EMORY | LAW

Emory Law Journal

Volume 74 | Issue 1

2024

Playing Fair, Paying Fair: A Comprehensive Federal Scheme for the Regulation of Collectives and the Student-Athlete Name, Image, and Likeness Market

Josh Blackman

PLAYING FAIR, PAYING FAIR: A COMPREHENSIVE FEDERAL SCHEME FOR THE REGULATION OF COLLECTIVES AND THE STUDENT-ATHLETE NAME, IMAGE, AND LIKENESS MARKET[†]

ABSTRACT

College athletics have transformed with the advent of new name, image, and likeness (NIL) policies, permitting student-athletes to earn compensation in exchange for the use of their NILs. This development was driven by a series of court decisions, ultimately constraining the National Collegiate Athletic Association's (NCAA) authority and capacity to enforce its compensation-prohibiting rules. State legislatures have adopted NIL laws in an effort to obtain competitive advantages for in-state educational institutions ("institutions"), resulting in a patchwork of NIL regulations across the United States. In the midst of this varied NIL regulatory landscape, the NCAA is ill-equipped to enforce NIL rules, the market values of NILs are shrouded in mystery, and entities unaffiliated with institutions have been able to avoid accountability for sex discrimination. Though numerous federal NIL bills have been proposed in both the House and Senate, no proposal has gained traction due to the inclusion of controversial provisions.

This Comment proposes a comprehensive federal scheme for NIL regulation, combining core provisions from state NIL laws, considering the failures of previous federal proposals, and addressing issues regarding the actions of collectives in the NIL dealmaking process. Specifically, this federal scheme calls for the creation of a central oversight entity with subpoena power to regulate the NIL marketplace, an express preemption of state NIL laws, the incorporation of foundational provisions from state NIL legislation, mandatory disclosure of NIL deals, the participation of institutions in the dealmaking process, and a requirement for collectives to affiliate with institutions. The combination of these provisions would allow student-athletes to earn fair market NIL compensation while being protected from discrimination in the dealmaking process.

[†] This Comment received the Mary Laura "Chee" Davis Award for Writing Excellence.

TABLE OF CONTENTS

INTRODUCTION 113
I. COLLEGE ATHLETICS, THE NCAA, AND THE NCAA'S AUTHORITY 115
A. The NCAA and the Business of College Athletics 115
B. Judicial Review of the NCAA's Authority and the Business of NIL 123
1. Antitrust: NCAA v. Board of Regents of the University of Oklahoma 124
2. Relevant Commercial Market: Agnew v. NCAA 126
3. Name, Image, and Likeness: O'Bannon v. NCAA 128
4. NCAA v. Alston*, Justice Kavanaugh's Concurrence, and the Interim NIL Policy* 130
5. The Business of NIL 131
II. THE CURRENT NIL LEGISLATIVE LANDSCAPE 136
A. State NIL Legislation 137
1. States Without NIL Laws 137
2. Common Provisions in State NIL Laws with Minor Impacts on Collectives 138
3. NIL Law Impacting Collectives: Institutional Involvement 143
B. Federal NIL Legislative Proposals 145
III. AN EFFECTIVE FEDERAL NIL REGULATORY SCHEME 149
A. The Failures of Existing Proposals 149
B. The Core Provisions of an Effective Federal NIL Law 150
IV. COLLEGE ATHLETICS UNDER AN EFFECTIVE FEDERAL NIL REGULATORY SCHEME 154
CONCLUSION 155

INTRODUCTION

Former University of Southern California (USC) star running back Reggie Bush helped lead his team to win the 2004 national title and individually won the Heisman Trophy in 2005.[1] In 2010, however, a National Collegiate Athletic Association (NCAA) investigation uncovered that Bush had violated NCAA rules by receiving improper gifts and benefits during his storied career as a USC Trojan, including payments for hotels, rent-free housing for his family, and a new suit to wear while accepting the Heisman Trophy.[2] In response, the NCAA penalized USC by vacating wins during Bush's time as a player—including the national championship—and restricting USC's ability to give future athletic scholarships.[3] Further, Bush was deemed ineligible to have received the Heisman Trophy, leading to his forfeit of college football's highest honor.[4]

In contrast, recent USC quarterback Caleb Williams, the winner of the 2022 Heisman Trophy, had an annual name, image, and likeness (NIL) deal valuation of $2.6 million, driven by agreements with companies including AT&T and Beats by Dre for the use of Williams' NIL in advertising and marketing materials.[5] Why were Bush and Williams treated so differently? The explanation of this disparate treatment lies in the rules and laws governing college athletics' business and legal frameworks.

---

[1] Rick Reilly, *This (Ex-)Heisman Winner Was Punished for Something That Is Essential Today*, WASH. POST (Aug. 23, 2023, 9:59 AM), https://www.washingtonpost.com/opinions/2023/08/08/college-football-heisman-trophy-reggie-bush-nil/. The Heisman Trophy is annually presented to the most outstanding college football player in the country, based on a vote by members of the press, former recipients, and fans. *See* Matt Bonesteel, *The Heisman Trophy Will Be Awarded Saturday. Here's What to Know*, WASH. POST (Dec. 7, 2021, 2:33 PM), https://www.washingtonpost.com/sports/2021/12/07/heisman-trophy-what-to-know/.

[2] Teddy Grant, Aisha Frazier & Brittany Gaddy, *Reggie Bush Sues NCAA over Suggestion He Was Part of 'Pay-for-Play' Plan*, ABC (Aug. 23, 2023, 10:03 PM), https://abcnews.go.com/US/reggie-bush-sues-ncaa-suggestion-part-pay-play/story?id=102507581. The NCAA is a member-led organization that proposes rules and policies to govern college sports, consisting of 1,098 member colleges and universities and 102 athletic conferences. *What Is the NCAA?*, NCAA, https://www.ncaa.org/sports/2021/2/10/about-resources-media-center-ncaa-101-what-ncaa.aspx (last visited July 22, 2024).

[3] Lynn Zinser, *U.S.C. Loses Its 2004 B.C.S. National Championship*, N.Y. TIMES (June 6, 2011), https://www.nytimes.com/2011/06/07/sports/ncaafootball/usc-stripped-of-2004-bcs-national-championship.html.

[4] Bill Pennington, *Reggie Bush, Ineligible for '05, Returns Heisman*, N.Y. TIMES (Sept. 14, 2010), https://www.nytimes.com/2010/09/15/sports/ncaafootball/15heisman.html. Fourteen years after his forfeiture of the award, Bush's Heisman Trophy was reinstated due to the "enormous changes in the college football landscape" discussed in this Comment. *See* Pete Thamel, *Reggie Bush Gets Heisman Trophy Back 14 Years After Forfeiting*, ESPN (Apr. 24, 2024, 9:00 AM), https://www.espn.com/college-football/story/_/id/40014492/reggie-bush-heisman-trophy-returned.

[5] Reilly, *supra* note 1.

One of the most significant changes in the history of college athletics occurred on July 1, 2021, when the NCAA amended its rules to allow student-athletes to earn compensation for their NIL rights.[6] Surrounding this development, state lawmakers rushed to pass legislation, creating a patchwork of NIL laws across the country.[7] Collectives—entities formed by financial supporters ("boosters") unaffiliated with educational institutions ("institutions")—rose in popularity to facilitate deals between student-athletes and businesses in an effort to attract and maintain talent at college athletic programs.[8] In the rapidly developing NIL marketplace, a combination of constrained NCAA authority and conflicting state NIL laws contributes to a lack of transparency in NIL dealmaking and accountability for collective activities.[9]

This Comment argues for a comprehensive federal NIL regulatory scheme that fills the gaps and rectifies the disincentives created by current NIL regulation. Under the current system, the NCAA maintains its regulatory role in college athletics.[10] However, the NCAA's authority and enforcement capacity have been severely limited by recent court decisions, rendering the NCAA unable to effectively regulate the NIL marketplace.[11] Therefore, a new oversight entity must be created to accomplish what the NCAA cannot. Also under the current system, NCAA rules conflict with state NIL law provisions—driven by efforts to maximize recruiting advantages for in-state institutions—frustrating the enforcement of the NCAA's NIL rules.[12] The federal scheme proposed in this Comment addresses this issue by expressly preempting state NIL laws, requiring disclosure of NIL deals, and empowering the oversight entity to hold actors in the NIL marketplace accountable for wrongdoing. Finally, this federal

---

[6] NCAA, INTERIM NIL POLICY (2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf (last visited June 23, 2024).

[7] Alcino Donadel, *Minus Federal Oversight, States Are Passing Their Own Laws on NIL Deals for Student-Athletes*, UNIV. BUS. (Aug. 23, 2023), https://universitybusiness.com/minus-federal-oversight-states-are-passing-their-own-laws-on-nil-deals-for-student-athletes/; Laura C. Murray, *The New Frontier of NIL Legislation*, 60 HOUS. L. REV. 757, 760 (2023).

[8] Margaret Fleming & Dan Whateley, *How NIL Deals and Brand Sponsorships Are Helping College Athletes Make Money*, BUS. INSIDER (Sept. 19, 2023), https://www.businessinsider.com/how-college-athletes-are-getting-paid-from-nil-endorsement-deals.

[9] *See* Amanda Christovich, *NCAA Tells Schools to Ignore State Laws When It Comes to NIL*, FRONT OFF. SPORTS (June 27, 2023, 4:26 PM), https://frontofficesports.com/in-latest-nil-memo-ncaa-tells-schools-to-ignore-state-laws/.

[10] NCAA, INTERIM NIL POLICY, *supra* note 6.

[11] *See infra* Part I.B.

[12] *See* Fleming & Whateley, *supra* note 8; *see also* Christovich, *supra* note 9.

NIL regulatory scheme requires collectives to affiliate with institutions, ending collectives' ability to escape Title IX scrutiny.[13]

Part I of this Comment discusses the history and profitability of college athletics and analyzes legal challenges to the NCAA's authority that ultimately resulted in the modern NIL marketplace. Part II provides an overview of the current NIL regulatory landscape by introducing foundational provisions in state NIL laws and showcasing institutional involvement provisions. Then, Part II compares various federal NIL proposals, highlighting similarities and differences in their proposed methods of regulating the marketplace. Part III introduces an effective federal NIL regulatory scheme, featuring core provisions from existing and proposed legislation, required institutional involvement in the NIL marketplace, and a preemption of state NIL laws. Part III further discusses the creation of a new oversight entity armed with the authority to regulate the activities of collectives, then contemplates the fairness and protection of student-athletes that would be achieved through this federal scheme.

I. COLLEGE ATHLETICS, THE NCAA, AND THE NCAA'S AUTHORITY

The modern NIL marketplace arose from developments in college athletics, including its rise in popularity and profitability, changes in its governance, and input from the courts. This Part consists of three sections. Section A discusses the rise of college athletics and the creation of the NCAA. Section B addresses the profitability of college athletics and the implications of key television broadcasting agreements. Then, section C analyzes significant antitrust judicial decisions limiting the NCAA's authority over institutions and student-athletes, paving the way for the modern NIL landscape.

A. The NCAA and the Business of College Athletics

Responding to the growing popularity of college athletics and concerns for player safety, sixty-two colleges and universities chartered the Intercollegiate Athletic Association of the United States (IAAUS) on December 28, 1905.[14] In 1910, the IAAUS was renamed the National Collegiate Athletic Association (NCAA).[15] The NCAA has been involved in the regulation of college athletics

---

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

[14] *History*, NCAA, https://www.ncaa.org/sports/2021/5/4/history.aspx (last visited May 20, 2024).

[15] *Id.*

for over one hundred years, increasing its scope of authority throughout the twentieth century and culminating in its modern governance structure.[16]

It was not until the 1920s and '30s that the NCAA took over the previously student-led role of managing collegiate athletics.[17] Concurrently, the operating and recruiting responsibilities shifted from students to coaches and administrators.[18] Following the shift to administrative leadership, one of the NCAA's first significant authoritative moves was its adoption of the "Sanity Code."[19] The code established standards for financial aid, recruitment, and academics to maintain amateurism.[20] To enforce the Sanity Code and investigate possible offenders, the NCAA created a Constitutional Compliance Committee.[21] Armed only with expulsion from the NCAA as a punishment for violating the Sanity Code, neither the code nor the Constitutional Compliance Committee were effective at regulating college athletics.[22] In 1951, the Sanity Code was repealed and replaced with new enforcement procedures, and the Committee on Infractions was created with expanded penal authority.[23] Further effectuating the shift to administrative leadership, the NCAA instituted an executive director.[24] Through the executive director, the NCAA negotiated its first deal for the live televising of college football games and established an enforcement division to assist the Committee on Infractions in enforcing penalties.[25]

---

[16] *See* Guy Lewis, *The Beginning of Organized College Sport*, 22 AM. Q. 222, 229 (1970); *History*, *supra* note 14.

[17] *See* Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 991–92 (1987). The NCAA adopted a 10-point code in December 1922, including a restriction against freshmen competing at the varsity level, a ban on student-athlete participation on professional and noncollegiate teams, restrictions on transfers, and a prohibition against graduate student participation. Michael Oriard, *NCAA Academic Reform: History, Context and Challenges*, 5 J. INTERCOLLEGIATE SPORT 4, 6–7 (2012); *Timeline - 1920s*, NCAA, https://www.ncaa.org/sports/2021/6/14/timeline-1920s.aspx (last visited May 20, 2024). Until the end of World War I, students managed the policies and logistics of college sports, with the NCAA playing only a minor role in governing intercollegiate athletics. Smith, *supra* at 991. Instead, the Association devoted its efforts to organizing championship competitions. *Id.*

[18] Smith, *supra* note 17, at 991–92.

[19] *History*, *supra* note 14.

[20] *Id.*

[21] Smith, *supra* note 17, at 992.

[22] *Id.* at 992–93.

[23] *Id.* at 993.

[24] *History*, *supra* note 14. Walter Byers was named executive director of the NCAA in 1951 and held the position for thirty-six years. *Id.*

[25] *Id.*; Smith, *supra* note 17, at 993.

Strong leadership and revenues from television contracts increased the NCAA's enforcement capacity through the 1950s and '60s.[26] Starting in 1971, the NCAA's enforcement processes and decisions were the subjects of criticism, leading to the separation of the investigative and prosecutorial functions of the Committee on Infractions.[27] The diversity in the sizes of member institutions led to the NCAA's creation of Divisions I, II, and III in 1973—each with individual championships and legislative authority.[28] Further, members of Division I created the I-A and I-AA subdivisions in 1978, which were respectively renamed the Football Bowl Subdivision and Football Championship Subdivision decades later.[29] In 1976, the NCAA's enforcement authority expanded to the direct penalizing of institutions, fanning the flames of NCAA criticism to the point of an investigation by the House of Representatives Subcommittee on Oversight and Investigation on the alleged unfairness of NCAA rule enforcement.[30] The Congressional hearings resulted in only minor changes in the NCAA's enforcement processes, and the NCAA continued to face criticism and challenges to its authority into the 1980s.[31]

Such challenges to the NCAA's authority drove the NCAA to adopt Convention Proposal No. 48 in 1983, elevating the academic requirements for prospective student-athletes.[32] Responding further to criticism, in 1984, college and university presidents from the three divisions formed the Presidents Commission with the power to set the NCAA's regulatory agenda.[33] The Presidents Commission transformed the NCAA's governance structure by adding an Executive Committee and Board of Directors for each of the three divisions, with positions filled by college and university presidents.[34]

---

[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, 15 (2000).

