Maximizing NIL Rights for College Athletes

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ABSTRACT: The National Collegiate Athletic Association ("NCAA") regulates the majority of college athletics in the United States. Since its inception, the NCAA has sought to preserve the concepts of amateurism and competitive equity among its member institutions. To that end, the NCAA has prohibited players from receiving compensation beyond their athletic scholarships. These restrictions have recently come under attack by both the states and Congress. Current legislative proposals seek to prohibit the NCAA and member institutions from denying college athletes the ability to profit off of their name, image, and likeness ("NIL"). These proposals have offered varying methods of player compensation, ranging from restricted individual NIL benefits to revenue-sharing models similar to professional sports. In response, the NCAA has since removed any restrictions related to NIL benefits for college athletes, allowing the individual schools to determine the permissible scope of such benefits. This Note offers a framework to maximize NIL rights for college athletes. This framework includes: (1) the formation of a Commission on College Athletics and an independent third party to negotiate NIL contracts on behalf of players; (2) extensive individual NIL rights; (3) comprehensive group licensing and co-branding rights; and (4) a limited exception to the right of publicity in sports broadcasting to grant athletes access to a share of the massive TV contracts that have fueled the growth of college athletics.

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I. INTRODUCTION

College athletics and its principal governing body, the National Collegiate Athletic Association ("NCAA"), are in the middle of a massive overhaul. Conference realignments[1] and playoff expansions[2] have shifted the college football landscape. More significantly, the NCAA recently lost a massive antitrust case, wherein the Supreme Court held that the NCAA may not prohibit schools from offering unlimited benefits tied to education.[3] If this were not enough, for the first time in the history of the NCAA, college athletes are now able to profit off of their name, image, and likeness ("NIL").[4]

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1. *Pac-12, Big Ten, and ACC Alliance Takes Shape Following Texas and Oklahoma's SEC Push*, ATHLETIC (Aug. 25, 2021, 9:23 AM), https://theathletic.com/live-blogs/oklahoma-and-texas-conference-realignment-rumors-sec-expansion-big-ten-reaction-and-big-12-fallout/s8DgtCNpx3ut [https://perma.cc/5SXZ-L6L4]; Alan Blinder & Kevin Draper, *Eyeing the SEC, Oklahoma and Texas Plan to Leave the Big 12*, N.Y. TIMES (July 26, 2021), https://www.nytimes.com/2021/07/26/sports/ncaafootball/sec-big-12-oklahoma-texas.html [https://perma.cc/S25F-6PUN].

2. Dennis Dodd, *College Football Playoff Expansion: CFP Board Pushes 12-team Field Closer to Approval with Summer Study*, CBS SPORTS (June 22, 2021, 1:14 PM), https://www.cbssports.com/college-football/news/college-football-playoff-expansion-cfp-board-pushes-12-team-field-closer-to-approval-with-summer-study [https://perma.cc/6Q6J-MH54]; Ross Dellenger, *The Rose Bowl Throws a Wrench in College Football's Playoff Expansion Plan*, SPORTS ILLUSTRATED (July 20, 2021), https://www.si.com/college/2021/07/20/college-football-playoff-expansion-rose-bowl [https://perma.cc/665L-7A7M].

3. NCAA v. Alston, 141 S. Ct. 2141, 2164–66 (2021) (approving unlimited "education-related benefits—such as . . . scholarships for graduate school, payments for tutoring, and the like"); *see also* Marc Edelman, *What Happens Now That the Supreme Court has Decided* Alston v. NCAA*?*, FORBES (June 22, 2021, 10:34 AM), https://www.forbes.com/sites/marcedelman/2021/06/22/what-happens-now-that-the-supreme-court-has-decided-alston-v-ncaa/?sh=6e0003027393 [https://perma.cc/8V48-AAL5] (predicting colleges will begin offering additional educational benefits to college athletes).

4. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy [https://perma.cc/VJ6L-QEKH]; *see also* Bill Bender, *NIL Tracker:*

For years, the NCAA has been at the center of a debate over whether student-athletes should be compensated beyond athletic scholarships. Many have argued that athletes have earned an equitable portion of the exorbitant revenues produced by college athletics.[5] Others argue that athletes are fairly compensated through athletic scholarships and that paying players beyond the cost of admission would ruin college athletics.[6] This debate reached a head in 2019 when California created an avenue for player compensation by enacting the Fair Pay to Play Act,[7] which would allow student-athletes to profit off of their NILs beginning in 2023.[8] Several states followed suit and adopted similar legislation with varying compensation structures and restrictions.[9] In response to the groundswell of state laws supporting NIL benefits for college athletes, the NCAA announced that it was open to changing its NIL rules for the first time.[10]

Which College Athletes Are Signing Endorsement Deals?, SPORTING NEWS (July 1, 2021), https://www.sportingnews.com/us/ncaa-football/news/nil-tracker-college-athletes-signing-endorsement-deals/appbna8md6g1is65pvrwra938 [https://perma.cc/2KQ5-U8J8] (tracking college athletes taking advantage of NIL deals).

5. *See, e.g.*, Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 15, 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643 [https://perma.cc/REN9-8HA4] ("Big-time college sports are fully commercialized. Billions of dollars flow through them each year. The NCAA makes money, and enables universities and corporations to make money, from the unpaid labor of young athletes."); Joe Nocera, *A Way to Start Paying College Athletes*, N.Y. TIMES (Jan. 8, 2016), https://www.nytimes.com/2016/01/09/sports/a-way-to-start-paying-college-athletes.html [https://perma.cc/FU9C-UE4B] (proposing a salary cap model similar to professional sports leagues); John Thompson, Jr., *Let's Drop the Charade and Pay College Athletes*, N.Y. TIMES (Nov. 12, 2020), https://www.nytimes.com/2020/11/12/opinion/sunday/ncaa-sports-paying-college-players.html?action=click&module=RelatedLinks&pgtype=Article [https://perma.cc/V47H-DYX4] ("Since the N.C.A.A. is clearly hurting kids and coaches by refusing to act on its own rules, let's end the charade and allow college athletes to be paid.").

6. *See, e.g.*, Ekow N. Yankah, *Why N.C.A.A. Athletes Shouldn't Be Paid*, NEW YORKER (Oct. 14, 2015), https://www.newyorker.com/sports/sporting-scene/why-ncaa-athletes-shouldnt-be-paid [https://perma.cc/9CQS-3CAD] (arguing that paying college athletes devalues education and severs relational ties to the general student body); Matthew J. Gustin, Note, *The* O'Bannon *Court Got It Wrong: The Case Against Paying NCAA Student-Athletes*, 42 W. ST. L. REV. 137, 158 (2015) ("Student-athletes . . . make sacrifices just to be given a chance to play, even when their bank account has less than $20 in it. It is this unconditional 'love of the game' which makes college sports unique, and it needs to be preserved." (footnote omitted)).

7. CAL. EDUC. CODE §§ 67450–67457 (West 2021).

8. *Id.* § 67456(h).

9. *See, e.g.*, S.B. 6722, 2019 State Assemb., Reg. Sess. (N.Y. 2019); S.B. 582, 2020 Fla. S., Reg. Sess. (Fla. 2020); Legis. B. 962, 106th Leg., 2d Sess. (Neb. 2020); S.B. 20-123, 2020 Gen. Assemb., Reg. Sess. (Colo. 2020). For a comprehensive overview of current state NIL proposals, see Kristi Dosh, *Tracker: Name, Image and Likeness Legislation by State*, BUS. COLL. SPORTS (Sept. 21, 2021), https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state [https://perma.cc/T6SH-ABRS].

10. *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, NCAA (Oct. 29, 2019), https://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities [https://perma.cc/WE8W-YSUE].

Yet, fearing "a patchwork of different laws from different states,"[11] the NCAA requested assistance from Congress to draft federal legislation that would preempt the conflicting state laws.[12] Members of Congress from both sides of the aisle responded with competing bills containing differing views on the scope of permissible NIL benefits.[13] Two years later, Congress has yet to adopt a national bill that would preempt the various state bills effective as of January, 2022.[14] Without federal legislation, or some uniform standard, some fear "that extra benefits will be running wild in the streets."[15] Absent a specific directive from Congress, the NCAA adopted an interim policy of allowing broad NIL rights to athletes, with few restrictions imposed directly by the NCAA.[16] As a result, and for the first time in the history of the NCAA, the states and individual schools are responsible for determining the scope of college athletes' NIL rights.[17]

In the meantime, Congress is tasked with ironing out the details of these rights through national legislation. The plan that is ultimately adopted will drastically change the landscape of college athletics for the financial benefit of college athletes. The question remains, by how much?

This Note offers a solution that will maximize the NIL rights of college athletes while avoiding true "pay-for-play"[18] between the institutions and players to preserve what so many have come to love about college athletics.

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11. *NCAA Statement on Gov. Newsom Signing SB 206*, NCAA (Sept. 30, 2019), https://www.ncaa.org/about/resources/media-center/news/ncaa-statement-gov-newsom-signing-sb-206 [https://perma.cc/N9TJ-GT6K].

12. Emily Giambalvo, *As the NCAA Asks Congress for Help on NIL Legislation, Lawmakers Want More Rights for College Athletes*, WASH. POST (July 23, 2020), https://www.washingtonpost.com/sports/2020/07/23/ncaa-asks-congress-help-nil-legislation-lawmakers-want-more-rights-college-athletes [https://perma.cc/72E7-SUFQ].

13. Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019); Student Athlete Level Playing Field Act, H.R. 8382, 116th Cong. (2020); Collegiate Athlete Compensation Rights Act, S. 5003, 116th Cong. (2020); Fairness in Collegiate Athletics Act, S. 4004, 116th Cong. (2020); College Athletes Bill of Rights, S. 5062, 116th Cong. (2020).

14. Dennis Dodd, *Desperation is Setting in for the NCAA as Congress Looks Slow to Move on Name, Image and Likeness*, CBS SPORTS (June 9, 2021, 4:44 PM), https://www.cbssports.com/college-football/news/desperation-is-setting-in-for-the-ncaa-as-congress-looks-slow-to-move-on-name-image-and-likeness [https://perma.cc/5L8N-65TT].

15. *Id.*

16. Hosick, *supra* note 4.

17. *Id.*

18. As opposed to NIL rights, "pay-for-play" would involve schools paying athletes directly as employees for participation in athletics. While this may be feasible for a significant collection of athletic programs, the reality is that such a system would force out a larger portion of schools, further distorting competitive balance, and eliminating opportunities for countless prospective high school athletes looking to make it to the next level. *See* Ray Yasser & Carter Fox, *Third-Party Payments: A Reasonable Solution to the Legal Quandary Surrounding Paying College Athletes*, 12 HARV. J. SPORTS & ENT. L. 175, 192–95 (2021) (distinguishing NIL benefits from pay-for-play, emphasizing that the latter will lead to the abandonment of non-revenue producing sports).

Part II of this Note provides an overview of the NCAA and college athletics. Spanning the early years of college athletics to today, the history of the NCAA as a governing body has experienced significant changes. Principally among them has been the explosion of revenues in the top revenue-producing sports, largely as a result of lucrative TV contracts.[19] Part II will conclude with a discussion of the path ahead for the NCAA and college athletics following recent developments related to player compensation. [20]

Part III will focus on NIL rights in the college athletics setting. First, this Part will cover the Fair Pay to Play movement[21] triggered by a collection of states. It will provide an overview of the active NIL legislation among the states and the leading proposals presented by Congress to date. Part III will then cover the right of publicity, from which NIL rights are derived, and how these rights have been applied in the sports law context.

Part IV offers a framework for maximizing NIL rights. It will first discuss the need for a national standard for NIL benefits imposing reasonable restrictions to ensure competitive balance and to preserve what makes college athletics great. This can be achieved through the dual establishment of a Commission on College Athletics to oversee NIL legislation and a third-party organization that will administer NIL benefits on the athletes' behalves Under this framework, the Note will argue for comprehensive NIL rights—including group licensing and co-branding—in addition to individual NIL rights. Lastly, this Part will propose a limited right of publicity exemption requiring compensation for use of college athletes' NILs in sports broadcasting contracts.

II. COLLEGE ATHLETICS & THE NCAA

College athletics are an American tradition uniquely rooted in our national identity.[22] Before the NCAA was established, college athletics amounted to a largely unregulated collection of schools competing on inconsistent schedules and lacking standardized rules.[23] While this era of college athletics lacked organization, demand for college athletics was on the rise.[24] By the end of the 19th century, college athletics had become a profitable

19. Liane Higgins, *The Decade when Everything Changed in College Football*, WALL ST. J. (Aug. 26, 2021), https://www.wsj.com/articles/college-football-changes-transfers-nil-11629997921 [https://perma.cc/YJP6-8X2F].

20. *See infra* Part II.

21. *See supra* note 9 and accompanying text.

22. *See* Timothy Davis, *Balancing Freedom of Contract and Competing Values in Sports*, 38 S. TEX. L. REV. 1115, 1128 (1997).

23. *See* Guy Lewis, *The Beginning of Organized Collegiate Sport*, 22 AM. Q. 222, 224–25 (1970) (examining casual, informal rowing competition between Yale, Harvard, and Brown in the 1850s); Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 489–91 (1995).

24. *See* HOWARD J. SAVAGE, HAROLD W. BENTLEY, JOHN T. MCGOVERN & DEAN F. SMILEY, AMERICAN COLLEGE ATHLETICS 18–22 (1929).

enterprise.[25] The NCAA was formed in the beginning of the 20th century, not to capitalize on an emerging market, but in response to national concerns regarding the health and safety of college football players.[26] Since this transitionary period, both the NCAA and college athletics have experienced tremendous growth, as the market for college athletics has exploded into a billion-dollar industry.[27] Today, the NCAA is the governing body for over 1,000 schools and 100 athletic conferences.[28]

This Part is divided into three Sections. First, it will provide a brief history of college athletics, the formation of the NCAA, and some of the key cases that helped establish the NCAA's authority over college athletics. Next, the discussion will examine how college athletics became the billion-dollar industry that it is today. Finally, this Part will cover the paradigmatic shift that has occurred in recent years, resulting in an uncertain future for the NCAA and its constituents.

