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Kelley L. Flint
University of Richmond School of Law

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MORE MONEY, FEWER PROBLEMS: A POST-*ALSTON V.*
NCAA APPROACH TO REDUCING GENDER INEQUITIES IN
SPORTS

*Kelley L. Flint**

* J.D. Candidate, Class of 2022 at the University of Richmond School of Law. Kelley Flint has focused on issues impacting gender equity and environmental justice. As a former college athlete, her studies place a particular emphasis on gender equity in athletics. She graduated from Virginia Commonwealth University with a major in Journalism and minor in Environmental Studies.

"As a girl growing up, I was always taught to be so grateful for the crumbs. Women are taught that. No more. We are only going to be happy with the cake, the icing, and the cherry on top. We deserve it, and we're going to go for it."

- Billie Jean King

ABSTRACT

In 2021 over the span of a few months, amateurism, the foundation of the National Collegiate Athletic Association was challenged and redefined. Following the passage of "name, image, and likeness" laws at the state level and an unfavorable Supreme Court ruling, the NCAA's structure has been forced to evolve. These changes have opened up possibilities for college athletes to monetize their playing in a model that is not based on viewership or revenue sharing. Serious equity gaps between men's and women's sports continue to exist, predicated on which sports generate the most money. While not a holistic solution, name, image and likeness deals are one way for women athletes to close gaps in equity.

INTRODUCTION

Of the glass ceilings that remain unshattered, athletics may be one of the thickest. Reformers are making strides towards greater gender equality across industries. However, wage gaps, discrimination, harassment, and unequal opportunities for women are prevalent across nearly all workforces.¹ Few industries exemplify these inequities more than athletics. For example, media coverage is the largest money-mover in sports.² Still, while women make up forty-percent of sports participants globally, they receive only four-percent of the media coverage.³ Lack of broadcasting creates a ripple effect for women in sports, leading to a lack of sponsors, fans, and revenue.⁴ In addition, there are perceptions that the inequities for women in sports simply exist because women's athletics are "slower and less interesting."⁵ The lack of media coverage perpetuates a circular "chicken-and-egg" argument raising the

¹ NAT'L P'SHIP FOR WOMEN AND FAMILIES, AMERICA'S WOMEN AND THE WAGE GAP 3 (Jan. 2022), <https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/americas-women-and-the-wage-gap.pdf>.

² Joe Pompliano, *How Do Professional Sports Teams Make Money?*, ROUNDHILL INVESTMENTS, <https://www.roundhillinvestments.com/research/prosports/how-do-professional-sports-teams-make-money> (Apr. 28, 2021).

³ Macaela MacKenzie, *Female Athletes Receive Only 4% of Sports Media Coverage - Adidas Wants to Change That*, GLAMOUR (July 16, 2019), <https://www.glamour.com/story/female-athletes-receive-only-4-of-sports-media-coverage-adidas-wants-to-change-that>.

⁴ *Id.*

⁵ Charlotte Gibson, *Report Finds Strides Made in Women's Sports in Past Few Years, but Inequality Remains*, ESPN (Jan. 15, 2020), https://www.espn.com/espn/story/_/id/28489077/report-finds-strides-made-women-sports-years-inequality-remains; Travis Scheadler & Audrey Wagstaff, *Exposure to Women's Sports: Changing Attitudes Toward Female Athletes*, THE SPORT J. (2018), <https://thesportjournal.org/article/exposure-to-womens-sports-changing-attitudes-toward-female-athletes/>.

following question: Are women's sports not covered because people find them uninteresting, or are people uninterested in women's sports because they are not covered? Studies tend to demonstrate the latter is likely true.⁶

As women athletes⁷ at the professional level fight for equal pay and greater media representation, women at the collegiate level face their own set of hurdles to equity. Title IX mandates that every educational institution receiving federal funding provides equal opportunities—including athletic opportunities—to its students, regardless of gender.⁸ Since Congress passed Title IX in 1972, women's participation in sports has increased by 1,000 percent.⁹

The continued existence of gender inequities in sports is irrefutable, as evidenced by women's continued efforts to advocate for equality in athletics.¹⁰ Advocates break down barriers and demand change through public relations campaigns, lawsuits, and individual enterprises emphasizing women's sports.¹¹ This article explores a different avenue for change by analyzing recent changes in amateurism and antitrust in the National Collegiate Athletic Association ("NCAA") in the wake of the Supreme Court's decision in *Alston v. NCAA*, which may be harnessed to reduce gender inequities in athletics. Specifically, the article focuses on the developing commercial areas of name, image, and likeness legislation.

Section I provides context by recounting a brief history of collegiate sports and amateurism in the NCAA and examines the framework for name, image, and likeness sponsorships in collegiate sports after *Alston v. NCAA*. Section II outlines the inequities and landscape for women in sports both at the collegiate and professional levels. Section III argues that removing amateurism barriers for women in collegiate athletics can reduce gender inequities by extending revenue-earning years for women in sports; placing economic pressures on institutions such as women's professional sports leagues and the NCAA; and allowing the private sector and athletes themselves to fill gaps missed by Title IX compliance. Finally, the article concludes by offering how

⁶ Schedler & Wagstaff, *supra* note 5.

⁷ While the term "female athlete" has historically been used in media coverage, "women athletes" will be used throughout this article. By using "women" rather than "female" as a descriptor, the aim is to describe both a more inclusive term for athletes who were not assigned female at birth, as well as reflect the categories collegiate athletics and professional leagues use to distinguish gendered sports.

⁸ 20 U.S.C. § 1681(a) (2021).

⁹ *Fast Facts*, NAT'L CTR. FOR EDUC. STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=93> (last visited Mar. 15, 2022).

¹⁰ Kim Eslessor, *Judge Dismisses U.S Soccer Equal Pay Case- Here's Why*, FORBES (May 4, 2020), <https://www.forbes.com/sites/kimelsesser/2020/05/04/judge-dismisses-us-womens-soccer-equal-pay-case---heres-why/?sh=129d0eea728d>.

¹¹ Sarah Mervosh and Christina Caron, *8 Times Women in Sports Fought for Equality*, N.Y. TIMES (Mar. 8, 2019), <https://www.nytimes.com/2019/03/08/sports/women-sports-equality.html>.

increasing gender equity in sports is imperative to goals of reaching overall gender equality.

I. FROM INCEPTION TO A NEW ERA OF COLLEGE ATHLETICS

A. *History of the NCAA and Amateurism*

In the United States, commercialization and competition have operated in tandem from the inception of intercollegiate athletics. What began as a friendly competition between student-led teams became a mechanism for institutions of higher learning to seek prestige over rival schools in more than just academics.¹² By the early 1900s, storied competitions like the Harvard-Yale regatta evolved into sponsored events with such pride and monetary gain at stake that schools recruited non-student professionals to compete.¹³ As rosters increasingly filled with athletes who were not students and schools sought more significant unfair advantages, the need for regulation became apparent.¹⁴ Incremental steps were taken.¹⁵ First, the faculty took control of the intercollegiate teams and competitions, making a minimal difference in levels of corruption.¹⁶ Then, athletic conferences were formed among schools to schedule competition, provide structure, and create regulations.¹⁷ Conferences had some success in reigning in unfair advantages, but, in their place, new concerns arose.¹⁸ With minimal regulations regarding the rules governing the sports themselves, college athletics became increasingly dangerous.¹⁹ In 1905, eighteen students died playing intercollegiate football.²⁰ The deaths and prevalence of serious injuries garnered national attention, pressuring the government to respond.²¹ At President Roosevelt's urging, heads of university programs gathered to create rules and safety measures for intercollegiate football.²² Thus, the NCAA was born, and since 1910 it has been the predominant governing body for intercollegiate competition, establishing rules for ninety national championship sports and overseeing 1,098 member

¹² See Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9 (2000) (detailing how the Harvard-Yale regatta dates back to 1852 and is the oldest active intercollegiate competition in the United States).