[27] *Id.*

[28] *History*, *supra* note 14. By the time the NCAA divided into three divisions, there were 667 member institutions. *See* Gordon S. White Jr., *N.C.A.A. Reorganizes Into 3 Groups*, N.Y. TIMES, Aug. 7, 1973, at 41. Of the 667 members, "the 126 colleges rated [as] major football institutions [were required to] be in Division I in all sports." The remaining 541 institutions were given a month to declare their preferred division for non-football sports, with "any of those 541 playing football . . . be[ing] placed in Division II or III in football by the [NCAA]." *Id.*

[29] *History*, *supra* note 14.

[30] Smith, *supra* note 26, at 16.

[31] *Id.*

[32] *See History*, *supra* note 14.

[33] *Id.*

[34] Smith, *supra* note 26, at 17.

As it presently exists, the NCAA's governance structure consists of an association-wide level and three division levels to manage its 1,098 member institutions, over one hundred athletic conferences, and about half a million student-athletes.[35] Division I institutions compete at the highest level, frequently appear on television, offer full athletic scholarships to some student-athletes, and are frequently subject to public scrutiny.[36] Division II institutions generally invest less in athletics than their Division I counterparts, utilizing a partial-scholarship model to provide limited athletic scholarships to student-athletes.[37] Division III institutions do not offer athletics-based scholarships to student-athletes.[38] Rather, scholarships may only be awarded based on merit and financial need to ensure that athletics merely complements a student-athlete's academic experience.[39] The NCAA Board of Governors and six association-wide committees address and decide issues impacting the entirety of college sports across divisional levels.[40] Each division employs a slightly different structure to govern its daily affairs, set rules, and provide operating guidelines independent of, yet in accordance with, the NCAA's overall strategy.[41] For

---

[35] *How the NCAA Works*, NCAA, https://www.ncaa.org/sports/2015/10/28/how-the-ncaa-works.aspx (last visited May 20, 2024); *What Is the NCAA?*, *supra* note 2.

[36] *See How the NCAA Works*, *supra* note 35.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* Association-wide committees include: (i) Committee on Women's Athletics, (ii) Committee on Competitive Safeguards and Medical Aspects of Sports, (iii) Honors Committee, (iv) Minority Opportunities and Interests Committee, (v) Postgraduate Scholarship Committee, and (vi) Walter Byers Scholarship Committee. *Id.* The Board of Governors, the supreme governing body of the NCAA, consists of nine voting members: four Division I representatives, one Division II representative, one Division III representative, two independent governors, and one graduated NCAA student-athlete. *Id.* Of the four Division I representatives, one must be a president or chancellor and one must be an athletic conference commissioner; and the two independent governors must not be currently employed or otherwise compensated by a member institution or athletic conference. *Id.* Non-voting, ex officio members of the Board of Governors include the chairs of the Division I Council, Division II Management Council, and Division III Management Council; the president of a historically black college or university; two graduated NCAA student-athletes (from the two divisions not represented by the voting student-athlete board member); and the NCAA President. *Id.* The Board of Governors provides final approval of the NCAA's budget and strategic planning, hires the NCAA's president, creates policies and procedures in furtherance of the NCAA Constitution, and implements legal strategy and risk management with the divisional governing bodies. *Id.*

[41] *Id.* Division I governance consists of ten committees, the Division I Council, and the Board of Directors. *Id.* Division II governance consists of ten committees, the Division II Management Council, and the Division II Executive Board. NCAA, HOW THE NCAA WORKS: DIVISION II, at 2 (2024), https://ncaaorg.s3.amazonaws.com/champion-magazine/HowNCAAWorks/D2_HowNCAAWorks.pdf (last visited May 20, 2024). Division III governance consists of ten committees, the Division III Management Council, and the Division III Presidents Council. NCAA, HOW THE NCAA WORKS: DIVISION III, at 2 (2024), https://ncaaorg.s3.amazonaws.com/champion-magazine/HowNCAAWorks/D3_HowNCAAWorks.pdf (last visited May 20, 2024).

NCAA legislation to be amended, each division must act through its legislative process—from the committee level through the council level to the board and presidents council levels—for the change to be approved.[42]

Though the majority of NCAA member institutions belong to Divisions II and III, public perception of college athletics is dominated by high-profile Division I institutions, their subdivisions, and their conferences, especially in football and basketball.[43] Institutions competing in the Division I Football Bowl Subdivision (FBS) are represented by one of ten conferences, with a few institutions opting to compete independently.[44] Of the ten FBS conferences, the five largest conferences—commonly referred to as the Power Five—include the Atlantic Coast Conference (ACC), Big 12, Big Ten, Pac-12, and Southeastern Conference (SEC).[45]

As college athletics has evolved into its present form, which is characterized by specialized divisions and conferences vying for prominence, the business of broadcasting competitions has grown into a multi-billion-dollar industry.[46] In 2019, Division I athletics generated $15.8 billion in revenue, mostly from men's football and basketball media rights deals, football bowl game revenues, ticket sales, royalties and licensing deals, and donor contributions.[47] In 2020, the 182 million-person college sports fanbase was the largest sports fanbase in the

---

[42] *See How the NCAA Works*, *supra* note 35.

[43] *See* Andrew Zimbalist, *Analysis: Who Is Winning in the High-Revenue World of College Sports?*, PBS (Mar. 18, 2023, 7:14 PM), https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports (stating football and basketball generate the vast majority of revenues among the 1,100 NCAA member institutions); *Our Division I Members*, NCAA, https://www.ncaa.org/sports/2021/5/11/our-division-i-members.aspx (last visited July 22, 2024) (stating there are over 350 Division I member institutions).

[44] NCAA College Football FBS Standings, NCAA, https://www.ncaa.com/standings/football/fbs (last visited July 22, 2024). Of the 133 FBS institutions, only four institutions represent themselves: Notre Dame, Army West Point, the University of Massachusetts, and the University of Connecticut. *Id.*

[45] Steve Berkowitz, *NCAA's Power Five Conferences Are Cash Cows*, USA TODAY (May 19, 2023), https://www.usatoday.com/story/sports/college/2023/05/19/power-5-conferences-earnings-billions-2022/70235450007/. The remaining FBS conferences include the American Athletic Conference, Conference USA, the Mid-American Conference, the Mountain West Conference, and the Sun Belt Conference. NCAA College Football FBS Standings, *supra* note 44. The lower Division I Football Championship Subdivision (FCS) consists of thirteen conferences and one independent institution. NCAA College Football FCS Standings, NCAA, https://www.ncaa.com/standings/football/fcs (last visited July 22, 2024). The FCS consists of the Big Sky Conference, Big South-Ohio Valley Conference, Coastal Athletic Association, Ivy League, Mid-Eastern Athletic Conference, Missouri Valley Football Conference, Northeast Conference, Patriot Conference, Pioneer Conference, Southern Conference, Southland Conference, Southwestern Athletic Conference, and United Athletic Conference. *Id.* The sole independently competing FCS institution is Kennesaw State University. *Id.*

[46] *See* Zimbalist, *supra* note 43.

[47] *Id.*

United States—more sizable than those of the National Football League, National Basketball Association, and Major League Baseball.[48] Notably, women's college basketball viewership has seen a recent surge, with the 2024 Division I Women's NCAA National Championship game averaging 18.7 million viewers—higher than the average 14.82 million viewers tuning in for the Men's National Championship game.[49] Compared to the overall population of the United States, college sports fans were 1.6 times more likely to have incomes greater than $100,000, making the fanbase attractive to brand marketers—but what considerations are given to the student-athletes who drive this market?[50] Amid significant television broadcasting deals and conference negotiations driving the business of college sports, student-athletes have historically received only minimal NCAA-permitted forms of compensation.[51]

Television rights are the leading source of revenue for Power Five conferences.[52] On August 30, 2007, the Big Ten debuted the Big Ten Network—

---

[48] Kristi Dosh, *New Report Shows How Attractive College Sports Fans Are to Brand Marketers*, FORBES (Aug. 17, 2021, 9:34 AM), https://www.forbes.com/sites/kristidosh/2021/08/17/new-report-shows-how-attractive-college-sports-fans-are-to-brand-marketers/. Data on the college sports fanbase was compiled by Learfield, a media and data analytics provider, through a partnership with 110 institutions, in its 2020 Intercollegiate Fan Report. *Id.* The approximate college sports fanbase includes over 20 million "Known Fans," who directly participated in college sports-related transactions with an institution, and over 130 million "digital" or "anonymized" fans, who engaged with athletic department websites. *Id.*

[49] Vanessa Romo, *Women's NCAA Championship TV Ratings Crush the Men's Competition*, NPR (Apr. 10, 2024, 6:41 AM), https://www.npr.org/2024/04/10/1243801501/womens-ncaa-championship-tv-ratings.

[50] *See* Dosh, *supra* note 48.

[51] *See* Jon Solomon, *The History Behind the Debate over Paying NCAA Athletes*, ASPEN INST. (Apr. 23, 2018), https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/.

[52] *College Media Rights: What Has Happened and What's Next?*, USA TODAY (Aug. 25, 2022, 5:50 PM), https://www.usatoday.com/story/sports/ncaaf/2022/08/25/college-media-rights-what-has-happened-and-whats-next/50640697/. Until the early 1980s, the NCAA limited potential business opportunities in the realm of college sports through its exclusive control of television rights. Scott Dochterman, *On the Big Ten Network's Legacy: 'We Busted Open a New Frontier'*, THE ATHLETIC (Aug. 31, 2022), https://theathletic.com/3539634/2022/08/31/big-ten-network-legacy/. During this timeframe, institutions were not permitted to appear on national broadcasts more than six times every two years, with the NCAA slating games for regional and national broadcasts. Jason Kersey, *Exploring the History of College Football Media Rights*, THE OKLAHOMAN (Aug. 28, 2013, 9:00 AM), https://www.oklahoman.com/story/sports/college/cowboys/2013/08/25/exploring-the-history-of-college-football-media-rights/60887384007/. In 1984, however, the NCAA's monopoly on college football television contracts was litigated by the Board of Regents at the University of Oklahoma and University of Georgia Athletic Association, resulting in the Supreme Court ruling the NCAA violated the Sherman Antitrust Act by unreasonably restricting institutions' abilities to privately negotiate their own broadcasting agreements in defiance of consumer preferences. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 99, 107 (1984); *infra* Part I.B.1. In the wake of this decision, "Grant of Rights" agreements emerged between institutions and conferences, through which institutions agreed to transfer full and exclusive sports broadcasting rights to their respective conferences for a fixed term as an alternative to institutions individually managing their sports broadcasting rights. Drew Thornley, *What Are Grant of Rights Contracts in U.S. College Football & Their*

the first conference-specific television network.[53] Soon after, FBS conferences shifted their focus to the football television market, resulting in numerous conference realignments as successful, football-playing institutions sought to join conferences with prominent media deals.[54] As conference realignment threatened the existence of smaller conferences, the Power Five capitalized on media deals, reporting a combined $3.3 billion in revenue in fiscal year 2022.[55] The Big Ten reported the highest annual revenue at $845.6 million, earning each member institution in the conference an annual distribution of approximately $58.8 million.[56] To put this figure into perspective, members of Conference USA are expected to earn annual distributions of approximately $750,000 in revenue under the conference's November 2022 multimedia rights deal with CBS Sports and ESPN.[57]

Revenue disparity exists beyond comparisons of conferences. Television rights to college sporting events were historically controlled by the NCAA, which limited the number—and restricted the geographic range—of contests

---

Impact on the Institutions, LAWINSPORT (May 12, 2023), https://www.lawinsport.com/topics/item/what-are-grant-of-rights-contracts-in-u-s-college-football-how-can-universities-exit-them.

[53] *See* Scott Dochterman, *Big Ten Network: A Napkin and an Idea that Preserved, Prospered and Thrives Today*, THE ATHLETIC (Aug. 29, 2022), https://theathletic.com/3536353/2022/08/29/big-ten-network-anniversary/.

[54] *Cf.* Amanda Christovich, *TV Money Built the Modern Power 5. Then Destroyed It.*, FRONT OFF. SPORTS (Aug. 7, 2023, 12:12 PM) https://frontofficesports.com/tv-money-built-power-5-then-destroyed-it/ ("The [*Board of Regents*] decision created a legal pathway for the [conferences to] reign[] supreme . . . but it didn't happen overnight."). One such realignment occurred in 2013, when football-playing members of the Big East Conference, a conference renowned for its prowess in college basketball, exited to pursue revenue from football broadcasting. *Id.* This Big East exodus was rooted in a discrepancy between television deals in the early 2010s. *Id.* While the Big East was negotiating with ESPN to increase its annual payout from $36 million annually to $155 million per year, worth about $1.3 billion over the life of the contract, a May 2011 Pac-12 television deal with ESPN and Fox worth a reported $3 billion caused Big East members to reevaluate and ultimately turn down ESPN's proposal. *Id.* Unbound by a Big East-ESPN contract, football-playing members of the Big East—namely Syracuse, Pitt, and Louisville—left the conference to join the ACC, leaving the Big East void of lucrative college football. *Id.*; Andrea Adelson, *Realignment Revisited - The Beginning of the End for Big East Football*, ESPN (July 20, 2021, 8:00 AM), https://www.espn.com/college-football/story/_/id/31838915/realignment-revisited-beginning-end-big-east-football.

[55] Berkowitz, *supra* note 45.

[56] *Id.* Nebraska, Maryland, and Rutgers received smaller distributions because the universities were not entitled to full shares of revenue from the Big Ten Network, a broadcaster involved in the Big Ten's television agreement. *Id.*

[57] John Riker, *Conference USA Signs Five-Year Media Rights Deal with ESPN and CBS*, BUS. OF COLL. SPORTS (Nov. 10, 2022), https://businessofcollegesports.com/television/conference-usa-signs-five-year-media-rights-deal-with-espn-and-cbs/; *Conference USA Announces Multimedia Rights Deal*, CONF. USA (Nov. 10, 2022), https://conferenceusa.com/news/2022/11/10/general-conference-usa-announces-multimedia-rights-deal.aspx.

televised by institutions.[58] However, in 1984, the Supreme Court ruled that institutions, and conferences via grants by institutions, could not be punished for exercising their ownership rights to college sports regular-season games, matches, and contests.[59] Nonetheless, the NCAA retained, and continues to maintain, ownership of the rights to all ninety NCAA championships.[60] Thus, despite losing out on lucrative regular-season football programming to institutions and conferences, basketball remains a key revenue stream for the NCAA, with the Association reporting nearly $1.3 billion in revenue for fiscal year 2023.[61] Just as conferences distribute earnings to their members, the NCAA distributes approximately 60% of revenue to Division I, 4.37% to Division II, and 3.18% to Division III members and conferences.[62]

The revenues associated with college sports—the billion-dollar figures generated by the NCAA, the multi-million-dollar returns realized by the Power Five institutions, and the smaller distributions earned by the remaining FBS and FCS institutions—rely on a key player: the student-athlete. The previous NCAA constitution provided: "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."[63] In compliance

---

[58] NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 90 (1984).

[59] *Id.* at 120.