A. FORMATION OF THE NCAA & ENFORCEMENT AUTHORITY

The origin of college athletics in the United States dates back to the early 19th century, when students initiated unorganized competitions with other schools.[29] In 1852, the first intercollegiate competition was between Harvard and Yale's competitive rowing teams.[30] Over the next couple decades demand for athletics increased as other sports developed,[31] leading to the formation of organizations typically "run by the students themselves."[32] Demand for college athletics grew exponentially and by the close of the 19th century,

25. *Id.* at 306–08; *see also* Karen Given, *Tracing the Origins of College Sports Amateurism*, WBUR (Oct. 13, 2017), https://www.wbur.org/onlyagame/2017/10/13/ncaa-amateurism-origins-history [https://perma.cc/E2R6-2GKH] ("By the 1890s, college football had become a moneymaker. And it created something that you don't find anywhere else in the world: this industry of big-time college sports.").

26. Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 11–13 (2000).

27. NCAA, NCAA RESEARCH: 15-YEAR TRENDS IN DIVISION I ATHLETICS FINANCES 13 [hereinafter 15-YEAR TRENDS], https://ncaaorg.s3.amazonaws.com/research/Finances/2020RES_D1-RevExp_Report.pdf [https://perma.cc/3AHF-ETCH] ("NCAA schools across all three divisions reported total athletics revenues of just over $18.9 billion dollars in 2019.").

28. *What is the NCAA?*, NCAA (2021), https://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa [https://perma.cc/RFL3-A8C5].

29. Lewis, *supra* note 23, at 224–25.

30. *Id.* at 224; *see also* James M. Whiton, *The First Harvard-Yale Regatta (1852)*, OUTLOOK, June 1, 1901, at 286, 286–89 (describing the historic impact of the rowing competition).

31. Lewis, *supra* note 23, at 227–28.

32. Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 989 (1987). The "College Rowing Association" was the first intercollegiate athletic association formed in 1858 by students "from Harvard, Brown, Trinity and Yale." Lewis, *supra* note 23, at 227. Shortly thereafter, similar organizations were formed for baseball, track and field, and football. *Id.* at 228–29.

intercollegiate athletic competition had become "sacredly connected with the glory of Alma Mater herself."[33]

Throughout the early years of college athletics, the top players were often paid and some players were not even students.[34] While many school administrators viewed the collegiate model "as a profitable means of placing their institution in the limelight, with resultant increases in admissions and economic support," a growing number of universities recognized a need for "a national organization to regulate athletics."[35] In lockstep with the heightened demands for a centralized governing body, there were also increasing health concerns in intercollegiate athletics, particularly in American football.[36] The health risks led many to consider abolishing the sport altogether.[37] This outcome was avoided, however, thanks to the formation of a Rules Committee spearheaded by President Theodore Roosevelt and a collection of football advocates.[38] As a result, the Intercollegiate Athletic Association ("IAA") was formed in 1906 to create "competition and eligibility rules for gridiron football and other intercollegiate sports."[39] In 1910, the IAA was renamed the NCAA.[40]

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33. Lewis, *supra* note 23, at 228 (quoting *The College Regatta*, YALE LITERARY MAG., Oct. 1864, at 13).

34. Smith, *supra* note 32, at 989. Even at the Harvard-Yale Regatta, "Harvard obtained the services of a coxswain who was not currently a student." *Id.* Furthermore, player compensation was not uncommon:

> For example, it is reported that Hogan, a successful student-athlete at Yale at that time, was compensated with: (1) a suite of rooms in the dorm; (2) free meals at the University club; (3) a one-hundred dollar scholarship; (4) the profits from the sale of programs; (5) an agency arrangement with the American Tobacco Company, under which he received a commission on cigarettes sold in New Haven; and (6) a ten-day paid vacation to Cuba.

Smith, supra note *26*, at 11 n.7.

35. Smith, *supra* note 32, at 989–90.

36. Smith, *supra* note 26, at 12 ("[I]n 1905 alone, there were over eighteen deaths and one hundred major injuries in intercollegiate football.").

37. *Id.*; *see also* Christopher Klein, *How Teddy Roosevelt Saved Football*, HIST. (July 21, 2019), https://www.history.com/news/how-teddy-roosevelt-saved-football [https://perma.cc/B5S6-YKT7] ("Obituaries of young pigskin players ran on a nearly weekly basis during the football season. The carnage appalled America. Newspaper editorials called on colleges and high schools to banish football outright.").

38. Klein, *supra* note 37. In fact, Teddy Roosevelt and the Rules Committee are responsible for implementing fundamental changes to the game, including the forward pass. Katie Zezima, *How Teddy Roosevelt Helped Save Football*, WASH. POST (May 29, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/05/29/teddy-roosevelt-helped-save-football-with-a-white-house-meeting-in-1905 [https://perma.cc/9576-BUU9] ("The new rules allowed for forward passing of the ball . . . a change designed to eliminate packs of players scrambling and viciously vying for the football, which is where many injuries were sustained.").

39. *National Collegiate Athletic Association*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/National-Collegiate-Athletic-Association [https://perma.cc/MD2R-NTJ4].

40. *Id.*

Although the NCAA took over as the official governing body of intercollegiate athletics, its enforcement powers were minimal.[41] The limited authority of the NCAA led to even greater commercialization of athletics, blurring the line between college and professional athletics.[42] The growing popularity of athletics coupled with concerns over "gambling scandals and recruiting excesses"[43] resulted in the NCAA's adoption of the "Sanity Code" in 1948.[44] The primary purpose of the Sanity Code was to regulate the recruiting practices of member institutions to curtail the perceived exploitation of college athletes.[45] However, the Sanity Code was considered too extreme by most schools "because their only sanction was expulsion"[46] and was quickly replaced with the establishment of the Committee on Infractions ("COI").[47] The COI contained far broader sanctioning authority over various infractions[48]

41. Smith, *supra* note 26, at 13.

42. *See id.* at 14 ("The capacity of the NCAA to regulate excesses was not equal to the daunting task presented by the growth of, interest in, and commercialization of sport.").

43. *Id.*; *see also* Jayma Meyer & Andrew Zimbalist, *A Win Win: College Athletes Get Paid for Their Names, Images, and Likenesses and Colleges Maintain the Primacy of Academics*, 11 HARV. J. SPORTS & ENT. L. 247, 251 (2020) ("The de facto payrolls of several college teams reached $100,000 and the football coach at Oklahoma State estimated that its rival Oklahoma annually spent over $200,000 ($2.86 million in today's dollars) on players.").

44. Smith, *supra* note 26, at 14.

45. *See id.*

46. *Id.* at 15; *see also* Andy Schwarz, *The NCAA Has Always Paid Players; Now It's Just Harder to Pretend They Don't*, DEADSPIN (Aug. 29, 2015, 12:25 PM), https://deadspin.com/the-ncaa-has-always-paid-players-now-its-just-harder-t-1727419062#:~:text=The%20NCAA%20passed%20what%20was,other%20members%20of%20the%20NCAA [https://perma.cc/TZZ7-8H5N] (discussing the failure of the Sanity Code).

47. *See Division I Committee on Infractions*, NCAA (2021), http://www.ncaa.org/governance/committees/division-i-committee-infractions [https://perma.cc/S9M8-EHZH].

48. Violations enforced under the COI are divided into three levels with increasing penalties depending on the level of "breach of conduct." NCAA, INSIDE THE DIVISION I INFRACTIONS PROCESS: VIOLATION STRUCTURE AND LEVELS 1 (2019) [hereinafter DIVISION I INFRACTIONS PROCESS], https://ncaaorg.s3.amazonaws.com/infractions/d1/glnc_grphcs/D1INF_InfractionsViolationLevels.pdf [https://perma.cc/7XLZ-NRNK]. The COI's regulatory powers include the "authority to address prehearing procedural matters, set and conduct hearings or reviews, find facts, conclude violations of NCAA legislation, prescribe appropriate penalties and monitor institutions on probation to ensure compliance with penalties and terms of probation, as well as conduct follow-up proceedings as may be necessary." *Division I Committee on Infractions*, *supra* note 47. For a broader discussion and critique of the COI's enforcement powers, see generally Nathaniel Richards, Note, *The Judge, Jury, and Executioner: A Comparative Analysis of the NCAA Committee on Infractions Decisions*, 70 ALA. L. REV. 1115 (2019) (providing a comprehensive overview of the COI).

ranging from the ridiculously mundane[49] to the most severe.[50] Today, the COI continues to act as the enforcement arm of the NCAA's extensive grasp on college athletics, encapsulated in the cumbersomely detailed NCAA Bylaws.[51]

Fundamental throughout the NCAA Bylaws are the dual tenets of "amateurism" and "competitive equity." As one of the NCAA's governing principles, the Bylaws require that: "Student-athletes shall be amateurs . . . and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived."[52] To promote the ideal of amateurism, the NCAA's enforcement measures seek to "maintain[] a clear line of demarcation between college athletics and professional sports."[53] Furthermore, athletic scholarships, or "grant-in-aid," are "not considered to be pay or the promise of pay for athletics skill."[54] In addition to its focus on amateurism, the NCAA enforces numerous rules designed to promote competitive balance among the constituent programs.[55] To achieve this purpose, the NCAA imposes recruiting restrictions,[56] academic

49. *See, e.g.*, Kami Mattioli, *The Most Ridiculous NCAA Violations in College Basketball*, SPORTING NEWS (Sept. 5, 2014), https://www.sportingnews.com/us/ncaa-basketball/news/most-ridiculous-silly-insane-ncaa-violations-college-basketball/d9btttfwi4zy1e28c86oaap2k [https://perma.cc/L8SK-KSLE].

50. *See* Branch, *supra* note 5 (detailing some of the most notable NCAA sanctions involving the likes of Reggie Bush, Cam Newton, and Jim Tressel). A prominent example of the COI's extensive authority was displayed in its enforcement of the so-called "Death Penalty" on the Southern Methodist University ("SMU") football team. SMU established a competitive program in the 1980s that was largely the byproduct of under-the-table payments to the country's top high school recruits. Eric Dodds, *The 'Death Penalty' and How the College Sports Conversation Has Changed*, TIME (Feb. 25, 2015, 6:00 AM), https://time.com/3720498/ncaa-smu-death-penalty [https://perma.cc/7TLT-GDJV]; see DIVISION I INFRACTIONS PROCESS, *supra* note 48, at 1. The "Death Penalty" prohibited SMU from participating in the 1987 season and is considered the harshest sanction imposed by the NCAA through the COI. Dodds, *supra*.

51. The 2021 version of the Division I Manual is over 450 pages long and divided into three parts: the NCAA Constitution, the Operating Bylaws, and Administrative Bylaws. NCAA, 2021-2022 NCAA DIVISION I MANUAL (2021) [hereinafter NCAA MANUAL], https://web3.ncaa.org/lsdbi/reports/getReport/90008 [https://perma.cc/8CKM-D8Z8].

52. *Id.* at art. 2.9.

53. *Id.* at art. 12.01.2 ("Clear Line of Demarcation"); *see also id.* at art. 1.3.1 ("Basic Purpose").

54. *Id.* at art. 12.01.4 ("Permissible Grant-in-Aid"); *see id.* at art. 12.02.10 ("Pay") ("Pay is the receipt of funds, awards or benefits not permitted by the governing legislation of the Association for participation in athletics."); *id.* at art. 12.02.11 ("Professional Athlete") ("A professional athlete is one who receives any kind of payment, directly or indirectly, for athletics participation except as permitted by the governing legislation of the Association.").

55. "The structure and programs of the Association and the activities of its members shall promote opportunity for equity in competition to ensure that individual student-athletes and institutions will not be prevented unfairly from achieving the benefits inherent in participation in intercollegiate athletics." *Id.* at art. 2.10 ("The Principle of Competitive Equity").

56. *Id.* at art. 13.

eligibility requirements,[57] playing and practice time restrictions,[58] and much more.

These tenants have traditionally been protected by the courts. For instance, the COI was challenged under the Due Process Clause[59] in *NCAA v. Tarkanian*, where the Supreme Court ruled that the NCAA was not subject to Due Process claims as a private actor.[60] The NCAA is also protected from individual state interference by way of the dormant Commerce Clause.[61] In the employment context, federal courts have rejected the existence of an employer-employee relationship between the NCAA and players while granting heightened protections for college coaches.[62] Moreover, in 2019 the Ninth Circuit determined that student-athletes were not employees of the NCAA under either the Fair Labor Standards Act or California labor law.[63] Thus, the NCAA is protected from due process claims, is isolated from state interference, and—unlike their coaches—college athletes do not receive employment law protections.

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57. *Id.* at art. 14.

58. *Id.* at art. 17.

59. U.S. CONST. amend. XIV, § 2.

60. NCAA v. Tarkanian, 488 U.S. 179, 196 (1988) ("The NCAA is properly viewed as a private actor at odds with the State when it represents the interests of its entire membership in an investigation of one public university."); *cf.* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 302 (2001) (ruling that a private high school athletic association was a *de facto* state actor for 14th Amendment purposes). Throughout the 1970s, the NCAA investigated UNLV's basketball program, uncovering 38 violations of NCAA rules, 10 of which were attributed to head coach Jerry Tarkanian. *Tarkanian*, 488 U.S. at 181. In rejecting Tarkanian's claims against the NCAA, the Court articulated the state action requirement, finding that the NCAA was a private actor sheltered from Due Process Clause restrictions, "no matter how unfair that conduct may be." *Id.* at 191. Justice White dissented, pointing out that

> UNLV . . . suspend[ed] Tarkanian . . . because it embraced the NCAA rules governing conduct of its athletic program and adopted the results of the hearings conducted by the NCAA . . . as it had agreed that it would. Under these facts, I would find that the NCAA acted jointly with UNLV and therefore is a state actor.

Id. at 203 (White, J., dissenting).

61. U.S. CONST. art. I, § 8, cl. 3; *see* NCAA v. Miller, 10 F.3d 633, 637 (9th Cir. 1993). In *Miller*, the State of Nevada enacted legislation requiring that the COI provide greater procedural guarantees for Nevada schools. *Id.* (noting that in their infraction proceedings, "the NCAA does not provide the accused with the right to confront all witnesses, the right to have all written statements signed under oath and notarized, the right to have an official record kept of all proceedings, or the right to judicial review of a Committee decision"). The Ninth Circuit voided the entirety of the Nevada statute finding that it directly regulated interstate commerce. *Id.*

62. *See* Hennessey v. NCAA, 564 F.2d 1136, 1154 (5th Cir. 1977) (upholding an NCAA Bylaw imposing limits on the number of assistant coaches that any member institution could employ); Law v. NCAA, 134 F.3d 1010, 1024 (10th Cir. 1998) (protecting assistant basketball coaches by invalidating NCAA rules designating them as "restricted-earnings" positions that imposed a $16,000 salary cap on those positions).

