's professional and collegiate sports. It is simply another step in the process of advancement.

Conclusion

Since 2021, women's basketball has improved from rarely receiving media coverage to people debating about how the media covers it. People pay attention to women's sports now that social media has connected them to female athletes. Furthermore, Caitlin Clark has generated intense popularity in women's basketball, which has fueled public support for female athletes in other sports, forcing traditional media platforms to recognize the attraction of women's sports. Social media and Caitlin Clark have become powerful forces for accumulating public attention, but much of this excitement has been fueled by NIL. Fans witnessed female athletes in national commercials and promoting products on their social media accounts, meaning that major companies were involved in promoting women's sports, giving them credibility. Women's sports have seen immense growth in the past four years; examining how NIL currently impacts NCAA sports will be essential to understanding and continuing the growth of women's sports.

Chapter 3: Name, Image, and Likeness (NIL) and its Impact on Gender Equity

Introduction

During an interview, Deputy Athletics Director and Senior Women's Administrator at Middle Tennessee State University (MTSU), Diane Turnham, said, "NIL threw equity out the window" (Turnham). People have widely expressed the concern that the proliferation of NIL rights in the NCAA would negatively impact gender equity in intercollegiate sports, but the issue remains unaddressed. The NCAA finally created an official NIL policy in their bylaws in January of 2024 to replace the interim policy that had been in place since July 2021. These bylaws govern the NCAA, but several state laws currently conflict with these guidelines. Furthermore, the OCR has remained silent on how Title IX applies to NIL activities, leaving schools, administrators, and athletes with questions. If Title IX is to have any force or meaning for gender equity in intercollegiate sports, it must apply to NIL activities. This chapter will outline the history of NIL rights in the NCAA, the current policy guidelines, how NIL has impacted female student-athletes thus far, and how schools could be liable for gender discrimination in NIL activities.

The Proliferation of NIL Rights for NCAA Athletes

The NCAA's concept of amateurism has persisted through generations of student-athletes and decades of debate about paying them. The NCAA is built upon a conception of amateurism that it has adamantly defended in court. Everything from NCAA rules to the term student-athlete was established to reinforce this concept. The NCAA's first executive director coined the term "student-athlete" to prevent football players from receiving workers' compensation if they injured themselves during a game (Solomon). It was first used in 1955 when the widow of Ray Denison, who died playing in an NCAA

football game, filed for workers' compensation death benefits. As a result, the Colorado Supreme Court found that she was not eligible because Denison did not qualify as an employee and universities were "not in the football business" (Colorado Supreme Court qtd. in Solomon). This statement has not stood the test of time with public schools in the Big Ten and Southeastern conferences, making over \$2 billion in combined revenue during the 2022 fiscal year and the top-ranked student-athlete in NIL as of October 2024, Shedeur Sanders, having an NIL valuation of \$5.8 million (Berkowitz, On3).

The NCAA used its position as an educational organization to circumvent antitrust laws, using amateurism as the foundation. However, the NCAA's amateurism rules have been subject to many lawsuits; one of the first successful antitrust attacks against the NCAA reshaped the organization by putting more power and money in the hands of conferences (Solomon). In *NCAA v. Board of Regents of University of Oklahoma*, the Supreme Court decided that the NCAA's control over the television rights of college football games violated antitrust laws (Solomon, United States Supreme Court). Subsequently, universities allowed conferences to negotiate media rights for them. *NCAA v. Board of Regents* made football more widely available to watch but had negative implications for the NCAA's future as a scholastic organization. In his dissent, Justice Byron White, a former standout college football player, expressed his concern that this ruling threatened college football's status as a scholastic institution and treated it as a commercial enterprise (Greenhouse, United States Supreme Court). Again, the court recognized how NCAA sports differ from professional sports leagues because of their status as an educational institution. The *Regents* case contributed significantly to the commercialization of NCAA sports, which has come to fruition with the proliferation of

NIL rights for student-athletes. Another important implication of the *Regents* case was the majority opinion's statement, "athletes must not be paid," dicta that became important to the O'Bannon decision in 2015 (Solomon, United States 9th Circuit Court of Appeals).

In 2009, former NCAA football player Ed O'Bannon sued the Collegiate Licensing Company (CLC) for permitting a video game company to use his NIL without compensation. This case ignited the ongoing debate about paying college athletes, especially when a district court sided with O'Bannon and declared that NCAA amateurism rules violated antitrust laws (United States 9th Circuit Court of Appeals). This decision was eventually overturned by an appellate court, which issued an injunction on the lower court's decision, stating that "when [amateurism rules] uphold procompetitive purposes courts should not hesitate to uphold them," meaning that if the rules aim to promote competition in the market—in this case among the NCAA's member institutions—they are permissible in court (United States, Supreme Court). However, the court maintained that antitrust laws applied to the NCAA, a significant ruling because in 2021, the Supreme Court maintained this precedent and denied the NCAA an exception to antitrust laws in *NCAA v. Alston*, which significantly impacted the NCAA's decision to change their NIL regulations.

Not only did litigation pressure the NCAA to change their NIL regulations, but state legislation did so, too. California's Fair Pay to Play Act placed another integral pressure on the NCAA's NIL restrictions. The Fair Pay to Play Act was signed into law in 2019 and expected to take effect in January of 2023 but was moved up to September 2021 after the NCAA changed its NIL regulations. The act permitted California student-athletes to profit from their NIL without losing NCAA eligibility (State of California).

According to Governor Newsom, the act was designed to lead “the charge against the unjust power imbalance in college sports” (qtd. in the State of California). With athletes like basketball icon LeBron James signing on, it caught the attention of both the NCAA and other state legislatures (State of California). At the time of its signing, it directly violated NCAA eligibility regulations. This act was the first of its kind, but it certainly was not the last; other states, including Florida, Texas, Alabama, Georgia, Mississippi, and New Mexico, all passed similar legislation effective July 1, 2021 (Allender). The day before these laws were to take effect, June 30, 2021, the NCAA announced its interim NIL policy (Hosick).

The NCAA would have challenged these laws in court had it not been for the Supreme Court’s decision in *NCAA v. Alston*. *Alston* was the most impactful antitrust lawsuit against the NCAA because the NCAA failed to receive the antitrust exemption that it had requested, leading it to change its NIL regulations. In January of 2021, the NCAA delayed voting on NIL-related changes to their bylaws; this indicates that the NCAA may not have changed its NIL policy had it not been for the *Alston* decision six months later (Jessop and Sabin 57). After the *Alston* decision, which was handed down on June 21, 2021, the NCAA would not have had grounds to combat state laws like the Fair Pay to Play Act. In their article about Title IX and NIL in the *Journal of Legal Aspects of Sport*, Alicia Jessop and Joe Sabin state that the NCAA “would have bullishly defended against NIL laws” if not for the court’s decision in *Alston*, making the case the impetus for the NCAA’s 2021 decision to lift their NIL prohibitions (57).