[60] NCAA, TELEVISION RIGHTS OVERVIEW 2020–21 NCAA CHAMPIONSHIPS, at 1 (2021), https://www.ncaa.com/_flysystem/public-s3/files/2021-01/2020-21%20Television%20Rights%20Overview.pdf. In 2016, the NCAA reached an $8.8 billion agreement with media providers CBS and Turner to broadcast the Division I Men's Basketball Championship, commonly referred to as "March Madness." Greg Andrews, *March Madness TV-Rights Price Tag Continues to Soar*, INDIANAPOLIS BUS. J. (Mar. 13, 2021), https://www.ibj.com/articles/tv-rights-skyrocket. March Madness television deals and ticket sales for all college athletics championships generate most of the NCAA's annual revenue. *Finances*, NCAA, https://www.ncaa.org/sports/2021/5/4/finances.aspx (last visited July 22, 2024).

[61] Steve Berkowitz, *NCAA Recorded Nearly $1.3 Billion in Revenue in 2023, Putting Net Assets at $565 Million*, USA TODAY (Feb. 1, 2024, 7:50 PM), https://www.usatoday.com/story/sports/college/2024/02/01/ncaa-had-almost-1-3-billion-in-revenue-during-2023-fiscal-year/72443294007/.

[62] *Finances*, *supra* note 60.

[63] *Bylaw 2.9: The Principle of Amateurism*, NCAA: LSDBI, https://web3.ncaa.org/lsdbi/bylaw?bylawId=2470&division=1&adopted=0 (last visited June 24, 2024); Dalton Clouser, *Amateurism vs. Antitrust: The NCAA's Restriction of Student-Athlete Compensation*, 49 W. ST. U. L. REV. 97, 99 (2022).

with this provision and other NCAA rules, student-athlete compensation was limited to scholarships and grants.[64]

The current NCAA Constitution, effective August 1, 2022, now provides: "Student-athletes may not be compensated by a member institution for participating in a sport, but may receive educational and other benefits in accordance with guidelines established by their NCAA division."[65] This amendment, opening the door for alternative forms of student-athlete compensation, reflects a history of Supreme Court decisions regarding the NCAA's authority over the business of college athletics and student-athlete compensation.

B. Judicial Review of the NCAA's Authority and the Business of NIL

The Supreme Court's critical role in the development and protection of student-athlete NIL rights developed from a series of antitrust cases involving the NCAA, its members, and student-athletes. This section analyzes the Court's antitrust review of the NCAA's authority over college football broadcasting deals, discusses the Court's acknowledgment of a quasi-commercial relationship between institutions and student-athletes, traces the evolution of the Court's treatment of student-athlete NILs, and examines the business of modern NIL deals.

---

[64] NCAA CONST. 2 ¶ B (2021), https://ncaaorg.s3.amazonaws.com/governance/ncaa/constitution/NCAAGov_Constitution121421.pdf; *see also Scholarships*, NCAA, https://www.ncaa.org/sports/2014/10/6/scholarships.aspx (last visited Sept. 25, 2024). The NCAA established, and presently maintains, different standards for awarding benefits to student-athletes by the three divisions. *Scholarships*, *supra*. Division I and II institutions are permitted to offer athletic scholarships to student-athletes, while Division III institutions are prohibited from providing the same. *Id.* Further, Division I institutions are permitted to offer student-athletes multi-year scholarships and fund a student-athlete's completion of a bachelor's or master's degree after participation in an NCAA sport, but Division II and III schools are not. *See id.* In addition, Division I student-athletes are permitted to benefit from the NCAA Division I Student-Athlete Opportunity Fund. *Id.* Beyond athletic scholarships, institutions across all division levels are authorized to provide academic scholarships to student-athletes, and student-athletes may receive need-based aid. *Id.*

[65] NCAA CONST. 2, *supra* note 64; Corbin McGuire, *NCAA Members Approve New Constitution*, NCAA (Jan. 20, 2022, 6:12 PM), https://www.ncaa.org/news/2022/1/20/media-center-ncaa-members-approve-new-constitution.aspx.

1. Antitrust: NCAA v. Board of Regents of the University of Oklahoma

The NCAA's authority has been challenged often on antitrust grounds.[66] This subsection outlines common frameworks used in analyzing antitrust suits before discussing how they have been applied in key Supreme Court cases involving the NCAA. Antitrust regulation is rooted in the Sherman Act, which was enacted in 1890 to combat monopolistic and anticompetitive business practices.[67] Antitrust analysis under the Sherman Act employs three main legal standards to assess liability for trade restrictions. The two main tests used are the rule of reason and per se liability.[68] The rule of reason is the standard antitrust analysis, employed to measure a trade restraint's impact on competition.[69] This rule's analytical framework considers the facts pertaining to a particular business, the impact and nature of the restraint, and the reasons and purposes for adopting such a restraint.[70] In contrast, the per se rule is applied when a "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output."[71] Per se violations of the Sherman Act include restraints of trade considered so harmful to competition to be deemed almost always illegal, including price fixing, market dividing, and bid-rigging agreements.[72] A third and less-utilized framework, called "quick-look" analysis, is employed where per se analysis is inappropriate but neither elaborate industry analysis nor evidence of market power are necessary to demonstrate an agreement's anticompetitive nature.[73] Quick-look analysis is used when a mere

---

[66] *See, e.g.*, NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984); Agnew v. NCAA, 683 F.3d 328 (2012); O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015); NCAA v. Alston, 141 S. Ct. 2141 (2021).

[67] *Sherman Anti-Trust Act (1890)*, NAT. ARCHIVES, https://www.archives.gov/milestone-documents/sherman-anti-trust-act (last visited May 19, 2024); *see* An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies, Pub. L. No. 51-647, 26 Stat. 209 (1890); Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383, 1397 (1976) (renaming to the "Sherman Act").

[68] William H. Rooney, Timothy G. Fleming & Michelle A. Polizzano, *Tracing the Evolving Scope of the Rule of Reason and the Per Se Rule*, 2021 COLUM. BUS. L. REV. 1, 2 (2021).

[69] Michael A. Carrier, *The Four-Step Rule of Reason*, 33 ANTITRUST L.J. 50, 50 (2019).

[70] *Id.* (quoting Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)). In practice, the rule of reason framework is a four-step process: (i) the plaintiff must demonstrate a trade restraint's significant anticompetitive effect, (ii) the burden shifts to the defendant to demonstrate a legitimate procompetitive justification for the restraint, (iii) the burden shifts back to the plaintiff to show that the restraint is either not reasonably necessary to achieve its intended purpose or that a less restrictive practice could achieve the same objectives, and (iv) the court balances the restraint's anticompetitive and procompetitive effects. *Id.* at 50–51. Notably, only four percent of antitrust cases reach the fourth stage in litigation, with eighty-four percent of cases resulting in dismissal for plaintiff's failure to sufficiently demonstrate a significant anticompetitive effect in the first stage. *Id.*

[71] *Agnew*, 683 F.3d at 336 (citing *Bd. of Regents*, 468 U.S. at 100).

[72] *The Antitrust Laws*, FED. TRADE. COMM'N, https://ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited May 17, 2024).

[73] *Agnew*, 683 F.3d at 336 (citing *Bd. of Regents*, 468 U.S. at 109).

"rudimentary understanding" of economics is sufficient to acknowledge a restraint's anticompetitive impact on markets and consumers.[74]

In 1984, the Supreme Court struck down the NCAA's television plan on antitrust grounds in *NCAA v. Board of Regents of the University of Oklahoma*—a key starting point in courts' limitations on the NCAA's authority.[75] Leading up to the suit, the College Football Association (CFA), an organization formed to advance the positions of major football-playing NCAA members, began advocating for a greater institutional role in negotiating television plans in 1979.[76] In a controversial move, the CFA negotiated its own television agreement with the National Broadcasting Company (NBC), signed in August 1981, which allowed a greater number of appearances for each institution and generated increased revenues for CFA members.[77] The NCAA countered, threatening to discipline any CFA member that complied with the CFA television agreement by imposing sweeping sanctions on CFA members.[78] The CFA, through the Board of Regents at the University of Oklahoma and the University of Georgia Athletic Association, sued the NCAA, arguing it violated the Sherman Act by unreasonably restraining trade in televising college football games.[79]

Applying the rule of reason, the district court in *Board of Regents* first identified the relevant market as "live college football television," finding that alternative programming had significantly less audience appeal.[80] Next, the district court concluded that the NCAA's restraints constituted complete control over the supply of college football made available to television networks, advertisers, and the public audience.[81] Weighing the justifications offered by the

---

[74] Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 770 (1999).

[75] *Bd. of Regents*, 468 U.S. 85, 88 (1984).

[76] *Id.* at 94. Before 1979, the NCAA negotiated college television plans on behalf of its members, allowing only one college football game per week to be televised in a region, with an institution limited to a maximum of two televised appearances per year. *Id.* at 90. Further, the plan prohibited the televising of any college football game on three of the season's ten Saturdays. *Id.* The CFA's members included the universities in the Big 8, Southeastern, Southwest, Atlantic Coast, and Western Athletic Conferences, as well as independents including Notre Dame, Penn State, Pittsburgh, Army, and Navy. Thomas Scully, NCAA v. Board of Regents of the Univ. of Okla*.: The NCAA's Television Plan Is Sacked by the Sherman Act*, 34 CATH. U. L. REV. 857, 859 n.18 (1985). Notably, members of the Pac 10 and Big 10 Conferences did not join the CFA. *Id.*

[77] *Bd. of Regents*, 468 U.S. at 94–95.

[78] *Id.* at 95.

[79] *Id.* at 88.

[80] *Id.* at 95.

[81] *Id.* at 96. The district court found that the NCAA restrained competition in the relevant market by fixing the price for certain telecasts, boycotting potential broadcasters through its exclusive network contracts, boycotting potential competitors through its threat of sanctions against non-conforming NCAA members, and limiting the potential production of televised college football games. *Id.*

NCAA for its restraints, the district court rejected the argument that televising college football adversely affected gate attendance and the competitive balance between NCAA members—as both claims were unsupported by evidence.[82] Thus, the district court held that the NCAA's sole negotiating control over football televising violated the Sherman Antitrust Act.[83] The Court of Appeals for the Tenth Circuit employed a different analysis to find a violation of the Sherman Act, holding that the NCAA's television plan constituted illegal per se price fixing.[84] The court added that, even if the plan was not per se illegal, any procompetitive justifications offered by the NCAA failed to offset the plan's anticompetitive limitations on pricing and production volume.[85]

The Supreme Court, however, refused to apply per se analysis, acknowledging that certain horizontal restraints on competition were necessary for the existence and operation of all league sports—for if competitors did not agree to a set of rules defining competition, there would be no competition to market.[86] Applying the rule of reason, the Court rejected the NCAA's procompetitive justifications for restraining the college football television market.[87] This decision dealt a significant blow to the NCAA's authority over the business of college sports, shifting authority from the NCAA to institutions and conferences to negotiate television contracts to earn increased broadcasting revenues and media exposure.[88]

2. Relevant Commercial Market: Agnew v. NCAA

As institutions and conferences benefitted from the *Board of Regents* decision and profited from the popularity of college athletics, the earning

---

[82] *Id.*

[83] *Id.* at 88, 95. The Sherman Act was Congress's first antitrust law, passed in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *The Antitrust Laws*, *supra* note 72.

[84] *Bd. of Regents*, 468 U.S. at 88, 97.

[85] *Id.* at 97–98.

[86] *Id.* at 101. Furthering this line of argument, the Supreme Court noted, "[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the grounds that there are no other professional lacrosse teams." *Id.* (quoting Robert H. Bork, THE ANTITRUST PARADOX 278 (1978)).

[87] *Id.* at 113, 119.

[88] *See How the Supreme Court Broke the NCAA's Lock on TV Revenue*, FAST CO. (Mar. 24, 2024), https://www.fastcompany.com/91065686/supreme-court-ncaa-tv-revenue.

potential of student-athletes remained limited by NCAA scholarship rules.[89] In 2012, *Agnew v. NCAA* challenged these NCAA rules on antitrust grounds, wherein the court recognized the "not noncommercial" nature of the transactions between NCAA members and student-athletes, opening the door to future challenges to the NCAA's authority.[90]

Unlike *Board of Regents*, *Agnew* was brought by student-athletes, not institutional representatives.[91] The plaintiffs, Joseph Agnew and Patrick Courtney, both received one-year athletic scholarships to compete in NCAA Division I football programs, and both subsequently suffered career-ending injuries while playing the sport.[92] Two previous NCAA bylaws limiting the athletic scholarships offered by members were at issue in the case: the one-year scholarship limit, prohibiting NCAA members from offering student-athletes multi-year scholarships, and the annual cap on the number of athletic scholarships an NCAA member is permitted to offer for each of the member's teams.[93] After suffering their injuries, the plaintiffs' athletic scholarships were not renewed.[94] The plaintiffs alleged that the NCAA's regulations of athletic scholarships reduced the number of athletic scholarships offered and prevented some students from obtaining a bargained-for education—constituting antitrust violations under the Sherman Act.[95] The Sherman Act and the Clayton Act, which was enacted by Congress in 1914 to bolster the federal antitrust regime, collectively provide plaintiffs a civil cause of action where plaintiffs are "injured in [their] business or property by reason of anything forbidden in the antitrust laws."[96]

Taking both of these statutes into consideration, the U.S. Court of Appeals for the Seventh Circuit noted that, even if a detailed market analysis is not necessary under a per se or quick-look analysis, a relevant commercial market

---

[89] *See* Agnew v. NCAA, 683 F.3d 328, 333 (2012); NCAA, 2009–10 NCAA DIVISION I MANUAL 181, 187 (2009), https://www.ncaapublications.com/productdownloads/D110.pdf.

[90] *Agnew*, 683 F.3d at 340 ("Despite the nonprofit status of NCAA member schools, the transactions those schools make with premier athletes—full scholarships in exchange for athletic services—are not noncommercial, since schools can make millions of dollars as a result of these transactions." (footnote omitted)).

[91] *Id.* at 332.

[92] *Id.*

[93] *Id.* at 333; NCAA, 2009–10 NCAA DIVISION I MANUAL, *supra* note 89, at 185–87.

[94] *Agnew*, 683 F.3d at 332.

[95] *Id.* at 333.

[96] *Id.* at 334 (quoting 15 U.S.C. § 15); *see The Antitrust Laws*, *supra*, note 72. The Clayton Act addresses anticompetitive practices not expressly prohibited by the Sherman Act, including mergers and interlocking directorates. *Id.* Under the Clayton Act, a plaintiff is entitled to recover threefold the damages sustained as a result of violation(s) of the antitrust laws. 15 U.S.C. § 15.

needs to first exist and be identified before anticompetitive effects can be measured.[97] The plaintiffs vaguely asserted that NCAA members compete for student-athletes to attend their institutions and obtain bachelor's degrees, but such a discussion failed to identify the confines of the product market constituting a relevant commercial market under the Sherman Act.[98] Though the court, in dicta, discussed how a proper identification of a labor market for student-athletes would have constituted a cognizable market under the Sherman Act, the plaintiffs failed to include such a discussion in their complaint.[99] Accordingly, the Seventh Circuit affirmed the district court's dismissal of the case due to the plaintiffs' failure to identify a relevant commercial market.[100] Nonetheless, the court's finding of "not noncommercial" transactions between institutions and student-athletes hinted at the potential for successful antitrust challenges to the NCAA's rules regarding student-athlete compensation.[101]

3. Name, Image, and Likeness: O'Bannon v. NCAA

Building on the student-athlete focus of the *Agnew* challenge to the NCAA's authority, the class action antitrust suit *O'Bannon v. NCAA* brought student-athlete NIL rights under judicial scrutiny in 2015.[102] Ed O'Bannon played basketball at the University of California, Los Angeles (UCLA) between 1992 and 1995, earning a starting position on the team in all but the 1992 season and leading the team to a record-breaking thirty-two victories and the 1995 NCAA Championship.[103] While visiting a friend's house, O'Bannon observed an avatar of himself on a college basketball video game.[104] The UCLA virtual player visually resembled O'Bannon and wore the same jersey number—a use of likeness to which O'Bannon did not consent and for which he did not receive compensation.[105] O'Bannon sued the NCAA, alleging the NCAA's rules against

---

97 *Agnew*, 683 F.3d at 333, 345.