¹³ *Id.* at 11.

¹⁴ *Id.*

¹⁵ *Id.* at 12–13.

¹⁶ *Id.*

¹⁷ *Id.* at 11.

¹⁸ *Id.* at 14.

¹⁹ Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 990 (1987).

²⁰ *Id.*

²¹ *Id.*

²² Smith, *supra* note 12 at 9.

institutions.²³

One of the most significant rules the NCAA governs is the preservation of amateurism in college athletics.²⁴ The original constitution for the NCAA defines an amateur as “one who enters and takes part in athletic contests purely in obedience to play impulses or for the satisfaction of purely play motives and for the exercise, training, and social pleasure derived.”²⁵ The NCAA’s constitutional view of amateurism is thus defined by an athlete’s intrinsic motivation for competing.²⁶ However, in practice, amateurism is defined in the negative by the activities athletes are prohibited from doing. Most importantly, amateurism in its original form prevented student-athletes from receiving compensation in any form for playing for a school.²⁷

The NCAA’s concept and enforcement of amateurism evolved over the decades since its inception.²⁸ During the early twentieth century, the public’s interest in collegiate athletics increased.²⁹ As money continued to flow, the NCAA’s regulations at the time did little to curtail the scandals associated with the rampant commercialization of collegiate sports.³⁰ In the decades to come, the NCAA rapidly expanded its regulations and eventually formed the Committee on Infractions, which was charged with punishment of member-institutions that violated any rules promulgated by the NCAA.³¹ Simultaneously, in the 1950s, the NCAA negotiated an exclusive multi-million dollar contract to televise collegiate football.³² Today, college football is a billion-dollar industry.³³ The success of broadcast football caused a rapid expansion of revenue for collegiate sports in general.

While highly profitable, the NCAA and institutions saw that the unfair advantages it aimed to quash once again were rampant.³⁴ Powerhouse schools

²³ *What is the NCAA?*, NAT’L COLLEGIATE ATHLETIC ASS’N, <https://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> (last visited Mar. 15, 2022).

²⁴ NAT’L COLLEGIATE ATHLETIC ASS’N, 2019-20 NCAA DIVISION I MANUAL 1 (2019) (NCAA Const. art. 1 § 3.1).

²⁵ Nat’l Collegiate Athletic Ass’n Const. art. 2 § 2.9.

²⁶ *Id.*

²⁷ See Kristin R. Muenzen, *Weakening Its Own Defense? The NCAA’s Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 260 (2003).

²⁸ Glenn Wong, Kyle Skillman, & Chris Deubert, *The NCAA’s Infractions Appeals Committee: Recent Case History, Analysis and the Beginning of a New Chapter*, 9 VA. SPORTS & ENT. L.J. 47, 49–50 (2009).

²⁹ Smith, *supra* note 12 at 13.

³⁰ *Id.* at 14.

³¹ Wong, et al., *supra* note 28 at 50.

³² Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Okla., 468 U.S. 85, 85–86 (1984).

³³ Felix Richter, *U.S. College Sports Are a Billion-Dollar Game*, STATISTA (Jul. 2, 2021), <https://www.statista.com/chart/25236/ncaa-athletic-department-revenue/>.

³⁴ Wong, et al., *supra* note 28 at 52.

bribed talented recruits to commit to playing in exchange for cars, money, promises of special treatment on campus, and other benefits, primarily funded through "boosters" (donors to the athletic department of a given institution).³⁵ In theory, the NCAA would punish member institutions with sanctions for recruiting and other amateurism violations.³⁶ However, large, revenue-producing universities were disproportionately let off with warnings, compared with smaller institutions.³⁷ The 1970s changed the structure of college athletics with the creation of the "divisions" (Divisions I, II, and III) based on the size and athletic prowess of a member institution.³⁸ Division I schools are the largest and, therefore, the most revenue-producing institutions.³⁹ Each division has differing rules and degrees of enforcement, with Division I, in theory, being the most restrictive.⁴⁰ But even among Division I schools, there were, and are, discrepancies in enforcement.⁴¹ As a result, in 1978, Congress launched an investigation into the NCAA after criticism that the organization was not equally enforcing its regulations, offering leniency to the higher revenue earning schools.⁴² The House of Representatives could not substantiate any findings of improper influence in enforcement, and the hearing resulted only in suggested changes.⁴³

In 1985 the NCAA convened to amend its leadership and infraction protocols.⁴⁴ The 1985 changes also caused the NCAA to strengthen its amateurism rules and increase its enforcement efforts.⁴⁵ Enforcement only furthered after 1988 when the Supreme Court held in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma* that the NCAA is not a state actor and therefore can take property (scholarships, salaries,

³⁵ *Id.* at 51.

³⁶ *Id.* at 49–50.

³⁷ See Alexander Lodge, *Who's Afraid of the Big Bad NCAA: The Ed O'Bannon v. NCAA Decision's Impact on the NCAA's Amateurism Model*, 41 J. CORP. L. 775, 778 (2016) (Division I schools representing the main source of income of NCAA, which, with reasonable inference, suggests that they are more likely to get off with a warning from the NCAA than smaller institutions).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Wong, et al., *supra* note 28 at 51–52.

⁴¹ See generally, CONGRESSIONAL RESEARCH SERVICE, THE NCAA AND DUE PROCESS: LEGAL ISSUES (2004); The NCAA and Due Process: Legal Issues John Underwood, *It was a trial but worth it*, SPORTS ILLUSTRATED (Oct. 9, 1978), <https://vault.si.com/vault/1978/10/09/it-was-a-trial-but-worth-it-the-congressional-investigation-of-the-ncaas-enforcement-practices-though-flawed-may-lead-to-needed-changes>.

⁴² Nancy Scannell, *Hill Begins Hearings on NCAA Rule Enforcement*, N.Y. TIMES (Feb. 26, 1978), <https://www.washingtonpost.com/archive/sports/1978/02/26/hill-begins-hearings-on-ncaa-rule-enforcement/70aebaeb-522c-4043-a6ba-fc28de4f9c83/>.

⁴³ Wong, et al., *supra* note 28 at 52.

⁴⁴ *Id.*

⁴⁵ *Id.*

accolades, etc.) without raising due process violations.⁴⁶ Until recently, the NCAA stringently enforced its amateurism rules, including its "no-pay-for-play" blanket prohibition, which prevented schools from offering any kind of compensation, including occasional meals, to student-athletes.⁴⁷ It was not until the recent Supreme Court case of *Alston v. NCAA* that the NCAA made an about-face to its amateurism requirements.⁴⁸

B. 2021: The Summer that Rocked the NCAA

i. Alston v. NCAA

Before discussing the decision in *Alston v. NCAA*, the context of the decision should be understood by a preceding Supreme Court case ruling on NCAA restraints.⁴⁹ In *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, NCAA member institutions at the University of Oklahoma and University of Georgia challenged the exclusive broadcasting contract that allowed only the NCAA to profit from televised college football games.⁵⁰ The Boards of the Universities challenged the NCAA under the Sherman Antitrust Act.⁵¹ The Supreme Court held the NCAA's exclusive agreement to be anti-competitive and violative of antitrust laws under the Sherman Act.⁵² Though the Court barred the NCAA from exclusively profiting off of the broadcasts, the holding was narrow.