Although the case never explicitly mentions NIL, it concluded that the NCAA’s limitation on academic-related benefits and scholarships violated antitrust laws (United

States Supreme Court). One of the court's major findings was that the NCAA could not provide a consistent definition of amateurism because its rules had changed significantly over time (United States Supreme Court 101-102). This was important because the NCAA argued that the distinction between college and professional sports—the presence of amateur athletes—created the demand for their product and therefore, their justification for not paying student-athletes (United States Supreme Court 103). The Supreme Court's conclusion that the NCAA had no consistent definition of amateurism severely damaged its ability to justify prohibitions on NIL compensation in the future. This case severely limited the NCAA's ability to restrict athletic compensation by prohibiting them from limiting educational-related benefits while also pressuring them to change their NIL compensation policies.

Justice Kavanaugh, in his concurring opinion, took this decision further by questioning the NCAA's prohibition on paying student-athletes:

The NCAA's business model of using unpaid student athletes to generate billions of dollars in revenue for the colleges raises serious questions under the antitrust laws. In particular, it is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes. And if that asserted justification is unavailing, it is not clear how the NCAA can legally defend its remaining compensation rules. (United States Supreme Court 110-111)

While Justice Kavanaugh's opinion holds no legal authority, it could indicate that pay-for-play may be the only legal option for the NCAA in the future. It also attacked the NCAA's conception of amateurism.

The struggle for NIL rights has been a lengthy battle, spanning generations of student-athletes. Due to the culmination of litigation and laws supporting the rights of

student-athletes against the NCAA's monopsony power, the NCAA faced far too much pressure to maintain its NIL policy. State legislation and the Supreme Court's ruling in *NCAA v. Alston* forced the NCAA to create its interim policy, which provided a base upon which to build more guidelines.

NIL Policy Guidelines

Each state has different NIL laws, and both Congress and the OCR have failed to provide any guidance on NIL policy for collegiate athletics. There have been several changes to the NCAA's NIL guidelines, none of which addressed the application of Title IX to NIL activities. The NCAA established thorough bylaws in January 2024, but their effectiveness is yet to be seen.

Chaos ensued after the NCAA released its interim NIL policy in July 2021 because it relied on state laws to govern NIL activities. The interim policy on NIL outlined the following:

- Individuals can engage in NIL activities that are consistent with the law of the state where the school is located. Colleges and universities are responsible for determining whether those activities are consistent with state law.
- 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. (NCAA qtd. in Hosick)

This policy failed to provide student-athletes or schools with clear guidance for NIL activities. It was amended several times during the two years following its release. In these amendments and clarifications, the NCAA changed and, in some cases, removed rules, creating more confusion in the NIL landscape.

Then, in May of 2022, the NCAA released “Guidance Regarding Third Party Involvement,” in addition to their interim policy, to address the role of booster collectives. Collectives immediately emerged after the NCAA changed their NIL rules, the first of which was created in August of 2021 (about a month after the new rules were introduced) (“Gator Collective” and Nakos). This guidance placed some limitations on potential student-athletes’ (PSAs) interactions with NIL boosters, including prohibiting boosters from communicating with PSAs and their families, prohibiting boosters from guaranteeing a PSA a NIL deal if they commit to their school, prohibiting coaches or other school personnel from communicating with a PSA on behalf of a booster, and requiring NIL agreements to be made based on an “independent, case by case analysis of the value” of each PSA rather than their membership on a team, enrollment decisions, or athletic achievements (“Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement” 2). The policy guidance for current student-athletes was as follows:

- An NIL agreement between a SA and a booster/NIL entity may not be guaranteed or promised contingent on initial or continuing enrollment at a particular institution.
- NIL agreements must be based on an independent, case-by-case analysis of the value that each athlete brings to an NIL agreement as opposed to providing compensation or incentives for enrollment decisions (e.g., signing a letter of intent or transferring), athletic performance (e.g., points scored, minutes played, winning a contest), achievement (e.g., starting position, award winner) or membership on a team. (2)

Lastly, the guidance outlined other policies, including prohibitions on schools’ ability to market student-athletes or their abilities, on pay for play, on boosters engaging in recruiting, and on paying or incentivizing student-athletes based on their athletic

performance. And finally, it held institutions accountable for violating these guidelines (2-3). These were the first of the NCAA's clarifications and additions.

The NCAA finally created a bylaw regarding name, image, and likeness activities in January 2024, which took effect in September 2024. It maintains the same NIL allowances and prohibitions on pay-for-play that the interim policy did, stating that NIL activity must:

- (a) Include quid pro quo (e.g., compensation for work performed);
- (b) Not be contingent upon initial or continued enrollment at a particular institution (see Bylaw 22.01.2); and
- (c) Not be in return for athletics participation or achievement. (NCAA Governance)

In this new policy, the NCAA permitted the involvement of institutions in student-athlete NIL activities, specifically allowing them to “identify specific name, image and likeness opportunities” and “facilitate deals between student-athletes and third parties” (NCAA Governance). This reversed additions to their interim policy released on October 26, 2022, which declared it impermissible for athletics departments’ staff to represent or negotiate on behalf of student-athletes in NIL activities (“Institutional Involvement in a Student-Athlete’s Name, Image and Likeness Activities”). The 2024 bylaw also requires athletes to disclose all NIL deals over \$600 to their institution, which will then report this information to the NCAA on a biannual basis. This section also outlines the expectation that the NCAA “shall make available an aggregated database of disclosed name, image and likeness information” (NCAA governance 22.2.3.5.1). The bylaw also permitted athletes to hire agents, something the Fair Pay to Play Act already allowed (“Institutional Involvement in a Student-Athlete’s Name, Image and Likeness Activities” and State of California). While significantly more detailed than the interim policy, this bylaw fails to

address Title IX. The NCAA does not currently enforce Title IX in NIL activity internally, which is unsurprising because the NCAA is not legally obligated to adhere to Title IX. However, Charlie Baker, the current NCAA president, has expressed the desire for the federal government, or courts to provide some clarification as to Title IX's application to NIL (Vannini and Auerbach).

Although the NCAA finally put a real NIL policy in place, no uniform legal policy exists, so a patchwork of state laws still governs these activities. Each state's NIL laws have different provisions, some of which contradict the NCAA's policy. State legislatures have attempted to advantage their institutions through legislation; as of July 2023, five states (Arkansas, Missouri, New York, Oklahoma, and Texas) have laws that prohibit the NCAA from penalizing schools for NIL activities ("Name, Image and Likeness Legislation by State"). In other cases, state policies limit student-athletes' NIL opportunities to protect state institutions. For example, some state laws contain provisions prohibiting student-athletes from entering endorsement deals that conflict with those of their school. New Jersey's law goes a step further, prohibiting student-athletes from endorsing "sin sponsors," companies that sell alcohol, adult entertainment, tobacco, etc., a law potentially vulnerable to First Amendment concerns (Jessop and Sabin 65-67).