98 *Id.* at 346. The Court explained that, from the plaintiffs' discussion of the alleged bachelor's degree product market, it was not apparent whether the plaintiffs were arguing that the NCAA's regulations impacted the entire market for individuals seeking bachelor's degrees or, instead, a market only existing between student-athletes seeking bachelor's degrees in exchange for competing in athletics. *Id.*

99 *Id.* at 346–47.

100 *Id.* at 347.

101 *See id.* at 340.

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

103 *Hall of Fame: Ed O'Bannon*, UCLA, https://uclabruins.com/honors/hall-of-fame/ed-o-bannon/207 (last visited May 17, 2024). During the 1995 season, O'Bannon was awarded the John Wooden Award, was named Most Outstanding Player in the Final Four and Pac-10 Co-Player of the Year, and became a consensus All-American. *Id.*

104 *O'Bannon*, 802 F.3d at 1055.

105 *Id.*

compensating student-athletes for the use of their NILs illegally restrained trade under the Sherman Act.[106] Specifically, the court noted that the NCAA prohibited athletes "with few exceptions—from receiving *any* 'pay' based on [their] athletic ability, whether from boosters, companies seeking endorsements, or would-be licensors of the athlete's name, image, and likeness."[107] The district court sided with the plaintiffs, applying the rule of reason to find that the NCAA's prohibition of compensation for NILs had an unjustified anticompetitive impact on the college education market in violation of the Sherman Act.[108]

On appeal, the Ninth Circuit also applied the rule of reason to evaluate the NCAA's NIL compensation restrictions.[109] First, the court found that the NCAA's compensation restrictions had a significant anticompetitive effect on the college education market.[110] Evaluating the NCAA's suggested procompetitive justifications for its restrictions on NIL compensation, the court first rejected the NCAA's argument that the rules increased choices for athletes by differentiating college and professional options.[111] Nonetheless, the court agreed with the NCAA that two procompetitive purposes for the restrictions existed: the integration of academics with athletics and the preservation of the amateur nature of college sports.[112] Having found procompetitive purposes for the NCAA's restrictions, the court then evaluated whether reasonable alternatives to the restrictions existed.[113] The first proposed alternative was to permit NCAA members to compensate student-athletes through grants-in-aid covering the full cost of attendance.[114] The court found this alternative to be a reasonable and less-restrictive means of achieving the NCAA's procompetitive

---

[106] *Id.* O'Bannon's suit, which also named the Collegiate Licensing Company—the entity that licensed NCAA and several NCAA member trademarks for commercial use—as a defendant, was consolidated with a similar suit brought by Sam Keller, a former Arizona State University and University of Nebraska football quarterback, who added Electronic Arts as a defendant—the software company that produced college basketball and football video games. *Id.* Later, the plaintiffs settled claims against the Collegiate Licensing Company and Electronic Arts, leaving only the antitrust claim against the NCAA for trial. *Id.* at 1056.

[107] *Id.* (emphasis in original).

[108] *Id.* at 1057.

[109] *Id.* at 1069.

[110] *Id.* at 1072. The court concluded that the NCAA's compensation restrictions effectively "fix the price" of NIL rights, which is a component of the benefits provided by institutions to student-athletes. *Id.*

[111] *Id.* at 1072–73.

[112] *Id.* at 1073.

[113] *Id.* at 1074.

[114] *Id.*

purposes.[115] The second proposed alternative was allowing student-athletes to receive NIL compensation untethered to their educational expenses.[116] Stressing the NCAA's procompetitive purpose of maintaining the amateur nature of its college sports product, the court found that this student-athlete NIL compensation model was unreasonable.[117] Thus, the Ninth Circuit held that, under the rule of reason, the NCAA must permit its member institutions to compensate student-athletes for the use of their NILs up to the cost of attending the institution, but permitting compensation beyond the cost of attendance was not required by law.[118] The Supreme Court denied the NCAA's appeal.[119] Thus, *O'Bannon* opened the door for student-athlete NIL compensation up to the cost of attendance.

4. NCAA v. Alston*, Justice Kavanaugh's Concurrence, and the Interim NIL Policy*

The question of student-athlete NIL compensation was revisited and elevated to Supreme Court scrutiny in the 2021 case *NCAA v. Alston*.[120] Building on the *O'Bannon* analysis of the NCAA's rules for educational benefits, the Supreme Court upheld a district court injunction of the NCAA's limitations on the academic benefits institutions could award student-athletes.[121] In his concurrence, Justice Kavanaugh discussed extending student-athlete compensation beyond education-related benefits, though such restrictions were not at issue in *Alston*.[122] Nonetheless, Justice Kavanaugh's concurrence argued that the NCAA's limitations on compensation that was untethered to academic benefits raised significant issues under antitrust law.[123] Notably, the concurrence posits that all NCAA compensation rules should be analyzed under the rule of reason, without special consideration given to "stray comments" in previous

---

[115] *Id.* at 1075. The court also noted that there was no evidence that awarding grants-in-aid up to the full cost of attendance would significantly increase costs for institutions or the NCAA, with the NCAA already permitting institutions to fund the full cost of a student-athlete's attendance. *Id.*

[116] *Id.* at 1076.

[117] *See id.* Comparing the education-untethered NIL cash compensation model to the NCAA's restriction at issue—the prohibition of NIL compensation—the Ninth Circuit concluded that the cash compensation model was less effective at promoting amateurism and maintaining consumer demand. *Id.*

[118] *Id.* at 1079.

[119] NCAA v. O'Bannon, 137 S. Ct. 277 (2016).

[120] NCAA v. Alston, 141 S. Ct. 2141 (2021).

[121] *O'Bannon*, 802 F.3d at 1074–75; *Alston*, 141 S. Ct. at 2164–66.

[122] 141 S. Ct. 2166–67 (Kavanaugh, J., concurring).

[123] *Id.* at 2168.

cases regarding amateurism and college athletics.[124] Further, Justice Kavanaugh argued that, if the NCAA's compensation rules were challenged under the rule of reason, the NCAA would likely fail to survive scrutiny due to a lack of a valid procompetitive justification for its rules.[125]

In response to Justice Kavanaugh's criticisms, the NCAA adopted an interim student-athlete compensation policy, effective July 1, 2021, giving student-athletes in all three divisions the opportunity to "benefit from their name, image and likeness."[126] The interim policy provides that student-athletes may engage in NIL activities consistent with state law, if state NIL legislation exists, and also use professional services providers to coordinate NIL activities; however, student-athletes are required to abide by state, school, and conference rules in reporting NIL activities.[127] Additionally, the policy clarifies that it does not alter the NCAA's rules against directly paying student-athletes for competing and improperly inducing student-athletes to attend a particular institution.[128] In an announcement of the policy, the NCAA President discussed the Association's intent to work with members of Congress to create a nationwide NIL solution,[129] but such a plan has not yet been realized. In the absence of a federal NIL law, the NIL industry rapidly developed to benefit institutions, businesses, and student-athletes, with states concurrently developing a patchwork of NIL regulations.

5. The Business of NIL

After the NCAA opened the door to NIL activities on July 1, 2021, a flurry of dealmaking ensued between student-athletes, startups, small businesses, and national corporations.[130] The growth of the NIL market, worth an estimated $1

---

[124] *Id.* at 2166–67. Justice Kavanaugh suggested that such comments were merely dicta and should not have any bearing on the legality of current NCAA compensation rules. *Id.*

[125] *Id.* at 2167. Justice Kavanaugh argued that the NCAA's business strategy would be "flatly illegal" in almost any other industry in America. *Id.* Using the restaurant industry as an example, Justice Kavanaugh posited that it would be illegal for all restaurants in a locale to agree to reduce cooks' wages based on the idea that customers prefer food from low-paid cooks. *Id.* Similarly, law firms are not permitted to agree to limit attorney compensation based on the idea of providing services out of a "love of the law." *Id.*

[126] INTERIM NIL POLICY, *supra* note 6; Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx.

[127] INTERIM NIL POLICY, *supra* note 6.

[128] *See id.*

[129] *Id.*

[130] Fleming & Whateley, *supra* note 8. Nebraska wide receiver Decoldest Crawford landed a deal with a local HVAC company; Miami (Florida) football commit Jaden Rashada allegedly signed a $9.5 million deal with a university booster; the Texas Tech football team signed a deal that provided $25,000 to each of its scholarship players during the 2022–23 season; star Texas Longhorns running back Bijan Robinson landed a

billion annually, is driven in large part by collectives—booster-funded entities created to facilitate NIL activities between an institution's student-athletes and businesses.[131] For the majority of student-athletes, NIL activities are small-scale, such as being compensated a few hundred dollars for attending an event or participating in a social media campaign.[132] However, for a limited population of student-athlete celebrities, mainly those attending Power Five institutions, NIL earnings amount to millions of dollars.[133]

About twenty percent of these NIL earnings are sourced from deals constructed directly between student-athletes and brands.[134] Collectives, through the facilitation of million-dollar-deals or local event appearances, account for the remaining eighty percent of NIL money flowing to student-athletes.[135] Just a year after the NCAA's interim NIL policy went into effect, more than 120 collectives were formed or were in the process of forming.[136] At the time, ninety-two percent of Power Five institutions benefitted—or would soon benefit from—at least one collective existing or in formation, including every SEC member.[137] Structurally, collectives exist independently of the institution they are formed to benefit.[138] Though collectives operate differently depending on organizational goals and institutional needs, the general fundraising model involves soliciting funds from institutions' boosters and businesses through single payments and subscriptions.[139] Further differentiated by their functions and the roles of donors, collectives fall into three major classifications:

---

deal with Lamborghini Austin; and Norfolk State running back Rayquan Smith earned over 70 NIL deals with both small brands and national corporations, including Body Armor, Arby's, and Champs Sports. Max Escarpio, *College Football's Most Unique NIL Deals in 2022*, BLEACHER REP. (Aug. 16, 2022), https://bleacherreport.com/articles/10045014-college-footballs-most-unique-nil-deals-in-2022#:~:text=Jaden%20Rashada's%20Alleged%20$9.5M%20NIL%20Contract&text=Miami%20commit%20Jaden%20Rashada%20might,a%20Hurricanes%20booster%20in%20June.

131 *See* Fleming & Whateley, *supra* note 8.

132 *Id.*

133 *See On3 NIL 100*, ON3 (May 18, 2024, 12:00 AM), https://www.on3.com/nil/rankings/player/nil-100/. Bronny James, freshman point guard for USC, has earned NIL deals valued at $3.7 million; and Colorado quarterback Shedeur Sanders' NIL agreements are valued at $4.6 million. *Id.*

134 *See* Fleming & Whateley, *supra* note 8.

135 *Id.*

136 Pete Nakos, *What Are NIL Collectives and How Do They Operate?*, ON3 (July 6, 2022), https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/.

137 *Id.*

138 *Id.*

139 *Id.* The NCAA defines a booster as "any third-party entity that promotes an athletics program, assists with recruiting or assists with providing benefits to recruits, enrolled student-athletes or their family members." Michelle Brutlag Hosick, *DI Board of Directors Issues Name, Image and Likeness Guidance to Schools*, NCAA (May 9. 2022, 5:21 PM), https://www.ncaa.org/news/2022/5/9/media-center-di-board-of-directors-issues-name-image-and-likeness-guidance-to-schools.aspx.

marketplace collectives, donor-driven collectives, and dual collectives.[140] Marketplace collectives, as the name suggests, operate as a market between businesses and student-athletes where the collective represents student-athletes as an agent in negotiating NIL deals with businesses.[141] Donor-driven collectives effectively "wash" donor money by creating opportunities for which student-athletes can receive collective funds in NCAA-compliant manners.[142] Dual collectives are a hybrid of marketplace and donor-driven collectives, connecting businesses with student-athletes and providing a vehicle for donors to indirectly compensate student-athletes.[143] A fourth quasi-collective "NIL club," unique for its student-athlete-driven approach and utilization of technology infrastructure, sells interactions with student-athletes to fanbase communities from which seventy-five percent of revenue is equally divided among participating student-athletes, and the software provider, such as YOKE,[144] receives the remaining twenty-five percent.[145]

Collectives in general, regardless of structural and operational differences, have received criticism for potential NCAA rule violations.[146] Specifically, the actions of collectives have raised concerns regarding improper inducements for

---

[140] Nakos, *supra* note 136.

[141] *Id.* Examples of marketplace collectives include MarketPryce Florida (benefiting University of Florida student-athletes) and TigerImpact (benefiting Clemson University student-athletes). *Id.*; *MarketPryce Florida – Florida Gators Collective*, ON3, https://www.on3.com/nil/collectives/marketpryce-florida-9/; *TigerImpact – Clemson Tigers Collective*, ON3, https://www.on3.com/nil/collectives/tigerimpact-74/.

[142] Nakos, *supra* note 136. Examples of donor-driven collectives include The Foundation (benefiting Ohio State student-athletes) and The Fund (benefiting Texas A&M University student-athletes). *Id.*; *The Foundation – Ohio State Buckeyes Collective*, ON3, https://www.on3.com/nil/collectives/the-foundation-16/; *Texas Aggies United – Texas A&M Aggies Collective*, ON3, https://www.on3.com/nil/collectives/the-fund-18/.

[143] Nakos, *supra* note 136. Examples of dual collectives include The Gator Collective (an additional collective benefiting University of Florida student-athletes) and Classic City Collective (benefiting University of Georgia student-athletes). *Id.*; *Gator Collective – Florida Gators Collective*, ON3, https://www.on3.com/nil/collectives/gator-collective-1/; *Classic City Collective – Georgia Bulldogs Collective*, ON3, https://www.on3.com/nil/collectives/classic-city-collective-11/.

[144] YOKE is a technology startup company that partners with institutions' athletic departments and provides custom software solutions that enable student-athletes to co-operatively market their NILs to engage with fanbases. *About Us*, YOKE, https://www.yoketeam.com/about-us (last visited May 18, 2024).

[145] Nakos, *supra* note 136. The East Lansing NIL Club is a YOKE-powered collective, through which opted-in Michigan State University football players divide seventy-five percent of their earnings into equal shares. Andy Wittry, *Inside the East Lansing NIL Club's Plans for NIL Revenue Sharing*, ON3 (June 27, 2022), https://www.on3.com/nil/news/michigan-state-spartans-football-east-lansing-nil-club-yoke/.