63. Dawson v. NCAA, 932 F.3d 905, 908 (9th Cir. 2019).

Despite the foregoing legal authority, for the modern college athlete, the association of college athletics with amateurism poses numerous contradictions.[64] For instance, the average Division I athlete spends 35.5 hours per week on academics and 33 hours per week on athletics.[65] In fact, male student-athletes in football, basketball, and baseball all spent as much, or more, time on athletics than academics.[66] One commentator has described the use of the terms "'amateurism' and . . . 'student-athlete' . . . [as] cynical hoaxes, legalistic confections propagated by the universities so they can exploit the skills and fame of young athletes. The tragedy at the heart of college sports is not that some college athletes are getting paid, but that more of them are not."[67]

Similarly, the preservation of competitive balance is often highlighted by those opposed to player compensation, as they fear paying college athletes will create an irreparable imbalance between the universities that can afford to pay players and those who cannot.[68] Moreover, they fear paying players will threaten the non-revenue producing sports.[69] While these are legitimate concerns that warrant consideration, they ignore or minimize the already existing competitive imbalances. Competitive imbalance has existed in college athletics for decades and has only been exacerbated in recent history

64. The NCAA's amateurism rules as a justification for non-payment have long been the subject of legal scrutiny. *See generally* Stanton Wheeler, *Rethinking Amateurism and the NCAA*, 15 STAN. L. & POL'Y REV. 213 (2004) (critiquing the history of amateurism in the NCAA); *see also* Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1304–15 (1992) (arguing that the NCAA's amateurism rules violate antitrust laws).

65. NCAA RSCH., GOALS STUDY: UNDERSTANDING THE STUDENT-ATHLETE EXPERIENCE 18, 20 (2019), https://ncaaorg.s3.amazonaws.com/research/goals/2020AWRES_GOALS2020con.pdf [https://perma.cc/BG6M-W34D].

66. *Id.* at 19, 21. As of 2019, basketball players reported spending more time on academics than athletics. *Id.* at 21; *see also id.* at 18 ("Division I men's basketball players continue to report a decrease in athletic time commitments (median of 36 hours/week in 2010, 34 in 2015, and 32 in 2019).").

67. Branch, *supra* note 5. Even "the term student-athlete" itself has questionable origins: "The term *student-athlete* was deliberately ambiguous. . . . That they were high-performance athletes meant they could be forgiven for not meeting the academic standards of their peers; that they were students meant they did not have to be compensated, ever, for anything more than the cost of their studies." *Id.*

68. *See* Cody J. McDavis, *Paying Students to Play Would Ruin College Sports*, N.Y. TIMES (Feb. 25, 2019), https://www.nytimes.com/2019/02/25/opinion/pay-college-athletes.html [https://perma.cc/6PND-EP5J].

69. *See* Yankah, *supra* note 6 ("This value can be seen in the countless student athletes, from gymnasts to softball players, who pour hours of work into training and competing with no hope of going pro."); Ben Strauss & Zach Schonbrun, *It's a Game of Spiraling Costs, So a College Tosses Out Football*, N.Y. TIMES (Dec. 2, 2014), https://www.nytimes.com/2014/12/03/sports/ncaafootball/uab-cancels-football-program-citing-fiscal-realities.html [https://perma.cc/N6PE-3X74] (noting that the financial struggles schools face attempting to keep pace with top programs causes some to increase student fees).

with the entrenchment of the "Power Five" conferences.[70] In addition to athletic dominance,[71] the current system has produced massive wealth imbalances for those within and without the Power Five.[72] The supremacy of these schools has led some to conclude that those conferences should simply break off from the NCAA altogether.[73]

Although competitive balance is a worthwhile purpose that must be considered going forward, it is an insufficient justification for denying college athletes the right to profit off of their NIL.

B. BOARD OF REGENTS *& TV MONEY IN COLLEGE SPORTS*

The growing business of college athletics further undermines support for both the ideal of amateurism and the goal of competitive balance. From the humble beginnings of the Harvard-Yale Regatta, college athletics have transformed into "the religion of the American people."[74] From 2004 to 2019 alone, the median revenue among Division 1 Football Bowl Subdivision ("FBS") schools increased by nearly 150 percent.[75] Yet, these revenue increases have been largely offset by increasing expenditures. In 2019, the median total revenues of FBS schools was $80.9 million, while average expenditures were $80.8 million.[76]

The massive revenues accumulated by the NCAA and its member schools derive from multiple sources, including ticket sales, conference payouts, and booster contributions.[77] However, the NCAA attributes the

70. The "Power Five" is comprised of the top revenue-producing conferences in college athletics: the Atlantic Coast Conference ("ACC"), Big Ten, Big 12, Pac-12, and the Southeastern Conference ("SEC"). Steve Berkowitz, *Power Five Conferences Had Over $2.9 Billion in Revenue in Fiscal 2019, New Tax Records Show*, USA TODAY (July 10, 2020, 2:00 PM), https://www.usatoday.com/story/sports/college/2020/07/10/power-five-conference-revenue-fiscal-year-2019/5414405002 [https://perma.cc/4Y3Y-DVHN].

71. The Power Five schools have been particularly dominant in college football. For instance, the last non-Power Five school to be crowned national champion was Brigham Young University in 1984. *College Football Championship History*, NCAA (Jan. 12, 2021), https://www.ncaa.com/news/football/article/college-football-national-championship-history [https://perma.cc/G6HF-WEZP].

72. *See* Paula Lavigne, *Rich Get Richer in College Sports as Poorer Schools Struggle to Keep Up*, ESPN (Sept. 2, 2016), https://www.espn.com/espn/otl/story/_/id/17447429/power-5-conference-schools-made-6-billion-last-year-gap-haves-nots-grows [https://perma.cc/ZA9Y-76C6].

73. *See* Heather Dinich, *Survey Shows Majority of Power 5 Athletic Leaders Favor Major Restructuring of NCAA Sports*, ESPN (Oct. 13, 2020), https://www.espn.com/college-sports/story/_/id/30108852/survey-shows-majority-power-5-athletic-leaders-favor-major-restructuring-ncaa-sports [https://perma.cc/FT8Y-2GU6]; *Knight Commission Recommends a New Governing Structure for the Sport of FBS Football*, KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS (Dec. 3, 2020), https://www.knightcommission.org/2020/12/knight-commission-recommends-a-new-governing-structure-for-the-sport-of-fbs-football [https://perma.cc/2UV6-VPVP].

74. Smith, *supra* note 26, at 9.

75. 15-YEAR TRENDS, *supra* note 27, at 42.

76. *Id.* at 7.

77. *Id.* at 14.

majority of its revenues to television rights and ticket sales associated with its sponsored championship events.[78] Likewise, the revenues of the Power Five conferences are similarly reliant on the contributions of television rights and ticket sales.[79] In 2019 alone, "[t]he Power Five . . . had more than $2.9 billion in combined revenue,"[80] and the top 40 college programs generated over $100 million each.[81]

Undoubtedly, the leading source of this compounding revenue has been the creation of long-term television contracts. The first significant television contract was signed in the 1950s, when "the NCAA negotiated its first contract valued in excess of one million dollars."[82] This number is miniscule relative to modern contract values. For example, in 2010 the NCAA agreed to a 14-year deal worth over $10 *billion* for the broadcasting rights to its "March Madness" men's basketball tournament.[83] That amount was surpassed shortly thereafter when the NCAA extended the contract for $8.8 billion over an eight-year period six years later.[84]

Not to be left out, the major athletic conferences have pounced on the growing television market by creating their own networks dedicated exclusively to their conferences' programming.[85] The first and most successful of these ventures has been the Big Ten Network, with "its media contracts for 2018 topp[ing] $759 million, the highest by far of any athletic conference ever."[86] While college athletics have been commercialized in one way or

78. *Where Does the Money Go*, NCAA (2021), https://www.ncaa.org/about/where-does-money-go [https://perma.cc/2MAY-8J6S].

79. *See* Rich Exner, *Topped by Ohio State, Big Ten Sports Approaches $2 Billion a Year in Spending*, CLEVELAND.COM (Feb. 25, 2020, 6:06 PM), https://www.cleveland.com/osu/2020/02/topped-by-ohio-state-big-ten-sports-approaches-2-billion-a-year-in-spending.html [https://perma.cc/YE6A-YNAS] (reporting that media rights, ticket sales, contributions, and royalties were the leading revenue sources for the Big Ten).

80. Berkowitz, *supra* note 70.

81. Steve Berkowitz et al., *NCAA Finances*, USA TODAY, https://sports.usatoday.com/ncaa/finances [https://perma.cc/Z7PW-FGT2] (denoting school revenue and expenses for 2018–2019).

82. Smith, *supra* note 26, at 15.

83. Rodger Sherman, *The NCAA's New March Madness TV Deal Will Make Them a Billion Dollars a Year*, SB NATION (Apr. 12, 2016, 5:06 PM), https://www.sbnation.com/college-basketball/2016/4/12/11415764/ncaa-tournament-tv-broadcast-rights-money-payout-cbs-turner [https://perma.cc/9HVL-6EMG].

84. *Id.*

85. *See* Kevin Draper, *New Cable Network for A.C.C. Heightens Arms Race in College Sports*, N.Y. TIMES (Aug. 22, 2019), https://www.nytimes.com/2019/08/22/sports/ncaafootball/acc-network-espn.html [https://perma.cc/FV5G-3U5W] (discussing expansion of conference networks and how "[a]mong the top conferences in college sports, only the Big 12 remains on the outside looking in when it comes to the upside of a league-focused network").

86. Karen Weaver, *The Big Ten Network Was Created by and for Its Fans – and Turned a Profit in Less than Two Years*, FORBES (Jan. 4, 2020, 12:00 AM), https://www.forbes.com/sites/karen

another since their inception,[87] the growth of the television industry is largely responsible for our modern understanding of collegiate athletics.

Perhaps surprisingly, the Supreme Court played an integral role in the massive growth in revenues from TV contracts. Antitrust is the predominant area of law in which the NCAA's authority has been questioned. In *NCAA v. Board of Regents of the University of Oklahoma*, the Supreme Court considered an antitrust challenge to the NCAA's regulation of football broadcasting rights.[88] The NCAA had granted ABC and CBS the exclusive broadcasting rights for the 1982–85 college football seasons and prohibited member schools from selling separate broadcasting rights.[89] The purported purpose of these restrictions was consistent with the NCAA's historical treatment of broadcasting rights as an attempt "to reduce, insofar as possible, the adverse effects of live television upon football game attendance."[90] While ultimately ruling against the NCAA on the antitrust issue under a rule of reason analysis,[91] the Court significantly emphasized that student-athletes were not to be paid, embracing the NCAA's amateurism justification:

> [T]he NCAA seeks to market a particular brand of football—college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports . . . . In order to preserve the character and quality of the "product," *athletes must not be paid* . . . .[92]

Despite this nod to the NCAA's amateurism model as an economic justification for denying player compensation, the *Board of Regents* decision laid the foundation for the proliferation of TV money in college sports.[93] Once schools were free to pursue their own broadcast agreements, television revenues exploded as regional markets competed for the broadcasting rights

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weaver/2020/01/04/the-big-ten-network-was-created-by-and-for-its-fans—and-turned-a-profit-in-less-than-two-years/#7663b71c7212 [https://perma.cc/H2QS-N325].

87. *See supra* Section II.A.

88. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 88 (1984).

89. *Id.* at 91–94.

90. *Id.* at 91.

91. *Id.* at 119–20. Under the Rule of Reason test, an action may be an unreasonable restraint of trade if the contracts themselves or the "surrounding circumstances giv[e] rise to the inference or presumption that they were intended to restrain trade and enhance prices." *Id.* at 103. (quoting Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 690 (1978)).

92. *Id.* at 101–02 (emphasis added); *see also id.* at 120 ("The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question . . . that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.").

93. Wheeler, *supra* note 64, at 213.

of local teams.[94] In an ironic twist, despite accepting the NCAA's arguments in favor of amateurism, the *Board of Regents* decision only led to greater commercialization of college athletics.

Although it would seem that there is more than enough money to go around, the NCAA and its constituent athletic departments argue that they cannot afford paying players, as most schools' "expenses exceed their revenue, requiring their colleges and universities to cover the shortfall."[95] While most athletic departments currently operate at a deficit,[96] claims that schools cannot afford to pay college athletes is hard to reconcile with how that money is actually spent.

One contributor to the deficit spending common among athletic departments has been the increasing cost of coaching salaries. In fact, in 2020 the reported salaries of 84 out of the 130 FBS schools exceeded $1 million last year.[97] Similar numbers have been reported for college basketball coaches.[98] In fact, football or basketball coaches are the top paid public employees in 40 states, and "[t]he four [College Football Playoff] coaches banked about four times what the 50 governors earned in 2019 ($6.9M)."[99]

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94. *See* Allen R. Sanderson & John J. Siegfried, *The National Collegiate Athletic Association Cartel: Why it Exists, How it Works, and What it Does*, 52 REV. INDUS. ORG. 185, 190–92 (2017) (detailing the growth in college football broadcasting post-*Board of Regents*).

95. *Athletics Departments that Make More than They Spend Still a Minority*, NCAA (Sept. 18, 2015), https://www.ncaa.org/about/resources/media-center/news/athletics-departments-make-more-they-spend-still-minority [https://perma.cc/843V-CBR8].

96. Will Hobson & Steven Rich, *Playing in the Red*, WASH. POST (Nov. 23, 2015), https://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills [https://perma.cc/A2NR-AHD9].

97. Steve Berkowitz, Matt Wynn, Sean Dougherty & Emily Johnson, *NCAA Salaries*, USA TODAY (Nov. 17, 2020), https://sports.usatoday.com/ncaa/salaries [https://perma.cc/N4SY-VRN3]. For example, one of the top paid coaches in college football, Clemson's Dabo Swinney, made over $8 million in 2020. *Id.* In relation to Swinney's lucrative coaching contract, he has been criticized for his comments related to player compensation. J. Brady McCollough, *Dabo Swinney Makes $9.3 Million a Year but Doesn't Think Players Should be Paid. Why?*, L.A. TIMES (Oct. 4, 2019, 6:00 AM), https://www.latimes.com/sports/story/2019-10-04/clemson-dabo-swinney-ncaa-paying-players [https://perma.cc/8BKP-KGN7] (referencing a 2014 quote where Swinney stated: "As far as paying players, professionalizing college athletics, that's where you lose me. I'll go do something else, because there's enough entitlement in this world as it is").