State legislatures are primarily concerned with advancing their institutions rather than regulating NIL activities. One Louisiana state representative even announced the goal of upsetting Nick Saban on the statehouse floor. Louisiana State Representative Stefanski stated the following while introducing amendments to the state's NIL bill: "If we want LSU or any other of our universities to be able to compete [in recruiting] with Texas A&M and with Alabama and see Nick Saban upset on a regular basis on the

sideline, we have to be competitive” (Stefanski qtd. in Johnson). This attitude towards NIL regulation pervades state legislatures, making states unreliable regulators of NIL activities. Some states, like Alabama, have gone a step further by repealing NIL laws altogether (Johnson). These examples confirm that regulating NIL cannot be left to the states because their goals are contradictory to those of the NCAA.

The NCAA has improved its regulations on NIL activities, but inconsistent state policies and the failure to address Title IX concerns leave NIL policy lacking. Congress must respond to this issue and provide student-athletes, institutions, and the NCAA with a law that governs NIL’s presence in collegiate athletics. Furthermore, the OCR must release a statement about how Title IX applies to NIL deals to address the issue of gender equity among student-athletes who make money from their NIL.

How New NIL Rules Affect Female Student-Athletes

Benefits for Female Student-Athletes

Although gender equity in NIL activities remains a concern, the proliferation of NIL rights in the NCAA has had positive implications for female athletes. Female athletes have fewer opportunities to play professional sports, so NIL provides them with more opportunities to make money while playing sports. NIL also prevents Olympic athletes from having to choose between capitalizing on their popularity and sacrificing their collegiate careers, a decision many female gymnasts have been forced to make. Furthermore, NIL opportunities have the potential to improve women’s careers when they play professional sports. Lastly, and potentially most importantly, NIL rights permit female student-athletes to improve the insufficient marketing and promotion of women’s sports by allowing them to take publicity into their own hands.

Increased Opportunities for Female Athletes

Women have few opportunities to play professional sports. The WNBA only has 144 roster spots in the entire league, twelve spots on each of the twelve teams, while the NBA has around 540 spots, about eighteen roster spots on each of the thirty teams (Jennings, Kent). Similarly, there are only 138 roster spots in the Professional Women's Hockey League (PWHL), comprised of twenty-three spots on each of the six teams, while the National Hockey League (NHL) has 736 spots comprised of twenty-three spots on each of the thirty-two teams ("Frequently Asked Questions," "How Many Players..."). But with the ability to capitalize on their NIL in college, female student-athletes now have more opportunities to earn money while playing sports. For example, the Cavinder twins, who do not possess the basketball prowess to play in the WNBA, have NIL valuations of \$889,000 and \$863,000, respectively (On3).

Positive Impact on Professional Female Athletes

Even professional female athletes have more earning potential as collegiate athletes because professional women's leagues are still growing. The NCAA currently accumulates more viewership and larger fan bases than women's professional leagues. The past three years saw major advances in women's basketball, but NCAA basketball still drew more viewership than the WNBA in 2024. The 2024 women's March Madness Tournament drew an average of 2.2 million viewers throughout the entire tournament, while this year's first seventeen WNBA playoff games, two of which Caitlin Clark played in, averaged 970,000 viewers (Rajan, Statista Research Department). Furthermore, the last game of the WNBA Finals this year averaged 2.2 million viewers. Indeed, the single most important game of the WNBA season averaged the same number of viewers as all

sixty-seven games of the women's NCAA tournament (Kasabian). In her article "The Image and Likeness of Women: The Implications of Title IX in the NIL Era" Ana Apostoleris Rivera observes that "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," suggesting that NIL produces a more equitable situation for female athletes (420). For many female athletes, the NCAA is the largest stage they will ever play on, and having the ability to capitalize on this will be incredibly important for female athletes who play professionally.

The proliferation of NIL and the massive growth of women's basketball has already positively impacted the lives of WNBA players. Caitlin Clark has opted not to play overseas or in the new U.S. three-on-three league, Unrivaled (as of November 2024) (Schnell). Clark is one of several current WNBA players who had ample opportunity to capitalize on NIL in college. Furthermore, current WNBA players who were not able to fully capitalize on their NIL, like Nika Muhl, who could not take full advantage of NIL as an international student, have opted to play overseas, proving that NIL money could be a contributing factor for these women (Sanchez). The ability to make NIL money in college can reduce the number of WNBA players who play overseas, an incredible burden on the minds and bodies of athletes. WNBA players often expressed their frustrations at having little to no rest between seasons and spending time away from their families because they needed the money that playing overseas provided (The Athletic).

However, NIL is certainly not the only reason that players are electing not to compete overseas; the WNBA Players' Union negotiated a new collective bargaining agreement (CBA) in 2020, and after this year's historic season, they have opted out of it

to renegotiate a better deal, which has made playing in the U.S. more appealing (The Athletic, Dierberger). Also, the increasing international political turmoil in Russia and the Middle East have made going overseas less attractive because Turkey and Russia are two of the most popular and lucrative places to play (The Athletic). Furthermore, after Britany Griner's Russian detention, which lasted nearly a year, players are more hesitant than ever to go overseas (ESPN, The Athletic Staff). Lastly, not everyone can attain the popularity that Caitlin Clark has achieved; her known NIL deals her senior year were estimated at \$3.1 million (Treacy). Some players who made NIL money in college still opt to play during the off-season, like the fourth pick of the 2024 WBNA Draft, Rikea Jackson, who committed to play in the Unrivaled league (Dalzell, Hall). While many factors contribute to a player's decision to go overseas, income is a major contributor; WNBA players who had the opportunity to make NIL money in college could have more control over their careers in the future and face less economic stress and pressure to go overseas.

Positive Impact on Female Olympians

The proliferation of NIL rights in the NCAA has had positive implications for Olympic athletes. The Olympics are the only other athletic organization that provides female athletes with media exposure comparable to the NCAA. In the past, female athletes have had to choose between profiting from their Olympic exposure and maintaining their scholarships. Ana Apostoleris Rivera writes that "the choice to cash out before college is now or never" for female Olympic athletes" (422). In her article, Rivera describes how this decision unfolded for Jordyn Wieber, an American gymnast who had committed to compete for the University of California Los Angeles (UCLA) but turned

professional ahead of the 2012 Olympics instead. Wieber was favored to win the all-around gold medal after winning one at the World Championships the year prior. However, after putting up the fourth-highest score in the all-around qualifiers, behind two of her teammates, she could not compete in the finals. Subsequently, Wieber failed to garner the attention and sponsorship deals she had expected, but had already relinquished her athletic scholarship by going professional (421-422). Wieber provides an example of the damaging consequences of the NCAA's previous amateurism rules that prohibited student-athletes from profiting off their name, image, and likeness. These rules disproportionately affected student-athletes who competed in sports that only receive media attention in the United States every four years during the Olympics. The new NIL rules prevent student-athletes from having to make a choice between capitalizing on Olympic opportunities and their scholarships, a choice that so frequently befell female athletes.