[146] Nicole Auerbach, *College Leaders 'Extremely Concerned' with NIL Collectives' Direction: Survey*, THE ATHLETIC (May 3, 2022), https://theathletic.com/3499920/2022/05/04/college-leaders-extremely-concerned-with-nil-collectives-direction-survey/.

recruits to attend an institution and violations of the NCAA's rules against pay-for-play.[147] For example, the University of Iowa football team, following a lackluster 2021 season, sought the transfer of the talented Michigan quarterback Cade McNamara.[148] The Swarm Collective, benefiting University of Iowa student-athletes, offered a job to McNamara for about $600 per hour to deliver meals to seniors and children in hospitals.[149] McNamara accepted the job and transferred to Iowa, allegedly receiving the offer before his transfer—which, if true, violated NCAA rules against providing compensation for recruiting purposes.[150] Naturally, the Swarm Collective denied that the offer was extended prior to McNamara's transfer.[151]

Further adding to concerns, many collectives are structured as charities or utilize charitable arms to allow for tax-deductible donations, which has garnered scrutiny from the Internal Revenue Service (IRS).[152] For collectives, the nonprofit structure was an effective way of attracting donations to compensate student-athletes for charitable appearances.[153] However, the IRS concluded that nonprofit collectives, in many cases, "operat[e] for [the] substantial nonexempt purpose" of providing economic benefits to student-athletes, outweighing any tax-exempt purpose furthered by collectives' activities.[154] Thus, a nonprofit collective focused on compensating student-athletes in furtherance of charitable purposes likely does not qualify as tax-exempt, meaning donations to the collective are concurrently not exempted—severely limiting the collective's source of funding.[155]

---

147 Fahrenthold & Witz, *supra* note 13.

148 *Id.*

149 *Id.*

150 *Id.*; *see* INTERIM NIL POLICY, *supra* note 6.

151 Fahrenthold & Witz, *supra* note 13.

152 *Id.*

153 Jim Vertuno, *IRS Throws a Chill into Collectives Paying College Athletes While Claiming Nonprofit Status*, ASSOCIATED PRESS (June 30, 2023, 6:09 AM), https://apnews.com/article/nil-athlete-endorsements-ncaa-irs-9d006bdb429f76adaa3d108196fd2c8c.

154 I.R.S. Chief Counsel Adv. Mem. 2023-004, at 2 (May 23, 2023), https://www.irs.gov/pub/lanoa/am-2023-004-508v.pdf (Internal Revenue Serv., Memorandum on Whether Operation of an NIL Collective Furthers an Exempt Purpose Under Section 501(c)(3)); Vertuno, *supra* note 153.

155 Vertuno, *supra* note 153. The IRS's scrutiny of nonprofit collectives led Gary Marcinick, the founder of the donor-driven Cohesion Foundation (benefitting Ohio State student-athletes), to believe that his collective—and the majority of donor-driven collectives—would cease to exist. *Id.* The Cohesion Foundation will operate through December 2023 and then dissolve. Joey Kaufman, *Ohio State Nonprofit NIL Collectives to Move in Opposite Directions After IRS Memo*, THE COLUMBUS DISPATCH (July 5, 2023, 8:26 AM), https://www.dispatch.com/story/sports/college/2023/06/30/ohio-state-nil-collectives-to-go-in-opposite-directions-after-irs-memo/70357708007/.

Yet, many collectives exist as for-profit entities, with their operations unfettered by the IRS's guidance.[156] Collectives also operate beyond the scope of Title IX regulations, further escaping regulation.[157] Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving [f]ederal financial assistance."[158] All public colleges and universities receive federal financial assistance and are, therefore, subject to Title IX.[159] Almost all private institutions are subject to Title IX by their receipt of federal funding via the federal financial aid programs utilized by their students.[160] Yet, due to their independence from institutions, collectives are not required to adhere to Title IX, meaning they are permitted to treat male and female student-athletes unequally.[161] Free from Title IX protections, collectives have disproportionately benefitted male student-athletes.[162] Among top institutions, the average collective contracts with male and female basketball players are $37,000 and $9,000, respectively.[163] Under the current regulatory environment, institutions are disincentivized from involving themselves in NIL deals between collectives and student-athletes, as such institutional involvement would expand the authority of Title IX to collectives' activities.[164] With institutional involvement, collectives would be required to provide male and female student-athletes the same funding opportunities.[165] This, in turn, would arguably limit collectives' buying power for star athletes, and ultimately dampen institutional athletic recruiting. In addition to collectives evading Title IX protections, the NCAA has also been hesitant to police the

---

156 *See* Vertuno, *supra* note 153.

157 *See* Colleen Murphy, *College Athletics Programs Face Likely 'Collision' Between NIL Deals and Title IX*, ALM L. (Oct. 17, 2023, 2:16 PM), https://www.law.com/2023/10/17/college-athletics-programs-face-likely-collision-between-nil-deals-and-title-ix/.

158 Education Amendments of 1972, 20 U.S.C. § 1681 (known as Title IX).

159 *See Title IX Frequently Asked Questions*, NCAA, https://www.ncaa.org/sports/2014/1/27/title-ix-frequently-asked-questions.aspx.

160 *Id.*

161 Fahrenthold & Witz, *supra* note 13.

162 Eric Prisbell, *Why NIL and Title IX Are 'About to Collide'*, ON3 (Sept. 18, 2023), https://www.on3.com/nil/news/why-nil-and-title-ix-are-about-to-collide/. According to Jason Belzer, CEO of Student Athlete NIL—a company that manages thirty collectives—about ninety-five percent of collective funds are distributed to male student athletes. *Id.*

163 Fahrenthold & Witz, *supra* note 13. These collective contract values were provided by Opendorse, a company that processes payments to student-athletes on behalf of collectives. *Id.*

164 *See* Murphy, *supra* note 157.

165 *See id.*

activities of collectives—punishing only one institution for improperly inducing recruits since the interim NIL policy went into effect.[166]

In an effort to clarify permissible collective activities, the NCAA Division I Board of Directors issued guidance nearly a year after the interim NIL policy went into effect, stating that: (i) institutions are not permitted to be directly involved in negotiations on behalf of a collective or a student-athlete; (ii) institution staff may not donate directly to collectives, be employed by a collective, or have equity in a collective; (iii) institutions may not request that donors direct their funds to specific sports teams or student-athletes; and (iv) institutions may not offer tickets or suites to induce donations to a collective.[167] Nonetheless, these guidelines are only effective where permitted by state law and when enforced by the NCAA.[168] Regarding enforcement, NCAA leaders complain that the NCAA lacks the capacity to effectuate fairness among collectives, institutions of all sizes, and student-athletes of all genders because the collectives would need to voluntarily place themselves under the authority of the NCAA,[169] which seems exceedingly unlikely. Empowered by the body of antitrust judicial decisions described above and unencumbered by the NCAA, the unchallenged inequality and impropriety perpetrated by collectives is further enabled by minimal opposition in state legislative schemes.[170]

II. THE CURRENT NIL LEGISLATIVE LANDSCAPE

In the absence of federal legislation, some states have established regulatory frameworks to govern the NIL marketplace, while others have remained on the sidelines. This Part proceeds in two sections. Section A discusses NIL regulation in states without enacted frameworks, compares and contrasts key components of state NIL laws, and examines the impact of NIL laws permitting institutional

---

166 Fahrenthold & Witz, *supra* note 13. The NCAA punished the University of Miami women's basketball coach for "facilitating impermissible contact between two prospects and a booster" after the booster posted about his involvement in inducing the prospects to transfer to the University of Miami. Nicole Auerbach, *NCAA, Miami Women's Basketball Agree to Level II Violations in Recruitment of Cavinder Twins*, THE ATHLETIC (Feb. 24, 2023), https://theathletic.com/4248477/2023/02/24/ncaa-nil-rules-penalties-recruiting-violations/.

167 Meghan Durham, *DI Board Approves Clarifications for Interim NIL Policy*, NCAA (Oct. 26, 2022, 1:21 PM), https://www.ncaa.org/news/2022/10/26/media-center-di-board-approves-clarifications-for-interim-nil-policy.aspx. The NCAA used the term "NIL entity" and "third party entity" in its guidance to refer to NIL collectives. *See id.*

168 *See id.*

169 Fahrenthold & Witz, *supra* note 13.

170 *See, e.g.*, Eric Prisbell, *The New NIL Collective Model: 'It's Illegal. But It's the Future.'*, ON3 (June 28, 2023), https://www.on3.com/nil/news/the-new-nil-collective-model-its-illegal-but-its-the-future-texas-arkansas/.

involvement on collectives and the NIL process. Section B analyzes the development and characteristics of significant federal NIL proposals.

A. State NIL Legislation

As of September 2024, thirty-two states have enacted NIL legislation, with varying degrees of restrictions on student-athletes, institutions, businesses, and collectives.[171] This section examines the landscape of NIL laws at the state level by discussing regulatory frameworks in states without NIL legislation, highlighting commonly included provisions in state NIL laws with minor impacts on collectives, and addressing clauses in state regulatory models with significant implications on the activities of collectives.

1. States Without NIL Laws

As a starting point, in the absence of a state law, the NIL activities of an NCAA member institution and its student-athletes are governed by the Association's interim NIL policy and the rules of the institution and its athletic conference.[172] Accordingly, student-athletes in these states are permitted to earn NIL compensation and use a professional services provider for representation so long as student-athletes abide by reporting rules set forth by their respective institutions and conferences, and adhere to NCAA rules against pay-for-play and improper inducements.[173] As of June 2024, there is no known NIL lawmaking activity, or history of such, in Alaska, Idaho, Indiana, North Dakota, South Dakota, or Wyoming.[174]

Though several states proactively passed NIL legislation in anticipation of the NCAA's interim policy, the leniency of the policy has resulted in some states rethinking their approaches to NIL—opting instead for institutions to be governed solely by the NCAA's interim policy.[175] Alabama, for example,

---

[171] *NIL Legislation Tracker*, SAUL EWING LLP, https://www.saul.com/nil-legislation-tracker (last visited Sept. 9, 2024); *see also* Donadel, *supra* note 7; Murray, *supra* note 7, at 766–70.

[172] INTERIM NIL POLICY, *supra* note 6.

[173] Hosick, *supra* note 126.

[174] *State and Federal Legislation Tracker*, TROUTMAN PEPPER (June 4, 2024), https://www.troutman.com/state-and-federal-nil-legislation-tracker.html (click "VIEW ALL STATES" to see a complete history of legislation by each state); Braly Keller, *NIL Incoming: Comparing State Laws and Proposed Legislation*, OPENDORSE (May 25, 2023), https://biz.opendorse.com/blog/comparing-state-nil-laws-proposed-legislation/ (detailing additional proposed legislation in Massachusetts, Rhode Island, West Virginia, and Wisconsin).

[175] Josh Moody, *States Rethink Restrictive NIL Laws*, INSIDE HIGHER ED (Feb. 10, 2022), https://www.insidehighered.com/news/2022/02/11/states-rethink-restrictive-nil-laws.

repealed its NIL law on February 3, 2022, finding that the state law was more restrictive than the guidelines proscribed by the NCAA.[176] In similar fashion, South Carolina suspended its NIL law on July 1, 2022, to remove restrictions that, in state legislators' views, placed institutions at a competitive disadvantage to those in other states without NIL laws.[177]

2. Common Provisions in State NIL Laws with Minor Impacts on Collectives

The majority of states have enacted NIL laws, expanding the rules governing institutions and student-athletes beyond the NCAA's interim policy.[178] The laws enacted by California, Florida, and Georgia offer core provisions for regulating NIL dealmaking.[179]

California was the first state to address NIL through legislation.[180] In 2019, two years before the NCAA's NIL policy went into effect, California State Senators Nancy Skinner and Steven Bradford, dissatisfied with the *O'Bannon* cost-of-attendance cap on student-athlete compensation, introduced Senate Bill No. 26—the "Fair Pay to Play Act."[181] The Act was signed into law, effective September 1, 2021, amending California's Education Code to prohibit postsecondary institutions from preventing a student-athlete from receiving compensation resulting from the student-athlete's NIL or athletic reputation.[182] Further, the law provides that earning compensation from NIL activities is not to affect a student-athlete's scholarship eligibility.[183] The law extends

---

[176] William Lawrence, *Alabama Has Repealed Its NIL Law—Can Alabama's Student-Athletes Still Get Paid?*, JD SUPRA (Feb. 17, 2022), https://www.jdsupra.com/legalnews/alabama-has-repealed-its-nil-law-can-7729528/.

[177] Jon Blau, *NIL Landscape Shifting Again for South Carolina Schools Come July 1*, POST & COURIER (June 24, 2022), https://www.postandcourier.com/sports/clemson/nil-landscape-shifting-again-for-south-carolina-schools-come-july-1/article_95e1b71a-f34d-11ec-80e6-63954f4ae46b.html.

[178] Keller, *supra* note 174.

[179] *See* CAL. EDUC. CODE § 67456 (West 2021); FLA. STAT. § 1006.74 (amended 2023); GA. CODE ANN. § 20-3-681 (2023).

[180] Tim Tucker, *NIL Timeline: How We Got Here and What's Next*, ATLANTA J.-CONST. (Mar. 18, 2022), https://www.ajc.com/sports/georgia-bulldogs/nil-timeline-how-we-got-here-and-whats-next/EOL7R3CSSNHK5DKMAF6STQ6KZ4/.

[181] *See* J. Brady McCollough, *How California Paved the Way for College Athletes to Cash in Big*, L.A. TIMES (July 1, 2021, 6:02 AM), https://www.latimes.com/sports/story/2021-07-01/how-southern-california-helped-launch-ncaa-nil-revolution; S.B. 26, 2021–22 Reg. Sess. (Cal. 2021).

[182] Cal. S.B. 26; CAL. EDUC. CODE § 67456(a)(1) (West 2021). The California NIL law was originally set to go into effect in 2023 but was accelerated to September 2021 to mark the "beginning of a national movement." Tucker, *supra* note 180 (internal quotation marks omitted) (quoting Gov. Gavin Newsom).

[183] § 67456(a)(1).

protections of student-athlete earnings by prohibiting athletic associations, such as the NCAA, conferences, and other organizations with authority over intercollegiate athletics, from taking actions to prevent student-athletes from earning NIL compensation.[184] Conforming with the NCAA's rules against improper inducements, prospective student-athletes are not permitted to earn compensation from institutions for their NIL or athletic reputation.[185] Additionally, the Fair Pay to Play Act protects a student-athlete's access to representation by an athletic agent or an attorney.[186] The law, however, restricts student-athletes from entering an NIL agreement that conflicts with the athlete's team contract when the athlete is engaged in official team activities.[187] And, student-athletes are required to disclose the terms of their NIL deals to an institution-designated official.[188] Beyond disclosure requirements, the burden of which rests on student-athletes, the prohibition of athlete contracts in conflict with team contracts, and rules specific to agent representation, the California law does not directly address or limit the activities of collectives.[189]

Soon after the Fair Pay to Play Act was introduced in the California Senate, legislators nationwide consulted Senator Skinner for guidance in developing NIL laws—cognizant of the recruiting advantages such laws could provide their states and institutions.[190] The Act's bipartisan support in the California Senate and Assembly, and advocacy from sports celebrities, including LeBron James, were additional factors driving states to consider implementing NIL legislation.[191]

Compelled by these factors, Florida was among the early states to join California on the playing field of state NIL legislation.[192] Florida's original NIL

---

184 § 67456(a)(2), (3).

185 § 67456(b).

186 § 67456(c).

187 § 67456(e).

188 *Id.*

189 *See* § 67456(c), (e)(1), (e)(2). Rules specific to agent representation may implicate some collective activities, especially those functioning as marketplace collectives, in which the collective often provides student-athletes with agent representation during negotiations with businesses. *See supra* Part I.B.5 (discussing marketplace collectives).