98. Steve Berkowitz, Steve Suo, Sean Dougherty & Emily Johnson, *NCAA Salaries*, USA TODAY (Mar. 9, 2021), https://sports.usatoday.com/ncaa/salaries/mens-basketball/coach [https://perma.cc/VF2A-VW2L].

99. Charlotte Gibson, *Who's Highest-Paid in Your State?*, ESPN (2019), https://www.espn.com/espn/feature/story/_/id/28261213/dabo-swinney-ed-orgeron-highest-paid-state-employees [https://perma.cc/HN79-QEFR]. The salaries for college coaches have caused some to consider imposing a cap (and a requisite antitrust law exemption) "to curb the rapidly increasing salaries of coaches in college sports." Dan Murphy, *Capping College Coaches' Salaries Discussed at Congressional Hearing*, ESPN (Sept. 15, 2020), https://www.espn.com/college-ports/story/_/

In addition to the increased salaries of college coaches, athletic facilities have become the schools' most expensive recruiting device. Competing schools have spent exorbitant amounts to upgrade their facilities in what has become an "athletic facilities arms race that is costing many of America's largest public universities hundreds of millions of dollars and shows no signs of subsiding."[100] In 2014 alone, the public schools of the Power Five conferences directed over $772 million to improving, paying down loans, or maintaining athletic facilities.[101] The increased spending on athletic facilities "is one of the biggest reasons otherwise profitable or self-sufficient athletic departments run deficits."[102] A concerning side-effect of the increasing expenditures in athletic facilities is that schools will often raise "athletic fees" for students to offset some of these costs.[103] Simply put, "the number of athletics departments struggling to profit is not evidence of inexorably rising costs, but of bloated spending."[104]

C. MOVING THE GOALPOSTS: O'BANNON *&* ALSTON

Extraneous to the success of television contracts, a related byproduct of the commercialization of college athletics was the success of video games. The seminal case in this area of law involved a challenge to the NCAA's licensing of college athletes' NILs to the video game company EA Sports.[105] Ed O'Bannon was a former basketball star at UCLA, leading its 1995 team to a

id/29892716/capping-college-coaches-salaries-discussed-congressional-hearing [https://perma.cc/ZLA2-PFQA].

100. Will Hobson & Steven Rich, *Colleges Spend Fortunes on Lavish Athletic Facilities*, CHI. TRIB. (Dec. 23, 2015, 6:40 AM), https://www.chicagotribune.com/sports/college/ct-athletic-facilities-expenses-20151222-story.html [https://perma.cc/JJV7-DEB5].

101. *Id.*

102. *Id.*

103. Will Hobson & Steven Rich, *Why Students Foot the Bill for College Sports, and How Some Are Fighting Back*, WASH. POST (Nov. 30, 2015), https://www.washingtonpost.com/sports/why-students-foot-the-bill-for-college-sports-and-how-some-are-fighting-back/2015/11/30/7ca47476-8d3e-11e5-ae1f-af46b7df8483_story.html?itid=sf [https://perma.cc/J9GY-R7BM] ("Outside the Power Five, athletic departments lacking annual windfalls from television networks are even more reliant on student fees. . . . Some smaller schools charge more than $2,000 per year in athletic fees . . . .").

104. Hobson & Rich, *supra* note 96. The level of spending amongst universities on athletic facilities has led some to argue in favor of legislation imposing spending caps. Sally Jenkins, *College Athletic Departments Are Paying Themselves to Lose Money*, WASH. POST (Nov. 25, 2015), https://www.washingtonpost.com/sports/colleges/flagrant-foul-college-sports-bosses-cry-poor-while-spending-lavishly/2015/11/25/f2d6d130-937d-11e5-b5e4-279b4501e8a6_story.html [https://perma.cc/D5T4-VLPD] ("Reform is simple. Athletic departments should be subjected to the same budgetary constraints as any other university department — by law.").

105. Steve Eder & Ben Strauss, *Understanding Ed O'Bannon's Suit Against the N.C.A.A.*, N.Y. TIMES (June 9, 2014), https://www.nytimes.com/2014/06/10/sports/ncaabasketball/understanding-ed-obannons-suit-against-the-ncaa.html [https://perma.cc/VY3E-2SJ6].

national title and collecting national accolades along the way.[106] Long after his college career was over, however, O'Bannon "recognized himself on a video game and was troubled that his likeness was being used without his consent — or payment."[107] In 2009, O'Bannon and other former players filed an antitrust lawsuit against the NCAA to eliminate "rules prohibiting universities from paying players for their publicity rights."[108]

In *O'Bannon v. NCAA*, the Ninth Circuit issued two important rulings involving the future of student-athlete compensation.[109] First, the court affirmed the district court in finding that the NCAA could not restrict member institutions from providing scholarships that covered the full cost of attendance ("COA").[110] However, the court refused to follow the lower court's ruling allowing institutions to compensate players for their NIL through a deferred compensation program.[111] The Ninth Circuit found that such a program exceeded the court's authority under antitrust law's rule of reason analysis, relying heavily on the argument that player compensation beyond the full COA would destroy amateurism, and "[o]nce that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point."[112]

The court granted strong deference to the NCAA's amateurism argument, surmising "that not paying student-athletes is *precisely what makes them amateurs*."[113] While the *O'Bannon* court vindicated the NCAA's amateurism defense, the opinion opened the door to future antitrust lawsuits challenging the NCAA's compensation restrictions.[114] Indeed, the *O'Bannon* decision set the table for a separate and more comprehensive challenge against the NCAA and its members.[115]

Almost 30 years after *Board of Regents*, a group of athletes filed a class action antitrust lawsuit against the NCAA and the separate conferences

106. *Id.*

107. *Id.*

108. *Id.*

109. O'Bannon v. NCAA, 802 F.3d 1049, 1053 (9th Cir. 2015).

110. *Id.* at 1074. This issue was decided with relative ease, as the NCAA largely agreed that it would not contradict the NCAA Bylaws to allow increased compensation through additional scholarship funding. *See id.* at 1075 ("Dr. Mark Emmert, the president of the NCAA, testified at trial that giving student-athletes scholarships up to their full costs of attendance would not violate the NCAA's principles of amateurism because all the money given to students would be going to cover their 'legitimate costs' to attend school.").

111. *Id.* at 1079.

112. *Id.* at 1078.

113. *Id.* at 1076.

114. *Id.* at 1079 ("[T]he NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules.").

115. *See generally In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239 (9th Cir. 2020), *cert. granted sub nom.*, NCAA v. Alston, 141 S. Ct. 2141 (analyzing the NCAA restrictions for benefits tied to education).

seeking "to dismantle the NCAA's entire compensation framework."[116] In *NCAA v. Alston*, a California district court ruled in favor of the athletes, finding that the Power Five conferences would offer greater compensation benefits to players but for the NCAA's compensation restrictions.[117] The district court also rejected the NCAA's amateurism justification, finding that the compensation restrictions "do not follow any coherent definition of amateurism" and that additional benefits post-*O'Bannon* "have not diminished demand for college sports."[118] While restrictions on "pay-for-play" were permissible, the court found that the NCAA could not cap "certain education-related benefits."[119] The Ninth Circuit affirmed the decision in full but rejected the athletes' additional claim that benefits beyond the COA were also violative of antitrust law.[120] In a unanimous decision delivered by Justice Gorsuch, the Supreme Court affirmed the decision in favor of the athletes.[121] After laying out the relevant antitrust principles, the Court canned the NCAA's amateurism defense, dismissing the Court's prior commentary on amateurism's validity in *Board of Regents* as dicta.[122] In reaching this conclusion, the Court emphasized how much the college athletics market has changed since 1984:

> When it comes to college sports, there can be little doubt that the market realities have changed significantly since 1984. Since then, the NCAA has dramatically increased the amounts and kinds of benefits schools may provide to student-athletes. For example, it has allowed the conferences flexibility to set new and higher limits on athletic scholarships. It has increased the size of permissible benefits "incidental to athletics participation." And it has developed the Student Assistance Fund and the Academic Enhancement Fund, which in 2018 alone provided over $100 million to student-athletes. Nor is that all that has changed. In 1985, Division I football and basketball raised approximately $922 million and $41 million

116. *Id.* at 1247.

117. *Id.* at 1247–49. The district court relied heavily on evidence provided by the petitioners "that schools, as buyers of athletic services, exercise monopsony power to artificially cap compensation at a level that is not commensurate with student-athletes' value," and found that concerns raised by the Power Five conferences "constituted further proof that, absent the NCAA's rules, student-athletes would receive higher compensation." *Id.* at 1248–49.

118. *Id.* at 1249 (quoting *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1074 (N.D. Cal. 2019)). In light of these factors, the district court ultimately determined that a Less Restrictive Alternative ("LRA") existed to enforce the NCAA's legitimate purpose of prohibiting payments unrelated to the COA. *Id.* at 1251–52.

119. *Id.* at 1260.

120. *Id.* at 1264–65.

121. NCAA v. Alston, 141 S. Ct. 2141, 2166 (2021).

122. *Id.* at 2157–58 ("Given the sensitivity of antitrust analysis to market realities—and how much has changed in this market—we think it would be particularly unwise to treat an aside in *Board of Regents* as more than that.").

> respectively. By 2016, NCAA Division I schools raised more than $13.5 billion. From 1982 to 1984, CBS paid $16 million per year to televise the March Madness Division I men's basketball tournament. In 2016, those annual television rights brought in closer to $1.1 billion.[123]

Ultimately, the Court affirmed the district court's analysis as "stand[ing] on firm ground . . . consistent with established antitrust principles, and a healthy dose of judicial humility."[124]

Yet, despite this unprecedented win for college athletes, the ruling was limited to certain education-related benefits.[125] Because the respondents did not relitigate the NCAA's restrictions on benefits tied to *athletics*, "pay-for-play" remains prohibited.[126] However, Justice Kavanaugh's concurrence indicated that the walls may be closing in on the NCAA's compensation restrictions tied to athletics.[127] First, Justice Kavanaugh noted the "circular and unpersuasive" nature of "the NCAA['s] [argument] that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid."[128] Kavanaugh concluded his blistering concurrence with the following headline-raising point:

> 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.

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123. *Id.* at 2158 (citations omitted).

124. *Id.* at 2166.

125. As the Court acknowledged in its opinion, "student-athletes do not renew their across-the-board challenge to the NCAA's compensation restrictions. . . . Our review is confined to those restrictions now enjoined." *Id.* at 2154.

126. *Id.* The Court recognized that some may not be satisfied with the limited ruling:

> Some will think the district court did not go far enough. By permitting colleges and universities to offer enhanced education-related benefits, its decision may encourage scholastic achievement and allow student-athletes a measure of compensation more consistent with the value they bring to their schools. Still, some will see this as a poor substitute for fuller relief. At the same time, others will think the district court went too far by undervaluing the social benefits associated with amateur athletics.

Id. at 2166.

127. *Id.* at 2166–67 (Kavanaugh, J., concurring).

128. *Id.* at 2167; *see also id.* at 2168 ("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."). When compared to other industries, the NCAA's "amateurism" and "student-athlete" arguments were particularly unpersuasive. *Id.* at 2167–68 (comparing the NCAA to restaurants, law firms, hospitals, and news organizations, noting that "[p]rice-fixing labor is price-fixing labor. . . . Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product").

> And under ordinary principles of antitrust law, it is not evident why college sports should be any different. *The NCAA is not above the law.*[129]

III. NAME, IMAGE, AND LIKENESS RIGHTS

Following *Alston*, it is clear that change is on the horizon for the NCAA and college athletics. Whether the NCAA may continue to prohibit schools from paying athletes directly for play will almost certainly be the subject of a future antitrust suit. However, the NCAA has recently had to broaden its defenses to address a separate legal claim: athletes' right to commercialize their own NIL. No matter the long-term impact of *Alston*, NIL benefits have opened the door to compensation rights separate from the revenues collected by the schools.

This Part will first discuss the swell of state legislation initiated by the California Fair Pay to Play Act. After several states enacted legislation challenging the NCAA's prohibition of NIL rights, several members of Congress proposed reformative legislation that would provide a national NIL standard. To date, no such bill has been passed, and players' abilities to profit off of their NIL depends on a variety of competing state laws and university policies. Next, this Part will cover the Right of Publicity and what NIL benefits actually entail. Finally, this Part will review NIL rights specifically in the sports law context.

A. *THE FAIR PAY TO PLAY MOVEMENT*

In 2019, California was the first to step in by proffering the California Fair Pay to Play Act, prohibiting California institutions from preventing college athletes to commercialize their own NIL.[130] The California bill also provided measures allowing athletes to hire agents,[131] and was originally scheduled to take effect in 2023, but was later expedited to become effective on September 1, 2021.[132] California legislator Nancy Skinner, who introduced and co-authored the Fair Pay to Play Act, described the purpose of the bill as "to give California college athletes access to the free marketplace—just like all other Americans enjoy—but also to spur others to join the cause."[133]

Several states followed California's lead by adopting similar legislation.[134] By September 2020, 20 states had introduced or passed some form of NIL law

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129. *Id.* at 2169 (emphasis added).

130. S.B. 206, 2019 Leg., Reg. Sess. (Cal. 2019).

131. *Id.* § 2(c).

132. *Id.* § 2(h); CAL. EDUC. CODE § 67456(h) (2021).

133. Nancy Skinner & Scott Wilk, *In California, We Forced the NCAA's Hand on Paying Athletes. But More States Must Step Up.*, USA TODAY (Jan. 15, 2020, 1:09 PM), https://www.usatoday.com/story/opinion/2020/01/15/ncaa-california-student-athletes-pay-image-likeness-column/4456723002 [https://perma.cc/EP9G-4CPV].