Prior to *Alston*, there was a general impression among regulators that the NCAA was considered untouchable by antitrust challenges, as it was held to a seemingly modified "rule of reason" standard, thus making all its anti-competitive restraints elusive to court challenges.⁵³ The Rule of Reason is a factually based evaluation of an anti-competitive agreement to determine if it violates antitrust laws or serves a legitimate purpose beyond restrictions on the market.⁵⁴ Courts use several factors, including the business purpose of the agreement, market power of the parties, competition within the relevant market, and other fact-specific considerations.⁵⁵ The Court applied the Rule of Reason to the horizontal price-fixing of the television contract in *Board of*

⁴⁶ *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 181 (1988).

⁴⁷ Wong, et al., *supra* note 28 at 53.

⁴⁸ *Nat'l Collegiate Athletic Ass'n v. Alston*, 141S. Ct. 2142 (2021).

⁴⁹ *See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 85–86 (1984).

⁵⁰ *Id.*

⁵¹ *Id.* at 85; Sherman Antitrust Act, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§1-38).

⁵² *Bd. of Regents* at 118–21.

⁵³ Lodge, *supra* note 37 at 779.

⁵⁴ Herbert J. Hovenkamp, *The NCAA and the Rule of Reason*, FAC. SCHOLARSHIP AT PENN L. 1, 4 (2017), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2798&context=faculty_scholarship.

⁵⁵ *Id.* at 1.

Regents, determining it did violate antitrust laws.⁵⁶ Horizontal price-fixing is usually a *per se* antitrust violation, and no Rule of Reason analysis is necessary.⁵⁷ However, the Court rationalized its use of a fact-based analysis, stating:

This decision is not based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics. Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.⁵⁸

While the holding in *Board of Regents* on first reading would appear to have paved the way for federal challenges to amateurism rules, after *Board of Regents*, all federal cases found amateurism rules to be necessary to the market and product of collegiate sports.⁵⁹ Dicta in *Board of Regents* by Justice Stevens was often cited in the six antitrust rulings following *Board of Regents*, and until *Alston* was the final word on amateurism in the NCAA:

The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like.

The dicta that "athletes must not be paid" became crucial to decisions after *Board of Regents*.⁶⁰ Courts conducted a "blind look" Rule of Reason analysis under an assumption that amateurism rules were not unreasonable restraints on trade and that the Sherman Act does not apply to amateurism rules.⁶¹

In *Alston*, the plaintiffs were current and former student-athletes who played Division I athletics in revenue-generating sports.⁶² The athletes sued the NCAA and eleven conferences, challenging their limitations on compensation and amateurism provisions.⁶³ *Alston* centered on constraints to education-related benefits, such as additional funds for student-athletes to purchase books or receive paid internships.⁶⁴ The NCAA had capped education-related

⁵⁶ Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 105 (1984).

⁵⁷ *Id.* at 100.

⁵⁸ *Id.* at 100–01.

⁵⁹ Tibor Nagy, *The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 311, 340–41 (2005).

⁶⁰ *Id.* at 341–42.

⁶¹ *Id.* at 343.

⁶² Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2141 (2021).

⁶³ *Id.*

⁶⁴ *See generally id.*

benefits at a low level and was strict in enforcing its rules.⁶⁵ The athletes argued that the limitations violated federal antitrust law because, but for the restrictions, the student-athletes would receive greater compensation in exchange for playing.⁶⁶ The Supreme Court applied the Rule of Reason and held that the limits to education-related benefits violate antitrust law, as the limits restrained trade in the relevant labor market, affected interstate commerce, and produced significant anti-competitive effects in violation of the Sherman Act.⁶⁷ The Supreme Court agreed with the plaintiff-athletes that the NCAA could achieve its legitimate purpose, preserving amateurism in college athletics, in a substantially less restrictive manner.⁶⁸ However, the Supreme Court's narrow holding meant it only applied to education-related benefits, offering no guidance on what less restrictive measures would entail.⁶⁹

ii. Name, Image, and Likeness

The NCAA's amateurism rules prohibited student-athletes from profiting off of their name, image, or likeness ("NIL").⁷⁰ The NCAA fiercely defended its prohibition over the past four decades, frequently sanctioning schools and athletes that violated its NIL regulations.⁷¹ The intent behind the blanket prohibition was to maintain amateurism and prevent revenue-generating sports from becoming *de facto* professional leagues.⁷² The sweeping ban met its intended goals to maintain amateurism. However, it simultaneously created unintended consequences and over-enforcement such as NIL rules affecting athletes post-graduation.⁷³ In *O'Bannon v. National Collegiate Athletic Association*, athletes sued the NCAA and EA Sports for using their likenesses in the popular game *Madden College Sports*.⁷⁴ The Ninth Circuit opened the door for NIL changes with its ruling, holding that student-athletes should be allowed to profit off their name, image, and likeness while playing NCAA athletics.⁷⁵ The NCAA appealed to the Supreme Court, but the Court declined to hear the case.⁷⁶

⁶⁵ *Id.* at 2152.

⁶⁶ *Id.*

⁶⁷ *See generally id.* at 2141 (2021).

⁶⁸ *Id.* at 2163.

⁶⁹ *Id.* at 2166.

⁷⁰ NAT'L COLLEGIATE ATHLETIC ASS'N, DIVISION I MANUAL, Rule 2.9, 12.1.2.1 (2021).

⁷¹ Smith, *supra* note 12 at 21–22.

⁷² Nat'l Collegiate Athletic Ass'n Const. art. 1 § 3.1.

⁷³ *Id.*

⁷⁴ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F. 3d 1049, 1052 (9th Cir. 2015).

⁷⁵ *Id.*

⁷⁶ *Id.*

In August 2019, California passed the first NIL law in the country.⁷⁷ The law, titled the "Student Athlete Bill of Rights," directly opposed the NCAA's NIL rules by prohibiting any California postsecondary educational institution from "preventing students participating in intercollegiate compensation as a result of the use of the student's name, image, or likeness."⁷⁸ The NCAA followed with its own set of proposed rules allowing greater NIL for student-athletes, but did not extend the same degree of flexibility to athletes as the California proposal.⁷⁹ Other states followed California's lead, and to date, twenty-nine other states have passed NIL legislation.⁸⁰ More states will follow, and NIL will be legal nationwide, at least at the legislative level. Most NIL laws similarly mirror California's in prohibiting any institution of higher learning within a state from banning a student-athlete from making money by leveraging their name, image, or likeness.⁸¹ Some states, including Virginia, have opted for restrictions on promoting "vices" such as gambling, adult entertainment, alcohol, firearms, and tobacco products.⁸² Beyond state limitations, schools themselves may also impose more requirements on NIL, such as prohibiting the use of the school's facilities for any NIL-related activity or preventing a student-athlete from using a school's logo or mascot in promotions.⁸³ Other than state and institution-imposed requirements, there is no limit to what a student-athlete can earn through their NIL.⁸⁴

While the NCAA was slowly adjusting to the pressures of state NIL legislation, the challenges to the NCAA's regulatory authority in *Alston v. NCAA* accelerated the policy shift.⁸⁵ Though *Alston* did not expressly deal with NIL, it was the nail in the coffin for the NCAA's unchallenged enforcement authority for amateurism limitations. In its ruling in *Alston*, the Supreme Court held that it would apply the Rule of Reason to future challenges against the NCAA, implying that if the NCAA did create rules against athletes' use of their NIL, the Court would strike them down.⁸⁶ Justice Brett Kavanaugh's

⁷⁷ CAL. EDUC. CODE § 67456 (2019).