190 McCollough, *supra* note 181.

191 Michael McCann, *What's Next After California Signs Game Changer Fair Pay to Play Act Into Law?*, SPORTS ILLUSTRATED (Sept. 30, 2019), https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12.

192 Andrea Adelson, *Florida Updates NIL Legislation to Remove Legal Restrictions*, ESPN (Feb. 16, 2023,12:11 PM), https://www.espn.com/college-football/story/_/id/35673223/florida-updates-nil-legislation-remove-legal-restrictions.

law, effective July 1, 2021,[193] substantially mirrored the provisions of California's NIL law. At its core, the original Florida law provided that student-athletes could earn market-value compensation for the use of their NILs, but that compensation could not be exchanged for athletic performance or attendance at a particular institution.[194] Distinct from the California law, the Florida law expressly provided that *only* third parties, such as collectives, could provide compensation to student-athletes, with institutions themselves not permitted to facilitate or negotiate NIL deals between third parties and student-athletes.[195] Other novel provisions in the original Florida law included a prohibition of NIL contracts extending beyond the duration of a student-athlete's athletic participation at an institution and a required financial literacy and life skills workshop for student-athletes.[196] Institutions were required to teach financial aid, debt management, budgeting, and time-management during the workshops, but they were prohibited from using the workshop as a means of marketing or soliciting financial products or services for providers.[197] Thus, the original Florida law maintained the power of collectives to create NIL deals, free of influence from institutions.

Following California, Florida, and ten other states, Georgia Governor Brian Kemp signed into law NIL legislation on May 6, 2021, effective July 1 of the same year.[198] Like the original Florida law, the Georgia law contains the California law's core provisions—permitting NIL market-value compensation for student-athletes, maintaining scholarship eligibility regardless of NIL compensation, and prohibiting NIL contracts that conflict with team or institution contracts.[199] In addition, the Georgia law mirrors the language of the

---

[193] Adam Wells, *Florida to Be 1st State with NIL Rights for NCAA Athletes to Profit Off Likeness*, BLEACHER REP. (June 12, 2020), https://bleacherreport.com/articles/2895927-florida-to-be-1st-state-with-nil-rights-for-ncaa-athletes-to-profit-off-likeness. Florida claimed to be the first state in which a student-athlete could profit from NIL because the California NIL law, though the first to be implemented by a state, was not slated to go into effect until January 1, 2023—years after the effective date of the Florida NIL law. *Id.*

[194] Intercollegiate Athlete Compensation and Rights, S.B. 646, 2020 Sess. (Fla. 2020). The original Florida NIL law was effective until February 15, 2023. H.B. 7-B, 2023B Sess. (Fla. 2023). *See infra* Part II.A.3. for a discussion of the Florida NIL law as amended.

[195] FLA. STAT. § 1006.74(2)(a)–(b) (2021).

[196] § 1006.74(2)(j)–(k) (2021).

[197] § 1006.74(2)(k) (2021). Additionally, the law required the workshops to last a minimum of five hours at the start of a student-athlete's first and third academic years. *Id.*

[198] Tucker, *supra* note 180. In addition to California and Florida, the ten states preceding Georgia in passing NIL laws were Colorado, Nebraska, New Jersey, Michigan, Arizona, Alabama, Arkansas, Mississippi, Montana, and New Mexico. Victoria Larned, *The Ultimate College and High School NIL Timeline*, ECCKER SPORTS (Mar. 29, 2022), https://ecckersports.com/industry-insights/the-ultimate-college-and-high-school-nil-timeline/.

[199] GA. CODE ANN. § 20-3-681(a), (c), (d)(1) (2023). The Georgia NIL law does not reflect the amended Florida NIL law, which no longer contains provisions protecting scholarship eligibility and prohibiting

original Florida law's financial literacy and life skills workshops provision, holding institutions to the same length and topic requirements as the Florida law.[200] Despite substantial similarities with preceding NIL laws, the Georgia law is notable for its inclusion of a pooling arrangement provision.[201] The Georgia law created a framework for institutions to create an arrangement through which student-athletes could pool NIL compensation to benefit previously-enrolled student-athletes at the same institution.[202] The provision sets forth conditions for such pooling arrangements, including a prohibition on contributions greater than seventy-five percent of a student-athlete's total NIL compensation to the pool.[203] To be eligible to receive a pro rata share of the pool, calculated according to the number of months the recipient participated as a student-athlete at the institution, a period of at least twelve months must have elapsed following the recipient's graduation or withdrawal from the institution.[204] However, with institutions having the choice to opt out of pooling arrangements,[205] and with the arrangement reducing the earning potential of highly marketable student-athletes, Georgia institutions are unlikely to utilize the framework. The Georgia law does not directly address or limit the activities of collectives.[206]

By June 2021, a total of twenty-seven states had passed NIL legislation—many becoming effective on July 1, 2021—the same day the NCAA interim policy became effective.[207] Many of these state NIL laws included similar core provisions to those found in the California and Georgia laws: institutions and conferences are not permitted to prohibit student-athletes from receiving NIL compensation, student-athletes may not enter NIL contracts that conflict with

---

conflicting NIL and team or institution contracts. *See* GA. CODE ANN. § 20-3-681(a), (c), (d)(1) (2023); *see* FLA. STAT. § 1006.74 (2023).

200 *Compare* GA. CODE ANN. § 20-3-681(e) (2023), *with* FLA. STAT. § 1006.74(2) (2023).

201 *Compare* GA. CODE ANN. § 20-3-681(d)(4)(B) (2023), *with* CAL. EDUC. CODE § 67456 (West 2021), *and* FLA. STAT. § 1006.74 (2023).

202 GA. CODE ANN. § 20-3-681(d)(4)(B) (2023).

203 § 20-3-681(d)(4)(B)(i). Under the provision, the institution must create an escrow account solely for maintaining pooled funds, contributions must be deposited by the institution's athletic director or designee, and the pooling arrangement must not discriminate on the basis of race, gender, or other status protected by law. § 20-3-681(d)(4)(B)(ii), (iii), (v).

204 § 20-3-681(d)(4)(B)(iv).

205 *See* Madeline Coleman, *Georgia NIL Law Would Allow Schools to Pool, Redistribute Athletes' Endorsement Money*, SPORTS ILLUSTRATED (May 6, 2021), https://www.si.com/college/2021/05/06/georgia-kemp-signs-name-image-and-likeness-bill-pool-resditribution-law.

206 *See* § 20-3-681.

207 Tucker, *supra* note 180. NIL laws became effective on July 1, 2021, in Alabama, Connecticut, Florida, Georgia, Illinois, Kentucky, Louisiana, Mississippi, New Mexico, Ohio, Oregon, Pennsylvania, and Texas. *Id.* In states without effective NIL legislation on this date, the NCAA interim policy took effect as the governing set of NIL regulations. *Id.*; *see also* INTERIM NIL POLICY, *supra* note 6.

team or institution contracts, and student-athletes are permitted to be represented by an agent or attorney.[208] Being laboratories of democracy, some states have customized their NIL laws with unique provisions to reflect state-specific values.[209] In addition, several states joined Florida and Georgia in requiring or encouraging institutions to provide student-athletes with workshops focused on topics including financial literacy, time management, and entrepreneurship.[210] While the states created different requirements on the timing, duration, and focus of the workshops, the incorporation of these educational provisions in state NIL frameworks supports the professional development of student-athletes—a population facing a financial literacy gap.[211]

Though not included in the laws of Florida, Georgia, or California, another commonly included provision in state NIL laws is a prohibition on NIL contracts

---

[208] ARK. CODE ANN. § 4-75-1303(d)–(f) (2023) (granting student-athletes the right to earn NIL compensation without fear of recourse from institutions or conferences); § 4-75-1304(a)(2) (restricting student-athletes from entering contracts that conflict with an institution contract); § 4-75-1305(a), (b) (permitting student-athletes to obtain representation by a state-licensed agent, financial advisor, or attorney); KY. REV. STAT. ANN. § 164.6943(1) (West 2024) (providing that institutions and associations shall not prohibit student-athletes from earning NIL compensation); § 164.6947(1)(a) (allowing the governing board of an institution to prohibit student-athletes from entering an agreement in conflict with an institution contract); § 164.6943(2) (prohibiting institutions from restricting student-athletes' rights to obtain an athlete agent); MISS. CODE ANN. § 37-97-107(1), (2) (2023) (prohibiting institutions, athletic associations, and conferences from preventing student-athletes from earning NIL compensation); § 37-97-107(11) (prohibiting student-athletes from entering contracts that conflict with provisions of an institution contract); § 37-97-107(6) (prohibiting institutions, athletic associations, and conferences from preventing student-athletes from obtaining professional representation by athlete agents or attorneys).

[209] Michael McCann, *Congressional Push for NCAA NIL and Employment Faces Long Road*, SPORTICO (May 30, 2023, 5:55 AM), https://www.sportico.com/law/analysis/2023/congress-nil-employment-debates-might-be-too-late-1234724281/.

[210] Missouri requires institutions to offer two workshops annually focused on topics such as "financial literacy, life skills, time management, and entrepreneurship." MO. REV. STAT. § 173.280.8(1) (2023). Texas requires institutions to hold a mandatory financial literacy and life skills course during a student-athlete's first academic year at the institution, for a duration of at least five hours. TEX. EDUC. CODE ANN. § 51.9246(i) (West 2023). In comparison, the Nevada NIL law provides that an institution "may require" student-athletes to participate in workshops to prepare student-athletes to enter into NIL contracts. NEV. REV. STAT. § 398.320 (2021).

[211] *See* Press Release, Off. of Governor Ron DeSantis, Governor DeSantis Signs Bill to Empower Student Athletes and Support Professional Development (Feb. 16, 2023), https://www.flgov.com/2023/02/16/governor-desantis-signs-bill-to-empower-student-athletes-and-support-professional-development/; Ronda Lee, *Young Athletes May Face Financial Literacy Gap as Their Wealth-Building Chances Grow*, YAHOO FIN. (Apr. 23, 2023), https://finance.yahoo.com/news/young-athletes-may-face-financial-literacy-gap-as-their-wealth-building-chances-grow-130731318.html. In 2019, about half of 30,000 college students surveyed felt unprepared to manage their money—which, in combination with modern NIL opportunities, threatens student-athletes' capacity to build wealth. *Id.*

between student-athletes and entities in certain industries.[212] The NIL law in Illinois prohibits student-athletes from contracting with or receiving compensation from a licensee for endorsing or promoting gambling, alcohol, nicotine, cannabis, adult entertainment, performance-enhancing supplements, or any product or service reasonably considered to be "inconsistent with the values or mission" of the student-athlete's institution or athletic program.[213] The Texas NIL law prohibits student-athletes from engaging in NIL deals for the promotion of these industries, excluding cannabis, but adds that student-athletes may not benefit from promoting firearms the student-athlete cannot legally purchase.[214] The Pennsylvania NIL law is distinct for prohibiting NIL deals that promote prescription pharmaceuticals.[215] Just like the previously discussed provisions, these prohibitions against industry-specific NIL deals have only a minor impact on the activities of collectives—limiting the pool of businesses with which a collective may facilitate deals.

3. NIL Law Impacting Collectives: Institutional Involvement

While the state legislative provisions discussed thus far have only minor, if any, implications for collectives, provisions permitting institutional involvement in the NIL deal process significantly impact the relationship between collectives and institutions. These restrictions highlight the conflict between the NCAA and state law, enabling collectives to evade accountability for questionable activities.

The original Florida NIL law was amended on February 16, 2023, to give institutions the power to facilitate NIL deals while protecting institutions and employees from liability arising from a student-athlete's ability to earn NIL compensation.[216] This amendment was motivated by views that the original Florida law—enacted prior to the NCAA's interim NIL policy—unnecessarily restricted institutions in light of the interim policy's leniency.[217] Thus, the

---

[212] *See NIL State Laws*, NIL NETWORK (Aug. 27, 2022), https://www.nilnetwork.com/nil-laws-by-state/ (compiling state NIL laws and their notable provisions, including, among others, prohibitions against NIL deals with certain industries, including adult entertainment, alcohol, nicotine, gambling, drugs, and weapons).

[213] 110 ILL. COMP. STAT. 190/20(i) (2021). Ohio's NIL law features prohibitions on deals through which student-athletes promote the same industries listed in the Illinois law but clarifies that medical marijuana products may not be promoted. OHIO REV. CODE ANN. § 3376.07 (West 2023).

[214] TEX. EDUC. CODE ANN. § 51.9246(g)(2)(B)(iv) (West 2023). In comparison, the Virginia NIL law prohibits the promotion of all weapons, including "firearms and ammunition for firearms." VA. CODE ANN. § 23.1-408.1(D)(8) (2024).

[215] 5 PA. CONS. STAT. § 3706(d)(5) (2023).

[216] Adelson, *supra* note 192; FLA. STAT. § 1006.74(3) (2023). The amended Florida law also added entrepreneurial education to the law's workshop requirement. § 1006.74(2).

[217] Adelson, *supra* note 192.

amendment added institutions to the NIL-deal playing field, alongside student-athletes and collectives.[218] The only constraint on collective activities expressed in the amendment is a requirement that agents—if utilized by a collective—protect student-athletes from "unauthorized appropriation and commercial exploitation" of the student-athletes' NIL rights.[219] However, the amendment allows institutions to assist student-athletes in finding and understanding NIL opportunities, simplifying the deal process for student-athletes seeking such opportunities.[220] Through the amendment, institutions are now capable of managing the reputational and legal risks created by collectives in the NIL market.[221] Among the states joining Florida in amending their NIL laws to permit institutional involvement in the NIL deal process are Illinois, Kansas, Missouri, Montana, and Tennessee.[222] Pennsylvania also addressed institutional involvement in its NIL law, providing that institutions are not forbidden from facilitating or negotiating NIL deals but may opt out from doing so.[223]

State legislatures opening the door to institutional involvement in NIL dealmaking have created conflict between the NCAA's rules and state law, especially regarding the role of collectives, highlighting the need for a uniform federal legislative scheme.[224] In a June 27, 2023 NCAA memorandum to member institutions, the NCAA clarified that institutions must adhere to its rules against pay-for-play and improper inducements even when adherence "conflicts with permissive state laws."[225] The memorandum extended its warning to

---

[218] *See* § 1006.74.

[219] *See id.*

[220] *See id.*; Evan Crowell, *Florida Governor Amends NIL Laws*, SPORTS ILLUSTRATED (Feb. 17, 2023, 8:00 AM), https://www.si.com/college/tennessee/football/ron-desantis-passes-nil-bill.

[221] Dan Murphy, *NCAA to Discuss NIL Changes Allowing More School Involvement*, ESPN (Oct. 9, 2023, 1:17 PM), https://www.espn.com/college-sports/story/_/id/38615589/ncaa-discuss-nil-changes-allowing-more-school-involvement. As an example of reputational and legal risk created by a collective, a $13 million NIL deal between Gator Collective (benefiting University of Florida student-athletes) and quarterback Jaden Rashada fell apart, speculatively due in part to concerns over the legality of the deal—specifically, whether the deal was an improper inducement—and resulted in the university appearing "dysfunctional." David Whitley, *No Quick Fix for Rashada-Like Dramas in This Era of NIL As Gators Are Discovering*, GAINESVILLE SUN (Jan. 14, 2023, 7:22 AM), https://www.gainesville.com/story/sports/college/basketball/2023/01/14/qb-5-star-recruit-jaden-rashada-and-florida-gators-tied-up-in-nil-mess/69807301007/; Stewart Mandel & Andy Staples, *Jaden Rashad's Unprecedented Recruitment: How a 4-Star QB Went from $13.85 Million to No NIL Deal*, THE ATHLETIC (Feb. 6, 2023), https://www.nytimes.com/athletic/4149181/2023/02/06/jaden-rashada-nil/.