Narrowing the Publicity Gap

Allowing female student-athletes' to market their sports using their own personal brands is one of the most important implications of the new NIL rules. With the proliferation of NIL rights, female athletes are no longer resigned to relying on athletic departments to market their sports (Jessop and Sabin). Generally, schools spend more money marketing their men's teams than their women's teams; as part of their research for an article about Title IX and NIL, Jessop and Sabin examined the staff directory pages of the top ten revenue generating programs at the Division I level. They found that twenty-five total positions were dedicated solely to marketing men's teams, while only four total positions were dedicated to marketing women's teams (78). Furthermore, in

2023, ESPN examined six years' worth of marketing expenses of fifty-two public, Power 5 schools; they found that 79% of those expenses were not gender specific, but of the gender specific expenses 17% were dedicated to men's teams and only 4% were dedicated to women's teams (Surendran and Lavigne). All of this data serves to prove that schools prioritize marketing men's teams over women's teams and therefore, spend more money promoting men's teams.

Prohibitions on using their name, image, and likenesses to make money, restricted what women could do in terms of marketing themselves. Now, women no longer have to wait for athletics directors, most of whom are men, to invest in them, as they have the opportunity to build their own brands (Jessop and Sabin 82). As discussed in Chapter 2, many female student-athletes have become adept at building their social media brands and using these platforms to attract brand deals. Sponsor United, a company that collects data on sport sponsorships, produced a NIL marketing partnerships report for 2022-2023. The report stated that "women athletes are also eclipsing their male counterparts on social media," finding that they "accounted for nearly half of the top 50 NIL athletes by total social media engagement, despite comprising less than 30% of all athletes in [their] research pool" ("2022-23...").

Women have capitalized on their NIL opportunities via social media, attracting more attention to their sports and teams. For example, Livvy Dunne, arguably the most successful female athlete in the NIL market, has attracted more fans to women's gymnastics; during this past regular season, LSU gymnastics averaged over 12,000 fans at their six home meets, the highest gymnastics attendance rate in the country (Moses). Dunne who is valued at \$4 million on On3 as of October 2024, has also launched the

Livvy Fund, a subset of LSU's collective Bayou Traditions, aimed at helping LSU's female athletes build their brands and gain sponsorship deals (Bayou Traditions, Moses). Reportedly, Dunne has used this fund to help her teammates in the NIL space (Hebert). Dunne represents just one example of female athletes improving the marketability of women's sports via social media. Now that women are no longer required to rely on marketing from athletic departments who prioritize football teams above all else, they have more opportunities to bring attention to their sports through their personal brand deals. Companies now have the ability to promote female student-athletes without having to go through athletic departments, meaning that athletes like Dunne can sponsor brands, while also bringing attention to women's sports. Moreover, when major companies sponsor female athletes, they validate female sports by treating them as an investment opportunity rather than a charity.

Gender Inequity in NIL Activities

Despite the many positive implications of NIL rights for female athletes, there are some ramifications for gender equity in NCAA sports. Obviously, there are several women thriving on the NIL market, but there are only five women in On3's NIL top 100 list: Livvy Dunne, Flau'Jae Johnson, Paige Bueckers, and Haley and Hanna Cavinder (On3). NIL activity significantly favors men, with male student-athletes receiving almost 90% of NIL deals (Opendorse). This does not constitute gender discrimination because Title IX has never required that institutions spend equal amounts of money on men's and women's sports, let alone third parties who invest in them. However, how and where athletes acquire these deals could leave schools liable under Title IX. Female athletes must work much harder than their male counterparts to earn NIL compensation. While discussing NIL, Title IX trailblazer and a Senior Women's Administrator, Diane Turnham

said, “we fought so long just to get the same scholarships, but now, when you see those inequities [in NIL deals], it really bothers me” (Turnham). Turnham, who arrived at MTSU in 1982 worked in women’s NCAA athletics before Title IX really took effect, so she knows what gender inequity looks like, and has observed it in the current NIL market.

It is unrealistic to expect equal NIL compensation for male and female student-athletes, but where the money comes from could raise Title IX concerns about equity. According to Opendorse’s “NIL Insights,” as of April 2024, football and men’s basketball make up 82.9% of NIL compensation, while the top six women’s sports only make up 10% of NIL compensation (Opendorse). Most of the deals received by football and men’s basketball players come from booster collectives; according to On3, booster collectives are organizations independent of universities that “pool funds from boosters and businesses, help facilitate NIL deals for athletes and also create their own ways for athletes to monetize their brands” (Nakos). According to Opendorse, as of July 2022, 93% of this donor money goes to men’s sports. In contrast, 91% of women’s compensation comes from brand deals, despite 61% of all brand compensation going to male student-athletes (Hunzinger).

This is significant because when a student-athlete enters a brand deal, they use their NIL to promote a product, which is only valuable if they have a recognizable NIL or a significant social media following. According to an article in the *Sport Management Review* titled “There is no nil in NIL: examining the social media value of student-athletes’ names, images, and likenesses,” advertisers place an increasing amount of value on influencer marketing via social media (Kunkel et al. 845). The article states that student-athletes could negotiate payment based on their reach and number of followers,

charge companies based on clicks and engagement, or receive an initial payment upfront for their posts on social media (Kunkel et al. 845). For brands, student-athletes are only as valuable as their reach, meaning student-athletes must earn a brand's attention and then negotiate their deal.

In contrast, receiving money from NIL collectives is far less work intensive. Unlike brands whose goal is to market their companies, NIL collectives are designed to give student-athletes money. For example, the boosters at the University of Texas in Austin vowed to "blindly give" \$50,000 to each offensive lineman on their football team for "future charity work" (Oliphant 545). Some collectives direct NIL deals to student-athletes in exchange for social media promotion of charities or businesses that belong to the collective, but others distribute deals without requiring any specific NIL activity in exchange, in other words, without the quid-pro-quo element that the NCAA requires (Oliphant 552). In some cases, male student-athletes need only be on a certain team to earn NIL money; this was the case for Texas Tech's football team, whose donor-collective, the Matador Club, committed to signing all 100 roster players to \$25,000 NIL contracts in 2022 (Gresser). The only requirement for these athletes was to complete charity work and community service, but it was unclear how many hours of charity work these players were required to perform.

Female student-athletes predominantly earn their NIL compensation from brand deals; in fact, this is how they earn 91% of their NIL money. This indicates that female athletes make money because of their ability to market themselves on social media rather than their status as student-athletes alone. Conversely, the primary source of compensation for male student-athletes (donor collective deals) requires significantly less

personal brand development; they receive NIL deals for their status as student-athletes. Not only are female student-athletes making significantly less NIL money than their male counterparts, but oftentimes, they are working much harder than male student-athletes to earn those deals.