⁷⁸ *Id.*

⁷⁹ Steve Berkowitz, *NCAA Unveils Proposed Rules Changes Related to Athletes' Name Image and Likeness*, USA TODAY (Nov. 13, 2020), <https://www.usatoday.com/story/sports/college/2020/11/13/ncaa-nil-name-image-likeness-proposal/6281507002/>.

⁸⁰ *Tracker: Name, Image and Likeness Legislation by State*, BUS. OF COLL. SPORTS (Sept. 21, 2021), <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/>.

⁸¹ *Id.*

⁸² H.B. 7001, 2021 Leg., 2021 Spec. Sess. (Va. 2021).

⁸³ VCU ATHLETICS INTERIM NAME, IMAGE, AND LIKENESS (NIL) POLICY, VA. COMMONWEALTH UNIV. ATHLETICS COMPLIANCE 2–3 (2021) (on file with author).

⁸⁴ H.B. 7001, 2021 Leg., 2021 Spec. Sess. (Va. 2021).

⁸⁵ Arash Khalili et al., *The State of P(l)ay for College Athlete NIL*, LOEB & LOEB (Aug. 2021), <https://www.loeb.com/en/insights/publications/2021/08/the-state-of-p-l-ay-for-college-athlete-nil>.

⁸⁶ *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2166 (2021).

concurring opinion included even stronger language than the majority's, demonstrating unsympathetic sentiment towards the NCAA. Justice Kavanaugh wrote that "nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate...."⁸⁷ On June 30, 2021, a week after the *Alston* opinion was published, the NCAA rescinded its regulations on NIL, allowing member institutions to formulate their policies according to state law.⁸⁸ The new policy went into effect July 1, 2021, and immediately student-athletes signed contracts to advertise and promote products.⁸⁹

iii. Current NIL Deals

There is no national clearinghouse or disclosure requirement for NIL deals to date, so tracking the exact number of deals or financial details of contracts is not possible. However, NIL is a widely reported topic, and interviews with student-athletes reveal some earnings estimates as well as which athletes are working with national brands. Though numerous athletes simultaneously took advantage of the change in NCAA policy, the "faces" of the first collegiate NIL deal are Fresno State University women's basketball players Haley and Hannah Cavinder, who both signed national endorsements with Boost Mobile and Six Star Pro Nutrition.⁹⁰ Both successful athletes, the commercial value of partnering with the twins' NIL does not originate from their athletic prowess, but rather comes from their nearly four million TikTok followers.⁹¹ With the combined deals, coupled with access to other social media revenue, it is estimated the twins are earning in the five-figure range.⁹² Other women athletes with significant social media followings will also be able to monetize their social media engagement, including Louisiana State University gymnast Olivia Dunn who has four million TikTok followers and an additional one

⁸⁷ *Id.* (Kavanaugh, J., concurring).

⁸⁸ Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NAT'L COLLEGIATE ATHLETIC ASS'N (Jun. 30, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy?division=d1>.

⁸⁹ David Cobb, *As NIL Rules Go Into Effect, These NCAA Athletes Moved Quickly to Profit From Name, Image and Likeness*, CBS SPORTS (Jul. 1, 2021), <https://www.cbssports.com/college-football/news/as-nil-rules-go-into-effect-these-ncaa-athletes-moved-quickly-to-profit-from-name-image-and-likeness/>.

⁹⁰ Ross Dellenger, *Behind the Scenes as the Cavinder Twins Became the Faces of Day 1 of NIL*, SPORTS ILLUSTRATED (July 1, 2021), <https://www.si.com/college/2021/07/01/hanna-haley-cavinder-twins-nil-deal-basketball-tiktok>.

⁹¹ *Id.*

⁹² *Id.*

million Instagram followers.⁹³

Other examples of widely reported NIL deals are what college sports journalists predicted: football and basketball deals.⁹⁴ Some examples include University of North Carolina quarterback Sam Howell and Clemson quarterback D.J. Uiagalelei partnering with the fast-food chain Bojangle's to make appearances and share content on their respective social media platforms.⁹⁵ Another football player taking advantage of their NIL is Arkansas receiver Trey Knox, who is partnered with PetSmart to start a social media campaign alongside his dog.⁹⁶ Football deals also extend to prospective students, including a recruit for the University of Georgia who is reported to already have an endorsement deal with the apparel company Onward Reserve.⁹⁷ Perhaps the largest NIL earner is Alabama quarterback Bryce Young, who partnered with CashApp.⁹⁸ Young's coach, Nick Saban, estimates Young is earning six figures for his endorsements.⁹⁹

⁹³ Payton Titus, *How Female Athletes and Women's Sports Can Benefit from NIL*, TAMPA BAY TIMES (July 6, 2021), <https://www.tampabay.com/sports/gators/2021/07/06/how-female-athletes-and-womens-sports-can-benefit-from-nil/>.

⁹⁴ Rob Joyce, *Notable NCAA NIL Deals*, AUDACY: 1080 WTIC NEWSTALK (July 7, 2021), <https://www.audacy.com/wtic/sports/notable-ncaa-nil-deals>; Katie McInerney, *What is NIL? NCAA Rules are Changing Regarding Athlete Pay. Here's What It Means*, BOS. GLOBE (July 2, 2021), <https://www.bostonglobe.com/2021/06/30/sports/ncaa-nil-rules-change/>.

⁹⁵ David Kenyon, *The Biggest and Most Notable NIL Deals in College Football So Far*, BLEACHER REP.: COLL. FOOTBALL (July 26, 2021), <https://bleacherreport.com/articles/2946352-the-biggest-and-most-notable-nil-deals-in-college-football-so-far>.

⁹⁶ Wesley Coburn, *Arkansas WR Trey Knox Teams with PetSmart in NIL Deal*, FANSIDED (July 2021), <https://dogoday.com/2021/07/06/trey-knox-arkansas-petsmart/>.

⁹⁷ Mike Griffith, *Onward Reserve Sending NIL Opportunities to Brock Vandagriff, Matthew Boling on July 1*, DAWGNATION (June 9, 2021), <https://www.dawgnation.com/football/georgia-nil-endorsement-brock-vandagriff/NH7EWX4C3ZEXDBKIDYRKMVPWYM/>.

⁹⁸ Ben Kercheval, *Bryce Young Has Earned 'Ungodly Numbers' In Income From NIL Deals*, CBS SPORTS (July 21, 2021), <https://www.cbssports.com/college-football/news/nick-saban-reveals-alabama-bryce-young-has-earned-ungodly-numbers-in-income-from-nil-deals/>.

⁹⁹ Kenyon, *supra* note 95.

The final example of athletes already seizing NIL opportunities are those who are agreeing to "micro-NIL" deals. Micro-deals are transactions with lower-pay in exchange for social media campaigns or brand ambassador programs.¹⁰⁰ The entertainment company Barstool sports is leveraging quantity of endorsements by signing thousands of athletes to engage in NIL deals with the brand, though the company has yet to coordinate what the NIL activities or promotions will be.¹⁰¹

II. EXISTING INEQUALITIES IN WOMEN'S SPORTS

A. Title IX and Inequities at the Collegiate Level

While the history of college athletics and the NCAA is well over a century old, participation truly began fifty years ago for women athletes.¹⁰² What market forces did to revolutionize and bring explosive growth to men's sports, federal laws and regulations did for women's sports.¹⁰³ In 1972, President Nixon signed Title IX of the 1972 Federal Education Amendments into law.¹⁰⁴ Title IX is a broad mandate that directly responds to the marked inequities and exclusions women face in education settings.¹⁰⁵ Consisting of only thirty-seven words, the Amendment reads:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.¹⁰⁶

Despite the brevity of the legislation, Title IX covers nearly all forms of discrimination on the basis of sex, including ensuring equitable safety on campus by requiring sexual assault grievance procedures, mandating inclusive school-sponsored clubs and organizations, and providing an equal opportunity to participate in athletics.¹⁰⁷

While the language of Title IX is broad, the Department of Education

¹⁰⁰ Dan Whateley & Amanda Perelli, *How Student-Athletes With Small Social Media Followings Are Cashing In On the NIL Gold Rush*, BUS. INSIDER (Sep. 2, 2021), <https://www.businessinsider.com/student-athletes-making-money-as-micro-and-nano-influencers-nil-2021-8>.