[222] Keller, *supra* note 174.

[223] 5 PA. CONS. STAT. § 3706(a) (2024).

[224] Christovich, *supra* note 9.

[225] Ross Dellenger (@RossDellenger), X (June 27, 2023, 12:30 PM), https://x.com/RossDellenger/status/1673730411040763904?s=20. The NCAA memo was obtained by Sports Illustrated and shared via X. *Id.*

collectives, stating that: (i) entities "closely associated with an institution" may not compensate student-athletes for the use of their NILs, (ii) boosters or collectives may not contact prospective student-athletes to discuss NIL opportunities linked to the student-athlete attending a particular institution, and (iii) collectives may not condition NIL compensation on a student-athlete's attendance at a particular institution.[226] Further, the memorandum dictated that institutions may not provide benefits to boosters to incentivize funding a collective or pay a collective to, in turn, compensate a student-athlete.[227]

Even where state law provides that the NCAA may not enforce its rules regarding dealmaking between institutions, collectives, and student-athletes, the NCAA maintains its prohibition of the aforementioned activities.[228] This leaves institutions with two options: ignore the NCAA's guidance and resort to litigating punishments, or adhere to the NCAA's rules and suffer recruiting disadvantages compared to institutions that choose the former option.[229] Thus, collectives, which would be severely limited or eradicated by the enforcement of NCAA rules, are creatures of state NIL laws that set only minimal restrictions on collective activities.[230] Though a federal NIL law could create a uniform regulatory landscape, subjecting institutions and collectives to the same body of rules regardless of the state in which they reside, no such law exists.

B. Federal NIL Legislative Proposals

Despite support from the NCAA and athletic conferences, a federal NIL law does not currently exist.[231] Since the release of the NCAA's interim NIL policy, the NCAA has worked with Congress to develop a national NIL solution.[232] In

---

[226] *Id.*

[227] *Id.* Under the guidance offered in the NCAA's memo, the 12th Man+ Fund at Texas A&M University violates NCAA rules because the collective exists under the fundraising arm of the institution's athletic department. Christovich, *supra* note 9. Likewise, the University of Texas violates NCAA rules by offering, through its fundraising arm, priority tickets to donors based on donors' contributions to the Texas One Fund collective. *Id.*

[228] Dellenger, *supra* note 225.

[229] *See* Christovich, *supra* note 9.

[230] *See* Dellenger, *supra* note 225; Christovich, *supra* note 9; *see also supra* Part II.A.2.

[231] Ralph D. Russo, *NCAA Made a 'Big Mistake' By Not Setting Up Framework for NIL Compensation, New President Says*, ASSOCIATED PRESS (June 8, 2023, 3:14 PM), https://apnews.com/article/ncaa-baker-president-congress-nil-7bf8416505d1ffec57f89e805d39d766; Dennis Romboy, *College Athletic Conferences Urge Congress to Pass NIL Legislation*, DESERET NEWS (Nov. 1, 2023, 11:34 AM), https://www.deseret.com/sports/2023/11/1/23941880/name-image-likeness-nil-college-sports-urge-congress-federal-law.

[232] *See* Hosick, *supra* note 126.

particular, the NCAA has lobbied for Congress to regulate NIL compensation by granting the NCAA protection from antitrust challenges for enforcing its rules, creating a registry of deals, requiring agent certification, and establishing a uniform standard for NIL contracts.[233] The NCAA argues that current state NIL laws promote a lack of transparency and accountability in the dealmaking process and must be preempted.[234] Twenty-eight athletic conferences, including the Power Five, have also lobbied Congress for a federal NIL law, claiming that the landscape of state NIL laws allows collectives to perpetrate pay-for-play schemes under the guise of an NIL deal consistent with NCAA rules.[235] These lobbying efforts have not gone unnoticed by legislators, as numerous bills have been introduced since 2019, by both Democrats and Republicans.[236] Yet, not a single NIL-related bill has gone to a floor vote in Congress.[237]

Nonetheless, comparing the provisions of proposed federal legislation sheds light on the core terms of future NIL regulation. In May 2023, Representative Gus Bilirakis circulated a discussion draft of the Fairness, Accountability, and Integrity in Representation (FAIR) of College Sports Act.[238] In addition to mirroring the common provisions of state NIL laws previously discussed, the Act also called for the creation of a regulatory authority—the United States Intercollegiate Athletics Committee—to oversee NIL activities, establish and

---

[233] Russo, *supra* note 231; Eric Prisbell, *Examining the NCAA's Aggressive Push for Federal NIL Laws*, ON3 (Sept. 25, 2023), https://www.on3.com/nil/news/ncaa-aggressively-pushes-for-federal-nil-bill-corey-booker-lindsey-graham-tommy-tuberville-joe-manchin/.

[234] *Id.*

[235] *See* Romboy, *supra* note 231. The association of these twenty-eight athletic conferences is known as the Coalition for the Future of College Athletics. *Id.* Tony Petitti, the Commissioner of the Big Ten, testified to the Senate Judiciary Committee that one of the biggest threats to college sports is the inability to distinguish true NIL deals, which are not offered as an inducement for a student-athlete to attend a particular institution, from pay-for-play schemes, which are improper inducements or deals linked to a student-athlete's athletic performance. *Id.* Petitti warned the Committee that the operational control of college athletics is shifting to collectives as they become more influential in the NIL process. *Id.*

[236] *NIL Legislation Tracker*, *supra* note 171.

[237] Prisbell, *supra* note 233; Kevin Miller, *NCAA: Congress Releases Multiple Bills Focusing on NIL and the Transfer Portal*, FANSIDED: GARNET&COCKY (July 26, 2023), https://garnetandcocky.com/2023/07/26/ncaa-congress-releases-bills-nil/.

[238] Rep. Gus Bilirakis, DISCUSSION DRAFT OF FAIRNESS, ACCOUNTABILITY, AND INTEGRITY IN REPRESENTATION OF COLLEGE SPORTS ACT, 118TH CONG. (2023) [hereinafter FAIR COLLEGE SPORTS ACT]; *see* Press Release, Gus Bilirakis, House of Representatives, Chairman Bilirakis Releases Discussion Draft of NIL Reform Package (May 24, 2023), https://bilirakis.house.gov/media/press-releases/chairman-bilirakis-releases-discussion-draft-nil-reform-package.

enforce NIL rules, and serve as a clearinghouse for NIL registration and reports.[239] Currently, this act has remained inactive since its circulation.[240]

The Student Athlete Level Playing Field Act was introduced in the House on May 24, 2023.[241] The Act included requiring student-athletes to be enrolled full-time at a particular institution before entering an NIL deal associated with that institution, mandating the reporting of NIL deals exceeding $500, and creating a regulatory authority—the Covered Athletic Organization Commission—to investigate, enforce, and report on rule violations.[242] The Act has remained inactive since introduction.[243]

The College Athlete Economic Freedom Act, originally introduced in 2021 and reintroduced in 2023,[244] mirrors the common state NIL law provisions discussed previously, but also permits the United States Secretary of Commerce to conduct NIL market analysis and grants the Federal Trade Commission (FTC) authority to treat violations of the Act as "unfair or deceptive act[s] or practice[s]" under the Federal Trade Commission Act.[245] In addition, the College Athlete Economic Freedom Act creates a revenue sharing framework through which institutions and athletic conferences would be required to obtain a group license from student-athletes before using their NILs in media rights deals.[246] Notably, the Act regulates collectives by requiring the entities to

---

[239] FAIR COLLEGE SPORTS ACT, *supra* note 238. The commonly included provisions in state NIL laws also included in this federal proposal are protecting student-athletes' rights to earn compensation "commensurate with market value" for the use of their NILs, permitting student-athletes to obtain professional representation, and permitting the prohibition of NIL deals involving the promotion of gambling, nicotine, alcohol, controlled substances, and lewd material. *Id.* at § 101; *see supra* Part II.A.2.

[240] *S. 4004 (116th): Fairness in Collegiate Athletics Act*, GOVTRACK, https://www.govtrack.us/congress/bills/116/s4004 (last visited May 28, 2024).

[241] Student Athlete Level Playing Field Act, H.R. 3630, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/house-bill/3630/text.

[242] *Id.*

[243] *H.R. 3630: Student Athlete Level Playing Field Act*, GOVTRACK, https://www.govtrack.us/congress/bills/118/hr3630 (last visited June 29, 2024).

[244] College Athlete Economic Freedom Act, S. 238, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/238/text; College Athlete Economic Freedom Act, S. 2554, 118th Cong. (2023), https://www.congress.gov/118/bills/s2554/BILLS-118s2554is.pdf.

[245] College Athlete Economic Freedom Act, S. 2554, 118th Cong. (2023), https://www.congress.gov/118/bills/s2554/BILLS-118s2554is.pdf; *see also* 15 U.S.C. § 57a(a)(1)(B) (giving authority to the Federal Trade Commission to define unfair or deceptive acts or practices).

[246] College Athlete Economic Freedom Act, S. 238, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/238/text; Kristi Dosh, *4 New Federal NIL Bills Have Been Introduced in Congress*, FORBES (July 29, 2023, 9:31 AM), https://www.forbes.com/sites/kristidosh/2023/07/29/4-new-federal-nil-bills-that-have-been-introduced-in-congress/?sh=3cbcb4094d46.

register with the FTC and report all NIL agreements in an effort to curtail discrimination by gender, race, and sport.[247]

The Protecting Athletes, Schools and Sports Act of 2023 was introduced in the Senate and endorsed by NCAA President Charlie Baker.[248] It features protections for institutions, mandatory NIL deal reporting to the FTC, limitations on student-athlete eligibility following transfers between institutions, and a requirement that collectives be affiliated with an institution.[249]

In the House, the 2021 Student Athlete Level Playing Field Act was reintroduced and approaches NIL regulation through FTC oversight of deals exceeding $500, establishes that student-athletes are not considered employees, and creates the Covered Athlete Organization Commission to resolve disputes between student-athletes and institutions or athletic organizations.[250]

Finally, the College Athletes Protection and Compensation Act of 2023 was circulated as a discussion draft in the Senate and proposes the creation of the College Athletics Corporation to oversee the creation and enforcement of NIL rules while requiring institutions to report athletic program revenues and expenditures.[251] These federal proposals are similar in their advocacy for central oversight—either through an existing federal agency or through the creation of a new body—and for transparency through mandatory reporting of NIL deals and athletic program expenses. Despite the number of proposals in both the House and Senate, some level of bipartisan support, and efforts by the NCAA and institutions, a federal NIL law still does not exist.[252]

---

[247] Dosh, *supra* note 246.

[248] Protecting Athletes, Schools, and Sports Act of 2023, S. 2495, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/senate-bill/2495/text?s=1&r=17; Dosh, *supra* note 246.

[249] S. 2495; Dosh, *supra* note 246.

[250] Student Athlete Level Playing Field Act, H.R. 3630, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/house-bill/3630/text?s=1&r=49; Dosh, *supra* note 246.

[251] DISCUSSION DRAFT OF COLLEGE ATHLETES PROTECTION AND COMPENSATION ACT OF 2023, 118TH CONG. (2023) [hereinafter Bipartisan Discussion Draft]. The proposal was announced in the form of a bill discussion draft cosigned by Senators Richard Blumenthal and Jerry Moran. Press Release, Office of Senator Cory Booker, Booker, Blumenthal, Moran Announce Bipartisan Discussion Draft of Legislation to Protect College Athletes' Health, Education & Economic Rights (July 20, 2023) https://www.booker.senate.gov/news/press/booker-blumenthal-moran-announce-bipartisan-discussion-draft-of-legislation-to-protect-college-athletes-health-education-and-economic-rights; Dosh, *supra* note 246.

[252] *See* Dosh, *supra* note 246.

III. AN EFFECTIVE FEDERAL NIL REGULATORY SCHEME

The current dormancy of federal NIL proposals can be attributed to disagreement regarding the entity tasked with central oversight of NIL activities, disincentives for enforcing NIL violations, and the ongoing "business as usual" appearance of college sports.[253] This Part considers these roadblocks while incorporating core provisions from state NIL laws and federal proposals to create a comprehensive federal regulatory scheme that effectuates uniformity and equitability among student-athletes, institutions, and collectives in the NIL marketplace.

A. The Failures of Existing Proposals

Among the hurdles preventing the enactment of a federal NIL law is disagreement over the appropriate entity to regulate the NIL market.[254] The NCAA has lobbied Congress to pass a law that enables the NCAA to regulate the NIL market by including an antitrust exemption to protect it from the legal repercussions of enforcing its rules.[255] Yet, such an antitrust exemption has drawn skepticism from both Democrats and Republicans for fear of frustrating the procompetitive spirit of antitrust law and harming college athletics consumers.[256] Some federal proposals have called for the delegation of NIL market regulation to an existing agency, such as the FTC.[257] Other proposals have included the creation of new regulatory bodies to oversee NIL activities, such as the College Athletics Corporation or the United States Intercollegiate Athletics Committee.[258] While a proposal containing an antitrust exemption for the NCAA is unlikely to succeed, it is less clear whether an existing agency or new entity gives an NIL bill a higher likelihood of passage into law.

As another hurdle to a federal NIL regulatory scheme, the current lack of uniform NIL regulation incentivizes states to loosen regulatory enforcement to

---

253 Michael McCann, *One Year After Senate NIL Hearing, a Federal NIL Law Remains Elusive*, SPORTICO (July 2, 2022, 8:55 AM), https://www.sportico.com/law/analysis/2022/federal-nil-bill-1234680391/; *see* Prisbell, *supra* note 233 (outlining several proposed laws granting enforcement powers to the FTC, the NCAA, or newly established bodies).

254 *See* Prisbell, *supra* note 233 (listing different proposals for oversight of the NIL market).

255 McCann, *supra* note 253.

256 *See id.*

257 *See, e.g.*, Student Athlete Level Playing Field Act, H.R. 3630, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/house-bill/3630/text?s=1&r=49; Protecting Athletes, Schools, and Sports Act of 2023, S. 2495, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/senate-bill/2495/text?s=1&r=17.