A broader cultural implication of the breakdown of NIL compensation is the notion that major female earners are successful due to their sex appeal rather than their athletic abilities. Three of the most successful female student-athletes, Livvy Dunne and the Cavinder twins, conform to traditional beauty standards, and many of their posts appeal to the male gaze. Legendary women's basketball coach Tara Vanderveer views this as "a step back" for female athletes because the emphasis on female beauty rather than athletic ability upholds sexist rhetoric in sports (Vanderveer qtd. in Streeter). Conversely, Kurt Streeter, the *New York Times* journalist who interviewed Vanderveer and others, said, "The female athletes I spoke to said they were consciously deciding whether to play up or down their sexuality" and viewed this choice as empowering rather than conforming to sexist traditions. Haley Jones, a guard for the University of Stanford's basketball team and a seven-figure NIL earner, observes that female student-athletes will be sexualized regardless of what they wear or post online. Regarding his interview with Jones, Streeter writes,

Jones was quick to note female athletes can choose not to participate in social media and lose out on the biggest profits. Or they can take part, make money, focus on the supportive fans and hold their breath with a sort of resignation about the swath of online reactions — often leering and sexualized comments on their social media platforms — that show how much they are objectified.

The new NIL landscape in college athletics highlights the prejudice that female athletes have always faced. Regardless of how one interprets female athletes' choices about

posting, it is evident that many of the top female earners obtained that position through social media popularity rather than athletic performance.

Overall, the proliferation of NIL rights has had positive implications for women's collegiate sports. NIL has created opportunities for more women to make money playing sports than was previously possible due to their limited professional opportunities. It also allowed them to market their sports at a higher level without relying on athletic departments that prioritize men's sports over them. However, NIL also created new gender equity issues and highlighted existing ones within collegiate sports that must be addressed.

Where Schools Are Liable Under Title IX

As previously discussed, NIL has created greater gender inequity in college sports. But NIL deals are outside the purview of school control and donor collectives, while affiliated with universities, do not answer to them, which makes addressing this gender inequity difficult. Moreover, the NCAA itself is not subject to Title IX regulations, and neither are companies nor collectives. However, schools could still be vulnerable to Title IX complaints for the activities of donor collectives and their own unequal marketing and promotion of men's and women's teams. As previously discussed, student-athletes attract brand deals via social media popularity or general NIL recognition. Athletic departments dedicate more gender-specific marketing dollars towards men's teams, which is problematic now that recognition of student-athletes' NILs and student-athletes' social media followings are directly linked to NIL dollars. Schools could be liable under Title IX for promoting men's teams more than women's teams because

female student-athletes can now show an actual injury—making less NIL money—in a court of law.

Donor Collectives

Abigail Oliphant’s article, titled “NIL Collectives and Title IX: A Proactive Consideration of Title IX’s Application to Donor-Driven NIL Collectives,” argues that donor collectives could be addressed under Title IX in the same manner as third-party funding from boosters. The 1979 Policy Interpretation does not address third-party funding, so courts established how Title IX applied to these donors. Case precedent and OCR guidance have established that schools are responsible for creating equity in scholarships and athletics benefits and accommodating interests and abilities, regardless of gender discrimination in third-party funding (Oliphant 541).

In 1997, the courts first examined how Title IX would apply to third-party funding in *Daniels v. School Board of Brevard County*. In this case, several softball players on the high school varsity team sued the school board for disparities between their team and the varsity baseball team, claiming that they constituted a Title IX violation. As their defense, the school board argued that they could not be held responsible for the differences in the fundraising activities of the two teams. The court rejected this defense and established that the school could be held accountable for gender disparities created by third-party funding, stating, “Defendant’s responsibility to ensure equal athletic opportunities, in accordance with Title IX. This funding system is one to which the Defendant has acquiesced; Defendant is responsible for the consequences of that approach” (United States District Court qtd. in Oliphant 541-542). This case required that schools maintain equity in accordance with Title IX regardless of third-party donations, a precedent that

was upheld in *Chalenor v. University of North Dakota* in 2002. In this case, wrestling team members sued the University of North Dakota for eliminating the men's wrestling team because the athletics budget disproportionately favored men over women. The wrestling team argued that their team could be maintained through private donor funding (Oliphant 542). The court rejected this solution because once an institution receives a donation, it becomes "public money, subject to Title IX's legal obligations in their disbursement" (United States 8th Circuit Court qtd. in Oliphant 542).

Furthermore, in 1995 the OCR issued a clarification letter about third-party donations, stating that athletic departments' responsibility to provide equivalent athletic benefits and opportunities applied to third-party donations (Oliphant 542). The OCR reasoned that "[i]f 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" (OCR qtd. in Oliphant 543).

This rule presented a problem for institutions because, typically, boosters donate more money to men's programs than women's. According to Oliphant, when these disparities constitute a Title IX violation, "institutions can choose to allocate more funds to the less-supported sex, seek to control the booster budget, or reject the booster club donations" (544). If athletic departments fail to reallocate donor funds equitably, they are in violation of Title IX. If donors circumvent the athletic department by going to teams directly, the NCAA has set consequences that could "jeopardize a student-athletes' eligibility for intercollegiate competition, jeopardize a school's membership status with

the NCAA or cause a booster to lose access to all booster benefits” (NCAA qtd. in Oliphant).

These precedents indicate that Title IX should apply to NIL collective deals. Abigail Oliphant writes that “NIL compensation is just a new form of third-party funding” and, therefore, must be regulated by institutions to maintain Title IX compliance. The current NIL landscape allows collectives to circumvent Title IX concerns. For example, Butler University’s collective has a website stating, “[a]ll unrestricted donations will be utilized to support Men’s Basketball Student Athletes. Donors may restrict funds to be used to support specific sports and/or specific Student Athletes” (All Good Dawgs qtd. in Oliphant). This website openly states that Butler’s donor collective favors male student-athletes over female student-athletes. If a female student-athlete at Butler were to sue her university for Title IX discrimination, based on past precedent, the university would be responsible for remedying the collective’s discrimination in some way.

While third-party donations and donor-collective NIL deals are similar, Oliphant acknowledges several differences between them, specifically the recipients of the funds, the lack of institutional involvement, and the quid-pro-quo structure of NIL (549). NIL money differs from third-party donations in terms of who receives the funds. Institutions receive third-party donations while student-athletes themselves receive NIL compensation, making it difficult for schools to address gender inequity in NIL compensation. Oliphant argues that both third-party donations and NIL compensation benefit student-athletes and, therefore, can be considered athletics benefits under Title IX (550). Furthermore, the courts have already established that institutions cannot simply

ignore donor activities and remain compliant with Title IX. These payments still affect their athletics departments, so they remain responsible for any Title IX implications even if they are not receiving the funds directly (Oliphant 551). Lastly, the quid-pro-quo aspect of NIL, in which athletes are paid in exchange for a promotional activity, differs from a donation because athletes are essentially selling a service. However, as previously established, many donor collectives do not require this sponsorship activity. Oliphant argues that “in practice, donor-driven collective NIL compensation is just discriminatory third-party booster funding with a new name” (Oliphant 553). If past legal precedent and the OCR’s clarification letter apply to NIL, which they should, then institutions could be liable for Title IX violations caused by the actions of the donor collectives that support them.