¹⁰¹ Brendan Menapace, *Barstool Sports Has Signed Thousands of College Athletes to NIL Partnerships, But No One (Not Even Barstool) Seems to Know the Plan*, PROMO MKTG. MAG. (Aug. 20, 2021), <https://magazine.promomarketing.com/article/barstool-is-trading-branded-merchandise-for-nil-rights-is-it-worth-it-for-athletes/>.

¹⁰² Richard C. Bell, *A History of Women in Sport Prior to Title IX*, THE SPORT J. (Mar. 14, 2008), <https://thesportjournal.org/article/a-history-of-women-in-sport-prior-to-title-ix/>.

¹⁰³ *Id.*

¹⁰⁴ 20 U.S.C. § 1681(a).

¹⁰⁵ U.S. DEP'T OF JUST., EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX 6 (2012).

¹⁰⁶ 20 U.S.C. § 1681(a).

¹⁰⁷ U.S. DEP'T OF JUST., *supra* note 105 at 9, 11.

regulates educational institutions with more specific guidance on adhering to a nondiscriminatory standard.¹⁰⁸ For athletics, the Department of Education has created specific requirements for schools to ensure equal opportunity regardless of sex.¹⁰⁹ To determine if equal opportunity is provided, the Department of Education examines whether the following factors are present: (i) opportunities and treatment; (ii) equipment; (iii) game and practice times; (iv) travel and per diem allowances; (v) coaching and tutoring; (vi) assignment and compensation of coaches and tutors; (vii) facilities; and (viii) publicity.¹¹⁰ Other regulations mandate that if athletic scholarships are available, there must be "reasonable opportunities for such awards for members of each sex in substantial proportion to the number of students of each sex participating in . . . athletics."¹¹¹

Since Title IX's enactment in 1972, women's participation in sports has increased at a rate ten times greater than the rate of participation when Title IX was passed.¹¹² Yet, forty years later, opportunities still lag behind men's opportunities for women athletes. In the 2015-16 academic year, women athletes accounted for 46.7 percent of Division I athletes while making up, on average, 53 percent of the undergraduate population on Division I campuses.¹¹³ To comply with the Department of Education's regulations, participation in sports should be "proportionate to the interest and demographic make-up of the school."¹¹⁴ Typical non-compliance of Title IX includes funding disparities, unequal scholarship opportunities, and disparate quality in facilities regarding athletic opportunities.¹¹⁵ For collegiate athletics, disparate treatment and the demographic make-up of Division I athletes are excused in some capacity as certain men's sports are "revenue-generating" for a school. However, very few college sports programs are profitable.¹¹⁶ By and large,

¹⁰⁸ *Id.* at 1–2.

¹⁰⁹ *Id.* at 1, 3. For more on the efficacy of Title IX and the ongoing debate over whether "sex" includes or excludes "gender" see, Erin E. Buzvis, "On the Basis of Sex": Using Title IX to Protect Transgender Students from Discrimination in Education, 28 WIS J.L. GENDER & SOC'Y 219, 220–21 (2013).

¹¹⁰ *Protecting Students: Athletics*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-issue04.html> (last visited Nov. 5, 2021).

¹¹¹ *Id.*

¹¹² *Fast Facts: Title IX*, *supra* note 9.

¹¹³ *Id.*

¹¹⁴ Title IX of the Education Amendments of 1972, 44 Fed. Reg. 71,399, 71,418 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

¹¹⁵ Anne Bloom, *Financial Disparity as Evidence of Discrimination Under Title IX*, 2 VILL. SPORTS & ENT. L.F. 5, 13 (1995).

¹¹⁶ See *Finances of Intercollegiate Athletics*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics> (last visited Nov. 7, 2021).

men's sports, like women's collegiate athletics, operate at a revenue loss.¹¹⁷ Disparate funding partially relates to the massive budgets that revenue-generating sports require.¹¹⁸

While Title IX increased women's participation in sports, gaps in equity remain. More than three-quarters of the young women who play sports will quit before playing at the collegiate level, compared to just half of young men.¹¹⁹ Less than one percent of women play professionally or for a national team at the collegiate level compared to five percent of men.¹²⁰ Though several factors contribute to this statistic, the lack of revenue-earning potential after college is also a driver for women to cease participation. Sports are not an anomaly, though; lack of opportunity for upward mobility is common among other industries with high rates of discrimination.¹²¹ It is perhaps unsurprising, then, that legal scholars of sports and the law find that sports are a microcosm for our society's racial and gender issues and often are a platform to bring attention and change to these issues.¹²²

Although Title IX was a catalyst for progress towards equality in education-related opportunities, athletics remain an area of inequity, even at the heavily regulated collegiate level.¹²³ A contributing factor to unequal treatment is the proliferation of NCAA-administered competition and promotional material, including championships and tournaments.¹²⁴ As the Court in *Tarkanian* indicated, the NCAA is a private actor not beholden to regulations that affect state entities.¹²⁵ As a result, the NCAA has a pattern of offering better championship and playoff facilities and broadcast opportunities to men's sports, particularly revenue-generating ones, than women's sports.¹²⁶

¹¹⁷ See DANIEL L. FULKS, NAT'L COLLEGIATE ATHLETIC ASS'N, REVENUES AND EXPENSES 2004–15: DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 19 (2006).

¹¹⁸ *Id.* at 21–26.

¹¹⁹ *Do You Know the Factors Influencing Girls' Participation in Sports?*, WOMEN'S SPORTS FOUND., <https://www.womenssportsfoundation.org/do-you-know-the-factors-influencing-girls-participation-in-sports/> (last visited Nov. 7, 2021).

¹²⁰ *Id.*

¹²¹ Mary Beth Faller, *Looking at Sports as a Microcosm of Racial, Gender Disparities in Society*, ARIZ. ST. U. (Mar. 30, 2019), <https://scrd.asu.edu/content/looking-sports-microcosm-racial-gender-disparities-society>.

¹²² *Id.*

¹²³ See Julie Macur & Alan Blinder, *Anger Erupts Over Disparities at NCAA Tournaments*, N.Y. TIMES (Mar. 19, 2021), <https://www.nytimes.com/2021/03/19/sports/ncaabasketball/women-ncaa-tournament-weight-room.html>.

¹²⁴ Emma Baccarlieri, *NCAA's Shameful Tournament Disparities Take Spotlight From Where it Belongs*, SPORTS ILLUSTRATED (Mar. 19, 2021), <https://www.si.com/college/2021/03/19/ncaa-womens-tournament-unequal-treatment-men-march-madness>.

¹²⁵ Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 181 (1988).

¹²⁶ See Macur & Blinder, *supra* note 123.