258 *See* Bipartisan Discussion Draft, *supra* note 251; FAIR COLLEGE SPORTS ACT, *supra* note 238.

poach top student-athletes from states with tighter regulatory regimes, encouraging representatives of those states with looser regulations to oppose federal NIL regulation.[259] By opposing central oversight via a federal NIL law, states can customize their enforcement of NIL rules and be accountable to only themselves, resulting in potential pay-for-play schemes and an uneven playing field for student-athletes across the country.[260]

A final setback to the passage of a federal NIL law is the "business as usual" appearance of college athletics and the lack of state-level legal challenges.[261] As the current NIL landscape developed, concerns of disparate treatment of student-athletes across states drove some to believe that the college sports industry would lose viewership and become dominated by wealthy programs perpetrating pay-for-play schemes to monopolize talent.[262] In reality, NIL has not appeared to harm college athletics viewership,[263] and the NCAA maintains its rules against pay-for-play.[264] In addition, under state NIL laws, many of which lack effective enforcement mechanisms, litigation has not surfaced against institutions or student-athletes.[265] Thus, at a quick glance, the patchwork of state NIL laws and NCAA rules appears to be effective at allowing NIL compensation while maintaining the industry of college athletics, providing no incentive for lawmakers to address NIL at a federal level.[266] This view of current NIL regulation, however, fails to consider the inability of the NCAA to enforce its rules—given the courts' limitations on the entity's authority—and the disincentives for in-state actors to enforce NIL violations at the expense of in-state institutions.[267]

B. The Core Provisions of an Effective Federal NIL Law

Rather than accepting the current patchwork of state NIL laws and toothless NCAA rules as an effective means of providing student-athletes with NIL

---

259 *See* Irwin A. Kishner, Daniel A. Etna & Justin Blass, *Why Federal Regulation Is Necessary to Level the NIL Playing Field*, SPORTICO (Sept. 6, 2023, 8:30 AM), https://www.sportico.com/leagues/college-sports/2023/why-nil-needs-federal-legislation-ncaa-1234735926/.

260 *See id.*; Romboy, *supra* note 231.

261 McCann, *supra* note 253.

262 *See id.*; *supra* Part I.A.

263 *See, e.g.*, Anthony Crupi, *March Madness TV Ratings Return to Pre-Pandemic Levels*, SPORTICO (Mar. 25, 2022, 12:01 AM), https://www.sportico.com/business/media/2022/march-madness-tv-ratings-soar-1234669627/.

264 McCann, *supra* note 253.

265 *Id.*

266 *See id.*

267 *Id.*

compensation—while allowing institutions and collectives to avoid accountability and obtain competitive advantages through pay-for-play schemes—an effective federal NIL regulatory scheme must be created. This section creates such a scheme by considering the failures of existing federal proposals, incorporating core provisions from federal proposals and state NIL laws, and including a requirement that collectives be affiliated with institutions and subject to the same anti-discrimination laws as institutions.

With the NCAA unable to fully enforce its rules due to antitrust rulings, and with states disincentivized to police NIL law violations, federal central oversight is a necessary provision to hold institutions and collectives accountable.[268] It is disadvantageous to assign this regulatory authority to the NCAA in a federal NIL law due to antitrust sentiment among lawmakers.[269] By giving central oversight authority to an entity other than the NCAA, while expressly preempting state NIL laws, the conflict between state law and NCAA rules is avoided, providing clear guidance for institutions, collectives, and student-athletes on how to comply with NIL rules.

After weighing the benefits of assigning oversight authority to an existing federal agency or creating a new entity, the best option is the latter. On one hand, an existing agency, namely the FTC, is well suited to police the NIL market, with its established oversight protocols and enforcement measures against bad actors harming consumers and business competition.[270] Also favoring the selection of the FTC as the central NIL regulatory body is the FTC's existing involvement in the NIL market by monitoring endorsement requirements for student-athletes endorsing commercial products or services.[271] On the other hand, the ideal solution involves the creation of a new regulatory entity, tailored to address the challenges unique to the NIL marketplace, armed with subpoena power from Congress, and focused solely on regulating NIL deals and enforcing the federal regulatory scheme.[272] Utilizing an NIL-specific oversight entity, such

---

[268] McCann, *supra* note 253.

[269] *See id.*

[270] *See* Nick Messineo, *FTC Compliance Crucial for Student-Athletes Eyeing NIL Deals*, SPORTS ILLUSTRATED: FANNATION (Nov. 29, 2023, 3:00 PM), https://www.si.com/fannation/name-image-likeness/news/ftc-compliance-crucial-for-student-athletes-eyeing-nil-deals-nick9; Prisbell, *supra* note 233.

[271] Alonzo L. Llorens & Shayla J. Wright, *Best Practices for NIL Deals as Federal Regulators Step Up Enforcement of Misleading Endorsements*, SPORTS LIT. ALERT (Oct. 21, 2022), https://sportslitigationalert.com/best-practices-for-nil-deals-as-federal-regulators-step-up-enforcement-of-misleading-endorsements/.

[272] *See, e.g.*, Dennis Dodd, *House Subcommittee Considering Federal Regulatory Body to Oversee NIL Rights for College Athletes*, CBS SPORTS (May 23, 2023, 5:19 PM), https://www.cbssports.com/college-football/news/house-subcommittee-considering-federal-regulatory-body-to-oversee-nil-rights-for-college-athletes/; Ralph D. Russo, *Bipartisan Trio of Senators Propose Federal Oversight of NIL Compensation, Athlete*

as the College Athletics Corporation proposed by the bipartisan College Athletes Protection and Compensation Act, has the advantage of administrative simplicity—with a specialized body creating guidelines, investigating offenses, and enforcing rules.[273] Reflecting many of the federal NIL proposals, student-athletes, institutions, athletic conferences, and collectives would be required to disclose NIL deals to the new entity, and the entity shall maintain publicly-available databases of NIL activity.[274]

With a specialized NIL oversight entity and an express preemption of state NIL laws, the federal regulatory scheme must include the core provisions found in many state NIL laws enumerating the rights and obligations of actors in the NIL marketplace. As a foundational requirement, the federal law must prohibit institutions, athletic conferences, and the NCAA from preventing student-athletes from receiving NIL compensation as long as the compensation is not exchanged for athletic performance or used as an inducement for attending an institution.[275] To protect student-athletes' earning potential and academic outcomes, the law must prohibit institutions from reconsidering a student-athlete's scholarship eligibility based on NIL earnings.[276] In addition, the federal NIL law should mimic state laws requiring institutions to hold mandatory financial literacy and life skills workshops for student-athletes.[277] Finally, the federal NIL law must permit student-athletes to be represented by an agent or attorney but should condition representation on certification from the central oversight entity.[278] In the interest of avoiding potential roadblocks to passing the

Health Care, ASSOCIATED PRESS (July 20, 2023, 11:05 AM), https://apnews.com/article/ncaa-nil-senators-booker-blumenthal-moran-baker-sankey-f4f7b5d7c20085227be14f6fbe8eb59a (regarding the College Athletes Protection & Compensation Act). The NCAA does not possess subpoena power, leaving the NCAA ill-prepared to investigate and enforce NIL rule violations. *See* Russo, *supra*.

[273] Olafimihan Oshin, *Senators Announce Push to Reform College Athletics*, THE HILL (July 20, 2023, 3:54 PM), https://thehill.com/homenews/senate/4108518-senators-announce-push-to-reform-college-athletics/; Bipartisan Discussion Draft, *supra* note 251.

[274] *See, e.g.*, Collegiate Athlete Compensation Rights Act, S. 5003, 116th Cong. (2020), https://www.congress.gov/116/bills/s5003/BILLS-116s5003is.pdf.

[275] *See, e.g.*, CAL. EDUC. CODE § 67456(a)(1) (West 2021); FLA. STAT. § 1006.74 (2023).

[276] *See, e.g.*, GA. CODE ANN. § 20-3-681(c) (2023).

[277] *See, e.g.*, GA. CODE ANN. § 20-3-681(e) (2023); FLA. STAT. § 1006.74(2) (2023).

[278] *See, e.g.*, ARK. CODE ANN. § 4-75-1305(b) (2023) (prohibiting institutions from penalizing student-athletes for obtaining professional representation); Steve Berkowitz, *Three U.S. Senators Unveil Discussion Draft of Bill Addressing NIL Issues for NCAA Athletes*, USA TODAY (July 20, 2023, 2:38 PM), https://www.usatoday.com/story/sports/college/2023/07/20/senators-discussion-draft-bill-addressing-nil-ncaa-athletes/70435685007/ (stating that the College Athletes Protection and Compensation Act's proposed oversight entity would be tasked with creating a formal process for certifying agents representing student-athletes in NIL dealmaking).

federal NIL law, common state prohibitions of NIL deals involving certain industries should be absent from the legislation.[279] These core provisions, combined with a new central oversight entity, would create a basic framework for allowing student-athletes to earn NIL compensation while ensuring nationwide transparency.

To transform this basic federal NIL regulatory framework into a vehicle for changing the college sports industry, the federal scheme must: (i) permit institutional involvement in the NIL dealmaking process and (ii) require collectives to affiliate with institutions so they are subject to Title IX. By permitting institutional involvement in the NIL dealmaking process, just as the Florida NIL law allows, institutions—which are subject to Title IX as recipients of federal funding—must not discriminate on the basis of sex while assisting student-athletes in finding NIL opportunities.[280] Allowing institutions to participate in the NIL dealmaking process, rather than requiring institutions to rely on unaffiliated collectives, simplifies the deal process for student-athletes and reduces the likelihood of institutions incurring liability through collectives' actions in violation of law or NCAA rules.[281] A collective's structural independence from an institution enables disparate treatment for male and female student-athletes, which has manifested as a gender gap in NIL earnings.[282] Considering Title IX's roots in achieving gender equality in educational opportunities and benefits, and considering that NIL deals are predicated on the publicity of students at institutions receiving federal funds, allowing collectives to contract for this publicity while avoiding the anti-discriminatory protections of Title IX is wrong.[283] Title IX protections have been essential to achieving and maintaining fairness in college athletics.[284] Allowing collectives to avoid liability under Title IX threatens the fairness that Title IX has attained, threatening a backslide to a landscape in which male student athletes benefit far more than their female counterparts.[285] To remedy this, the federal NIL law should require all collectives to be affiliated with institutions,

---

279 *E.g.*, ILL. COMP. STAT. 190/20(i) (2022); TEX. EDUC. CODE ANN. § 51.9246(g)(2)(B)(iv) (West 2023); 5 PA. CONS. STAT. § 3706(d) (2022).

280 *See* FLA. STAT. § 1006.74 (2023); Crowell, *supra* note 220; 20 U.S.C. §§ 1681–1688.

281 *See* Crowell, *supra* note 220.

282 Fahrenthold & Witz, *supra* note 13; *see supra* Part I.B.5.

283 *See* Julia Elbaba, *What Is Title IX and How Has It Transformed Women's Sports?*, NBC SPORTS CHI. (June 6, 2022, 4:44 PM), https://www.nbcsportschicago.com/ncaa/what-is-title-ix-and-how-has-it-transformed-womens-sports/325761/; *Title IX Frequently Asked Questions*, supra note 159.

284 Elbaba, *supra* note 283. Before Title IX, only two percent of female athletic programs received college athletic budgets, and scholarships for female student athletes were practically nonexistent. *Id.*

285 *See* Prisbell, *supra* note 162.

expanding the applicability of Title IX to collective activities and allowing Title IX to further its history of maintaining fairness in the ever-changing landscape of college athletics.

IV. COLLEGE ATHLETICS UNDER AN EFFECTIVE FEDERAL NIL REGULATORY SCHEME

By combining these core provisions in a federal NIL regulatory scheme, many of the issues plaguing the modern landscape of college sports would be resolved. This Part discusses how the proposed federal NIL law resolves the conflict caused by the current patchwork of state NIL laws, holds actors accountable through transparency, and safeguards against discrimination in the NIL marketplace.

The conflict between NCAA enforcement and state law would dissipate with the preemption of state NIL laws.[286] Armed with the data made available by the new oversight entity, the NCAA can return to its primary concerns with the NIL market: investigating and enforcing its rules against pay-for-play and improper inducements to maintain fair competition in college sports.[287] This federal NIL law would further alleviate the NCAA's enforcement burden by simplifying the jurisdictional considerations the NCAA must take, eliminating the NCAA's need to conduct state-by-state legal analysis before enforcing its rules.[288] With a new, central oversight entity given the authority to investigate and enforce nationwide NIL rules, bad actors would no longer be able to hide behind nuanced state NIL laws and the NCAA's lack of subpoena power.[289]

Further shedding light on the NIL marketplace, this federal NIL law would provide the public with NIL deal data, holding actors in the deal process accountable. The mandatory disclosures required by the federal NIL law, including the parties involved and the timing of such deals, would prevent questionable transfers tied to NIL deals—like Cade McNamara's from Michigan to Iowa.[290] Deal transparency further ensures that institutions and collectives are participating in NIL dealmaking in a way that complies with Title IX, with

286 *See* Christovich, *supra* note 9; *supra* Part II.A.3.
287 *See* Hosick, *supra* note 126.
288 *See* Kishner et al., *supra* note 259.
289 *See* Russo, *supra* note 272; Christovich, *supra* note 9.
290 *See* Fahrenthold & Witz, *supra* note 13.

regulators able to analyze deal data for potential sex-based discrimination.[291] In addition, publicly-available NIL deal data would help student-athletes and institutions understand the market values of NILs, better positioning them to maximize earning potential and negotiate at arm's length.[292]

Student-athletes further benefit from the federal NIL regulatory scheme for its treatment of collectives. By eliminating the landscape of collectives existing independently of institutions, the federal NIL law would bring collectives under the purview of Title IX, protecting student-athletes from sex discrimination in NIL deals orchestrated by collectives.[293] Also under the federal NIL law, the interests of student-athletes—a population afflicted with a financial literacy gap—are protected through permitted institutional involvement, enabling institutions to assist student-athletes with finding, understanding, and securing NIL deals.[294]

CONCLUSION

The current NIL landscape is far from uniform, and student-athletes—though competing in the same sports on a national stage—have different earning potentials depending on the state in which their institution is located. Under the current system of state NIL laws, conflict exists between the NCAA, which seeks to enforce its rules and states, which seek to provide their institutions with competitive advantages. In the midst of this conflict, collectives have been able to avoid accountability for discriminatory practices and facilitate NIL deals of questionable validity. To create a level playing field for student-athletes, institutions, and collectives, Congress needs to adopt a comprehensive federal scheme to regulate actors in the NIL dealmaking process. The federal law must contain core provisions requiring institutional involvement in NIL dealmaking, collective affiliation with institutions, and the creation of a new oversight entity to develop, investigate, and enforce NIL-related rules. Further, the law must

---

[291] *See* 20 U.S.C. §§ 1681–88. The U.S. Department of Education's Office for Civil Rights enforces Title IX. Office for Civil Rights, *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC. (Aug. 2021), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

[292] *See* Shehan Jeyarajah, *NCAA Approves New NIL Guidelines, Will Create Agent Registry in Effort to Bring Transparency to Process*, CBS SPORTS (Jan. 10, 2024, 5:58 PM), https://www.cbssports.com/college-football/news/ncaa-approves-new-nil-guidelines-will-create-agent-registry-in-effort-to-bring-transparency-to-process/. Eighteen months after the launch of NIL, the market value of NILs for student-athletes in a given sport was unknown due to a lack of transparency. *Id.*

[293] *See* Fahrenthold & Witz, *supra* note 13.

[294] Murphy, *supra* note 221; Lee, *supra* note 211.

expressly preempt state NIL laws and contain foundational provisions protecting student-athletes' ability to earn NIL compensation.

This federal regulatory scheme would resolve many of the issues currently plaguing college athletics and the NIL marketplace. Through the uniform application and enforcement of NIL rules, increased transparency of NIL dealmaking, and accountability for all actors in the NIL marketplace, fairness would return to the arena of college athletics.

JOSH BLACKMAN*

* Emory University School of Law, J.D., 2025; University of North Carolina at Charlotte, B.A., 2022. Thank you to Professor Jennifer Mathews, Maranda Johnston, David Nielsen, Sydney McCabe, and all the members of the Journal who assisted with the development and editing of this Comment. Thank you to my wife, Becca Blackman, for your constant support and inspiration.