Athletics Marketing

As previously discussed, brand deals provide another avenue for student-athletes to acquire NIL money outside of donor collectives, who frequently favor male student-athletes. Brands are attracted to student-athletes with well-known NILs, which could leave schools that spend less money marketing women’s athletics vulnerable to Title IX claims. Recall from Chapter 1, that Title IX assesses three categories for compliance: scholarships, athletic benefits, and accommodation of interests and abilities. The 1979 Policy Interpretation lists nine factors that are considered when assessing athletics benefits under Title IX, the ninth of which is publicity. The OCR does not require equal spending on these factors if the “overall effects of any differences is negligible” (United States OCR). Now that female athletes are permitted to make money off their NIL, the “overall effects” of inferior marketing dollars would be less NIL revenue. Female student-athletes could prove that the effects of less marketing dollars are not negligible

and hold their institutions accountable for spending equal marketing dollars on women's and men's teams.

Social media is a crucial aspect of publicity for student-athletes now that NIL rules have changed. Not only do schools spend less money marketing women's sports, but they also mention women's teams less in social media posts. In February 2023, EPSN conducted a study on the X (formerly Twitter) accounts of the then sixty-five Power 5 schools to review the frequency at which they mentioned their men's and women's teams. After examining over three million posts (over 3,000 per account), the researchers concluded that 82% of Power 5 schools posted their men's teams more often than their women's teams, with the most biased school, Notre Dame, mentioning their women's teams only 18.6% of the time (Surendran and Lavigne).

This data, proving that Power 5 (now Power 4) schools mention male student-athletes more than female student-athletes on social media, could leave athletic departments open to Title IX claims now that social media can directly impact a student-athlete's income. According to Opendorse, after just the first year of NIL in collegiate sports, social media activity drove 67.6% of NIL transactions (Hunzinger). The social media accounts of athletics departments often have major followings with the potential to attract more attention to individual accounts of student-athletes. Kiki Rice, a UCLA basketball player, told ESPN, "UCLA athletics is a huge platform. None of our individual platforms are going to be bigger...So when [the athletic department account] is able to promote us at a high level and really get the word out about our team and the players on our team, it definitely helps our individual social media platforms (Rice qtd. in Surendran and Lavigne). Here, Rice expressed the positive effects that her school's social media

platforms can have on athletes' individual brands, a sentiment that Jaeden Lizakowski, an Assistant Director of Social Media and Digital Marketing at the University of Florida, has also acknowledged. A quick scroll through several Florida Gators team accounts reveals that athletes are typically tagged in the posts in which they are featured. When asked about this, Lizakowski wrote:

Tagging athletes in our posts has become a common practice, especially with the rise of NIL opportunities. My co-worker and I prioritize this engagement, as it not only enhances our content but also fosters relationships with athletes and encourages collaboration. By tagging athletes, we help amplify their personal brands and strengthen their connection to the Gators. Additionally, we keep up with trends in how athletes are using social media, ensuring that our content aligns with their personal branding efforts. (Lizakowski)

Social media marketing teams at universities can directly impact the social media accounts of student-athletes and, therefore, their NIL earnings. This means the practice of tagging athletes could come under scrutiny if schools continue to reference their men's teams more than their women's teams, as the ESPN study revealed.

It is more important than ever for student-athletes to have many followers on social media because they can use those numbers to earn NIL money. Before the proliferation of NIL rights, a study conducted for an article in *Sport Management Review* examined how many student-athletes could make money off their NIL using social media and how much based on how many thousands of followers they have. They used the metric brands used for NFL players who made between \$4.77 and \$10.14 per post per thousand followers as of 2019 (Kunkel 845). Now that student-athletes have been able to monetize their NILs for three years, this data could be collected from student-athletes as well. The article determined that student-athletes in the NCAA had meaningful NIL value due to their social media presence (857). This is true for Livvy Dunn, who has admitted

to making over \$500,000 for one social media post (Steinberg). If student-athletes can monetize a certain number of followers and prove what Kiki Rice has observed, that athletic departments' social media accounts can impact the accounts of individual athletes, female student-athletes could have valid Title IX claims against their institutions for posting them significantly less than their male counterparts. One legal expert told ESPN, "If athletes can stick a dollar-figure loss on unequal promotion, they could up the ante of a Title IX lawsuit" (Surendran and Lavigne).

The marketing and publicity of NCAA sports have become increasingly scrutinized in the past three years, as women's sports have continued to gain popularity and the media has highlighted NIL deals. The amount that an athletic department markets or posts student-athletes could directly impact their income because businesses can place an exact dollar amount on the number of followers a student-athlete has. Athletics departments have recognized the power of social media. A quick scroll through several athletic departments' staff directories reveals that it is common to have social media divisions with three to seven employees, not including interns who are not recorded on the directories, but, for reference, the University of Florida has fifteen social media interns (Lizakowski). Now, these departments could be a source of liability if schools do not monitor gender equity in their activities.

Conclusion

College sports have become a billion-dollar industry since the Colorado Supreme Court declared that the NCAA was "not in the football business" in 1957 (Colorado Supreme Court qtd. in Solomon). The proliferation of NIL in NCAA athletics has been chaotic and confusing, with layers of contradicting laws and guidelines and no clear

guidance from the federal government or the OCR. After three years of NIL, football players are the clear winners of this new system. Although football produces the most revenue among all NCAA sports, it cannot be removed from Title IX considerations because the status of a sport as revenue-producing has no impact on Title IX requirements. By supporting, contributing, or passively allowing gender discrimination in NIL deals, schools have left themselves vulnerable to Title IX claims in several ways. If the OCR fails to provide Title IX guidelines for NIL deals and donor collectives, the courts will have to clarify the role of Title IX in this new era of the NCAA, which can only occur if student-athletes sue their schools.

Chapter 4: Recommendations

Introduction

Despite incredible improvement to the state of women's sports since 1972, Title IX and its enforcement methods are flawed. Female athletes still face immense gender inequities in athletic opportunities, athletics benefits, and NIL compensation. Now that the NCAA has given student-athletes the right to financially benefit from their NIL's, gender equity has become more complex than ever. The NCAA has little to no control over NIL activities despite its bylaws and enforcement procedures. Furthermore, states have proven unwilling to enforce NIL regulations because their goal of advantaging their institutions is contradictory to maintaining the principles of amateurism. With no uniform regulations for NIL and no clear advice from the federal government, NIL has amplified the present gender inequities in intercollegiate sports.

To remedy this situation, Congress must pass legislation to regulate NIL activities across the country as well as see the importance of allocating more government funds to the OCR. In the meantime, the OCR must also address how Title IX applies to NIL using current legal precedent and past policy. Moreover, to improve its efficiency in Title IX enforcement, the OCR should revisit the current guidelines governing Title IX enforcement to best capitalize on the present public support for women's sports.