The NCAA's disparate treatment of women's tournaments garnered national attention during the 2021 NCAA Division I Women's Basketball Tournament, when a University of Oregon player, Sedona Prince, posted a TikTok video that went viral.¹²⁷ The video showed that the women's weight room facilities were in a partitioned conference room with only low-weight dumbbells and minimal equipment.¹²⁸ By comparison, the men's facilities had actual weight rooms and private training facilities.¹²⁹ The national attention the video garnered also raised awareness about how the NCAA did not allow use of the "March Madness" trademark for the women's tournament.¹³⁰ In the wake of this publicity, the NCAA changed its position to allow the women's tournament to use the logo and trademark.¹³¹

The 2021 NCAA Division I College Softball World Series also made national news for mistreatment.¹³² The women's teams were scheduled to play back-to-back playoff games with no rest day, and some games were scheduled to start as late as midnight.¹³³ The women's teams also did not have locker rooms or showers at the practice or game facilities.¹³⁴ The men's baseball tournament did not have the same issues.¹³⁵ The media coverage of the disparate treatment in NCAA tournaments led to a Congressional probe into the NCAA's treatment of its women athletes.¹³⁶

B. Inequities at the Professional Level

Though the discussion surrounding inequality at the collegiate level is relatively new to national media, inequality in women's professional sports has been ongoing for the past decade. The focal issue is the unequal pay between women and their male counterparts, which is highlighted by the U.S.

¹²⁷ *Id.*

¹²⁸ Baccarlieri, *supra* note 124.

¹²⁹ *See id.*

¹³⁰ Alanis Thames, *NCAA to Use 'March Madness' Slogan for Women's Basketball, Too*, N.Y. TIMES (Sept. 29, 2021), <https://www.nytimes.com/2021/09/29/sports/ncaabasketball/march-madness-womens-basketball.html>.

¹³¹ *Id.*

¹³² Molly Hensley-Clancy, *College Softball Coaches Decry Treatment by NCAA: 'What's Lower Than an Afterthought?'*, WASH. POST (April 23, 2021), <https://www.washingtonpost.com/sports/2021/04/23/ncaa-softball-college-world-series-disparities/>.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Molly Hensley-Clancy, *Pressure Mounts on NCAA as House Democrats Demand Answers Over Tournament Disparities*, WASH. POST (Mar. 24, 2021), <https://www.washingtonpost.com/sports/2021/03/24/ncaa-tournament-house-democrats-megan-rapinoe/>.

Women's National Soccer Team's (USWNT) litigation and fight for equal pay.¹³⁷ The pay structure of the men's and women's national soccer teams is indicative of a number of common issues among men and women's teams: while women's sports perform better, they are paid less:

The combined salaries of the 1,693 women playing in the top seven [soccer] leagues add up to \$41.6 million, just slightly less than the \$41.7 million salaries paid to Neymar, a Brazilian forward, by Paris Saint-Germain. [Soccer] in America is unusual because the women's team is paid less than the men, despite more people tuning in to watch them.¹³⁸

After the USWNT's collective bargaining agreement expired in 2013, players sued the U.S. Soccer Federation over gender discrimination in pay structure.¹³⁹ Answering the suit, lawyers for the U.S. Soccer Federation argued that the difference in pay was attributed to differences in skill.¹⁴⁰ The brief filed claimed the men's team has a "higher level of speed and strength," and the work of the women's team is not equal to the work of the men's national team.¹⁴¹ It also stated that "the job of a [male national team] player requires materially different skill and more responsibility than [the women's] job does, while also taking place under materially different working conditions."¹⁴² Finally, the brief argued that because the jobs were materially different, the men's and women's pay cannot be compared under the Equal Pay Act.¹⁴³ The argument incited national outrage, and the then-president of the U.S. Soccer Federation, Carlos Cordeiro, issued a public apology, saying that the brief "did not reflect the values of our federation or tremendous admiration of our women's national team."¹⁴⁴ In the wake of bad publicity and sponsors such as Coca-Cola and Budweiser publicly condemning the assertion, the federation sought mediation to resolve the dispute.¹⁴⁵ In 2019, all twenty-

¹³⁷ Caitlin Murray, *USWNT to Fight U.S. Soccer in Equal Pay Row: Appeal Says Judge's Decision 'Defies Reality'*, ESPN (Jul. 23, 2021), <https://www.espn.com/soccer/united-states-usaw/story/4437227/uswnt-to-fight-us-soccer-in-equal-pay-row-appeal-judges-decision-as-it-defies-reality>.

¹³⁸ *Where Female Athletes are More Popular Than Male Ones*, THE ECONOMIST (Jun. 29, 2019), <https://www.economist.com/united-states/2019/06/27/where-female-athletes-are-more-popular-than-male-ones>.

¹³⁹ Anne M. Peterson, *Women's National Soccer Team Players Sue for Equitable Pay*, ASSOCIATED PRESS (Mar. 8, 2019), <https://apnews.com/article/lawsuits-ap-top-news-international-soccer-ca-state-wire-sports-89de09f63ae14574b38ffb58974dc8b5>.

¹⁴⁰ Allison Frankel, *U.S. Soccer's Lawyers Learn the Hard Way That Legal Arguments can be Terrible P.R.*, REUTERS (Mar. 12, 2020), <https://www.reuters.com/article/us-otc-soccer-idINKBN20Z3HY>.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Kevin Draper & Andrew Das, *'Blatant Misogyny': U.S. Women Protest, and U.S. Soccer President Resigns*, N.Y. TIMES (Mar. 12, 2020), <https://www.nytimes.com/2020/03/12/sports/soccer/uswnt-equal-pay.html>.

eight women's players agreed to mediation and arbitration to reach a new pay-structure agreement.¹⁴⁶

The USWNT lawsuit argued for equal pay in part because the women's team has better viewership and more championships than the men's team. Other women's sports cannot offer such arguments, especially women's professional sports, which bring substantially less revenue than men's professional leagues. For example, the Women's National Basketball Association (WNBA) averages \$60 million annually while the National Basketball Association earns \$7.92 billion.¹⁴⁷ As a result, NBA players receive 50% of shared revenue, while WNBA players receive 20% of shared revenue.¹⁴⁸ A contributing factor to the WNBA's revenue is that it is decades behind the NBA in building its brand, and it is working out labor issues as a relatively new league.¹⁴⁹ A second factor is that the league is significantly smaller than the NBA, with only twelve teams compared to the NBA's thirty.¹⁵⁰ Additionally, the NBA's average ticket price is between \$51 to \$89, while a WNBA ticket costs just \$17 on average.¹⁵¹

The relative novelty of women's professional leagues is just one factor that contributes to lower revenue than men's leagues. Another significant factor is broadcast time, which brings in the majority of revenue for men's sports through advertising deals and revenue. A 2009 study found that men's sports receive 96.3% of primetime airtime, while women's sports receive just 1.6%.¹⁵² The discrepancy in coverage forces women's professional leagues to be creative in broadcasting to gain viewership, so they have partnered with streaming platforms like Twitch to allow fans to watch.¹⁵³ While professional sports are not covered equitably, the nature of Title IX publicity requires college sports be covered more equitably. As a result, college sports in non-revenue generating sports have closer viewership ratings, with some sports

¹⁴⁶ Kevin Baxter, *U.S. Soccer and USWNT Players Agree to Mediation Over Pay Dispute*, L.A. TIMES (Jun. 22, 2019), <https://www.latimes.com/sports/soccer/la-sp-us-soccer-uswnt-pay-dispute-mediation-20190622-story.html>.