134. *See* Matt Norlander, *Fair Pay to Play Act: States Bucking NCAA to Let Athletes Be Paid for Name, Image, Likeness*, CBS SPORTS (Oct. 3, 2019, 5:43 PM), https://www.cbssports.com/college-football/news/fair-pay-to-play-act-states-bucking-ncaa-to-let-athletes-be-paid-for-name-image-likeness [https://perma.cc/9ZTH-LU72]; Charlotte Carroll, *Tracking NCAA Fair Pay Legislation*

providing similar guarantees for players.[135] Florida and New York proposed a couple of the more notable NIL bills to date. Florida's NIL bill is essentially identical to the California bill but has an effective date of July 1, 2021, two years sooner than California's Fair Pay to Play Act.[136] The New York legislature, however, proposed a bill that goes even further. Senate Bill S6722A would allow players to earn "a percentage of the profits made from fans and family paying to cheer them on."[137] If passed, this revenue-sharing model would take effect in 2023 and will require every New York college to pay 15 percent of all ticket sales revenue to student-athletes.[138]

Prior to the California bill's official enactment, the NCAA and various athletic directors expressed strong opposition to such forms of player compensation.[139] However, the overwhelming shift in public opinion and the snowballing of state legislation quickly altered the NCAA's approach. In October 2019, the NCAA agreed to formulate plans that would allow for NIL payments.[140] In April 2020, the NCAA released a report of its internal findings on the possibility of NIL rule changes, and officially requested that Congress create national legislation to preempt the various state laws.[141]

Across the Country, SPORTS ILLUSTRATED (Oct. 2, 2019), https://www.si.com/college/2019/10/02/tracking-ncaa-fair-play-image-likeness-laws [https://perma.cc/G4JP-3L2J].

135. Dennis Dodd, *Bipartisan Name, Image, Likeness Bill Introduced to U.S. House Would Supersede State Laws for College Athletes*, CBS SPORTS (Sept. 25, 2020, 10:33 AM), https://www.cbssports.com/college-football/news/bipartisan-name-image-likeness-bill-introduced-to-u-s-house-would-supersede-state-laws-for-college-athletes [https://perma.cc/K7SM-APF8].

136. S.B. 582, 2020 Leg., Reg. Sess. (Fla. 2020 ("Students Participating in Intercollegiate Athletics"); FLA. STAT. § 1006.74(3) (2021).

137. S.B. S6722A, 2019 Leg., Reg. Sess. (N.Y. 2019) ("New York collegiate athletic participation compensation act"); David Lombardo, *New York Lawmaker Proposes Paying College Athletes*, TIMES UNION (Sept. 20, 2019, 5:42 PM), https://www.timesunion.com/news/article/New-York-lawmaker-proposes-paying-college-athletes-14455577.php [https://perma.cc/67RE-NBSB].

138. *Id.* § 8.

139. *See* Mark A. Emmert, *NCAA President Mark Emmert's Letter to the California Assembly*, WASH. POST (June 25, 2019, 8:30 AM), https://www.washingtonpost.com/context/ncaa-president-mark-emmert-s-letter-to-the-california-assembly/9189935d-3282-4046-88f7-abee191f8d4c [https://perma.cc/B8JH-5LHY]; NCAA Bd. of Governors, *NCAA Responds to California Senate Bill 206: Measure Would Upend Level Playing Field for All Student-Athletes*, NCAA (Sept. 11, 2019), https://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bill-206 [https://perma.cc/3UWW-QTEC]; Edward Aschoff, *Ohio State AD Gene Smith Against Fair Pay to Play Act*, ESPN (Oct. 1, 2019), https://www.espn.com/college-sports/story/_/id/27743871/ohio-state-ad-gene-smith-fair-pay-play-act [https://perma.cc/N3ZH-GXAR].

140. *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, NCAA (Oct. 29, 2019), http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities [https://perma.cc/X88N-43L5].

141. NCAA BD. OF GOVERNORS, FEDERAL AND STATE LEGISLATION WORKING GROUP: FINAL REPORT AND RECOMMENDATIONS 1 (2020) [hereinafter NCAA FINAL REPORT], https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf [https://perma.cc/S7Y6-3EA8].

The NCAA's request for Congress to step in prompted a response similar to that of the state legislatures. Multiple bills have been introduced in both the Senate and the House, and the issue appears to be non-partisan, with the general consensus being that players should be entitled to at least their own individual NIL.[142] Most of the proposed bills have limited the extent of player compensation to NIL rights, with varying degrees of the permissive use of NIL. One of the more prominent examples has been the bill introduced by Congressman Anthony Gonzalez (a former Ohio State and NFL wide receiver).[143] Entitled the "Student Athlete Level Playing Field Act," the bill would prohibit the NCAA or any member institution from preventing players from entering into endorsement or agency contracts.[144] The bill does impose certain restrictions, however, as it would allow the NCAA to prohibit players from entering into certain endorsement contracts with certain companies.[145] Other significant provisions of the proposed bill include: (1) charging the FTC with the responsibility of enforcement; (2) prohibiting "Unfair And Deceptive Practices By Boosters"; (3) preemption of state regulations "permitting or abridging the ability of a student athlete . . . to enter into an endorsement . . . or agency contract"; and (4) a provision clarifying that the bill does not grant employee status to student-athletes.[146]

A far more extensive bill has been proposed by Senators Cory Booker, Richard Blumenthal, Kristen Gillibrand, and Brian Shatz in the "College Athletes Bill of Rights"[147] which proposes massive reform to the entirety of the college athletics system. Senator Blumenthal described the bill as "undoubtedly a big swing . . . . It's a sweeping, comprehensive overhaul of a system that is badly broken and exploitive of the college athletes who are stuck in it."[148] In addition to more expansive NIL rights, the bill would require schools to split their revenues with athletes after discounting for the athletes' COA benefits.[149] The bill would also require the provision of additional educational

142. *See, e.g.*, Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019); Student Athlete Level Playing Field Act, H.R. 8382, 116th Cong. (2020); Collegiate Athlete Compensation Rights Act, S. 5003, 116th Cong. (2020); Fairness in Collegiate Athletics Act, S. 4004, 116th Cong. (2020).

143. Ross Dellenger, *Bipartisan Name, Image, Likeness Bill Focused on Endorsements Introduced to Congress*, SPORTS ILLUSTRATED (Sept. 24, 2020), https://www.si.com/college/2020/09/24/name-image-likeness-bill-congress-endorsements [https://perma.cc/45VD-9WQX].

144. Student Athlete Level Playing Field Act, H.R. 8382 § 2(a)(1).

145. *Id.* § 2(a)(2) (allowing prohibitions of endorsement contracts related to tobacco, alcohol, marijuana, adult entertainment, or gambling companies).

146. *Id.* §§ 2(b), 5(a), 6, 7(d).

147. College Athletes Bill of Rights, S. 5062, 116th Cong. (2020).

148. Press Release, Cory Booker, Sen., U.S. Senate, Senators Booker and Blumenthal Introduce College Athletes Bill of Rights (Dec. 17, 2020), https://www.booker.senate.gov/news/press/senators-booker-and-blumenthal-introduce-college-athletes-bill-of-rights [https://perma.cc/3R6K-ZBKK].

149. College Athletes Bill of Rights, S. 5062 §§ 3(a)(6), 5.

and healthcare benefits to athletes, as well as reform for current transfer restrictions.[150] This is by far the most favorable bill for athletes and likely the least desirable for the NCAA and its members.[151]

In addition to the extensive benefits the bill would provide athletes through NIL benefits (including group licensing and limited use of school intellectual property ("IP")),[152] the Commission on College Athletics would receive initial federal funding of $50 million to administer players' NIL rights.[153] The Commission would be a federally chartered nonprofit corporation,[154] with its Board of Directors comprised of nine members, five of whom must be former college athletes.[155] Its duties would include establishing standards for endorsement contracts, certification of player agents, reporting on annual endorsement contracts, and providing a forum for resolution of disputes involving NIL benefits.[156]

The bill would also impose a substantial revenue sharing component.[157] This aspect of the bill presents a litany of potential problems under the NCAA's current structure. For starters, the bill requires a 50/50 split between the athletic departments and the players for all "commercial sports NIL revenue,"[158] defined as "the amount of total annual revenue generated from the athletic program at an institution of higher education."[159] This definition adopts a broad understanding of NIL benefits, and more closely resembles true pay for play as it seemingly includes *all* revenues the athletic departments bring in —including ticket sales and booster contributions.[160] Furthermore, the bill

150. *Id.* §§ 3(d), 4(b)(2)(B), 6. Additionally, the bill would establish a federal commission tasked with regulating the NCAA and providing NIL protections. *See id.* §§ 11, 12.

151. With the current administration and makeup of Congress, the bill has gained some traction and may be the frontrunner for national legislation. Ross Dellenger, *Senators Announce Proposal for 'College Athletes Bill of Rights'*, SPORTS ILLUSTRATED (Aug. 13, 2020), https://www.si.com/college/2020/08/13/senators-announce-college-athletes-bill-of-rights-proposal [https://perma.cc/28H6-HJMG].

152. College Athletes Bill of Rights, S. 5062 § 3(a).

153. *Id.* § 11(m).

154. *Id.* § 11(b)(1), (g)(1).

155. *Id.* § 11(c)(1)(A), (c)(1)(D)(ii)(I).

156. *Id.* § 11(d).

157. *Id.* § 5.

158. *Id.* § 5(b)(1).

159. *Id.* § 5(a)(2)(A).

160. In fact, Senator Booker has claimed that the revenue-sharing structure would amount to salaries "of $173,000 a year to football players, $115,600 to men's basketball players, $19,050 to women's basketball players and $8,670 to baseball players who are on full scholarship." Billy Witz, *Bill Offers New College Sports Model: Give Athletes a Cut of the Profits*, N.Y. TIMES (Dec. 19, 2020), https://www.nytimes.com/2020/12/17/sports/ncaafootball/college-athlete-bill-of-rights.html?action=click&module=RelatedLinks&pgtype=Article [https://perma.cc/N93T-E82Y]. Whether or not a true revenue-sharing model is possible has been debated by many, but this proposal would likely result in reduced spending elsewhere, particularly for the non-revenue producing sports. *See* Maxwell Strachan, *NCAA Schools Can Absolutely Afford to Pay College Athletes, Economists*

does not require NIL payments to be administered by an independent third-party entity, and it would allow the schools to provide direct payments to players of all "commercial sports NIL revenue."[161]

Ultimately, the proposed federal legislation highlights the shift in public opinion toward paying college athletes. Whether NIL rights alone are a satisfactory measure to address this problem remains unclear, and the College Athletes Bill of Rights' 50/50 revenue sharing model may have unintended negative consequences. Either way, NIL benefits appear to be here to stay.[162] While it is too early to forecast the long-term impact of the NCAA's current experiment with unencumbered NIL opportunities for athletes, a national standard is needed to preserve competitive balance and to prevent commercial exploitation of athletes.[163] Questions remain, however, as to how NIL rights will be implemented, what restrictions will be applied to the use of those rights, and how to preserve aspects of the current college athletics structure that are worth preserving.

B. NIL & THE RIGHT OF PUBLICITY

Before answering those questions, it is important to understand the scope of NIL rights. Under tort law, the right of publicity encompasses four distinct privacy interests, offering protection from: (1) intrusion into one's private affairs; (2) public disclosure of embarrassing private information; (3) negative publicity

Say, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/ncaa-pay-student-athletes_n_6940836 [https://perma.cc/5FDS-D6KL]; Thompson, *supra* note 5.

161. College Athletes Bill of Rights, S. 5062 § 5(b)(3).

162. *See, e.g.*, Chris Morris, *Alabama QB Bryce Young Already Has Nearly $1 Million in Likeness Deals*, FORTUNE (July 21, 2021, 11:07 AM), https://fortune.com/2021/07/21/bryce-young-nil-deals-endorsements-name-image-likeness-ncaa-sponsors-nick-saban [https://perma.cc/QRC3-53R2] (following the NCAA's removal of NIL restrictions, Alabama quarterback "[Bryce] Young has already amassed [NIL] deals worth nearly $1 million after playing just 7 games and throwing 22 passes last year"); David Kenyon, *The Biggest and Most Notable NIL Deals in College Football So Far*, BLEACHER REP. (July 26, 2021), https://bleacherreport.com/articles/2946352-the-biggest-and-most-notable-nil-deals-in-college-football-so-far [https://perma.cc/3MP5-6ELJ] (highlighting some of the more lucrative NIL deals).

163. Joe Moglia, *The NCAA Dropped the Ball on NIL*, FORBES (Aug. 18, 2021, 3:57 PM), https://www.forbes.com/sites/joemoglia/2021/08/18/the-ncaa-dropped-the-ball-on-nil/?sh=3a6a591f62a5 [https://perma.cc/N57A-NF79] ("[T]he NCAA dropped the ball, and NIL has become the wild west virtually overnight. The lack of comprehensive rules, with schools and divisions making it up as they go, means that the NCAA has abandoned their obligation to lead."); *see also* Dennis Dodd, *With the NCAA's Authority Quickly Eroding, Significant Change Is Ahead for Major College Sports*, CBS SPORTS (July 18, 2021, 1:11 PM), https://www.cbssports.com/college-football/news/with-the-ncaas-authority-quickly-eroding-significant-change-is-ahead-for-major-college-sports [https://perma.cc/7VJD-D7NN] (tracking the reform proposals of the major conferences).

placing the plaintiff "in a false light in the public eye"; and (4) appropriation of the plaintiff's NIL rights for the advantage of the defendant.[164]

NIL rights fall under the fourth category of privacy right and are described as the "[a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness."[165]

The Restatement (Third) of Unfair Competition has adopted a similar construction, establishing a cause of action against anyone "who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade . . . ."[166] What distinguishes NIL rights from the traditional rights of privacy is the element of appropriation by another, thus creating a separate category of property right as the "right of publicity."[167] In other words, NIL rights protect "the inherent right of every human being to control the commercial use of his or her identity."[168]

These rights are primarily defined by state law and vary depending on jurisdiction as "[o]ver 30 states recognize a right of publicity for living persons."[169] Today, several states have adopted legislation recognizing and enforcing the right to publicity.[170] In the states that do recognize the right of publicity, the following elements are generally required: (1) defendant's use of the plaintiff's NIL; (2) to the advantage of the defendant; (3) without the consent of the plaintiff; and (4) which is likely to cause injury to the plaintiff.[171]

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164. *See* Andrew B. Carrabis, *Strange Bedfellows: How the NCAA and EA Sports May Have Violated Antitrust and Right of Publicity Laws to Make a Profit at the Exploitation of Intercollegiate Amateurism*, 15 BARRY L. REV. 17, 30 (2010).

165. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389, 401 (1960). The other three violations of the right of privacy are: "1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs. 2. Public disclosure of embarrassing private facts about the plaintiff. [And] 3. Publicity which places the plaintiff in a false light in the public eye." *Id.* at 389.

166. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST. 1995).

167. *Id.*; Prosser, *supra* note 165, at 401–07.

168. J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2021).

169. *Id.* § 1:2. Many states have enacted statutes "recognizing the right of publicity." *See* Talor Bearman, Note, *Intercepting Licensing Rights: Why College Athletes Need a Federal Right of Publicity*, 15 VAND. J. ENT. & TECH. L. 85, 88 nn.17–18, 95 (2012). However, a significant number of "states [including Iowa] do not recognize the right of publicity." *Id.* at 88 n.16.

170. *See, e.g.*, KY. REV. STAT. ANN. § 391.170 (West 2021) ("The General Assembly recognizes that a person has property rights in his name and likeness which are entitled to protection from commercial exploitation."); TEX. PROP. CODE ANN. § 26.002 (West 2021) ("An individual has a property right in the use of the individual's name, voice, signature, photograph, or likeness after the death of the individual."); WIS. STAT. ANN. § 995.50(2)(am)(2) (West 2021) (describing the right of publicity as "[t]he use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian").

171. *See* Eastwood v. Superior Ct., 198 Cal. Rptr. 342, 347 (1983), *superseded by statute*, CAL. CIV. CODE § 3344 (West 2021); *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM.

Simply put, the right of publicity protects against the appropriation of one's identity for the commercial gain of another.

There is also little significance to the separate categories of "name," "image," and "likeness." However, an individual's "name" generally only receives protection against appropriations where "the name as used by the defendant must be understood by the audience as referring to the plaintiff."[172] Alternatively, protections against the unconsented use of another's "image" or "likeness" requires that "the plaintiff must be reasonably identifiable from the photograph or other depiction."[173] The distinction is largely insignificant because the right of publicity collectively protects an individual's "persona."[174] Thus, NIL laws generally require some clear relationship between the alleged appropriation and the individual's specific identity.[175]

The first time that the right of publicity was recognized in court was over a contract dispute involving a professional baseball player's agreement not to license his image for a competing bubble gum company.[176] There, the Second Circuit explained "in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture . . . ."[177] The court went on to explain that "it is common

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L. INST. 1995) ("One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in §§ 48 and 49.").

172. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (AM. L. INST. 1995).

173. *Id.*

174. James W. Quinn & Irwin H. Warren, *Professional Team Sports New Legal Arena: Television and the Player's Right of Publicity*, 16 IND. L. REV. 487, 490 (1983); *see also* Pamela Edwards, *What's the Score?: Does the Right of Publicity Protect Professional Sports Leagues?*, 62 ALB. L. REV. 579, 581 (1998) (including in the NIL rights of athletes their "names and nicknames, likenesses, portraits, performances (under certain circumstances), biographical facts, symbolic representations, or anything else that evokes this marketable identity" (citations omitted)); White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1398 (9th Cir. 1992) ("It is not important how the defendant has appropriated the plaintiff's identity, but whether the defendant has done so. . . . A rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth." (emphasis omitted)).

175. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (AM. L. INST. 1995) ("The use of other identifying characteristics or attributes may also infringe the right of publicity, but only if they are *so closely and uniquely associated with the identity of a particular individual* that their use enables the defendant to appropriate the commercial value of the person's identity." (emphasis added)); *see also id.* ("The right of publicity is not infringed unless the plaintiff is identified by the defendant's use."). Although there are various factors a court may consider to determine whether or not an individual's NIL has been appropriated, typical factors include: "a real name, nickname, or professional name, or by a likeness embodied in a photograph, drawing, film, or physical look-alike." *Id.*

176. Haelan Lab'ys, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 867 (2d Cir. 1953).

177. *Id.* at 868. This right was later articulated as a particular form of "property protection" despite *Haelan's* dismissal of the significance of that distinction. *See* Cardtoons, L.C. v. MLB

knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses [sic], trains and subways."[178]

Because the right of publicity is generally considered to be a state issue,[179] the Supreme Court has only considered the right of publicity once. In *Zacchini v. Scripps-Howard Broadcasting Company*, the plaintiff sued a broadcasting company for using a short video clip of the plaintiff's human cannonball act.[180] There, the Court assessed the plaintiff's claims of copyright infringement under the First and Fourteenth Amendments[181] and reversed the Ohio Supreme Court's decision granting summary judgment to the defendant.[182] The Court ultimately ruled in favor of the petitioner on First Amendment grounds, but noted in dicta that the justification for the right of publicity "is the straightforward one of preventing unjust enrichment . . . . No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."[183]

Group licensing and co-branding (or co-licensing) are derivations of individual NIL rights. Importantly, group licensing differs from individual NIL in that it allows individuals to "pool[] their NIL rights and licens[e] them collectively as a group."[184] This form of licensing allows licensees[185] to use the NIL of multiple persons in a single endorsement contract.[186] Relatedly, co-branding is akin to a joint venture in the NIL context. Co-branding allows the participants "to combine the market strength, brand awareness, positive associations, and cachet of two or more brands to compel consumers to pay a greater premium for them."[187]

Players Ass'n, 95 F.3d 959, 968 (10th Cir. 1996) ("Publicity rights, then, are a form of property protection that allows people to profit from the full commercial value of their identities.").

178. *Haelan Lab'ys, Inc.*, 202 F.2d at 868.

179. *See* MCCARTHY & SCHECHTER, *supra* note 168, § 1:3.

180. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 563–64 (1977).

181. *Id.* at 565–66.

182. *Id.* at 578–79.

183. *Id.* at 576 (quoting Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROBS. 326, 331 (1966)). The Court ruled in favor of the petitioner, finding that the broadcasting of his "human cannonball" act without his permission violated the First and Fourteenth Amendments. *Id.* at 563–66.

184. *NIL FAQs: Group Licensing*, KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS (2021), https://www.knightcommission.org/nil-faqs-group-licensing [https://perma.cc/99JB-NTV3].

185. Here, the players would constitute "licensors" while the businesses contracting for the players' NIL rights would represent the "licensees."

186. *NIL FAQs: Group Licensing*, *supra* note 184.

187. Will Kenton, *Co-Branding*, INVESTOPEDIA (June 19, 2020), https://www.investopedia.com/terms/c/cobranding.asp [https://perma.cc/B6LN-ZVB5].

Group licensing and co-branding are considered far more efficient than individual NIL rights because it maximizes the value of complementary IP rights and "reduces the potential for individual IP holders to exploit bargaining power advantages in licensing negotiations."[188] Thus, group licensing rights tend to increase the efficiency of licensing negotiations while also maximizing the value of NIL by allowing for products and services that otherwise would not be affordable to licensees absent group licensing.

C. NIL RIGHTS IN SPORTS LAW

Before the NCAA waived enforcement of its NIL rules, Article 12 of the NCAA Bylaws laid out the permissible and impermissible uses of player NILs.[189] NIL rights varied among the separate Divisions, and different rules applied before and after the athlete was enrolled at a member university.[190] Section 12.5.2.1 provides the general rule that Division I athletes may not profit off of their NIL:

> [A]fter becoming a student-athlete, a student-athlete shall not be eligible for participation in intercollegiate athletics if the student-athlete:
>
> > (a) Accepts any remuneration for or permits the use of the student-athlete's name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or
> >
> > (b) Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.[191]

However, Division II and III athletes were allowed to use their NILs in promotional activities so long as "payment is not based on the individual's involvement in athletics."[192] Furthermore, the NCAA requires all student-athletes to sign NIL waivers for marketing purposes, although they claim not to have used this in commercial negotiations: "[t]he NCAA has never

188. JEFFREY F. BROWN, JAMES BO PEARL, JEREMY SALINGER & ANNIE ALVARADO, BATES WHITE ECON. CONSULTING, A PROPOSAL FOR GROUP LICENSING OF COLLEGE ATHLETE NILS 11 (2020), https://www.bateswhite.com/media/publication/193_Brown_2020_Proposal_for_Group_Licensing_of_College_Athlete_NILS.pdf [https://perma.cc/8SY9-95KK].

189. NCAA MANUAL, *supra* note 51, at art. 12.5.1–2.

190. *Id.*

191. *Id.* at art. 12.5.2.1.

192. NCAA, NAME, IMAGE AND LIKENESS: WHAT STUDENT-ATHLETES SHOULD KNOW 1 (2020), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/2020_NILresource_SA.pdf [https://perma.cc/Q7EX-UXSQ].

attempted to make commercial use of student-athlete NIL, and has no intention of doing so in the future."[193]

Despite this claim, one of the most prominent examples of the commercial use of college athletes' NILs was in video games.[194] From the late 1990's through the early 2010's, Electronic Arts ("EA") Sports' NCAA Football video game series was among its most profitable products.[195] To the disappointment of many, the NCAA discontinued its licensing contract with EA Sports in 2013 during litigation of the *O'Bannon* decision.[196] Prior to the cancellation of the NCAA Football franchise, EA Sports was "the single biggest licensee from the NCAA and the [Collegiate Licensing Company ("CLC")] and provide[d] six figure paydays for some university member schools."[197] Many hoped that the NCAA's announcement that they would allow players to profit off of their individual NIL rights would bring the NCAA Football series back,[198] but without group licensing rights this is unlikely to occur.[199]

Similarly, in the co-branding context, the principal concern among schools with player use of institutional brands or conference involvement "is that group licenses will become a new tool for recruiting college athletes

193. NCAA FINAL REPORT, *supra* note 141, at 10.

194. Carrabis, *supra* note 164, at 22–23; *see* Kim Hidlay, *Commercial Exploitation of Student-Athletes in Video Games: The Need for Revisions in the NCAA Amateurism Bylaws*, 1 J. ENT. & SPORTS L. 70, 82–92 (2009); *see also* Ross Dellenger, *Group Licensing Is the Key to the Return of NCAA Video Games—So What's the Holdup?*, SPORTS ILLUSTRATED (May 5, 2020), https://www.si.com/college/2020/05/05/ncaa-football-video-game-return-group-licensing [https://perma.cc/RFF3-2J3T] (discussing how group licensing will impact economic viability of college sports video games).

195. *The History of NCAA Football*, ELEC. ARTS (Nov. 27, 2013), https://www.ea.com/news/ncaa-football-history [https://perma.cc/CX7D-AHSK]; Steve Berkowitz, *How EA Sports's NCAA Football Video Game Could Make a Comeback*, USA TODAY (May 20, 2019, 11:16 AM), https://www.usatoday.com/story/sports/2019/05/20/how-ea-sportss-ncaa-football-video-game-could-make-comeback/3704876002 [https://perma.cc/3YTR-Y8ll] ("During the trial of the *O'Bannon* case in June 2014, EA Sports executive Joel Linzner testified that the NCAA football game had been doing about $80 million a year in revenue on the sale of roughly 2 million units."); Chris Smith, *NCAA Football Video Game Is Worth over $75,000 Per Year for Top Teams*, FORBES (Aug. 22, 2013, 10:47 AM), https://www.forbes.com/sites/chrissmith/2013/08/22/ncaa-football-video-game-is-worth-over-75000-per-year-for-top-teams/?sh=58dc2bf026d4 [https://perma.cc/Z7NN-NK3V].

196. Alicia Jessop, *Fool Me Once, Shame on You; Fool Me Twice, Shame on Me: Why Congress Must Grant NCAA Athletes Group Licensing and Organization Rights in Name, Image and Likeness Legislation*, HARV. J. SPORTS & ENT. L. (SPECIAL ISSUE) (Aug. 31, 2020), https://harvardjsel.com/2020/08/fool-me-once-shame-on-you-fool-me-twice-shame-on-me-why-congress-must-grant-ncaa-athletes-group-licensing-and-organization-rights-in-name-image-and-likeness-legislation [https://perma.cc/D7ED-G5FT].

197. Carrabis, *supra* note 164, at 21.

198. *See, e.g.*, Dellenger, *supra* note 194; Berkowitz, *supra* note 195; Dan Bernstein, *'NCAA Football' Video Game Made Unlikely by NIL Recommendation*, SPORTING NEWS (Apr. 29, 2020), https://www.sportingnews.com/us/ncaa-football/news/ncaa-football-video-game-nil-ea-sports/1wn7zgp3utfkk1r3wz6an5dz1p [https://perma.cc/GY8G-A3P9].

199. Dellenger, *supra* note 194.

and will morph into a form of pay for play."[200] The NCAA and other third parties have expressed these concerns in their formal proposals for NIL legislation.[201] Others are less concerned with this issue and believe that any competition problems can be mitigated by effective legislation and third-party administration.[202]

Lastly, the lack of a federal right of publicity has prevented athletes from capitalizing on their NIL in the past[203] and makes it more difficult to force the NCAA to offer players compensation for the use of their NIL. Indeed, the NCAA has cited the lack of a federal statute recognizing the right of publicity as a justification for denying group licensing rights in areas such as "live broadcast[s], rebroadcasts, news accounts or many informational items or pictures."[204] This issue was on the table in *O'Bannon*, but the court ultimately balked at deciding "the thornier questions of whether participants in live TV broadcasts . . . have enforceable rights of publicity or whether the plaintiffs are injured by the NCAA's current licensing arrangement for archival footage."[205] In fact, many states have created specific statutory exceptions for the right of publicity regarding sports broadcasting.[206] This legal background led the NCAA to reject NIL payments for sports broadcasting and other recognized forms of the right of publicity unless "a NIL license is legally required."[207]

IV. MAXIMIZING NIL RIGHTS FOR COLLEGE ATHLETES

NIL rights are long overdue for players, and while there are certainly tradeoffs within the current structure, individual NIL rights are a "win win"[208] for all parties. NIL rights provide a route to player compensation that remains untethered to actual pay for play. While the liberation of NIL rights presents a number of potential tradeoffs, the benefits of granting NIL rights far outweigh these concerns if they can be reasonably implemented. However,

200. *NIL FAQs: Group Licensing*, *supra* note 184.

201. *Id.*; *see also* NCAA FINAL REPORT, *supra* note 141, at 18–19 (arguing that NIL compensation should be limited to cost of attendance to prevent NIL compensation from turning into a form of pay for play).