While government action is necessary to address the failures of Title IX and NIL governance, the NCAA and the universities themselves must work to clarify NIL regulations and remedy gender discrimination. The NCAA is not subject to Title IX; however, in the past, it has responded to public pressure to address gender discrimination within the organization. To avoid the type of backlash it received in 2021, the NCAA

should take steps towards gender equity in NIL activities. The NCAA lost significant control over its member institutions and student-athletes after removing their prohibition on NIL compensation. Therefore, the NCAA already has an incentive to monitor NIL activities. Conversely, universities are subject to Title IX regulations and have left themselves liable to Title IX claims in the current NIL landscape. They must work to provide female student-athletes with equitable NIL opportunities and equal NIL resources, as well as strictly monitor their student-athletes' NIL activities for compliance issues. Doing so could remedy some of the conflicts between Title IX and NIL.

Some prominent NCAA coaches have suggested that NIL has legalized pay-for-play. Lane Kiffin, the head football coach at the University of Mississippi (Ole Miss), has stated, "NIL has a lot to do with where players go. To not think that is crazy. There are schools with no shot to recruit certain players They're going to go where they get paid most. You've legalized paying players" (qtd. in Oliphant 552). Kiffin is not alone in believing that the NCAA threw amateurism out the window. Legendary women's basketball coach and current head coach of the UConn women's basketball team, Geno Auriemma, expressed a similar sentiment, "We've already become professional sports; let's say it, and let's act it." Auriemma begged the question, "Do we keep the charade of student-athlete, or do we call it what it is — semi-professional, pay-for-play sports?" (qtd. in Zucker). Both Auriemma and Kiffin make valid points about how NIL currently operates in the NCAA. If, as Auriemma suggested, the NCAA becomes a semi-professional league it might be easier to apply equity in student-athlete compensation with team salary caps and contracts. However, the following recommendations are aimed

at preserving amateurism and do not consider the possibility that the NCAA will become a semi-professional league, which is another realistic path for NCAA sports.

Recommendations for Congress

To create uniformity in NIL regulations, Congress must pass a bill addressing NIL activity, establishing what activities are permissible for student-athletes, administrators, institutions, and donor collectives. This law should require institutions to report NIL deals in accordance with the NCAA's bylaws. It should also require that every student-athlete and business working with them prove that a quid-pro-quo transaction occurs. Congress must address current NIL issues, such as the status of international athletes who cannot make NIL money on their student visas, by providing a visa exception for them. The status of donor collectives is another issue that Congress must address. Due to their associations with institutions that receive federal funding and their impact on interstate commerce, Congress could realistically monitor donor collective activities by creating a system for them to report said activities. Doing so would assist the OCR in applying Title IX to NIL activities because the OCR could monitor institutional involvement with donor collectives, as well as the sums of money collectives funnel to male and female student-athletes. These requirements could expose NIL deals that violate NCAA rules, such as the entire Texas Tech football roster receiving \$25,000 each. If Congress requires donor collectives to report their deals, the OCR and institutions themselves could ensure that student-athletes receive deals on a case-by-case analysis of their worth, which the NCAA requires in their bylaws. If Congress wishes to preserve collegiate sports and give public institutions, athletic administrators, and coaches control over their own athletic programs, they must pass a bill to regulate NIL activities that include monitoring provisions.

In addressing NIL activities in collegiate athletics, Congress cannot ignore the question of gender equity. Applying Title IX to NIL is the responsibility of the OCR. Still, Congress can support these efforts by adding a provision that NIL activities may not interfere with the goals of Title IX. As previously discussed, marketing student-athletes has become more important than ever, and institutions regularly spend more marketing dollars on men's teams than women's teams. Jessop and Sabin suggest that Congress amend the EADA so that schools must also report sports marketing expenditures (86). Requiring schools to report this data would assist the OCR in monitoring equal opportunities in the NIL marketplace because marketing directly impacts student-athletes' NIL worth. This is a strategy Congress could employ to support equity in the NIL landscape without amending Title IX or violating antitrust laws.

Finally, if Title IX is going to be properly enforced in the near future and applied to NIL in NCAA sports, Congress must see fit to improve the OCR's funding. If Title IX is to maintain the impact it has had on female athletes and continue to promote equity, Congress must validate its role in NIL by expanding OCR funding.

Recommendations for the Office of Civil Rights

The OCR's use of a policy that is almost thirty years old diminishes Title IX's efficacy. The Three-Part Test requires a lengthy review process, which OCR officials have admitted is both time- and resource-consuming (see page 19). The OCR has allowed institutions to skirt Title IX requirements by showing that they have a history of improving women's athletic opportunities or that the interests and abilities of women have been fully met regardless of their underrepresentation in sports (see page 13 for the Three-Part Test). If the OCR were to discard the second two prongs of the Three-Part

Test, it could require equal opportunities for female athletes or a plan similar to a resolution agreement that outlines how a school will become Title IX compliant within a certain timeline.

Equity in athletics has been difficult to achieve because it occurs over time as schools find money to add women's sports; Diane Turnham observed, "So as long as we have football, we need to have probably three or four more women's sports than men's. Right now, we have one more...all that can't happen at once, because it costs money" (Turnham). Title IX has now existed for fifty-four years, and the Three-Part Test is only about thirty, not long in the grand scheme of the NCAA, which was founded in 1906 ("History"). However, the Three-Part Test has proven inefficient. By reducing the avenues for Title IX compliance and giving schools less flexibility, the OCR could conduct these reviews quicker and spend more time assessing institutional compliance to resolution agreements, which is how actual change occurs.

The OCR should act now to capitalize on the immense popularity of women's sports and the current public outcry for equity. College basketball season has just begun, and women's sports fans can only hope that the momentum of women's college basketball will not die with the exit of Caitlin Clark. Furthermore, the success of Team U.S.A.'s female athletes at the 2024 Olympics garnered significant attention for women's sports. The United Nations reported that "Women's sports are currently experiencing an unprecedented surge in attention, attracting both dedicated fans and investors" and that "Women's sports media coverage has tripled since 2019 after remaining stagnant for three decades ("Facts and Figures: Women in Sport"). Women's sports are more popular than they have ever been. The OCR should work towards these changes to bring in a new

era of Title IX as it applies to women's sports while the public is still rallied behind female athletes. The NIL marketplace permits male collegiate athletes to make about 90% of NIL compensation. This inequality should push the OCR to enforce gender equity in intercollegiate sports with a stricter Title IX policy (Opendorse). Creating a new test for Title IX, requiring schools to provide women with equal opportunities to participate in collegiate sports or a plan to achieve gender equity, should be the next step in the OCR's regulation of Title IX.

A change in policy guidance will only have an impact if the OCR can adequately enforce it. The OCR currently has a Title IX Team Leader, but the enforcement offices are organized regionally (United States, OCR "Organizational Structure"). If the OCR is to truly make an impact on Title IX in women's sports, right now is the time to capitalize on its popularity. The OCR could develop a Title IX task force after they release new guidance. This task force could operate for a limited time to ensure the new rules effectuate change. However, this new task force would require more government funding because the OCR is currently bogged down with cases (see Figure 1 on page 22) and in need of a larger budget. While Title IX and gender equity are no more important than the other civil rights issues that the OCR handles, the OCR would have a unique opportunity to effectuate real change for women if it were to focus any new funding it receives over the next few years, on Title IX issues. This task force could also monitor NIL deals if Congress were to pass a bill requiring student-athletes to report them.