¹⁴⁷ Doug Robinson, *Pay Disparity Between NBA, WNBA is a Numbers Game*, DESERET NEWS (Apr. 7, 2021), <https://www.deseret.com/sports/2021/4/7/22367915/pay-disparity-between-nba-wnba-is-a-numbers-game>.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Michael A. Messner & Cheryl Cooky, *Gender in Televised Sports: News and Highlights Shows, 1989-2009*, U.S.C. CTR. FOR FEMINIST RESEARCH 1, 4 (2010), <https://dornsife.usc.edu/assets/sites/80/docs/tvsports.pdf> (remaining 2.1% of airtime was dedicated to gender neutral or gender shared topics).

¹⁵³ Dominic Massimo, *NWSL Gamifies Twitch Streams with Sports Buff*, SPORTTECHIE (Aug. 11, 2021), <https://sporttechie.com/nwsl-gamifies-twitch-streams-with-sport-buff>.

such as softball outperforming men's baseball in viewers.¹⁵⁴

III. HARNESSING NIL AND EDUCATION RELATED BENEFITS TO REDUCE INEQUALITY

There is no one-fit or simple solution for the myriad of barriers to equality that women athletes experience. Issues such as lack of broadcast time, lower pay, and fewer opportunities require nuanced responses to address the complex underlying factors that create inequitable circumstances. Though not a solution, changes to name, image, and likeness rules in collegiate sports may give women athletes greater agency in monetizing their playing careers. By removing earning prohibitions from NIL, women athletes will be able to extend their revenue-earning years, potentially allowing sports to be a viable career that otherwise would have limited opportunities to make a livable wage. In addition, the money flow at the collegiate level could pressure institutions to address inequality from a market perspective. More significant revenue potential may pressure media to cover women who are profiting from NIL and professional sports leagues to offer greater pay. Finally, high-earning women's players may rebut the NCAA's argument that women's sports cannot bring profits, bringing change to championship and tournament opportunities for women's sports.

The NCAA administers championships for twenty-four women's sports.¹⁵⁵ Of those, only nine sports have opportunities for professional league competition in the United States after college.¹⁵⁶ Some sports field semi-professional teams and others offer avenues to compete for limited spots on the national team.¹⁵⁷ For many women athletes, college sports are the highest level of competition available in their respective sport.¹⁵⁸ For the over 400,000 NCAA athletes that compete annually, college sports are the highest level at which they can compete, with less than two percent of college athletes continuing

¹⁵⁴ Clare Brennan, *Women's College World Series Tops College World Series Viewership*, JUST WOMEN'S SPORTS (Jul. 7, 2021), <https://justwomenssports.com/womens-college-world-series-tops-college-world-series-in-viewership/>.

¹⁵⁵ *Student-Athletes*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/student-athletes> (last visited Mar. 16, 2022).

¹⁵⁶ See *The Evolution of Women's Sports*, OHIO U. (Jan. 28, 2020), <https://onlinemasters.ohio.edu/blog/the-evolution-of-womens-sports/>.

¹⁵⁷ See NAT'L WOMEN'S L. CTR., TITLE IX THE BATTLE FOR GENDER EQUALITY IN ATHLETICS IN COLLEGE AND UNIVERSITIES 3 (2017), <https://nwlc.org/wp-content/uploads/2015/08/Battle-for-GE-in-Colleges-and-Universities.pdf>; *Women's Sports in Georgia*, EXPLORE GA., <https://www.exploregeorgia.org/blog/womens-sports-in-georgia> (last visited Nov. 11, 2021).

¹⁵⁸ See *Title IX and Other Women's Issues*, US LEGAL, <https://sportslaw.uslegal.com/title-ix-and-other-womens-issues/> (last visited Nov. 7, 2021).

their playing careers to a professional level.¹⁵⁹ Name, image, and likeness arrangements allow athletes to earn money for playing during their collegiate careers, substituting for professional pay that otherwise would be unavailable.¹⁶⁰ NIL contracts are not always lucrative deals; sometimes, sponsorships are small-pay in exchange for social media promotions.¹⁶¹ Even small opportunities to monetize athletic prowess were near nonexistent for women just twenty-five years ago, but they remain extremely limited. For example, for some trans women athletes, the use of their NIL in college may be the only level of competition they can monetize their playing, as certain professional leagues write rules that bar trans women from competing.¹⁶² Allowing women agency to engage in entrepreneurship and market their playing as a brand extends the limited years women can monetize playing. Though this is also true for male college athletes, it is particularly impactful for women, as post-collegiate opportunities to earn revenue for playing are more limited and low-paying.

Some scholars and journalists contend that the use of NIL may have the opposite effect on gender equity and only serve to widen equity gaps.¹⁶³ The specifics of most NIL contracts are not yet public; however, estimated figures for several high-profile deals are widely reported. For example, the University of Alabama football coach Nick Saban speculated that the quarterback Bryce Young is nearing the \$1 million mark in his partnership with Cash App.¹⁶⁴ NIL critics worry that male athletes will vastly outpace women athletes, only furthering pay inequality. Though apprehension concerning high-profile deals that would deepen the divide in pay between women and men athletes is legitimate, revenue-generating athletes account for a small percentage of the more than 500,000 NCAA student-athletes.¹⁶⁵ In addition, concerns NIL will widen the pay gap are predicated on the assumption that all or

¹⁵⁹ *Estimated Probability of Competing in College Athletics*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/about/resources/research/estimated-probability-competing-college-athletics> (last visited Nov. 7, 2021).

¹⁶⁰ See Dean Golembeski, *Companies Rush to Make Name, Image, Likeness Deals With College Athletes*, BEST COLL. (Sept. 30, 2021), <https://www.bestcolleges.com/news/analysis/2021/09/30/ncaa-nil-athlete-deals-social-media/>.

¹⁶¹ See Menapace, *supra* note 101.

¹⁶² See e.g., *Transgender Participation*, USA POWERLIFTING, <https://www.usapowerlifting.com/transgender-participation-policy/> (last visited Nov. 6, 2021).

¹⁶³ Amanda Christovich, *NIL's Inevitable Pay Gap?*, FRONT OFFICE SPORTS (June 9, 2021), <https://frontofficesports.com/newsletter/fos-college-nils-inevitable-pay-gap/>.

¹⁶⁴ The Athletic Staff, *Nick Saban: Alabama's Bryce Young Earning Near 'Seven Figures' in NIL Deals*, THE ATHLETIC (July 20, 2021), <https://theathletic.com/news/nick-saban-alabamas-bryce-young-earning-near-seven-figures-in-nil-deals/bxUbIpB0uPdX/>.

¹⁶⁵ See e.g., *Estimated Probability of Competing in Professional Athletics*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> (last visited Nov. 6, 2021).

most top marketable athletes are men who play revenue-generating sports.¹⁶⁶ A recent marketing study found that of the twenty-five college athletes with the greatest endorsement potential, thirteen were women, with an annual endorsement potential between \$466,000 and \$63,000.¹⁶⁷ The earnings range was much more varied for the top collegiate men athletes, with the top earner's estimated endorsement potential range between \$476,000 to \$14,000.¹⁶⁸ The marketing survey demonstrates that the difference between the highest-paid individual athletes (i.e., the highest-earning men using their NIL compared with the highest-earning women using their NIL) may be less indicative of a gap than the average numbers of men and women taking advantage of NIL reform.