202. *See generally* College Athletes Bill of Rights, S. 5062, 116th Cong. (2020) (adopting comprehensive NIL reform for college athletes without focusing on competitive balance); BROWN ET AL., *supra* note 188 (proposing regulatory model for implementing group licensing benefits).

203. Bearman, *supra* note 169, at 100–01.

204. NCAA FINAL REPORT, *supra* note 141, at 10.

205. Meyer & Zimbalist, *supra* note 43, at 281 (quoting O'Bannon v. NCAA, 802 F.3d 1049, 1067 (9th Cir. 2015)).

206. Frank Ryan & Matt Ganas, *Rights of Publicity in Sports-Media*, 67 SYRACUSE L. REV. 421, 432 (2017); *see, e.g.*, CAL. CIV. CODE § 3344(d) (West 2021); TENN. CODE ANN. § 47-25-1107(a) (West 2021).

207. NCAA FINAL REPORT, *supra* note 141, at 13.

208. *See generally* Meyer & Zimbalist, *supra* note 43 (proposing federal legislation extending group licensing rights to athletes).

unrestrained NIL benefits pose numerous threats to college athletics, including the potential to contradict the educational mission of college athletics,[209] subjecting athletes to greater commercial exploitation,[210] and further reducing the already limited downtime athletes have.[211]

Although the commercialization of college athletics is nothing new,[212] The current NIL framework appears to be especially vulnerable to abuse from boosters and businesses seeking to help their alma mater.[213] Similarly, NIL benefits will lead athletic departments to seek a competitive recruiting advantage by offering the greatest access to endorsement contracts for players.[214] As one former athlete told the Los Angeles Times, "[t]oday starts a new battle in the next decade of recruiting in college sports[,] . . . educating potential recruits on what your program is going to do to help you maximize the value of your NIL."[215] Thus, the competitive advantages that already exist for the larger

209. *See* DONNA LOPIANO ET AL., THE DRAKE GRP., COLLEGE ATHLETES SHOULD GIVE U.S. HOUSE NIL BILL A "C+" GRADE: KUDOS AND CRITICISM OF *THE STUDENT ATHLETE LEVEL PLAYING FIELD ACT* 4–5 (Oct. 19, 2020), https://www.thedrakegroup.org/wp-content/uploads/2020/10/Oct-19-Drake-Position-on-Gonzalez-Cleaver-NIL-Bill-Proposed-FINAL.pdf [https://perma.cc/Z9NK-5FR2] (suggesting improvements to current NIL proposals, including that "[g]iven the priority purpose of earning a degree, institutions and athletic governance organizations should be permitted to promulgate rules that prohibit college athletes from missing classes, exams or other academic responsibilities for employment/endorsement related activities").

210. Smith, *supra* note 26, at 11–13.

211. *See* NCAA RSCH., *supra* note 65, at 18.

212. *See supra* Section II.A.

213. *See* LOPIANO ET AL., *supra* note 209, at 3–5; Norman Chad, *California's Fair Pay to Play Act is a Step in the Right and the Wrong Direction at the Same Time*, WASH. POST (Oct. 13, 2019), https://www.washingtonpost.com/sports/colleges/the-fair-pay-to-play-act-is-a-step-in-the-right-and-the-wrong-direction-at-the-same-time/2019/10/13/9f98a262-ec6d-11e9-9306-47cb0324fd44_story.html [https://perma.cc/9D7D-LMKY] ("[W]hy wouldn't colleges align themselves with companies and local retailers that can assure large payments for the best athletes? Why wouldn't third parties — boosters — engage in licit and illicit behavior to pave the yellow brick road for the home team? Wouldn't some high schools start down this path to bring in better athletic talent?").

214. *See* Thomas Baker, *5 Issues to Keep an Eye on with the NCAA's New NIL Policy*, FORBES (Nov. 1, 2019, 11:40 AM), https://www.forbes.com/sites/thomasbaker/2019/11/01/examining-the-ncaas-evolving-nil-policy-keep-an-eye-on-the-following-issues/?sh=9a898bf7591f [https://perma.cc/EV3R-PQVP] (noting that "smart programs will likely try to capitalize on the NCAA's NIL policy by turning it into a recruiting advantage"). Georgia Tech appears to have fully embraced the potential of NIL enticements, as the school has "partnered with J1S, a creative agency that will consult with the football team on branding." Josh Planos, *Student-Athletes Will Soon Be Social Media Influencers. And One College Program Is Helping Them Do It.*, FIVETHIRTYEIGHT (June 8, 2020, 8:00 AM), https://fivethirtyeight.com/features/student-athletes-will-soon-be-social-media-influencers-and-one-college-program-is-helping-them-do-it [https://perma.cc/AX6N-QW5M]. The team even "added a dry-erase board to the sideline on which players could write their Instagram handles for public and TV viewing if they accounted for a takeaway." *Id.*

215. J. Brady McCollough, *Nebraska Prepares for Student-Athlete Branding by Partnering with Opendorse*, L.A. TIMES (Mar. 10, 2020, 11:37 AM), https://www.latimes.com/sports/story/2020-03-10/nebraska-opendorse-nil-athlete-branding [https://perma.cc/2NW7-67GM]; *see also* Glen West, *LSU Announces Partnership with Altius Sports for NIL Guidance*, FANNATION: LSU COUNTRY

programs may be exacerbated by additional expenditures to help athletes retain the most profitable endorsement contracts. While the NCAA and legislators have proposed "guardrails" to limit some of these outcomes,[216] no such national guidance currently exists.

However, the potential benefits of NIL rights for players are too great to be denied due to poor implementation. Thus, the remainder of this Note will discuss how Congress, the NCAA, or the collective action of the conferences can address these issues fairly. This Part will first provide a recommendation for an administrative structure that is split between a Congressional Commission and a third-party NIL organization tasked with bargaining on behalf of players. Then it will discuss how to regulate individual NIL benefits. Next, this Part will advocate for the adoption of group licensing and co-branding opportunities for athletes. Finally, this Part proposes that Congress incorporate a limited right of publicity exception that requires some level of payment to athletes for use of their NILs in sports broadcasting.

A. ADMINISTRATION OF NIL RIGHTS

In order to fully realize athletes' NIL potential, the establishment of a third-party entity tasked with managing certain NIL negotiations on the players' behalves will be required. This organization will be tasked with assisting players in negotiating NIL contracts and ensuring regulatory compliance. Much like the decision to grant NIL rights, the establishment of the third-party entity could be achieved either by the independent action of the NCAA or through congressional legislation. However, once the organization is established, its principal purpose should be to maximize NIL licensing opportunities for college athletes while balancing competitive equity concerns.

This system would protect against some of the NCAA's leading concerns over NIL legislation: (1) schools paying athletes directly; and (2) player unionization to negotiate NIL deals, triggering employment law hazards.[217] This format is particularly useful in navigating group licensing questions. The NCAA has addressed the structural problems in pursuing group licensing,

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(Oct. 5, 2020), https://www.si.com/college/lsu/football/lsu-nil-partnership-altius-sports [https://perma.cc/F5S2-A7H4] (noting that Texas and LSU have also sought NIL assistance from a third-party company).

216. *See* Michael McCann, *Legal Challenges Await After NCAA Shifts on Athletes' Name, Image and Likeness Rights*, SPORTS ILLUSTRATED (Apr. 29, 2020), https://www.si.com/college/2020/04/29/ncaa-name-image-likeness-changes-legal-analysis [https://perma.cc/RQ7G-LM8A] (describing some of the NCAA's proposed restraints on NIL compensation structure). Senator Chris Murphy expressed concern over a college system devoid of centralized regulation: "If the end result is a whole new byzantine set of rules that can result in students suspended or kicked off the team, then I'm not sure this ends up helping kids." Ross Dellenger, *Congress Members Lambaste NCAA's Vague and Restrictive NIL 'PR Document'*, SPORTS ILLUSTRATED (Apr. 30, 2020), https://www.si.com/college/2020/04/30/ncaa-nil-changes-congress-reaction [https://perma.cc/X6L4-ZJZ4].

217. NCAA FINAL REPORT, *supra* note 141, at 28; *see also* BROWN ET AL., *supra* note 188, at 7, 25.

claiming "the group licensing programs that currently exist in professional sports or the Olympics all benefit from legal structures not available to the NCAA or its member institutions, namely the presence of a player's association to serve as a bargaining unit for the athletes."[218]

As discussed above, the College Athletes Bill of Rights offers extensive benefits for players, but would also establish a federal Commission on College Athletics.[219] The Commission would be comprised of a majority of former college athletes and would establish regulations for endorsements, agents, reporting requirements, and serve as an arbitrator over NIL disputes.[220] What may need to be left out (or at least redrafted) is the bill's 50/50 revenue sharing split. As discussed above, this portion of the bill would place too high a burden on too many athletic departments, causing many schools to abandon non-revenue producing sports, imposing higher fees on the general student body, or taking other undesirable measures.[221]

One proposal that would mitigate some of these concerns has been provided by Bates White, a consulting firm which "specializes in providing advanced economic, financial, and econometric analysis to law firms, companies, and government agencies."[222] They propose an independent "NIL licensing entity created by Congress as a nonprofit membership organization operating on behalf of college athletes," and they claim that this would "strike[] an optimal balance of advocating for the athlete, protecting the NCAA and the member institutions, and facilitating and regulating new products and services."[223] Perhaps most importantly, the proposal would allow the entity to negotiate NIL contracts "on a per-deal basis, thus overcoming the collective action problem and avoiding the pay-for-play concerns of private negotiation. The entity would not be a union nor would it serve as a generalized negotiating body for college athletes other than in the context of NIL activities."[224]

Furthermore, by empowering a third-party entity through legislation, Congress can ensure schools are not directly involved in the payment of NIL benefits. This would allow the third-party entity to "distribute royalties directly to college athletes, with no administrative support from the NCAA or its members."[225] The organization's control over NIL payments could include both individual NIL endorsement contracts as well as managing group licensing negotiations. In the case of individuals, "the NIL licensing

218. NCAA FINAL REPORT, *supra* note 141, at 7.

219. *See supra* notes 147–57 and accompanying text.

220. *Supra* notes 155–56 and accompanying text.

221. *See supra* notes 157–63 and accompanying text.

222. *Our Firm*, BATES WHITE (2021), https://www.bateswhite.com/about.html [https://perma.cc/LKQ3-7A5W].

223. BROWN ET AL., *supra* note 188, at 22.

224. *Id.*

225. *Id.* at 27.

entity would deduct its fee from the royalties it collects and distribute the net payment to the college athlete."[226] For group licensing contracts, "[t]he NIL licensing entity would be responsible for determining a mutually acceptable royalty-sharing framework."[227] Royalty distributions for group licensing contracts could vary by contract, require equal payouts for all contracts, or establish some weighted form of royalty distribution akin to other group licensing models.[228]

Consolidation of these two proposals would provide the best of both worlds. The College Athletes Bill of Rights would provide overarching federal legislation ensuring group licensing rights and a Commission charged with overseeing NIL market participants. Rather than imposing a 50/50 revenue-sharing structure as proposed under the College Athletes Bill of Rights, establishing a third-party nonprofit organization to negotiate group licensing rights on behalf of players would allow for negotiations and minimize any unintended consequences of a revenue-sharing mandate. Together, a Commission on College Athletics and a third-party entity empowered to facilitate NIL benefits on the players' behalves will maximize NIL benefits. The Commission would be tasked with drafting NIL regulations and providing a forum for contract disputes, while the third-party entity would work on behalf of players while complying with all applicable laws and NCAA rules related to NIL benefits.

B. INDIVIDUAL NIL RIGHTS

As discussed in Section III.B, NIL rights represent "the inherent right of every human being to control the commercial use of his or her identity."[229] Yet, because no federal right of publicity exists, NIL rights are currently determined by state law. Generally, to state a cause of action an individual must show: (1) defendant's use of the plaintiff's NIL; (2) to the advantage of the defendant; (3) without the consent of the plaintiff; and (4) which is likely to cause injury to the plaintiff.[230] Prior to the NCAA's decision to defer to the states and schools in determining permissible NIL benefits,[231] it prohibited college athletes from receiving any individual NIL benefits under Article 12

226. *Id.* at 26.

227. *Id.*

228. *Id.* at 26–27. The proposal goes into extensive detail on the efficiencies of group licensing and how other industries have established similar payout structures for pooling royalty payments, specifically referencing patent pools and performing rights organizations ("PROs"). *Id.* at 11–21.

229. MCCARTHY & SCHECHTER, *supra* note 168, § 1:3.

230. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST. 1995) ("One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in §§ 48 and 49.").

231. Hosick, *supra* note 4.

of its Bylaws.[232] Additionally, student-athletes were required to sign NIL waivers for marketing purposes.[233] As NIL restrictions have now been lifted, NIL opportunities have already produced significant income for college athletes, particularly the most popular ones.[234]

NIL opportunities for athletes will of course present themselves in the more traditional marketing forms: commercials, billboards, appearances, etc. However, the most profitable NIL venture may come from social media. Players will be able to leverage their popularity and athletic talents into endorsement contracts with brands, hoping to market to younger audiences.[235] The financial benefits of social media increase with the number of followers an athlete may have, and "an athlete with a combined 150,000 followers on his social media platforms could stand to make 'well into the six figures.'"[236]

Female athletes are particularly in a position to capitalize off of their NILs, as "[w]omen control seventy to eighty percent of consumer purchases . . . . In 2019, the women's activewear market was valued at $124.64 billion growing at a compound annual rate of around eight percent."[237] Additionally, NIL rights for women may provide benefits that extend beyond their bank accounts. NIL rights offer female athletes the opportunity to market themselves and their teams, thereby increasing exposure to women's sports.[238] Thus, NIL rights allow athletes to take control of their own publicity and may offset some athletic departments' prioritization of the top revenue-producing sports in men's athletics.[239]

The potential benefits of individual NIL rights are massive for the top college athletes and may provide a semi-reliable stream of income for athletes

232. NCAA MANUAL, *supra* note 51, at arts. 12.5.1–5.2 (setting forth the distinction between the NCAA's old Bylaw requirements and its new requirements).

233. NCAA FINAL REPORT, *supra* note 141, at 10.

234. Ross Dellenger, *The First Thing to Understand About NIL Is that Nobody Fully Understands NIL*, SPORTS ILLUSTRATED (Aug. 26, 2021), https://www.si.com/college/2021/08/26/ncaa-recruiting-name-image-likeness-daily-cover [https://perma.cc/KJ45-UXJL] (commenting on the disparity among players in terms of NIL earnings: "One unnamed athlete made $210,000 in July from their NIL . . . . However, the average Division I athlete . . . made $471, and the monthly median figure was just $35.").