The OCR could work to address Title IX as it applies to NIL, even if it does not make any changes to current Title IX policy. To do so, the OCR could release policy guidance about NIL and donor collectives. This guide could outline schools' liability for

the gender discrimination of donor collectives and how they could remedy any present discrimination. The three options for addressing gender equity in third-party donations (see page 65) cannot apply to donor collectives because schools cannot pay female student-athletes, interfere with donor collectives, or demand that a male student-athlete reject donor money. But schools could better monitor their student-athletes' deals by requiring a student-athlete to report their quid-pro-quo action and ensure that student-athletes receive deals based on a “case-by-case analysis” of their worth rather than membership to a team. This would mean that schools must restrict deals that apply to their entire football or men’s basketball teams unless the collective offers similar deals to women’s teams as well. Institutional interference could be acceptable based on both Title IX concerns and concerns that donor collectives are not adhering to NCAA regulations. Schools could also amend gender disparities by working to facilitate more deals for female student-athletes who might be struggling to earn NIL attention. If male student-athletes at a particular institution are earning significantly more NIL compensation than female student-athletes, schools could work with female student-athletes to create more NIL opportunities for them.

Furthermore, the OCR could add NIL opportunities to the “athletics benefits” factors used to monitor Title IX. Recall from Chapter 1 that the OCR provided three areas for Title IX compliance, one of which is “athletics benefits.” To assess these benefits, the OCR outlined nine factors with the provision that “This list is not exhaustive. Under the regulation, it may be expanded as necessary at the discretion of the Director of the Office of Civil Rights” (United States OCR 73). These factors need not be equivalent but comparable. If the OCR adds NIL opportunities to this list, schools could be responsible

for the NIL education of all student-athletes and the promotion of student-athletes' NILs. The NCAA's bylaws allow institutions to facilitate deals between student-athletes and third parties. If the OCR were to add NIL opportunities to the list of athletics benefits, institutions would be obliged to provide equal opportunities for male and female student-athletes to earn NIL deals.

Another avenue for the OCR to address Title IX, as it applies to NIL, is the "publicity" factor of athletics benefits. If Congress amends the EADA to include marketing expenditures, the OCR could find schools in violation of Title IX for not spending equitable marketing dollars on men's and women's sports. Even without this amendment to the EADA, the OCR could use social media to monitor a school's publicity of student-athletes. If athletics departments significantly favor men's teams over women's teams, like Notre Dame, which only mentioned their women's teams 18.6% of the time in about 3,000 tweets, they could be found in violation of Title IX (Surendran and Lavigne). Requiring schools to market their men's and women's athletic programs equally could be a significant step in shrinking the gender pay gap in NIL compensation.

The OCR should be under pressure right now to capitalize on the popularity of women's sports. The OCR has the opportunity to create gender equity by changing some of its Title IX regulations at a time when gender discrimination in athletics is under public scrutiny. The OCR must also give institutions some guidance about how Title IX applies to NIL activities. By holding schools responsible for Title IX violations after the advent of NIL rights in NCAA sports, the OCR can ensure that Title IX is not disregarded in this new era of collegiate athletics.

Recommendations for the NCAA

While the NCAA is not subject to Title IX, it does have an incentive to regulate NIL deals to maintain the guise of amateurism. The NCAA, which already requires student-athletes to report NIL deals over \$600, could create a committee dedicated to NIL supervision. This committee could ensure that all deals involve quid-pro-quo activity and require that they be based on the individual analysis of each athlete rather than their membership to a team. They could then enforce sanctions for players, schools, or third parties that violate their bylaws similar to those used to address illegal third-party donor activities (see pages 65-66). By enforcing these NIL Bylaws, the NCAA will assist institutions and the OCR in enforcing Title IX.

Conclusion

As previously mentioned, these recommendations operate under the assumption that Congress, the courts, and the NCAA will maintain the idea of amateurism within NCAA athletics, meaning that pay-for-play will remain prohibited. The recommendations attempt to eliminate the pay-for-play structure that donor collectives are currently funding and promote gender equity within NCAA sports. The NIL market of NCAA athletics is presently a mess; conflicting state laws regulate NIL activities, the NCAA has no power to control or regulate donor collectives, institutions must scramble to find sponsors to pay players, and coaches have expressed frustration with the entire system. None of this can be remedied without guidance from the federal government. Congress and the OCR must work to regulate NIL and increase the efficacy of Title IX in this crucial moment for women's sports.

Overall, it will take several layers of rules and regulations to amend the Title IX issues that have resulted from the proliferation of NIL rights for student-athletes.

Congress, the OCR, the NCAA, and universities must work together to ensure gender equity in intercollegiate sports. If these four entities truly care about gender equity, or at the very least want to be perceived as caring about it, they must take steps towards resolving the current dilemma presented by Title IX and NIL.

Conclusion

Nelson Mandela believed that “Sport has the power to change the world...It has the power to inspire. It has the power to unite people in a way that little else does. It speaks to youth in a language they understand. Sport can create hope where once there was only despair” (Mandela qtd. in Longman). Sports deeply impact culture and are an integral aspect of society, particularly American society. They are an indicator of greater societal issues, one being gender equity; the status of female athletes often indicates the status of women in society as a whole. This makes gender equality in sports incredibly important. Women and girls must be given the same opportunities as men and boys to participate in scholastic sports.

The Women’s Sports Foundation has found a direct correlation between girls playing sports when they are younger and holding leadership positions in adulthood (“Play to Win”). In fact, the United Nations has found that “Eighty percent of female Fortune 500 CEOs played sports in their formative years” (“Facts and Figures in Women Sport”). When girls grow up playing sports, they are socialized differently and are more confident throughout their lives (Dicaro ch. 10 17:30). Thus, the opportunities women have to play sports can directly impact the position of women in society.

Collegiate sports are at a crossroads right now. The proliferation of NIL rights for NCAA athletes can improve gender equality in collegiate sports, but it also carries the possibility of exacerbating the present gender discrimination. The OCR and the NCAA and its member institutions must work together to provide NIL opportunities for female student-athletes comparable to those of men. As previously discussed, they can do so by regulating NIL activity and dedicating an equitable amount of marketing dollars to men’s

and women's teams. These actions would validate Title IX and the gender equity that it aims to create by bringing them forward into the new NIL era of NCAA athletics.

Caitlin Clark undoubtedly inspired many young girls who currently play sports and are consequently more likely to hold leadership positions in the future. Seeing female athletes like Clark playing on national television encouraged them to pick up a ball, join a team, or just watch the game of basketball. It is up to current leadership to ensure that when the next Caitlin Clark comes around, she will have the platform to inspire the younger generation.

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