As women tend to engage with social media more consistently than men, the ability to brand oneself may allow women athletes to reap the benefits in greater numbers than men.¹⁶⁹ Athletes like Louisiana State University gymnast Olivia Dunne or sister Fresno State basketball players Haley and Hanna Cavinder, who have millions of TikTok followers, cannot only enter into sponsorships with brands to earn money from their NIL but can also earn money from marketing themselves.¹⁷⁰ According to a Sport Management Review study, female athletes post more on social media than male athletes on average.¹⁷¹ While male athletes tend to have more followers, engagement levels show similar figures.¹⁷² According to the study, the option for female athletes to use social media creates the potential for a more "level playing field," which does not exist in traditional television and media coverage.¹⁷³

NIL reform may also reduce the sports dropout rates for young players. By age fourteen, girls drop out of sports at two times the rate of boys.¹⁷⁴ Factors include a lack of access to participate, social stigma, lower quality of experience, and lack of role models.¹⁷⁵ Where boys have a number of

¹⁶⁶ Christovich, *supra* note 163.

¹⁶⁷ See AJ Maestas & Jason Belzer, *How Much Is NIL Worth To Student Athletes?*, ATHLETIC DIRECTOR U (2021), <https://athleticdirector.u.com/articles/how-much-is-nil-really-worth-to-student-athletes/> (calculating endorsement potential by social media following and not accounting for athletes popularized by traditional broadcast media such as quarterback Bryce Young).

¹⁶⁸ *Id.*

¹⁶⁹ Thilo Kunkel et al., *There is No Nil in NIL: Examining the Social Media Value of Student-Athletes' Names, Images, and Likeness*, SPORT MGMT. REVIEW 1, 26 (2021).

¹⁷⁰ David M. Hale, *Social Media Stardom: How Changes to NIL Will Benefit Athlete-Influencers Across the NCAA*, ESPN (Mar. 8, 2021), https://www.espn.com/womens-college-basketball/story/_/id/30945653/social-media-stardom-how-changes-nil-benefit-athlete-influencers-ncaa.

¹⁷¹ Kunkel, *supra* note 169 at 26.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Do You Know the Factors Influencing Girls' Participation in Sports?*, *supra* note 119.

¹⁷⁵ *Id.*

professional players to aspire to become, girls have far fewer professional athlete role models who look like them. NIL reform could allow young girls to be exposed to college athletes as role models through advertising. In addition to the monetary benefits of playing collegiate sports, prolonged participation in sports is shown to produce higher self-esteem and health benefits in women, including a twenty-percent reduction in the risk of breast cancer.¹⁷⁶

Another benefit of NIL legislation unique to women athletes is that NIL contracts may offer control over privatizing equal facilities. As a private actor, the NCAA is not beholden to Title IX regulations.¹⁷⁷ Despite incremental changes to its policies regarding women's championships, facilities, media coverage, and even the ability to play, problems are not met with the same voracity as men's championships. Rather than relying on public outrage and national attention regarding unequal treatment by the NCAA, women athletes could seek partnerships with private companies to contract for equipment or facilities, filling gaps the NCAA may legally neglect. Privatization may provide an interim solution while women continue pressure on the NCAA to acknowledge women's sports as a marketable product.

IV. CONCLUSION

Sports have been described as a microcosm for life, giving rise to the expression "athletes die twice," once at retirement and again at the end of their lives.¹⁷⁸ The sentiment that athletics are life or death is particularly true in the United States. Here, sports are an integral aspect of American society both in their impact on the economy but also as a medium to transmit idealistic national values.¹⁷⁹ Americans celebrate contributions sports have made in the past to racial and social progress but simultaneously condemn the voices of current athletes protesting present inequalities.¹⁸⁰ Many of the systemic problems our society faces are under a microscope in athletics where issues such as racism, homophobia, gender discrimination, and wealth inequality are illuminated by stadium lights and media.¹⁸¹ Because sports is a keystone place in American identity, the accompanying spotlight will continue to be a

¹⁷⁶ *Id.*

¹⁷⁷ See *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 198–99 (1988).

¹⁷⁸ See e.g., Marty Smith, *How Do You Cope When It's Over?*, ESPN (May 10, 2012), https://www.espn.com/racing/nascar/cup/story/_/id/7916568/nascar-marty-smith-athletes-die-twice.

¹⁷⁹ Sportslifer, *Miracle on Ice: The Game That Shaped a Nation*, BLEACHER REP. (Feb. 22, 2010), <https://bleacherreport.com/articles/350458-miracle-on-ice-the-game-that-shaped-a-nation>.

¹⁸⁰ Larry Platt, *Athlete Activism Is On The Rise, But So Is The Backlash*, GLOB. SPORT MATTERS (Apr. 16, 2018), <https://globalsportmatters.com/culture/2018/04/16/athlete-activism-is-on-the-rise-but-so-is-the-backlash/>.

¹⁸¹ *Id.*

vehicle for greater societal change.

While name, image, and likeness reform is not a holistic solution to gender inequity in athletics, its use may offer both real change as well as a symbolic shift in how Americans view women athletes. NIL reform offers young athletes agency in their playing careers, especially for female athletes who otherwise would be unable to monetize a career in sports. The very real monetary shift is already taking place as the earnings gap between men and women in college sports is predicted to shrink. Symbolically, the spotlight on women and their NIL deals, as well as the deals themselves, may bring a change in how Americans view women athletes. Economic potential is entwined with measures of athletic prowess, so much so, that revenue earning, or lack thereof, becomes either an attractor or repellant to watching sports.¹⁸² There is a direct correlation between the highest-earning athletes and the most-watched.¹⁸³ NIL already is pushing media to cover women athletes more as they sign high-earning deals. NIL also privatizes what Title IX cannot account for. As the NCAA and other private actors, like broadcasters, are not required to offer equal opportunity, NIL deals may be able to fill in gaps. Women may contract for their own equipment, or facility sponsors may even contract with entire teams.¹⁸⁴

NIL law continues to develop as states pass bills and universities draft interim guidance for their athletes. The lack of clarity may be a barrier for NIL to reach its fullest potential as an avenue for equality. There is minimal guidance from the NCAA, and state laws differ in their application of NIL. Uniformity is likely coming, as intercollegiate sports, by nature, are interstate. Congressional proposals for federal NIL legislation establishing a national standard would offer consistency for student-athletes. Federal legislation may change the extent to which women athletes are able to control their ability to seek NIL arrangements privately. If federal legislation is passed that is more institution friendly, it may limit athletes in non-revenue generating sports NIL potential.¹⁸⁵ Alternatively, federal legislation may codify the existing state of NIL, or even go so far as to include gender equity concerns within the legislation.

Because NIL is a developing area of athletics and the law, only time will

¹⁸² Fred Bowen, *Why Do Some Athletes Make Millions? Because Fans Support Them.*, WASH. POST (July 26, 2017), https://www.washingtonpost.com/lifestyle/kidspost/why-do-some-athletes-make-millions-because-fans-support-them/2017/07/26/f743ae7e-70b6-11e7-8f39-eeb7d3a2d304_story.html.

¹⁸³ *Id.*

¹⁸⁴ Zach Koons, *Report: Entire College Football Team Offered Massive Deal*, THE SPUN (July 6, 2021), <https://thespun.com/acc/miami-fl/report-miami-offered-massive-nil-deal-american-top-team>.

¹⁸⁵ Dan Murphy, *Bipartisan Federal NIL Bill Introduced for College Sports*, ESPN (Sept. 24, 2020), https://www.espn.com/college-sports/story/_/id/29961059/bipartisan-federal-nil-bill-introduced-college-sports (discussing a failed NIL bill which would have favored institutional involvement in NIL deals).

tell what NIL reform has in store by allowing women the ability to "choose their destiny" and inject entrepreneurship into their playing careers. While the sports industry is still decades away from entirely closing its vast gender equity gap, even marginal change is progress.