235. Stephanie Stabulis, *Brands Are Ready for Name, Image and Likeness Legislation*, BUS. COLL. SPORTS (Jan. 25, 2021), https://businessofcollegesports.com/name-image-likeness/brands-are-ready-for-name-image-and-likeness-legislation [https://perma.cc/TYK9-K8RW].

236. Dellenger, *supra* note 194 ("The face of college football in 2020, Clemson quarterback Trevor Lawrence, has almost 500,000 followers on Instagram alone.").

237. Sarah Traynor, Note, *California Says Checkmate: Exploring the Nation's First Fair Pay to Play Act and What It Means for the Future of the NCAA and Female Student-Athletes*, 20 WAKE FOREST J. BUS. & INTELL. PROP. L. 203, 224 (2020) (footnote omitted).

238. *Id.* at 224–25.

239. *See* Kristi Dosh, *NCAA Group Licensing in the NIL Era*, BUS. COLL. SPORTS, at 21:07 (Nov. 4, 2020), https://businessofcollegesports.com/podcast/ncaa-group-licensing-in-the-nil-era [https://perma.cc/4XTV-X3NW].

without a massive social media following. These benefits are far from insignificant, "considering that more than 80 percent of college athletes on full scholarships are left below the poverty line . . . even an additional few hundred bucks per month represents a dramatic shift."[240] Individual NIL rights are an important first step, but they still fall short of maximizing athletes' earning potential and run the risk of leaving most athletes out. In order to fully recognize the benefits of the players NIL, further restrictions will need to be removed.

C. GROUP LICENSING & CO-BRANDING

For most college athletes, NIL legislation may only produce meaningful earnings if the athletes are allowed to benefit from group licensing and co-branding. Many of the current NIL proposals would prohibit "group licensing" endorsement deals.[241] This would prevent the return of Electronic Art's "NCAA Football" video game[242] and similar products, limiting most players' access to NIL compensation. Simply put, group licensing rights offer the greatest potential benefit to the greatest number of athletes.[243] While individual licensing rights are a huge step forward, the reality is that most athletes will not be able to capitalize on their individual NILs alone. This point was articulated in the concurring opinion in *Alston*:

> [F]ewer than 5% of Student-Athletes will ever play at a professional level, and most of those lucky few will stay in the pros only a few short years. In short, the college years are likely the only years when young Student-Athletes have any realistic chance of earning a significant amount of money or achieving fame as a result of their athletic skills.[244]

For these reasons it is essential that group licensing and some form of co-branding are included in NCAA rule changes or congressional legislation. This, in addition to the individual NIL benefits available to the most popular athletes, will provide the greatest benefit for all parties.

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240. Planos, *supra* note 214.

241. *See* Student Athlete Level Playing Field Act, H.R. 8382, 116th Cong. (2020); *see also* Dellenger, *supra* note 194.

242. Dellenger, *supra* note 194. The *NCAA Football* video game franchise produced over $1.3 billion in revenues within the United States during its tenure. Roger Groves, *EA Sports Will Still Score Even More Financial Touchdowns Without the NCAA*, FORBES (Sept. 28, 2013, 10:47 AM), https://www.forbes.com/sites/rogergroves/2013/09/28/ea-sports-will-still-score-even-more-financial-touchdowns-without-the-ncaa/#5b173fa8554a [https://perma.cc/9QYA-NYJN].

243. Jessop, *supra* note 196 ("In fact, for many NCAA athletes, group licensing presents the greatest opportunity to generate the highest NIL income.").

244. *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1266 (9th Cir. 2020) (Smith, J., concurring).

Pooling the NIL rights of players would allow for use of player NILs in both tangible (e.g., video games, trading cards, jerseys, etc.) and intangible products and services (e.g., social media endorsements, in-person player appearances, etc.).[245] Group licensing rights open doors for potential licensees and accommodates the time demands of players: "Those in the industry refer to group licensing as an easy route to player income: athletes wouldn't need to travel for photo shoots, film videos on their smartphones or craft social media ads."[246]

Similarly, the foregoing benefits would only be further optimized if athletes are permitted to use their team's logos, insignia, and other forms of IP when entering licensing contracts. Co-branding between the schools and the athletes through the use of institutional marks would allow both parties to capitalize on revenues from video games, jerseys, sports merchandising, advertisements, and other licensing products.[247] In fact, most players' ability to profit off of their NIL as college athletes may depend on cooperative licensing agreements with their schools. Fans and businesses alike will most likely associate the player with the school and vice versa. "That association between the NCAA, brands, and student-athletes brings value that can be monetized for all parties involved through trademark and other intellectual property protection."[248] Simply put, schools cooperating with athletes benefits all parties, as it creates products that otherwise would not exist.[249]

One potential compromise would be to centralize the use of institutional marks for co-branding products such as video games and jersey sales. This would involve a form of group licensing that would fall under "an arrangement where all college athletes in that sport would receive an equal share of

245. *See* Dosh, *supra* note 239, at 4:50.

246. Dellenger, *supra* note 194.

247. BROWN ET AL., *supra* note 188, at 22 ("In 2005 NCAA members in the FBS category reported $202.7 million in revenue from corporate sponsorships, advertising, and licensing, which increased to $761 million in 2018. However, that revenue is limited by NCAA rules *preventing commerce in products combining college athlete NILs with trademarks and other IP held by the NCAA and its members*." (emphasis added) (footnote omitted)).

248. Jeremy M. Evans, *Student-Athlete Brands in the Age of Name, Image, and Likeness*, AM. BAR ASS'N (Dec. 1, 2020), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/november-december/student-athlete-brands-age-name-image-likeness [https://perma.cc/8EC9-M9BE].

249. *See, e.g.*, Ross Dellenger, *Chris Braswell Lands Alabama's First Cobranded Merchandise Deal Under NIL*, SPORTS ILLUSTRATED (Aug. 17, 2021), https://www.si.com/college/2021/08/17/alabama-football-chris-braswell-breakingt-nil-deal [https://perma.cc/P775-MKZR] ("In one of the country's first colicensing apparel arrangements, Braswell, a redshirt freshman linebacker, and Alabama, one of the biggest brands in the sport, struck a deal with a third party to produce a cobranded T-shirt displaying both Braswell's last name and the school's trademark Crimson color and logo.").

revenue" from the sale of those products.[250] This is what would likely be required for a return of the EA Sports college athletics video game franchises[251] and is the current model among most professional leagues.[252] For instance, the NFL splits its "Madden checks" basically equally amongst players, with active players receiving over $17,000 per year and practice squad players receiving around $1,000 per year.[253]

However, the division of revenues between the league, the players, and the licensees among the professional leagues is largely a product of collective bargaining and players unions, a result the NCAA and its members hope to avoid.[254] However, player unionization is not absolutely necessary to achieve these outcomes, as will be discussed further below.

Another solution would be to allow the free market to run its course with respect to the use of institutional marks. There are at least two examples of this in the college athletics setting. The first of which comes from a group of college athletes who are not regulated by the NCAA: cheerleaders.[255] With cheerleading not being governed by the NCAA, cheerleaders have been able to profit off of their NIL, leading to the modern social media phenomenon of the "Cheerlebrity."[256] Beyond the lucrative individual endorsement contracts that some cheerleaders have been able to receive, cheerleaders face no restrictions on the use of their school's IP and are permitted to promote products while wearing school gear bearing institutional marks.[257]

Another example of largely unrestricted use of institutional logos and marks has been provided by the National Association of Intercollegiate Athletics ("NAIA"),[258] which markets itself as the league that allows college

250. *NIL FAQs: Group Licensing*, *supra* note 184.

251. *Id.*

252. *See* Bill Shea, *Madden NFL, NBA 2K, Other Sports Video Game Sales and Play Skyrocket in Pandemic*, ATHLETIC (June 17, 2020), https://theathletic.com/1876547/2020/06/17/madden-nfl-nba-2k-other-sports-video-game-sales-and-play-skyrocket-in-pandemic [https://perma.cc/YM3T-SBM3].

253. Tom Pelissero (@TomPelissero), TWITTER (Mar. 21, 2020, 2:29 PM), https://twitter.com/TomPelissero?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1241446751439118337%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fthespun.com%2Fmore%2Ftop-stories%2Fnfl-players-ea-sports-madden [https://perma.cc/JE8M-MJ8R].

254. NCAA FINAL REPORT, *supra* note 141, at 4.

255. *See* Tess DeMeyer, *The College Athletes Who Are Allowed to Make Big Bucks: Cheerleaders*, N.Y. TIMES (May 8, 2021), https://www.nytimes.com/2020/11/29/sports/the-college-athletes-who-are-allowed-to-make-big-bucks-cheerleaders.html [https://perma.cc/VXX8-GJ4F].

256. *Id.*

257. *Id.*

258. The NAIA is a competing governing body of college athletics that oversees over 250 schools with 77,000 student athletes and facilitates 27 national championships. *About Us*, NAIA (2021), https://www.naia.org/about/about-us [https://perma.cc/8D95-5UVZ].

athletes to "Maximiz[e] Your Return on Athletics."[259] In October, 2020, the NAIA announced that it would grant extensive NIL rights to its players, as well as making it "permissible for a student-athlete to reference their intercollegiate athletic participation in such promotions or appearances."[260] The NAIA will allow athletes to reference their involvement in college athletics to participate in commercials, sell nutrition supplements, offer sport lessons, and monetize their social media presence, among other permissible uses.[261]

In sum, the potential benefits of NIL legislation will only be fully realized if group licensing and the use of institutional IP are permitted. These would offer the greatest benefit to the greatest number of athletes. Furthermore, providing these rights would allow for the development of commercial products that would otherwise be unavailable if only individual NIL rights are granted. Ironically, group licensing and co-branding are the only means by which the NCAA and its members can create additional revenues for themselves. In this sense, group licensing is truly a "win win."[262]

D. EXTENDING NIL TO SPORTS BROADCASTING

The last step in maximizing players' NIL potential is to require athletes to be included in the payout of broadcasting contracts. The lack of a federal right of publicity has prevented athletes from profiting off of their NILs for years. Nowhere is this more consequential than in the TV contract setting, as the NCAA has relied on this absence in the law to deny this form of group licensing benefit to players.[263] To address this, Congress should incorporate into its final NIL legislation an additional right of publicity requirement. This would require sports broadcasts of college athletics to share revenues with players at a designated rate (e.g., ten percent), or require a seat at the negotiating table for players through the third-party representation discussed

259. *Why Choose the NAIA?*, NAIA (2021), https://www.naia.org/why-naia/index [https://perma.cc/RHR6-V74N].

260. *NAIA Passes Landmark Name, Image and Likeness Legislation*, NAIA (Oct. 6, 2020), https://www.naia.org/general/2020-21/releases/NIL_Announcement [https://perma.cc/AC2L-FHDC].

261. Kristi Dosh, *NAIA Becomes First in College Sports to Pass Name, Image and Likeness Legislation*, BUS. COLL. SPORTS (Oct. 20, 2020), https://businessofcollegesports.com/name-image-likeness/naia-becomes-first-in-college-sports-to-pass-name-image-and-likeness-legislation [https://perma.cc/LM7E-6AEA].

262. *See generally* Meyer & Zimbalist, *supra* note 43 (covering how group licensing is a "win win" for both college athletes and the member schools); Jessop, *supra* note 196 (discussing the benefits of group licensing for athletes and companies).

263. *See* NCAA FINAL REPORT, *supra* note 141, at 10 ("Because the right of publicity does not apply to live broadcast, rebroadcasts, news accounts or many informational items or pictures, any 'NIL' payments received by student-athletes supposedly in consideration for the creation or sale of those products could not be considered legitimate licensing or work product activity. It would, instead, be little more than payment for participating in the sporting contest itself – literal pay for play.").

above. This could include delayed implementation that allows all current contracts to expire, or it could establish an effective date that will permit current contracts to be renegotiated or restructured.

To address these issues, Congress should create a limited federal right of publicity specifically tied to its NIL legislation and require athletes to receive a share of sports broadcasting contracts. This issue has been considered by other legal scholars in the context of NIL rights.[264] In light of the potential establishment of a Commission on College Athletics and an independent third-party entity to negotiate group licensing contracts on behalf of student-athletes, the potential for a limited right of publicity is much more realistic. "Allowing athletes robust avenues for NIL commercialization while settling questions of unionization, pay-for-play, and TV broadcasting could be a reasonable compromise to the decade-long legal battle that continues in courts around the country."[265]

To realize this "reasonable compromise," Congress should adopt legislation providing for an initial sports broadcasting revenue sharing floor (e.g., ten percent) and require future sports broadcasting contracts to include player representation through a designated third-party licensing entity. This guarantee would be limited within the context of the college athlete NIL legislation and would not be applied to preempt any other sports or live performance broadcasting.

In this sense, the creation of the independent entity would provide the greatest possible benefits for all college athletes whose NILs are used in sports broadcasts. Inclusion in broadcasting revenues, in combination with the foregoing benefits, would maximize NIL benefits for the players, coaches, administrators, conferences, and the NCAA.

V. CONCLUSION

NIL rights have been long overdue and appear to be here to stay. What is left of college athletics will be determined by the actions (or inaction) of Congress, the NCAA, and the individual conferences and schools. Charting the uncertain path forward will require a massive overhaul of college athletics. Individual NIL rights will allow many athletes to take advantage of their market value, but just as many may be left out without extensive group licensing capabilities. Furthermore, the establishment of a Commission on College Athletics to oversee NIL benefits and an independent third-party organization to facilitate NIL contracts on behalf of players will protect

264. *See id.* at 107–11 (proposing a federal right of publicity to ensure compensation for the use of student-athletes NILs in video games); BROWN ET AL., *supra* note 188, at 25 ("Congress could also address the question of whether college athlete NIL rights extend to their participation in live athletic competitions, and if so whether college athletes should receive a fraction of revenue from television broadcasting or from tickets sales.").

265. BROWN ET AL., *supra* note 188, at 25.

players and schools from outright professionalization. These elements —extensive NIL benefits and effective administration detached from the conferences, schools, and the NCAA—will allow players to realize their fair share of the college athletics market.